South Carolina Bar
Continuing Legal Education Division

South Carolina Arbitration Certification Training

19-63

Tuesday, February 12, 2019

presented by
The South Carolina Bar
Continuing Legal Education Division

http://www.scbar.org/CLE

SC Supreme Court Commission on CLE Course No. 192298

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South Carolina Arbitration Certification Training
Tuesday, February 12, 2019

This program qualifies for 6.0 MCLE credit hours including up to .75 LEPR credit hour.
SC Supreme Commission on CLE Course #: 192298

Presenters:
Henry W. Brown, *Nexsen Pruet, LLC*
John A. Massalon, *Wills Massalon & Allen LLC*
Franklin J. Smith, Jr., *Richardson Plowden & Robinson, PA*
Thomas W. Traxler, *Carter Smith Merriam Rogers & Traxler, PA*

8: 50 a.m. **Welcome & Announcements**

9 a.m. **I. OPENING SESSION**

1. Introduction to Arbitration, its premises and statutory foundations, and a discussion of the various organizations supporting and administering arbitration.
2. An analysis of the applicable statutes, state and federal, that support arbitration and judicial recognition of agreements. Identification of the differences between the role of the Court, and the role of the arbiter. Where does the jurisdiction of the Court end and the jurisdiction of the Arbiter begin? Overview of arbitration from the initiation of the proceeding to enrollment of the award as a judgment. Discussion of the statutory requirements that must be met to have an enforceable award.

10 a.m. **II. PREHEARING ISSUES**

This segment considers the time period and activities from the Order or agreement compelling arbitration to the commencement of the hearing:

A. Arbitrability.
B. Where do the rules of procedure come from and how are they managed?
C. Discovery – What can be enforced, what should be allowed?
D. Motions – To what extent should prehearing motions be allowed and used?
E. Preemption – How are the rights and remedies of the Federal Act and the State Act coordinated?
F. Witness identification and exhibit collection.
G. Agreements to manage time and insure both sides get a fair allocation.

11 a.m. **Break**

11:15 a.m. **III. DEMONSTRATION AND DISCUSSION** of prehearing status/case management conference.

11:45 a.m. **Lunch**

1 p.m. **IV. HEARING STAGE**

The hearing has commenced and how is it managed? The end result is an enforceable award that can be entered as a judgment. How should the proceeding be managed to produce an enforceable result that the parties can accept as fairly created?

A. How to manage the absence of the Rules of Evidence?
B. What controls should there be on the admission of evidence?
C. The use of prehearing discovery or affidavits during the hearing.
D. Management of time, and how do you control the presentation of evidence?

2 p.m. **V. DEMONSTRATION OF A PORTION OF A HEARING AND DISCUSSION OF THE ISSUES PRESENTED**

2:30 p.m. **Break**

2:45 p.m. **VI. POST HEARING AND RETURN TO THE JUDICIAL SYSTEM**

A. Final vs. Interim Award – What authority does the Arbiter have to change his/her mind? What are the benefits of an interim award?
B. Substantive corrections, are they allowed, and under what circumstances?
C. Clerical corrections, are they allowed, and under what circumstances?
D. When does the Arbiter lose jurisdiction to adjudicate the dispute?
E. Appeals

3:45 p.m. **Ethical Considerations for Arbitrators**

4:30 p.m. **Miscellaneous Issues and questions and answers**

4:45 p.m. **Adjourn**

South Carolina Arbitration Certification Training

SPEAKER BIOGRAPHIES

Henry W. Brown

Nexsen Pruet, LLC
Columbia, SC

Henry Brown is a member of Nexsen Pruet's Columbia Office and practices primarily in the areas of construction litigation, commercial litigation, mediation and alternate dispute resolution. While at the University of South Carolina, Mr. Brown served as a member of the editorial board of the South Carolina Law Review. Mr. Brown received his J.D. in 1976 from the University of South Carolina; his B.A. in 1973 from Furman University.

Mr. Brown is a member of the South Carolina Bar and Richland County Bar Association. His recognitions include Best Lawyers in America, Construction Law; Litigation – Construction since 2003; South Carolina Super Lawyer in Construction Litigation; 2008, 2015, 2016; certified mediator in State and Federal Courts; South Carolina Bar – Construction Law Section; "Legal Elite of the Midlands" – Construction Law.

John A. Massalon

Wills Massalon & Allen LLC
Charleston, SC

An attorney since 1987, John is a partner with Wills, Massalon and Allen in Charleston. The firm was founded in 1999 and emphasizes civil litigation and mediation. His practice includes a focus on commercial litigation pertaining to business disputes, contract matters, land use and preservation issues. John is a certified mediator and regularly serves as a mediator in matters pending in the State and Federal Courts of South Carolina. Prior to his current position, he was a partner with Holmes and Thompson and before that John served as law clerk to US District Judge Falcon B. Hawkins and US Magistrate Judge Robert Carr. John earned a B.A. in History from the College of Charleston in 1984 and a J.D. From the University of South Carolina School of Law in 1987. John is a member of numerous legal associations and is also Past President of the Charleston County Bar Association. Currently, he is the Chair-Elect of the Dispute Resolution Section of the South Carolina Bar, the Vice Chairman of the Preservation Society of Charleston and a member of the Mediation and Meeting Center of Charleston Board of Directors.

Franklin J. Smith, Jr.

Richardson Plowden & Robinson, PA
Columbia, SC

Franklin J. Smith, Jr., is a shareholder at Richardson Plowden & Robinson, P.A. His practice primarily focuses on managing risks for entities involved in the construction industry, including construction litigation and arbitration, contract drafting and negotiation, claims resolution and avoidance, design professional malpractice, fidelity/surety law, coverage issues and insurance defense. A substantial part of Mr. Smith's practice involves mediation and arbitration on construction and business-related disputes. Prior to practicing law, Mr. Smith was a design engineer for Wilbur Smith & Associates.

Mr. Smith's attended the United States Military Academy, 1975-1977; received his B.S., Civil Engineering, cum laude from Clemson University, 1979; and his J.D. from University of South Carolina School of Law, 1984.

Mr. Smith is a Certified Circuit Court Mediator by the S.C. Supreme Court and U.S. District Court; His professional organizations include: Past Chair, Advisory Board for Clemson University, Civil Engineering Department (2013-2014); Past Chair, Construction Section, South Carolina Bar; Panel member, National Panel of Arbitrators, American Arbitration Association; Member, Dispute Avoidance and Resolution Division of the Form on the Construction Industry, American Bar Association; Certified Mediator; American Society of Civil Engineers, Member, South Carolina Defense Trial Attorneys' Association; and Richland County Bar Association.

Thomas (Tom) W. Traxler

Carter Smith Merriam Rogers & Traxler, PA
Greenville, SC

Thomas (Tom) W. Traxler is a partner with Carter, Smith, Merriam, Rogers & Traxler, P.A. in Greenville, SC. He graduated from Davidson College in 1974 with a B.A. in German, and the University of South Carolina School of Law in 1979.

He is a Fellow in the American College of Trial Lawyers and a member of the South Carolina Chapter of the American Board of Trial Advocates (ABOTA). He served on the South Carolina Board of Bar Examiners 2001-2009 and was an adjunct instructor in Business Law at Furman University from 1981 to 2011.

For several years, Tom has been selected among the *Best Lawyers in America*© and is recognized in 7 different areas of practices: Commercial Litigation, Bet-The-Company Litigation, Real Estate Litigation, Family Law, Personal Injury Litigation – Plaintiffs, and Alternative Dispute Resolution, and Mediation-Family Law. He was named the *Best Lawyers'* Greenville Family Law Lawyer of the Year in 2009 and 2015, the 2010 and 2014 Greenville Bet-the-Company Litigator of the Year, and the 2011 and 2012 Greenville Real Estate Litigator of the Year.

Tom has been listed in *Super Lawyers Magazine*® since its inception in South Carolina in 2008 and was also rated in The Top 25 lawyers in South Carolina by *Super Lawyers*® *Magazine/South Carolina* for the years 2009, 2013, 2014 and 2015, and was rated in The Top 10 in 2014-2018.

Tom was awarded the Greenville County Bar Tommy Thomason Award for 2009, the 2009 South Carolina Trial Lawyer of the Year Award by the South Carolina Chapter of the American Board of Trial Advocates (ABOTA), and the 2011 Platinum Compleat Lawyers Award from the University Of South Carolina School Of Law.

He has written and distributed to South Carolina Court Administration three (3) software programs for use in the Family Court, one being *Traxler's Child Support Calculator,* the *Alimony Calculator,* and the *Equitable Apportionment Worksheet.*

South Carolina Arbitration Certification Training

Statutes

Title 15 - Civil Remedies and Procedures

CHAPTER 48

Uniform Arbitration Act

SECTION 15-48-10. Validity of arbitration agreement; exceptions from operation of chapter.

(a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

(b) This chapter however shall not apply to:

(1) Any agreement or provision to arbitrate in which it is stipulated that this chapter shall not apply or to any arbitration or award thereunder;

(2) Arbitration agreements between employers and employees or between their respective representatives unless the agreement provides that this chapter shall apply; provided, however, that notwithstanding any other provision of law, employers and employees or their respective representatives may not agree that workmen's compensation claims, unemployment compensation claims and collective bargaining disputes shall be subject to the provisions of this chapter and any such provision so agreed upon shall be null and void. An agreement to apply this chapter shall not be made a condition of employment.

(3) A pre-agreement entered into when the relationship of the contracting parties is such that of lawyer-client or doctor-patient and the term "doctor" shall include all those persons licensed to practice medicine pursuant to Chapters 9, 15, 31, 37, 47, 51, 55, 67 and 69 of Title 40 of the 1976 Code.

(4) Any claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract.

HISTORY: 1978 Act No. 492, Section 1.

SECTION 15-48-20. Proceedings to compel or stay arbitration.

(a) On application of a party showing an agreement described in Section 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

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

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this section, the application shall be made therein. Otherwise and subject to Section 15-48-190, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

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

HISTORY: 1978 Act No. 492, Section 2.

SECTION 15-48-30. Appointment of arbitrators.

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, there shall be three arbitrators with one chosen by the party making the demand for arbitration, one chosen by the party against whom demand is made and third being chosen by those two chosen by the parties.

HISTORY: 1978 Act No. 492, Section 3.

SECTION 15-48-40. Majority action by arbitrators.

The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this chapter.

HISTORY: 1978 Act No. 492, Section 4.

SECTION 15-48-50. Hearing; record thereof.

Unless otherwise provided by the agreement:

(a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(b) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(c) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

(d) Upon the request of any party or arbitrator, the arbitrators shall cause to be made a record of the testimony and evidence introduced at the hearing.

HISTORY: 1978 Act No. 492, Section 5.

SECTION 15-48-60. Joinder of parties to arbitration.

Upon application to the arbitration panel by a party, a person who is subject to service of process over the subject matter of the arbitration shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, (2) he claims an interest relating to the subject of the action and is so situate that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) lead any of the persons already parties subject to a substantial risk of incurred double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the arbitrators shall order that he be made a party. Any person joined as a party to the arbitration shall have the same time to answer which was given to the initial defendant in the case.

HISTORY: 1978 Act No. 492, Section 6.

SECTION 15-48-70. Representation by attorney.

A party has the right to be represented by an attorney at any proceeding or hearing under this chapter. A waiver thereof prior to the proceeding or hearing is ineffective.

HISTORY: 1978 Act No. 492, Section 7.

SECTION 15-48-80. 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 circuit court.

HISTORY: 1978 Act No. 492, Section 8.

SECTION 15-48-90. Award.

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him.

HISTORY: 1978 Act No. 492, Section 9.

SECTION 15-48-100. Change of award by arbitrators.

On application of a party or, if an application to the court is pending under Sections 15-48-120, 15-48-130, 15-48-140, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in paragraphs (1) and (3) of subdivision (a) of Section 15-48-140, or for the purpose of clarifying the award. The application shall be made within twenty days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within ten days from the notice. The award so modified or corrected is subject to the provisions of Sections 15-48-120, 15-48-130 and 15-48-140.

HISTORY: 1978 Act No. 492, Section 10.

SECTION 15-48-110. Fees and expenses of arbitration.

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

HISTORY: 1978 Act No. 492, Section 11.

SECTION 15-48-120. Confirmation of an award.

Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed

grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 15-48-130 and 15-48-140.

HISTORY: 1978 Act No. 492, Section 12.

SECTION 15-48-130. Vacating an award.

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

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

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

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 15-48-50, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 15-48-20 and the party did not participate in the arbitration hearing without raising the objection;

But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

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

(c) In vacating the award on grounds other than stated in item (5) of subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with Section 15-48-30, or, if the award is vacated on grounds set forth in items (3) and (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 15-48-30. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

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

HISTORY: 1978 Act No. 492, Section 13.

SECTION 15-48-140. Modification or correction of award.

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

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

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

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

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

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

HISTORY: 1978 Act No. 492, Section 14.

SECTION 15-48-150. Judgment or decree on award.

Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court.

HISTORY: 1978 Act No. 492, Section 15.

SECTION 15-48-160. Judgment roll; docketing.

(a) On entry of judgment or decree, the clerk of court shall prepare the judgment roll consisting, to the extent filed, of the following:

(1) The agreement and each written extension of the time within which to make the award;

(2) The award;

(3) A copy of the order confirming, modifying or correcting the award; and

(4) A copy of the judgment or decree.

(b) The judgment or decree may be docketed as if rendered in an action.

HISTORY: 1978 Act No. 492, Section 16.

SECTION 15-48-170. Applications to court.

Except as otherwise provided, an application to the court under this chapter shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.

HISTORY: 1978 Act No. 492, Section 17.

SECTION 15-48-180. Court; jurisdiction; questions of law and fact.

The term "court" means any court of competent jurisdiction of this State. The making of an agreement described in Section 15-48-10 providing for arbitration in this State confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder. Unless otherwise provided by the arbitration agreement, when a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact.

HISTORY: 1978 Act No. 492, Section 18.

SECTION 15-48-190. Venue.

An initial application shall be made to the court of the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the application shall be made in the county where the adverse party resides or has a place of business or, if he has no residence or place of business in this State, to the court of any county. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

HISTORY: 1978 Act No. 492, Section 19.

SECTION 15-48-200. Appeals.

(a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under Section 15-48-20;

(2) An order granting an application to stay arbitration made under Section 15-48-20(b);

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of this chapter.

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

HISTORY: 1978 Act No. 492, Section 20.

SECTION 15-48-210. Chapter not retroactive.

This chapter applies only to agreements made subsequent to the effective date of this chapter.

HISTORY: 1978 Act No. 492, Section 21.

SECTION 15-48-220. Mechanics liens not precluded.

Nothing in this chapter shall preclude the filing and perfecting of a mechanics lien by any party to an arbitration agreement.

HISTORY: 1978 Act No. 492, Section 22.

SECTION 15-48-230. Uniformity of interpretation.

This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

HISTORY: 1978 Act No. 492, Section 23.

SECTION 15-48-240. Short title.

This chapter may be cited as the "Uniform Arbitration Act".

HISTORY: 1978 Act No. 492, Section 24.

TITLE 9—ARBITRATION

This title was enacted by act July 30, 1947, ch. 392, §1, 61 Stat. 669

Chap.		Sec.
1.	**General provisions**	**1**
2.	**Convention on the Recognition and Enforcement of Foreign Arbitral Awards**	**201**
3.	**Inter-American Convention on International Commercial Arbitration**	**301**

AMENDMENTS

1990—Pub. L. 101–369, §2, Aug. 15, 1990, 104 Stat. 450, added item for chapter 3.

1970—Pub. L. 91–368, §2, July 31, 1970, 84 Stat. 693, added analysis of chapters.

TABLE

Showing where former sections of Title 9 and the laws from which such former sections were derived, have been incorporated in revised Title 9.

Title 9 Former Sections	*Statutes at Large*	*Title 9 New Sections*
1	Feb. 12, 1925, ch. 213, §1, 43 Stat. 883	1
2	Feb. 12, 1925, ch. 213, §2, 43 Stat. 883	2
3	Feb. 12, 1925, ch. 213, §3, 43 Stat. 883	3
4	Feb. 12, 1925, ch. 213, §4, 43 Stat. 883	4
5	Feb. 12, 1925, ch. 213, §5, 43 Stat. 884	5
6	Feb. 12, 1925, ch. 213, §6, 43 Stat. 884	6
7	Feb. 12, 1925, ch. 213, §7, 43 Stat. 884	7
8	Feb. 12, 1925, ch. 213, §8, 43 Stat. 884	8
9	Feb. 12, 1925, ch. 213, §9, 43 Stat. 885	9
10	Feb. 12, 1925, ch. 213, §10, 43 Stat. 885	10
11	Feb. 12, 1925, ch. 213, §11, 43 Stat. 885	11
12	Feb. 12, 1925, ch. 213, §12, 43 Stat. 885	12
13	Feb. 12, 1925, ch. 213, §13, 43 Stat. 886	13
14	Feb. 12, 1925, ch. 213, §14, 43 Stat. 886	Rep.
15	Feb. 12, 1925, ch. 213, §15, 43 Stat. 886	14

POSITIVE LAW; CITATION

This title has been made positive law by section 1 of act July 30, 1947, ch. 392, 61 Stat. 669, which provided in part that: ''title 9 of the United States Code, entitled 'Arbitration', is codified and enacted into positive law and may be cited as '9 U.S.C., §—' ''.

REPEALS

Act July 30, 1947, ch. 392, §2, 61 Stat. 674, provided that the sections or parts thereof of the Statutes at Large covering provisions codified in this Act, insofar as such provisions appeared in former title 9 were repealed and provided that any rights or liabilities now existing under such repealed sections or parts thereof shall not be affected by such repeal.

CHAPTER 1—GENERAL PROVISIONS

Sec.	
1.	''Maritime transactions'' and ''commerce'' defined; exceptions to operation of title.
2.	Validity, irrevocability, and enforcement of agreements to arbitrate.
3.	Stay of proceedings where issue therein referable to arbitration.
4.	Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.
5.	Appointment of arbitrators or umpire.
6.	Application heard as motion.
7.	Witnesses before arbitrators; fees; compelling attendance.
8.	Proceedings begun by libel in admiralty and seizure of vessel or property.
9.	Award of arbitrators; confirmation; jurisdiction; procedure.
10.	Same; vacation; grounds; rehearing.
11.	Same; modification or correction; grounds; order.
12.	Notice of motions to vacate or modify; service; stay of proceedings.
13.	Papers filed with order on motions; judgment; docketing; force and effect; enforcement.
14.	Contracts not affected.
15.	Inapplicability of the Act of State doctrine.
16.	Appeals.

AMENDMENTS

1990—Pub. L. 101–650, title III, §325(a)(2), Dec. 1, 1990, 104 Stat. 5120, added item 15 ''Inapplicability of the Act of State doctrine'' and redesignated former item 15 ''Appeals'' as 16.

1988—Pub. L. 100–702, title X, §1019(b), Nov. 19, 1988, 102 Stat. 4671, added item 15 relating to appeals.

1970—Pub. L. 91–368, §3, July 31, 1970, 84 Stat. 693, designated existing sections 1 through 14 as ''Chapter 1'' and added heading for Chapter 1.

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

''Maritime transactions'', as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; ''commerce'', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §1, 43 Stat. 883.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

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

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 2, 43 Stat. 883.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 3, 43 Stat. 883.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883.

REFERENCES IN TEXT

Federal Rules of Civil Procedure, referred to in text, are set out in Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

1954—Act Sept. 3, 1954, brought section into conformity with present terms and practice.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

(July 30, 1947, ch. 392, 61 Stat. 671.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 5, 43 Stat. 884.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

(July 30, 1947, ch. 392, 61 Stat. 671.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 6, 43 Stat. 884.

§ 7. Witnesses before arbitrators; fees; compelling attendance

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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. 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.

(July 30, 1947, ch. 392, 61 Stat. 672; Oct. 31, 1951, ch. 655, § 14, 65 Stat. 715.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 7, 43 Stat. 884.

AMENDMENTS

1951—Act Oct. 31, 1951, substituted ''United States district court for'' for ''United States court in and for'', and ''by law for'' for ''on February 12, 1925, for''.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 8, 43 Stat 884.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 9, 43 Stat. 885.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(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.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, ch. 392, 61 Stat. 672; Pub. L. 101–552, § 5, Nov. 15, 1990, 104 Stat. 2745; Pub. L. 102–354, § 5(b)(4), Aug. 26, 1992, 106 Stat. 946; Pub. L. 107–169, § 1, May 7, 2002, 116 Stat. 132.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 10, 43 Stat. 885.

AMENDMENTS

2002—Subsec. (a)(1) to (4). Pub. L. 107–169, § 1(1)–(3), substituted ''where'' for ''Where'' and realigned margins in pars. (1) to (4), and substituted a semicolon for

period at end in pars. (1) and (2) and ''; or'' for the period at end in par. (3).

Subsec. (a)(5). Pub. L. 107–169, §1(5), substituted ''If an award'' for ''Where an award'', inserted a comma after ''expired'', and redesignated par. (5) as subsec. (b).

Subsec. (b). Pub. L. 107–169, §1(4), (5), redesignated subsec. (a)(5) as (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 107–169, §1(4), redesignated subsec. (b) as (c).

1992—Subsec. (b). Pub. L. 102–354 substituted ''section 580'' for ''section 590'' and ''section 572'' for ''section 582''.

1990—Pub. L. 101–552 designated existing provisions as subsec. (a), in introductory provisions substituted ''In any'' for ''In either'', redesignated former subsecs. (a) to (e) as pars. (1) to (5), respectively, and added subsec. (b) which read as follows: ''The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.''

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, ch. 392, 61 Stat. 673.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §11, 43 Stat. 885.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

(July 30, 1947, ch. 392, 61 Stat. 673.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §12, 43 Stat. 885.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

(July 30, 1947, ch. 392, 61 Stat. 673.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §13, 43 Stat. 886.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

(July 30, 1947, ch. 392, 61 Stat. 674.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §15, 43 Stat. 886.

PRIOR PROVISIONS

Act Feb. 12, 1925, ch. 213, §14, 43 Stat. 886, former provisions of section 14 of this title relating to ''short title'' is not now covered.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

(Added Pub. L. 100–669, §1, Nov. 16, 1988, 102 Stat. 3969.)

CODIFICATION

Another section 15 of this title was renumbered section 16 of this title.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub. L. 100–702, title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4670, § 15; renumbered § 16, Pub. L. 101–650, title III, § 325(a)(1), Dec. 1, 1990, 104 Stat. 5120.)

AMENDMENTS

1990—Pub. L. 101–650 renumbered the second section 15 of this title as this section.

CHAPTER 2—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Sec.
201. Enforcement of Convention.
202. Agreement or award falling under the Convention.
203. Jurisdiction; amount in controversy.
204. Venue.
205. Removal of cases from State courts.
206. Order to compel arbitration; appointment of arbitrators.
207. Award of arbitrators; confirmation; jurisdiction; proceeding.
208. Chapter 1; residual application.

AMENDMENTS

1970—Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692, added heading for chapter 2 and analysis of sections for such chapter.

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

EFFECTIVE DATE

Pub. L. 91–368, § 4, July 31, 1970, 84 Stat. 693, provided that: ''This Act [enacting this chapter] shall be effective upon the entry into force of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States.'' The Convention was entered into force for the United States on Dec. 29, 1970.

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accord-

ance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

CHAPTER 3—INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

Sec.

301. Enforcement of Convention.
302. Incorporation by reference.
303. Order to compel arbitration; appointment of arbitrators; locale.
304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity.
305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.
306. Applicable rules of Inter-American Commercial Arbitration Commission.
307. Chapter 1; residual application.

§ 301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 448.)

EFFECTIVE DATE

Pub. L. 101–369, §3, Aug. 15, 1990, 104 Stat. 450, provided that: ''This Act [enacting this chapter] shall take effect upon the entry into force of the Inter-American Convention on International Commercial Arbitration of January 30, 1975, with respect to the United States.'' The Convention entered into force for the United States on Oct. 27, 1990.

§ 302. Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter ''the Convention'' shall mean the Inter-American Convention.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 448.)

§ 303. Order to compel arbitration; appointment of arbitrators; locale

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 448.)

§ 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 449.)

§ 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 449.)

§ 306. Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules

of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

(Added Pub. L. 101–369, § 1, Aug. 15, 1990, 104 Stat. 449.)

§ 307. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

(Added Pub. L. 101–369, § 1, Aug. 15, 1990, 104 Stat. 449.)

South Carolina Arbitration Certification Training

Rules

South Carolina ADR Rules 12 & 13

American Arbitration Association

Optional Appellate Arbitration Rules
Commercial Arbitration Rules & Mediation Procedures
Consumer Arbitration Rules
Fast Track Procedures
Regular Track Procedures

JAMS

Comprehensive Rules & Procedures
Streamlined Rules & Procedures

Better Business Bureaus, Inc.

Rules of Binding Arbitration

Rule 12
Non-Binding Arbitration Hearing and Award

(a) Scope. This rule applies only to non-binding arbitrations. Nothing in this rule shall be construed to apply to binding arbitration pursuant to the Uniform Arbitration Act as adopted in South Carolina. Arbitrations selected by the parties under these rules are deemed non-binding arbitrations unless otherwise expressly agreed by the parties.

(b) Arbitration Hearings. The following shall apply to arbitration hearings, unless otherwise expressly agreed by the parties:

(1) Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were at trial. The arbitrator is empowered and authorized to administer oaths and affirmations.

(2) Rule 45, SCRCP, shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(3) The arbitrator shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the Chief Judge for Administrative Purposes.

(4) The South Carolina Rules of Evidence do not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) No ex parte communications between the parties or their counsel and the arbitrator are permitted.

(6) The arbitration hearing shall be limited to two hours unless the arbitrator determines that more time is necessary to insure fairness and justice to the parties. The arbitrator is not required to receive repetitive or cumulative evidence.

(7) No recording or transcript of an arbitration hearing shall be made.

(c) Award. Unless otherwise expressly agreed by the parties:

(1) The award shall be in writing, signed by the arbitrator. Within ten (10) business days after the hearing is concluded, the arbitrator shall serve the original award on the prevailing party, copies of the award on all other parties, and a Proof of ADR with the court, together with a certificate of service. The arbitration hearing is concluded when all the evidence is in and any arguments or post-hearing briefs the arbitrator permits have been completed or received.

(2) The award must resolve all issues raised by the pleadings.

(3) Findings of facts and conclusions of law or opinions supporting an award are not required.

(d) Trial De Novo as a Right. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties on a form approved by the Supreme Court or its designee within thirty (30) days after receipt of the arbitrator's award. No evidence that there has been an arbitration proceeding or any fact concerning the arbitration may be admitted in a trial, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties and the court's approval.

(e) Judgment Entered on Award. If the case is not terminated by agreement of the parties, and no party files a demand for trial de novo under Rule 12(d), the prevailing party shall submit to the Chief Judge for Administrative Purposes a proposed order directing the entry of judgment on the award, which when entered, shall have the same effect as a consent judgment in the action and may be enforced accordingly.

http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=12.0&subRuleID=&ruleType=ADR

Rule 13
Authority and Duties of Arbitrators

(a) Authority of Arbitrators. The arbitrator shall at all times be authorized to control the hearing and the procedures to be followed.

(b) Duties. The arbitrator shall set up the arbitration hearing. The arbitrator shall define and describe the following to the parties:

(1) The non-binding arbitration process, including the difference between arbitration and other forms of conflict resolution;

(2) The duties and responsibilities of the arbitrator and the parties; and

(3) The cost of the arbitration hearing.

(c) Arbitrator Not to be Called as Witness. The arbitrator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the arbitration in any adversary proceeding or judicial forum. All records, reports and other documents received by the arbitrator while serving in that capacity shall be confidential.

(d) Duty of Impartiality/Disclosure. The arbitrator has a duty to be impartial and to disclose any circumstance likely to affect impartiality or independence, including any bias, prejudice or financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.

(e) Reporting Results of Hearing. Within ten (10) days of conclusion of the hearing as set forth in Rule 12(c), the arbitrator shall file with the Clerk of Court Proof of ADR on a form approved by the Supreme Court or its designee. South Carolina Court Administration or the South Carolina Commission on Alternative Dispute Resolution may require the arbitrator to provide additional statistical data for evaluation of the program.

(f) Immunity. The arbitrator shall have immunity from liability to the same extent afforded judicial officers of this state.

http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=13.0&subRuleID=&ruleType=ADR

AMERICAN ARBITRATION ASSOCIATION®

OPTIONAL APPELLATE **ARBITRATION RULES**

Rules Effective November 1, 2013

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Optional Appellate Arbitration Rules

Introduction

The objective of arbitration is a fair, fast and expert result that is achieved economically. Consistent with this goal, an arbitration award traditionally will be set aside by a court only where narrowly defined statutory grounds exist. Sometimes, however, the parties may desire a more comprehensive appeal of an arbitration award within the arbitral process. The American Arbitration Association® has included clauses for appellate arbitration in its *Drafting Dispute Resolution Clauses - A Practical Guide* for a number of years. In addition, parties have developed their own processes and standards for conducting these proceedings. In order to provide for an easier, more standardized process, the AAA has developed these Optional Appellate Rules.

The following rules provide for an appeal to an appellate arbitral panel that would apply a standard of review greater than that allowed by existing federal and state statutes. The appellate rules anticipate an appellate process that can be completed in about three months, while giving both sides adequate time to submit appellate briefs. The rules permit review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous.

Utilization of these rules is predicated upon agreement of the parties. The right to appeal an arbitration proceeding is a matter of contract. A party may not unilaterally appeal an arbitration award under these rules absent agreement with the other party(s). The following sample language provides for such appellate review assuming a standard arbitration clause is already in place:

> *"Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA's Optional Appellate Arbitration Rules ("Appellate Rules"); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final*

until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof."

Optional Appellate Arbitration Rules

A-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for the appeal of an arbitration award* ("Underlying Award") rendered under the auspices of the American Arbitration Association (AAA), or the International Centre for Dispute Resolution® (ICDR®), or have otherwise provided for these Appellate Arbitration Rules, they shall be deemed to have made these Rules, as amended and in effect as of the date of submission of the appeal, a part of their agreement.

**These Appellate Rules do not apply to disputes where the arbitration clause is contained in an agreement between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices.*

A-2. Effect of Appeal on Underlying Award

(a) Upon the filing of a Notice of Appeal pursuant to Rule A-3 of these Rules, the parties agree that the Underlying Award shall not be considered final for purposes of any court actions to modify, enforce, correct, or vacate the Underlying Award ("judicial enforcement proceedings"), and the time period for commencement of judicial enforcement proceedings shall be tolled during the pendency of the appeal. The parties agree to stay any already initiated judicial enforcement proceedings until the conclusion of the appeal process. If the appeal is withdrawn, the Underlying Award shall be deemed final as of the date of withdrawal.

(b) The appellate process is not intended to replace the modification of award remedies available under the AAA's Commercial Arbitration Rules and Mediation Procedures ("AAA Commercial Rules"), or similar rule if applicable to the Underlying Award. Accordingly, if the sole subject of the appeal is a request for modification then a party must pursue those remedies under the applicable rules governing the Underlying Award. A party may appeal an adverse decision arising from a request for modification.

A-3. Filing Requirements

(a) Filing an Appeal: Provided the parties have an agreement for the appeal of an arbitration award pursuant to these Rules, an appeal may be initiated in the following manner:

(i) Any party to an Underlying Award may initiate an appeal by filing with the AAA, within thirty (30) days from the date the Underlying Award is submitted to the parties, a Notice of Appeal, the administrative filing fee as set forth in the Fee Schedule, a copy of the applicable arbitration agreement providing for appeal of the Underlying Award, and a copy of the Underlying Award. Filing may be accomplished through use of AAA WebFile®, located at **www.adr.org,** or by filing with any AAA office.

(ii) The party filing the Notice of Appeal (the "Appellant") shall simultaneously provide a copy of the Notice of Appeal and the applicable arbitration agreement to every other party to the Underlying Award (the "Appellees").

(iii) The Notice of Appeal shall include:

a. The name of each party;

b. The address for each party, including, if known, telephone and fax numbers and email address;

c. If applicable, the names, addresses, telephone and fax numbers and, if known, email address of the known representative for each party;

d. A statement setting forth the portion or portions of the Underlying Award being appealed and the errors alleged;

e. The qualifications, expertise and number of appellate arbitrators requested; and

f. The filing fee.

(b) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of the Notice of Appeal when the filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing for the appeal for administrative purposes, however, any disputes under this rule shall be reviewed and decided by the appeal tribunal.

If the filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the due date specified by the AAA, the filing may be returned to the filing party.

(c) Cross-Appeal. Each Appellee may file a cross-appeal with the AAA within seven (7) days after notice of filing of a Notice of Appeal. The Appellee shall, at the time of any such filing, send a copy of the cross-appeal to the Appellant and all other parties to the Underlying Award. The cross-appeal shall include a statement setting forth the portion or portions of the Underlying Award being appealed and the errors alleged, and the qualifications, expertise and number of appellate arbitrators requested. The administrative filing fee as set forth in the Fee Schedule must be paid at the time of the filing of any cross-appeal.

If the cross-appeal filing is deficient, and not cured by the date specified by the AAA, it may be returned to the filing party.

A-4. Qualifications of Appeal Tribunal

(a) The appeal tribunal shall be selected from the AAA's Appellate Panel, or, if an international dispute, from its International Appellate Panel.

(b) No person shall serve as an appellate arbitrator in any dispute in which that person is precluded from serving under the applicable code of ethics governing the appointment of arbitrators. Prior to accepting an appointment, the prospective appellate arbitrator(s) shall disclose to the AAA any circumstances likely to create

a presumption of bias or prevent a prompt resolution of the appeal. Upon receipt of such information, the AAA shall either replace the appellate arbitrator(s) or immediately communicate the information to the parties for their comments. In the event that the parties disagree as to whether the appellate arbitrator shall serve, the AAA has the authority to make the decision as to whether the appellate arbitrator(s) shall serve or whether another appellate arbitrator(s) shall be appointed by the AAA. The AAA is authorized to appoint another appellate arbitrator(s) if the appointed appellate arbitrator(s) is unable to serve promptly.

A-5. Appointment of Appeal Tribunal

If the parties have not appointed an appeal tribunal and have not provided for any other method of appointment, the appeal tribunal will be appointed by the AAA in the following manner:

(a) Upon receipt of a Notice of Appeal, the AAA shall send simultaneously to each party to the dispute an identical list of ten (10) (unless the AAA decides that a different number is appropriate) names of persons chosen from the AAA's Appellate Panel. The parties are encouraged to agree to the appeal tribunal from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon the appeal tribunal, each party shall have fourteen (14) days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of the appeal tribunal to serve. If the parties fail to agree on the appeal tribunal from the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the AAA's Appellate Panel without the submission of additional lists.

(c) A panel of three appellate arbitrators will be appointed unless the parties agree to utilize a single arbitrator. The AAA shall appoint the Chairperson of the panel.

(d) If the parties have requested an appellate arbitrator with specific qualifications, the AAA will consider such requests when creating the list of the appellate arbitrators. Such requests shall be made by the Appellant in its Notice of Appeal, and by the Appellee within three (3) days of receipt of the Notice of Appeal.

A-6. Vacancies

If an appellate arbitrator shall become unwilling or unable to serve, the AAA shall administratively appoint a substitute appellate arbitrator.

A-7. Preliminary Conference Call

(a) Within one week of the appointment of the appeal tribunal a preliminary conference call will be scheduled with the parties, the appeal tribunal and the Case Manager to review and formalize the briefing schedule, set a deadline for the submission of the record on appeal and address any other procedural issues consistent with these rules and the objectives for an expedited, cost effective and just appellate process.

(b) The appeal tribunal shall enter an order reflecting any briefing schedules, and any other timeframes and administrative matters determined during the preliminary conference call.

(c) The appeal tribunal may require a detailed specification of issues on appeal in advance of the first Appellant brief, and may direct or limit the Appellant/Appellee to certain areas or issues in their briefing or request additional briefing.

A-8. Absent Parties

The appeal tribunal may proceed with the appeal process in the absence of a party if it is determined by the appeal tribunal that the absent party consented to the jurisdiction of the appeal process by agreement, due notice was provided, and the absent party is provided a copy of the order from the preliminary conference call.

A-9. Jurisdiction

The appeal tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

If the appeal tribunal determines that it does not have jurisdiction to hear the appeal, the appeal shall be dismissed and the Underlying Award shall be deemed to be final.

A-10. Issues Subject to Appeal

A party may appeal on the grounds that the Underlying Award is based upon:

(1) an error of law that is material and prejudicial; or

(2) determinations of fact that are clearly erroneous.

A-11. Assessment of Costs

The Appellant/Cross-Appellant may be assessed the appeal costs, and other reasonable costs of the Appellee/Cross-Appellee, including attorneys' fees (if a statute or the parties' contract provides for an award of attorneys' fees), incurred after the commencement of the appeal if the Appellant/Cross-Appellant is not determined to be the prevailing party by the appeal tribunal.

A-12. AAA Fees and Costs of Underlying Arbitration and Appeal

(a) As a preliminary matter, all outstanding and unpaid AAA fees and costs from the arbitration proceeding giving rise to the Underlying Award owed by the party filing the appeal must be paid in full before an appeal will be initiated. For cross-appeals, all outstanding and unpaid AAA fees and costs owed by the Cross-Appellant must be paid in full before Cross-Appellant's cross-appeal will be initiated.

(b) The Appellant shall be responsible for the AAA's administrative fees and appeal tribunal fees and costs arising from the appeal where there is no cross-appeal. If there is a cross-appeal the fees and costs of the appeal shall be shared equally by the Appellant and Appellee, or shared pro rata if there is more than one Appellant or Appellee.

(c) Within seven (7) days after the appointment of the appeal tribunal the Appellant will be required to pay a deposit to cover the anticipated fees and expenses of the appeal tribunal. If there is a cross-appeal this deposit shall be shared equally or pro rata as set forth in (b) above.

(d) The appeal tribunal's decision may include a reallocation of a party's share of the fees and costs of the appeal.

(e) When the appeal has terminated, the AAA shall provide an accounting and return any unexpended balance and excess deposits paid by a party.

(f) A party's failure to timely pay the deposits required in Rule A-12(c) shall automatically place the nonpaying party's appeal in abeyance for a period of seven (7) days, following which if the deposits are not paid in full within this seven (7)-day grace period, the nonpaying party's appeal may be dismissed. If the appeal has been suspended by either the AAA or the appeal tribunal and the parties have failed to make the full deposits requested within the time provided after the suspension, the appeal tribunal, or the AAA if an appeal tribunal has not been appointed, may terminate the proceedings. The arbitration will terminate on its own accord after fourteen (14) days from the date of suspension.

A-13. Interpretation of Rules

The appeal tribunal shall interpret and apply these rules insofar as they relate to the appeal tribunal's powers and duties. All other rules shall be interpreted and applied by the AAA.

A-14. Place of Appeal

Unless all parties and the appeal tribunal agree otherwise, the appeal shall be conducted at the same place of arbitration as the underlying arbitration.

A-15. Oral Argument

(a) Unless otherwise directed by the appeal tribunal, all appeals will be determined upon the written documents submitted by the parties. If the appeal tribunal deems oral argument necessary, or a party requests oral argument, the appeal tribunal at its discretion may schedule same.

(b) Requests for oral argument must be made within thirty (30) days of service of the Notice of Appeal or it is waived. If oral argument is granted it shall be scheduled to take place within thirty (30) days of filing of the last brief.

A-16. Record on Appeal

The parties shall cooperate in compiling the record on appeal, and may submit as part of the record on appeal relevant excerpts of the transcript of the arbitration hearing giving rise to the Underlying Award, if any, expert reports, deposition transcripts or affidavits that were admitted as part of the arbitration hearing, documentary evidence admitted into evidence during the arbitration hearing, Appellant and Appellee pre- and post-hearing briefs, or other evidence relevant to the appeal that was presented at the arbitration hearing. A party may not present for the first time on appeal an issue or evidence that was not raised during the arbitration hearing. Any disputes concerning whether a document is part of the record on appeal shall be determined by the appeal tribunal. The record on appeal shall be submitted by the parties by the deadline determined by the appeal tribunal at the preliminary conference.

A-17. Appeal Briefs

Unless otherwise agreed by the parties and approved by the appeal tribunal, or determined by the appeal tribunal as a necessary deviation, the following briefing schedule shall be followed:

(a) Appellant's Initial Brief shall be served no later than twenty-one (21) days after service of its Notice of Appeal and limited to 30 double-spaced, typewritten pages.

(b) Appellee's Answer Brief shall be served no later than twenty-one (21) days after service of Appellant's Initial Brief and limited to 30 double-spaced, typewritten pages.

(c) If Appellee cross-appeals, then its Cross-Appeal Brief shall be served at the same time as Appellee's Answer Brief and limited to 30 double-spaced, typewritten pages.

(d) Appellant's Reply Brief to Appellee's Answer Brief, if any, shall be served within ten (10) days of service of Appellee's Answer Brief and limited to 10 double-spaced, typewritten pages.

(e) Appellant's Answer Brief to Appellee's Cross-Appeal shall be served no later than twenty-one (21) days after service of Appellee's Cross-Appeal Brief and limited to 30 double-spaced, typewritten pages.

(f) Appellee's Reply Brief to Appellant's Answer Brief, if any, shall be served within ten (10) days of service of Appellant's Answer Brief and limited to 10 double-spaced, typewritten pages.

(g) For good cause shown, each party is entitled to request a single seven (7)- day extension for filing a brief that is to be served under these rules, such extension to be granted by the Case Manager. In extraordinary circumstances, subject to the discretion of the appeal tribunal, an additional extension may be granted.

A-18. Service of Documents

(a) Service of notices, briefs, answers, and replies can be accomplished by electronic submission, facsimile, or mail provided all parties who are to receive copies are served contemporaneously in the same manner. Copies of cases, exhibits and the like attached to or referenced in briefs shall be delivered to the appeal tribunal directly via mail or overnight courier at the address provided by the Case Manager (in lieu or in addition to electronic or facsimile submission of these items, as determined by the appeal tribunal at the preliminary conference).

(b) Unless the rule provides a different method of calculating time periods, all deadlines under these Rules shall be determined by calendar days. If the last day of the time period is a legal holiday or weekend day, the period shall be extended until the first business day which follows.

A-19. Appeal Tribunal's Decision

(a) Within thirty (30) days of service of the last brief, the appeal tribunal shall take one of the following actions:

1. adopt the Underlying Award as its own, or,

2. substitute its own award for the Underlying Award (incorporating those aspects of the Underlying Award that are not vacated or modified), or,

3. request additional information and notify the parties of the tribunal's exercise of an option to extend the time to render a decision, not to exceed thirty (30) days.

The appeal tribunal may not order a new arbitration hearing or send the case back to the original arbitrator(s) for corrections or further review.

(b) The initial thirty (30)-day time frame may be modified for good cause or if oral argument is to take place and it has not yet occurred. In the event the extension is because of oral argument, the initial thirty (30) days for rendering a decision will commence the day following the conclusion of the oral argument.

(c) The appeal tribunal's decision shall be in writing and shall include a concise summary of the decision and an explanation for the decision, unless the parties agree otherwise.

(d) When the appeal tribunal consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the appeal tribunal must make all decisions.

A-20. Finality of Appeal

Upon the conclusion of the appeal process and after service of the appeal tribunal's decision upon the parties, the appeal tribunal's decision shall become the final award for purposes of judicial enforcement proceedings.

A-21. Confidentiality

The parties and the appeal tribunal shall maintain the confidentiality of these proceedings except in the case of a judicial challenge or court order concerning the proceeding, or as otherwise required by law.

A-22. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages, injunctive or declaratory relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these rules may not call an arbitrator, the AAA or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and its employees are not competent to testify as witnesses in any such proceeding.

Administrative Fee Schedule

There is a non-refundable $6,000 administrative fee to be paid by the party seeking an appellate arbitration under these Appellate Rules. An additional $6,000 administrative fee is to be paid by any party filing a cross-appeal under these Appellate Rules. These fees do not include the fees and costs of the Appeal Tribunal. Hearing rooms are also available for an additional cost. Please contact the AAA for additional information.

COMMERCIAL

Commercial

Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Commercial Disputes

AMERICAN ARBITRATION ASSOCIATION®

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Rules Amended and Effective October 1, 2013
Fee Schedule Amended and Effective July 1, 2016

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Commercial Arbitration Rules and Mediation Procedures

(Including Procedures for Large, Complex Commercial Disputes)

Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA®. To ensure that you have the most current information, see our web site at **www.adr.org.**

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association® (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on various forms of alternative dispute resolution.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Arbitration of existing disputes may be accomplished by use of the following:

> *We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following Controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.*

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds $75,000, the rules provide that the parties shall mediate their dispute upon the administration of the arbitration or at any time when the arbitration is pending. In mediation, the neutral mediator assists the parties in

reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional filing fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

Although these rules include a mediation procedure that will apply to many cases, parties may still want to incorporate mediation into their contractual dispute settlement process. Parties can do so by inserting the following mediation clause into their contract in conjunction with a standard arbitration provision:

> *If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.*

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission agreement:

> *The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)*

Large, Complex Cases

Unless the parties agree otherwise, the procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $500,000 exclusive of claimed interest, arbitration fees and costs. The key features of these procedures include:

- A highly qualified, trained Roster of Neutrals;
- A mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- Broad arbitrator authority to order and control the exchange of information, including depositions;
- A presumption that hearings will proceed on a consecutive or block basis.

Commercial Arbitration Rules

R-1. Agreement of Parties*

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest, attorneys' fees, and arbitration fees and costs.

Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000 or more, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-3 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) Parties may, by agreement, apply the Expedited Procedures, the Procedures for Large, Complex Commercial Disputes, or the Procedures for the Resolution of Disputes through Document Submission (Rule E-6) to any dispute.

(e) All other cases shall be administered in accordance with Sections R-1 through R-58 of these rules.

* *A dispute arising out of an employer promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures.*

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements

(a) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration.

(b) Arbitration pursuant to a court order shall be initiated by the initiating party filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of any applicable arbitration agreement from the parties' contract which provides for arbitration.

- **i.** The filing party shall include a copy of the court order.
- **ii.** The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party to either make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.
- **iii.** The party filing the Demand with the AAA is the claimant and the opposing party is the respondent regardless of which party initiated the court action. Parties may request that the arbitrator alter the order of proceedings if necessary pursuant to R-32.

(c) It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as any time requirements associated with the filing. Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.

(d) Parties to any existing dispute who have not previously agreed to use these rules may commence an arbitration under these rules by filing a written submission agreement and the administrative filing fee. To the extent that the parties' submission agreement contains any variances from these rules, such variances should be clearly stated in the Submission Agreement.

(e) Information to be included with any arbitration filing includes:

- **i.** the name of each party;
- **ii.** the address for each party, including telephone and fax numbers and e-mail addresses;
- **iii.** if applicable, the names, addresses, telephone and fax numbers, and e-mail addresses of any known representative for each party;
- **iv.** a statement setting forth the nature of the claim including the relief sought and the amount involved; and
- **v.** the locale requested if the arbitration agreement does not specify one.

(f) The initiating party may file or submit a dispute to the AAA in the following manner:

- **i.** through AAA WebFile, located at **www.adr.org;** or
- **ii.** by filing the complete Demand or Submission with any AAA office, regardless of the intended locale of hearing.

(g) The filing party shall simultaneously provide a copy of the Demand and any supporting documents to the opposing party.

(h) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a Demand or Submission when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration. However, all disputes in connection with the AAA's determination of the date of filing may be decided by the arbitrator.

(i) If the filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the date specified by the AAA, the filing may be returned to the initiating party.

R-5. Answers and Counterclaims

(a) A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of any answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(b) A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

(c) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.

(d) If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

(a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Mediation

In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-10. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, mediation of the dispute, potential exchange of information, a timetable for hearings, and any other administrative matters.

R-11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA may initially determine the place of

arbitration, subject to the power of the arbitrator after appointment, to make a final determination on the locale.

(b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, or a determination by the arbitrator upon appointment that applicable law requires a different locale, the locale shall be that specified in the arbitration agreement.

(c) If the reference to a locale in the arbitration agreement is ambiguous, and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-12. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

(a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-13. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-13, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson, and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-12, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-15. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-16. Number of Arbitrators

(a) If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the Demand or Answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

(b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim or a new or different claim must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

R-17. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-18. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

- **i.** partiality or lack of independence,
- **ii.** inability or refusal to perform his or her duties with diligence and in good faith, and
- **iii.** any grounds for disqualification provided by applicable law.

(b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-19. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate *ex parte* with a candidate for direct appointment pursuant to R-13 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Section R-19(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-18(b), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-18(b), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-19(a) should nonetheless apply prospectively.

(c) In the course of administering an arbitration, the AAA may initiate communications with each party or anyone acting on behalf of the parties either jointly or individually.

(d) As set forth in R-43, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-20. Vacancies

(a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-21. Preliminary Hearing

(a) At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.

(b) At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

R-22. Pre-Hearing Exchange and Production of Information

(a) *Authority of arbitrator.* The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

(b) *Documents.* The arbitrator may, on application of a party or on the arbitrator's own initiative:

i. require the parties to exchange documents in their possession or custody on which they intend to rely;

ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;

iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-23. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

(a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality;

(b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;

(c) allocating costs of producing documentation, including electronically stored documentation;

(d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and

(e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-24. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 calendar days in advance of the hearing date, unless otherwise agreed by the parties.

R-25. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

R-26. Representation

Any party may participate without representation (*pro se*), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-28. Stenographic Record

(a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.

(b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.

(c) If the transcript or any other recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

(d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

R-29. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-30. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-31. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.

(d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R-33. Dispositive Motions

The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

R-34. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-35. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence

(a) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.

(b) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.

(c) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-36. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-37. Interim Measures

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-38. Emergency Measures of Protection

(a) Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013.

(b) A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

(c) Within one business day of receipt of notice as provided in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

(d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule 7, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 38.

(e) If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.

(f) Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

(g) Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.

(h) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in this rule and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

(i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

R-39. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If documents or responses are to be filed as provided in Rule R-35, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.

(c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-40. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties , the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Expedited Procedures).

R-41. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-42. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-43. Serving of Notice and Communications

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), or electronic (e-mail) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by e-mail or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

(d) Unless otherwise instructed by the AAA or by the arbitrator, all written communications made by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

(e) Failure to provide the other party with copies of communications made to the AAA or to the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained therein.

(f) The AAA may direct that any oral or written communications that are sent by a party or their representative shall be sent in a particular manner. The failure of a party or their representative to do so may result in the AAA's refusal to consider the issue raised in the communication.

R-44. Majority Decision

(a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement or section (b) of this rule, a majority of the arbitrators must make all decisions.

(b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

R-45. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-46. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-47. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

- **i.** interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
- **ii.** an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-48. Award Upon Settlement—Consent Award

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-49. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-50. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other

parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-51. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-52. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-53. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-54. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and

the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-55. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.

(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

(c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-56. Deposits

(a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

(b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity of each case.

(c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation for the arbitrator's request for deposits.

R-57. Remedies for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

(a) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator take specific measures relating to a party's non-payment.

(b) Such measures may include, but are not limited to, limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim.

(c) The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any ruling regarding the same.

(d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.

(e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.

R-58. Sanctions

(a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

Preliminary Hearing Procedures

P-1. General

(a) In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.

(b) Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

P-2. Checklist

(a) The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:

- **(i)** the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-9;
- **(ii)** whether all necessary or appropriate parties are included in the arbitration;
- **(iii)** whether a party will seek a more detailed statement of claims, counterclaims or defenses;
- **(iv)** whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
- **(v)** which
  - **(a)** arbitration rules;
  - **(b)** procedural law; and
  - **(c)** substantive law govern the arbitration;
- **(vi)** whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation,
  - **(a)** any preconditions that must be satisfied before proceeding with the arbitration;
  - **(b)** whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;
  - **(c)** consolidation of the claims or counterclaims with another arbitration; or
  - **(d)** bifurcation of the proceeding.

(vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;

(viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;

(ix) how costs of any searches for requested information or documents that would result in substantial costs should be borne;

(x) whether any measures are required to protect confidential information;

(xi) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;

(xii) whether, according to a schedule set by the arbitrator, the parties will

(a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;

(b) exchange and pre-mark documents that each party intends to submit; and

(c) exchange pre-hearing submissions, including exhibits;

(xiii) the date, time and place of the arbitration hearing;

(xiv) whether, at the arbitration hearing,

(a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;

(b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;

(xv) whether any procedure needs to be established for the issuance of subpoenas;

(xvi) the identification of any ongoing, related litigation or arbitration;

(xvii) whether post-hearing submissions will be filed;

(xviii) the form of the arbitration award; and

(xix) any other matter the arbitrator considers appropriate or a party wishes to raise.

(b) The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the Demand for Arbitration or counterclaim as provided in Section R-5.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-43, the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-18. The parties shall notify the AAA within seven calendar days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents and Procedures for the Resolution of Disputes Through Document Submission

Where no party's claim exceeds $25,000, exclusive of interest, attorneys' fees and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. Where cases are resolved by submission of documents, the following procedures may be utilized at the agreement of the parties or the discretion of the arbitrator:

(a) Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator may convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.

(b) The arbitrator has the discretion to remove the case from the documents-only process if the arbitrator determines that an in-person hearing is necessary.

(c) If the parties agree to in-person hearings after a previous agreement to proceed under this rule, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearings after agreeing to this rule, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.

(d) The arbitrator shall establish the date for either written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.

(e) Unless the parties have agreed to a form of award other than that set forth in rule R-46, when the parties have agreed to resolve their dispute by this rule, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.

(f) If the parties agree to a form of award other than that described in rule R-46, the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.

(g) The award is subject to all other provisions of the Regular Track of these rules which pertain to awards.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 calendar days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

(a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two business days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.

(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-28.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 calendar days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;

(c) to obtain conflicts statements from the parties; and

(d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. With the exception in paragraph (b) below, if the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than $1,000,000, then one arbitrator shall hear and determine the case.

(b) In cases involving the financial hardship of a party or other circumstance, the AAA at its discretion may require that only one arbitrator hear and determine the case, irrespective of the size of the claim involved in the dispute.

(c) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Management of Proceedings

(a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute.

(b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.

(c) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.

(d) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with rule R-22 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.

(e) The arbitrator, or any single member of the arbitration tribunal, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in rules R-22 and R-23 of the AAA Commercial Rules.

(f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

(g) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Administrative Fee Schedules (Standard and Flexible Fees)

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT ***www.adr.org/feeschedule.***

Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via WebFile at **www.adr.org.**

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

(i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.

(ii) The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.

(iii) A brief statement of the nature of the dispute and the relief requested.

(iv) Any specific qualifications the mediator should possess.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

(i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.

(ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.

(iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the *Model Standards* and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

(i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

(ii) The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

(iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

(iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

(v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

(vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

(i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;

(ii) Admissions made by a party or other participant in the course of the mediation proceedings;

(iii) Proposals made or views expressed by the mediator; or

(iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

(i) By the execution of a settlement agreement by the parties; or

(ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or

(iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or

(iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT ***www.adr.org/feeschedule.***

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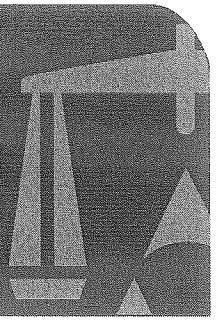
Consumer Arbitration Rules



Introduction

Millions of consumer purchases take place each year. Occasionally, these transactions lead to disagreements between consumers and businesses. These disputes can be resolved by arbitration. Arbitration is usually faster and cheaper than going to court.

The American Arbitration Association® ("AAA®," "the Association") applies the *Consumer Arbitration Rules* ("Rules") to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA has the discretion to apply or not to apply the *Consumer Arbitration Rule*, and the parties are able to bring any disputes concerning the application or non-application of the Rules to the attention of the arbitrator. Consumers and businesses are permitted to seek relief in a small claims court for disputes or claims within the scope of the small claims court's jurisdiction. These Rules were drafted and designed to be consistent with the minimum due process principles of the *Consumer Due Process Protocol*.

About the AAA

The administrator's role is to manage the administrative aspects of the arbitration, such as the appointment of the arbitrator, preliminary decisions about where hearings might take place, and handling the fees associated with the arbitration. As administrator, however, the AAA does not decide the merits of a case or make any rulings on issues such as what documents must be shared with each side. Because the AAA's role is only administrative, the AAA cannot overrule or change an arbitrator's decisions or rulings. The administrator will comply with any court orders issued from litigation involving the parties to the dispute.

The American Arbitration Association, founded in 1926, is a neutral, independent, and private not-for-profit organization. We offer a broad range of conflict management services to businesses, organizations, and individuals. We also provide education, training, and publications focused on methods for settling disputes out of court.

The Arbitrator

Except where the parties to a case reach their own settlement, the arbitrator will make the final, binding decision called the Award on the dispute and render it in writing. The Arbitrator makes all the procedural decisions on a case not made by the Administrator or not decided jointly by the parties. The arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney's fees and costs, in accordance with the law or laws that apply to the case.

Arbitrators are neutral and independent decision makers who are not employees of the AAA. Once appointed to a case, an arbitrator may not be removed by one party without the other party's consent or unless the Administrator determines an arbitrator should be removed and replaced by another arbitrator chosen by the Administrator in a manner described in these Rules.

The AAA's Consumer Arbitration Rules

The AAA has developed the *Consumer Arbitration Rules* for consumers and businesses that want to have their disagreements resolved through arbitration.

Availability of Mediation through Mediation.org

Mediation in consumer disputes is also available to help parties resolve their disputes. Parties interested in participating in mediation may find a mediator through **www.mediation.org.**

Administrative Fees

The Association charges a fee for its services under these Rules. A fee schedule is included at the end of these Rules in the Costs of Arbitration section.

Arbitrator's Fees

Arbitrators are paid for the time they spend resolving disputes. The business makes deposits as outlined in the fee schedule in the Costs of Arbitration section of these Rules. Unused deposits are refunded at the end of the case.

Notification

A business intending to incorporate these Rules or to refer to the dispute resolution services of the AAA in a consumer alternative dispute resolution ("ADR") plan should, at least 30 days prior to the planned effective date of the program,

- notify the Association of its intention to do so, and
- provide the Association with a copy of the consumer dispute resolution plan.

If a business does not comply with this requirement, the Association reserves the right to withhold its administrative services. For more information, please see R-12 below.

Filing a Case and Initial AAA Administrative Steps

R-1. Applicability (When the AAA Applies These Rules)

(a) The parties shall have made these *Consumer Arbitration Rules* ("Rules") a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ("AAA"), and

1) have specified that these *Consumer Arbitration Rules* shall apply;

2) have specified that the *Supplementary Procedures for Consumer-Related Disputes* shall apply, which have been amended and renamed the *Consumer Arbitration Rules*;

3) the arbitration agreement is contained within a consumer agreement, as defined below, that does not specify a particular set of rules; or

4) the arbitration agreement is contained within a consumer agreement, as defined below, that specifies a particular set of rules other than the *Consumer Arbitration Rules*.

When parties have provided for the AAA's rules or AAA administration as part of their consumer agreement, they shall be deemed to have agreed that the application of the AAA's rules and AAA administration of the consumer arbitration shall be an essential term of their consumer agreement.

The AAA defines a consumer agreement as an agreement between an individual consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use.

Examples of contracts that typically meet the criteria for application of these Rules, if the contract is for personal or household goods or services and has an arbitration provision, include, but are not limited to the following:

- Credit card agreements
- Telecommunications (cell phone, ISP, cable TV) agreements
- Leases (residential, automobile)
- Automobile and manufactured home purchase contracts
- Finance agreements (car loans, mortgages, bank accounts)
- Home inspection contracts
- Pest control services

- Moving and storage contracts
- Warranties (home, automobile, product)
- Legal funding
- Health and fitness club membership agreements
- Travel services
- Insurance policies
- Private school enrollment agreements

Examples of contracts that typically do not meet the criteria for application of these Rules, should the contract contain an arbitration provision, include, but are not limited to the following:

- Home construction and remodeling contracts
- Real estate purchase and sale agreements
- Condominium or homeowner association by-laws
- Business insurance policies (including crop insurance)
- Commercial loan and lease agreements
- Commercial guaranty agreements

(b) When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these Rules and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these Rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

(c) The consumer and the business may agree to change these Rules. If they agree to change the Rules, they must agree in writing. If the consumer and the business want to change these Rules after the appointment of the arbitrator, any changes may be made only with the approval of the arbitrator.

(d) The AAA administers consumer disputes that meet the due process standards contained in the *Consumer Due Process Protocol* and the *Consumer Arbitration Rules*. The AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the AAA determines the agreement substantially and materially complies with the due process standards of these Rules and the *Consumer Due Process Protocol*. Should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.

(e) The AAA has the initial authority to apply or not to apply the *Consumer Arbitration Rules*. If either the consumer or the business disagrees with the AAA's decision, the objecting party must submit the objection by the due date for filing an answer to the demand for arbitration. If an objection is filed, the arbitrator shall have the authority to make the final decision on which AAA rules will apply.

(f) If, within 30 days after the AAA's commencement of administration, a party seeks judicial intervention with respect to a pending arbitration and provides the AAA with documentation that judicial intervention has been sought, the AAA will suspend administration for 30 days to permit the party to obtain a stay of arbitration from the court.

(g) Where no disclosed claims or counterclaims exceed $25,000, the dispute shall be resolved by the submission of documents only/desk arbitration (see R-29 and the *Procedures for the Resolution of Disputes through Document Submission* below). Any party, however, may ask for a hearing. The arbitrator also may decide that a hearing is necessary.

R-2. Starting Arbitration under an Arbitration Agreement in a Contract

(a) Arbitration filed under an arbitration agreement naming the AAA shall be started in the following manner:

(1) The party who starts the arbitration (referred to as the "claimant" throughout the arbitration) must contact, in writing, the party that the case is filed against (referred to as the "respondent" throughout the arbitration) that it wishes to arbitrate a dispute. This written contact is referred to as the Demand for Arbitration ("Demand"). The Demand must do the following:

- Briefly explain the dispute
- List the names and addresses of the consumer and the business, and, if known, the names of any representatives of the consumer and the business
- Specify the amount of money in dispute, if applicable
- Identify the requested location for the hearing if an in-person hearing is requested
- State what the claimant wants

(2) The claimant must also send one copy of the Demand to the AAA at the same time the demand is sent to the respondent. When sending a Demand to the AAA, the claimant must also send the following:

- A copy of the arbitration agreement contained in the contract and/or agreement and/or purchase document
- The proper filing fee; the amount of the filing fee can be found in the Costs of Arbitration section at the end of these Rules.

(3) If the arbitration is pursuant to a court order, the claimant must send one copy of the Demand to the AAA at the same time the Demand is sent to the respondent. When sending a demand to the AAA, the claimant must also send the following:

- A copy of the court order
- A copy of the arbitration agreement contained in the contract and/or agreement and/or purchase document
- The proper filing fee

The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party either to make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.

The claimant may file by mail. The mailing address of the AAA's Case Filing Services is:

American Arbitration Association
Case Filing Services
1101 Laurel Oak Road, Suite 100
Voorhees, NJ 08043

Or, the claimant may file online using AAA WebFile: **https://www.adr.org**

Or, the claimant may file at any of the AAA's offices.

(b) The AAA will send a written notice letting the consumer and the business know the Demand for Arbitration has been received.

(c) The respondent may submit a written response to the Demand, known as an "answer," which describes how the respondent responds to the claimant's claim. The answer must be sent to the AAA within 14 calendar days after the date the AAA notifies the parties that the Demand for Arbitration was received and all filing requirements were met. The answer must be

- in writing,
- sent to the AAA, and
- sent to the claimant at the same time.

(d) The respondent may also file a counterclaim, which is the respondent filing a Demand against the claimant. If the respondent has a counterclaim, the counterclaim must briefly explain the dispute, specify the amount of money involved, and state what the respondent wants.

(e) If no answer is filed within 14 calendar days, the AAA will assume that the respondent does not agree with the claim filed by the claimant. The case will move forward after 14 days regardless of whether an answer is filed.

(f) When sending a Demand or an answer, the consumer and the business are encouraged to provide enough details to make the dispute clear to the arbitrator.

R-3. Agreement to Arbitrate When There is No AAA Arbitration Clause

If the consumer and business do not have an arbitration agreement or their arbitration agreement does not name the AAA, the parties may agree to have the AAA arbitrate their dispute. To start the arbitration, the parties must send the AAA a submission agreement, which is an agreement to arbitrate their case with the AAA, signed by the consumer and the business (email communications between all parties to a dispute reflecting an agreement to arbitrate also is acceptable). The submission agreement must

- be in writing (electronic communication is acceptable);
- be signed by both parties;
- briefly explain the dispute;
- list the names and addresses of the consumer and the business;
- specify the amount of money involved;
- specify the requested location for the hearing if an in-person hearing is requested; and
- state the solution sought.

The parties should send one copy of the submission agreement to the AAA. They must also send the proper filing fees. A fee schedule can be found in the Costs of Arbitration section at the end of these Rules.

R-4. AAA Administrative Fees

As a not-for-profit organization, the AAA charges fees to compensate it for the cost of providing administrative services. The fee schedule in effect when the case is filed shall apply for all fees charged during the administration of the case. The AAA may, in the event of the consumer's extreme hardship, defer or reduce the consumer's administrative fees.

AAA fees shall be paid in accordance with the Costs of Arbitration section found at the end of these Rules.

R-5. Neutral Arbitrator's Compensation

(a) Arbitrators serving under these Rules shall be compensated at a rate established by the AAA.

(b) Any arrangement for the compensation of an arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

(c) Arbitrator compensation shall be paid in accordance with the Costs of Arbitration section found at the end of these Rules.

R-6. Depositing Neutral Arbitrator's Compensation with the AAA

The AAA may require the parties to deposit in advance of any hearings such sums of money as it decides are necessary to cover the expense of the arbitration, including the arbitrator's fee, and shall render an accounting to the parties and return any unused money at the conclusion of the case.

R-7. Expenses

Unless otherwise agreed by the parties or as provided under applicable law, the expenses of witnesses for either side shall be borne by the party producing such witnesses.

All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne in accordance with the Costs of Arbitration section found at the end of these Rules.

R-8. Changes of Claim

Once a Demand has been filed, any new claims or counterclaims, or changes to the claim or counterclaim, must be made in writing and sent to the AAA. The party making the new or different claim or counterclaim shall send a copy to the opposing party. As with the original Demand or counterclaim, a party shall have 14 calendar days from the date the AAA notifies the parties it received the new or different claim or counterclaim to file an answering statement with the AAA.

If an arbitrator has already been appointed, a new or different claim or counterclaim may only be considered if the arbitrator allows it.

R-9. Small Claims Option for the Parties

If a party's claim is within the jurisdiction of a small claims court, either party may choose to take the claim to that court instead of arbitration as follows:

(a) The parties may take their claims to small claims court without first filing with the AAA.

(b) After a case is filed with the AAA, but before the arbitrator is formally appointed to the case by the AAA, a party can send a written notice to the opposing party and the AAA that it wants the case decided by a small claims court. After receiving this notice, the AAA will administratively close the case.

(c) After the arbitrator is appointed, if a party wants to take the case to small claims court and notifies the opposing party and the AAA, it is up to the arbitrator to determine if the case should be decided in arbitration or if the arbitration case should be closed and the dispute decided in small claims court.

R-10. Administrative Conference with the AAA

At the request of any party or if the AAA should so decide, the AAA may have a telephone conference with the parties and/or their representatives. The conference may address issues such as arbitrator selection, the possibility of a mediated settlement, exchange of information before the hearing, timing of the hearing, the type of hearing that will be held, and other administrative matters.

R-11. Fixing of Locale (the city, county, state, territory and/or country where the arbitration will take place)

If an in-person hearing is to be held and if the parties do not agree to the locale where the hearing is to be held, the AAA initially will determine the locale of the arbitration. If a party does not agree with the AAA's decision, that party can ask the arbitrator, once appointed, to make a final determination. The locale determination will be made after considering the positions of the parties, the circumstances of the parties and the dispute, and the *Consumer Due Process Protocol.*

R-12. Business Notification and Publicly-Accessible Consumer Clause Registry

Beginning September 1, 2014, a business that provides for or intends to provide for these Rules or another set of AAA Rules in a consumer contract (as defined in R-1) should

1. notify the AAA of the existence of such a consumer contract or of its intention to do so at least 30 days before the planned effective date of the contract.
2. provide the AAA a copy of the arbitration agreement.

Upon receiving the arbitration agreement, the AAA will review the agreement for material compliance with due process standards contained in the *Consumer Due Process Protocol* and the *Consumer Arbitration Rules* (see Rule 1(d)). There is a nonrefundable fee to conduct this initial review and maintain a publicly-available clause registry, which is detailed in the Costs of Arbitration section found at the end of these Rules. Any subsequent changes, additions, deletions, or amendments to a currently-registered arbitration agreement must be resubmitted for review and a review fee will be assessed at that time. The AAA will decline to administer consumer arbitrations arising out of that arbitration agreement where the business fails to pay the review fee.

If a business does not submit its arbitration agreement for review and a consumer arbitration then is filed with the AAA, the AAA will conduct an expedited review at that time. Along with any other filing fees that are owed for that case, the business also will be responsible for paying the nonrefundable review and Registry fee (including any fee for expedited review at the time of filing) for this initial review, which is detailed in the Costs of Arbitration section found at the end of these Rules. The AAA will decline to administer consumer arbitrations arising out of that arbitration agreement if the business declines to pay the review and Registry fee.

After the AAA reviews the submitted consumer clause, receives the annual consumer registry fee, and determines it will administer consumer-related disputes filed pursuant to the consumer clause, the business will be included on the publicly-accessible Consumer Clause Registry. This Consumer Clause Registry maintained by the AAA will contain the name of the business, the address, and the consumer arbitration clause, along with any related documents as deemed necessary by the AAA. The AAA's review of a consumer arbitration clause and determination whether or not to administer arbitrations pursuant to

that clause is only an administrative determination by the AAA and cannot be relied upon or construed as a legal opinion or advice regarding the enforceability of the arbitration clause. Consumer arbitration agreements may be registered at: **www.adr.org/consumerclauseregistry** or via email at **consumerreview@adr.org.**

For more information concerning the Consumer Clause Registry, please visit the AAA's website at **www.adr.org/consumerclauseregistry.**

The Registry fee to initially review a business's agreement and maintain the clause registry list is a yearly, non-refundable fee for the business's arbitration agreement. Any different arbitration agreements submitted by the same business or its subsidiaries must be submitted for review and are subject to the current review fee.

If the AAA declines to administer a case due to the business's non-compliance with this notification requirement, the parties may choose to submit their dispute to the appropriate court.

R-13. AAA and Delegation of Duties

When the consumer and the business agree to arbitrate under these Rules or other AAA rules, or when they provide for arbitration by the AAA and an arbitration is filed under these Rules, the parties also agree that the AAA will administer the arbitration. The AAA's administrative duties are set forth in the parties' arbitration agreement and in these Rules. The AAA will have the final decision on which office and which AAA staff members will administer the case. Arbitrations administered under these Rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-14. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

Appointing the Arbitrator

R-15. National Roster of Arbitrators

The AAA maintains a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators from this National Roster to resolve the parties' dispute(s).

R-16. Appointment from National Roster

(a) If the parties have not appointed an arbitrator and have not agreed to a process for appointing the arbitrator, immediately after the filing of the submission agreement or the answer, or after the deadline for filing the answer, the AAA will administratively appoint an arbitrator from the National Roster.

(b) If the parties' arbitration agreement provides for three or more arbitrators and they have not appointed the arbitrators and have not agreed to a process for appointing the arbitrators, immediately after the filing of the submission agreement or the answer, or after the deadline for filing the answer, the AAA will administratively appoint the arbitrators from the National Roster. The AAA will appoint the chairperson.

(c) Arbitrator(s) serving under these Rules will be neutral and must meet the standards of R-19 with respect to being impartial and independent.

R-17. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators and the parties do not agree on the number, the dispute shall be heard and decided by one arbitrator.

R-18. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, must provide information to the AAA of any circumstances likely to raise justifiable doubt as to whether the arbitrator can remain impartial or independent. This disclosure of information would include

(1) any bias;

(2) any financial interest in the result of the arbitration;

(3) any personal interest in the result of the arbitration; or

(4) any past or present relationship with the parties or their representatives.

Such obligation to provide disclosure information remains in effect throughout the arbitration. A failure on the part of a party or a representative to comply with the

requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-50.

(b) If the AAA receives such information from the arbitrator or another source, the AAA will communicate the information to the parties. If the AAA decides it is appropriate, it will also communicate the information to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosing such information does not mean that the arbitrator considers the disclosed information will likely affect his or her ability to be impartial or independent.

R-19. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties carefully and in good faith. The AAA may disqualify an arbitrator who shows

(1) partiality or lack of independence;

(2) inability or refusal to perform his or her duties with diligence and in good faith; or

(3) any grounds for disqualification provided by applicable law.

(b) If a party objects to the continued service of an arbitrator, or if the AAA should so decide to raise the issue of whether the arbitrator should continue on the case, the AAA will decide if the arbitrator should be disqualified. After gathering the opinions of the parties, the AAA will decide and that decision shall be final and conclusive.

R-20. Vacancies

If for any reason an arbitrator cannot or is unwilling to perform the duties of the office, the AAA may declare the office vacant. Any vacancies shall be filled based on the original procedures used to appoint the arbitrator. If a substitute arbitrator is appointed, the substitute arbitrator will decide if it is necessary to repeat all or part of any prior ruling or hearing.

Pre-Hearing Preparation

R-21. Preliminary Management Hearing with the Arbitrator

(a) If any party asks for, or if the AAA or the arbitrator decides to hold one, the arbitrator will schedule a preliminary management hearing with the parties and/or their representatives as soon as possible. The preliminary management hearing will be conducted by telephone unless the arbitrator decides an in-person preliminary management hearing is necessary.

(b) During the preliminary management hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of issues and claims, scheduling of the hearings, and any other preliminary matters.

(c) The arbitrator shall promptly issue written orders that state the arbitrator's decisions made during or as a result of the preliminary management hearing. The arbitrator may also conduct additional preliminary management hearings if the need arises.

R-22. Exchange of Information between the Parties

(a) If any party asks or if the arbitrator decides on his or her own, keeping in mind that arbitration must remain a fast and economical process, the arbitrator may direct

1) specific documents and other information to be shared between the consumer and business, and

2) that the consumer and business identify the witnesses, if any, they plan to have testify at the hearing.

(b) Any exhibits the parties plan to submit at the hearing need to be shared between the parties at least five business days before the hearing, unless the arbitrator sets a different exchange date.

(c) No other exchange of information beyond what is provided for in section (a) above is contemplated under these Rules, unless an arbitrator determines further information exchange is needed to provide for a fundamentally fair process.

(d) The arbitrator has authority to resolve any disputes between the parties about exchanging information.

R-23. Enforcement Powers of the Arbitrator

The arbitrator may issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient, and economical resolution of the case, including, but not limited to:

(a) an order setting the conditions for any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing in order to preserve such confidentiality;

Fast Track Procedures

F-1. Fast Track Applicability

The Fast Track Procedures shall apply to all two-party cases where no party's disclosed claim or counterclaim exceeds $100,000.

If a claim or counterclaim is amended to exceed $100,000, the case will be administered under the Regular Track Procedures (or Large, Complex Case Procedures, if applicable) unless all parties agree that the case may continue to be processed under the Fast Track Procedures.

The AAA, in its discretion, may reassign a matter to the Regular Track Procedures or, if applicable, Large, Complex Case Procedures, upon the occurrence of any of the following events:

(a) the case is to be decided by more than one arbitrator;

(b) the parties agree to any information exchange beyond that permitted by Section F-8;

(c) the timing of the case exceeds the Time Standards set forth in Section F-12; or

(d) hearing time exceeds what is allowable under Section F-11.

Where no party's claim exceeds $25,000, exclusive of interest, attorneys' fees and arbitration costs, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing or conference call is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents, as set forth in the D-Procedures of these Rules.

F-2. Answers and Counterclaims

If an answer or counterclaim is to be filed, it shall be filed within seven calendar days after notice of the filing of the demand is sent by the AAA. All other requirements of Section R-4 apply.

F-3. Limitation on Extensions

(a) In the absence of extraordinary circumstances, the AAA may grant no more than one seven-calendar-day extension of the time in which to respond to a demand for arbitration or a counterclaim as provided in F-2.

(b) All other requests for extensions of time are subject to Sections F-12 and R-43 of these Rules, as applicable.

F-4. Changes of Claim or Counterclaim

(a) A party may increase or decrease the amount of its claim or counterclaim up to seven calendar days prior to the first scheduled hearing, subject to the provisions of F-1. Such changes must be made in writing and provided to the AAA and the opposing party.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of seven calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed no new or different claim or counterclaim may be submitted without the arbitrator's consent.

F-5. Appointment and Qualification of Arbitrator

(a) Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement is to be filed, the AAA shall simultaneously submit to each party an identical list of five names from the Construction Panel from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list, and to advise the Association of their agreement.

(c) If the parties cannot agree upon an arbitrator, each party may strike up to two names from the list and rank the remaining names in order of preference. The list shall be returned to the AAA within seven calendar days of the AAA's transmission of the list. If a party does not return the list by the due date, all names shall be deemed acceptable to that party.

(d) The AAA will appoint the agreed-upon arbitrator, or in the event the parties cannot agree on an arbitrator, will designate the arbitrator from among those names not stricken. The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in R-20.

(e) Within the time period established by the AAA, the parties shall notify the AAA of any objection to the arbitrator appointed. Any objection by a party to the arbitrator shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

(f) Absent agreement of the parties, the arbitrator shall not have served as the mediator in the mediation phase of the instant proceeding.

(g) In the event the AAA is unable to appoint an arbitrator from the first list submitted, the AAA is empowered to appoint an arbitrator without the submission of additional lists.

F-6. Serving of Notice for Hearing

In addition to notice being provided according to the means specified in R-44, parties shall accept notice of hearings, including preliminary hearings, by telephone, email, AAA WebFile, fax, or mail.

F-7. Preliminary Telephone Management Hearing

(a) A preliminary telephone conference shall be held among the parties or their representatives and the arbitrator within 10 business days from the confirmation of the arbitrator's appointment.

(b) During this conference, the arbitrator shall direct the parties' preparations and presentations so that the Fast Track F-12 Time Standards can be met. Arrangements made during the Preliminary Management Hearing shall be confirmed in writing to the parties.

F-8. Exchange of Information

At least five business days prior to the hearing or no later than the date established by the arbitrator, the parties shall (a) exchange directly between themselves copies of all exhibits, affidavits and any other information they intend to submit at the hearing, and (b) identify all witnesses they intend to call at the hearing. The arbitrator is authorized to resolve any disputes concerning the exchange of information.

F-9. Discovery

There shall be no discovery, except as provided in F-8 or as ordered by the arbitrator in exceptional cases.

F-10. Date, Time and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing. The hearing shall be set so that the time standards in F-12 will be satisfied. The AAA will notify the parties in advance of the hearing date.

F-11. The Hearing

The hearing should not exceed one day. For good cause shown, the arbitrator may schedule additional time, which shall not exceed the equivalent of one day. The arbitrator shall schedule any additional time so as to comply with the F-12

Time Standards. At the discretion of the arbitrator, this additional time can take the form of an in-person meeting, a conference call, or some other means of taking testimony, provided that each party has the right to be heard and is given a fair opportunity to present its case.

F-12. Time Standards

The hearing shall be closed no later than 45 calendar days after the date of the preliminary telephone conference, unless all parties and the arbitrator agree otherwise or the arbitrator extends this time in extraordinary cases when the demands of justice require it and such agreement is memorialized by the arbitrator prior to the expiration of the initial 45-day period. Such report shall include the reason for the extension of the Time Standards. The AAA may extend the Time Standards in the event the parties agree to AAA mediation.

F-13. Time of Award

The award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

F-14. Neutral Arbitrator's Compensation

Arbitrators serving on Fast Track cases will receive compensation at rates established by the AAA.

Procedures for Large, Complex Construction Disputes

L-1. Applicability

Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes (hereinafter LCC) shall apply to all cases administered by the AAA under the Construction Industry Arbitration Rules in which the disclosed claim or counterclaim of any party is $1,000,000 or more, exclusive of claimed interest, attorneys' fees and arbitration fees and costs. Parties may agree to use these Procedures in cases involving claims or counterclaims under $1,000,000 or in cases involving non-monetary claims. The LCC Procedures are designed to complement the Regular Track of these Rules. To the extent there is any conflict between the Regular Track and the LCC procedures, the LCC Procedures shall control.

L-2. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference call will take place within 14 calendar days after the notice that the administrative filing requirements have been satisfied. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifications of the arbitrator as well as an efficient method for selecting the arbitrator;

(c) to obtain conflicts statements from the parties;

(d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate;

(e) to identify whether there are other related arbitrations for potential consolidation or parties who may request to join the arbitration;

(f) to discuss means and methods for cost-effective case management; and

(g) to discuss any other items which may facilitate the management of a complex arbitration.

L-3. Arbitrators

(a) Large, Complex Construction Cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree, three arbitrators shall hear the case.

(b) The parties are encouraged to agree upon a method for selection of the arbitrator(s). The AAA shall appoint arbitrator(s) by the method agreed upon by the parties.

(c) If the parties are unable to agree on a method of appointment, the AAA shall appoint the arbitrators from the Large, Complex Construction Case Panel, in the manner provided in the Regular Construction Industry Arbitration Rules. The AAA shall determine the number of names on the list(s).

(d) Absent agreement of the parties, the arbitrator shall not have served as the mediator in the mediation phase of the instant proceeding.

L-4. Preliminary Management Hearing and Management of Proceedings

(a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Construction Dispute.

(b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.

(c) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with R-24 of the AAA Construction Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.

(d) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator may place such limitations on the conduct of such discovery as the arbitrator shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator, consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(e) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator considers such production to be consistent with the goal of achieving a just, efficient and cost-effective resolution of a Large, Complex Construction Case.

(f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

(g) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.

(h) The arbitrator, or any single member of the arbitration panel, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in R-24 and R-25 of the AAA Construction Rules.

(i) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

L-5. Form of Award

In addition to the award requirements set forth in R-47 (a) and (b) unless the parties agree otherwise, the arbitrator shall issue a reasoned award.

Administrative Fee Schedules (Standard And Flexible Fee)

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT ***www.adr.org/constructionfeeschedule.***

Construction Industry Arbitration Rules

Regular Track Procedures

R-1. Agreement of Parties and Designation of Applicable AAA Rules

(a) The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Construction Industry Arbitration Rules or whenever they have provided for arbitration of a construction dispute pursuant to the Rules of the AAA without designating particular AAA Rules.

(b) Unless the parties or the AAA determines otherwise, the Fast Track Procedures shall apply in any case involving no more than two parties in which no disclosed claim or counterclaim exceeds $100,000, exclusive of claimed interest, attorneys' fees and arbitration fees and costs. Parties may also agree to use these procedures in larger cases. The Fast Track Procedures shall be applied as described in Section F of these Rules, in addition to any other portion of these Rules that is not in conflict with the Fast Track Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is $1,000,000 or more, exclusive of claimed interest, attorneys' fees, and arbitration fees and costs. The Procedures for Large, Complex Construction Disputes shall be applied as described in Section L of these Rules, in addition to any other portion of these Rules that is not in conflict with the Procedures for Large, Complex Construction Disputes.

(d) Parties may, by agreement, apply the Fast Track Procedures, the Procedures for Large, Complex Construction Disputes, or Procedures for the Resolution of Disputes through Document Submission (Section D of these Rules) to any dispute.

(e) All other cases shall be administered in accordance with the Regular Track Procedures of these Rules.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these Rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-3. National Panel of Construction Arbitrators

The AAA shall establish and maintain a National Panel of Construction Arbitrators ("National Panel") and shall appoint arbitrators as provided in these Rules. The term "arbitrator" in these Rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements Under an Arbitration Agreement in a Contract

(a) *Filing of a Demand:* Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

i. The initiating party ("the claimant") shall, within the time period, if any, specified in the contract(s), file with the AAA a demand for arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration. Filing may be accomplished through use of AAA WebFile, located at **www.adr.org,** or by filing the demand with any AAA office.

ii. The claimant shall simultaneously provide a copy of the demand and the applicable arbitration agreement to the opposing party ("the respondent").

iii. The demand shall include:

a) the name of each party;

b) the address for each party, including, if known, telephone and fax numbers and email addresses;

c) if applicable, the names, addresses, telephone and fax numbers and, if known, email address of the known representative for each party;

d) a statement setting forth the nature of the claim including the relief sought and the amount involved;

e) the locale requested, if the arbitration agreement does not specify one.

(b) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a demand when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration, however any disputes in connection with the AAA's determination may be decided by the arbitrator.

If a filing does not satisfy the Filing Requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the due date specified by the AAA, the filing may be returned to the filing party.

(c) *Answers and Counterclaims*

i. *Answering Statement:* A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of

the answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

ii. *Counterclaim:* A respondent may file a counterclaim within 14 calendar days after notice of the filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the counterclaim to the claimant and to all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

If the counterclaim filing is deficient, and not cured by the date specified by the AAA, it may be returned to the filing party.

(d) Parties are encouraged to provide descriptions of their claims, in any document filed pursuant to this section, in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

R-5. Filing Requirements Under a Submission Agreement

Parties to any existing dispute, who have not previously agreed to use these Rules, may commence arbitration under these Rules by either filing online through AAA WebFile or by filing at any office of the AAA a written submission to arbitrate under these Rules, signed by the parties. The submission shall contain:

(a) the names and addresses for each party and their representatives, including, if known, telephone and fax numbers and email addresses;

(b) a statement setting forth the nature of the dispute including the relief sought, the amount involved and the claims and counterclaims asserted by the parties. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party;

(c) the hearing locale, if agreed upon by the parties;

(d) the appropriate filing fee for each claim or counterclaim as provided in the AAA Fee Schedule applicable at the time of filing.

Parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of their dispute clear to the arbitrator.

R-6. Changes of Claim or Counterclaim

(a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed no new or different claim or counterclaim may be submitted without the arbitrator's consent.

R-7. Consolidation or Joinder

(a) If the parties are unable to agree to consolidate related arbitrations or to the joinder of parties to an ongoing arbitration, the AAA shall directly appoint a single arbitrator (hereinafter referred to as the R-7 arbitrator) for the limited purpose of deciding whether related arbitrations should be consolidated or parties joined. All requests for consolidation or joinder must be submitted to the AAA prior to the appointment of an arbitrator pursuant to R-14 through R-16 (the Merits Arbitrator), or within 90 days of the date the AAA determined that all administrative filing requirements were satisfied, whichever is later. Requests for consolidation or joinder submitted beyond these timeframes shall not be permitted absent a determination by the Merits Arbitrator that good cause was shown for the late request.

(b) To request consolidation of arbitrations, the requesting party must have filed a demand for arbitration, including the applicable arbitration provision(s) from the parties' contract(s) and must provide a written request for consolidation which provides the supporting reasons for such request. It is the requesting party's responsibility to provide a copy of the request to all parties at the same time the request is provided to the AAA. The other parties to the arbitration(s) shall provide their written responses to the request for consolidation within 10 days after notice of receipt of the request for consolidation is sent by the AAA.

(c) To request joinder of parties, the requesting party must file with the AAA a written request to join parties to an existing arbitration which provides the names and contact information for such parties, names and contact information for the parties' representatives, if known, and supporting reasons for such request. The party requesting joinder shall be responsible for simultaneously providing a copy of the joinder request and supporting reasons to all parties to the arbitration and the party or parties sought to be joined. The other parties to the arbitration and the party that is sought to be joined shall provide their written responses to the request for joinder within 14 days after notice of receipt of the request of joinder is sent by the AAA. Any party to an ongoing arbitration administered by the AAA that fails to object to the joinder request shall be deemed to have waived their

objection to the joinder request. If the party sought to be joined is not a party to an ongoing arbitration administered by the AAA, the party seeking joinder shall comply with the provisions of Rule 4(a) as to that party. If no response to the joinder request is received by a party that is not a party to an ongoing arbitration, that party will be deemed to have denied the joinder request.

(d) Absent agreement of all parties, the R-7 arbitrator appointed under this Rule shall not be a Merits Arbitrator who is appointed to any pending case involved in the consolidation request at issue.

(e) If the R-7 arbitrator determines that separate arbitrations shall be consolidated or that the joinder of additional parties is permissible, that arbitrator may also establish a process for selecting Merits Arbitrators for any ongoing or newly constituted case and, unless agreed otherwise by the parties, the allocation of responsibility for arbitrator compensation among the parties, subject to reapportionment by the arbitrator(s) appointed to the newly constituted case in the final arbitration award.

(f) The AAA may take reasonable administrative action to accomplish the consolidation or joinder as directed by the arbitrator. Pending the determination on a consolidation or joinder request, the AAA shall have the authority to stay the arbitration or arbitrations impacted by the consolidation or joinder request.

(g) The AAA shall maintain a panel of construction attorneys who have experience with consolidation or joinder issues. All arbitrators appointed to hear requests under this Rule shall be appointed from that panel, unless the parties agree otherwise.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-10. Mediation

In all cases where a claim or counterclaim exceeds $100,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Construction Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, unless the parties' agreement includes a requirement for mandatory mediation, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm to the AAA the completion of any mediation or any decision to opt out of this rule. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-11. Administrative Conference

(a) Before the appointment of the arbitrator, any party may request, or the AAA in its discretion, may schedule an administrative conference with a representative of the AAA and the parties and/or their representatives.

(b) The purpose of the administrative conference is to organize and expedite the arbitration, explore administrative details, establish an efficient means of selecting an arbitrator, ascertain the parties' preferred arbitrator qualifications and openness to consider mediation as a dispute resolution option and to address other appropriate concerns of the parties, including but not limited to joinder of parties, consolidation of related cases, and changes to claims. The possibility of proceeding through the submission of documents only, as set out in optional Section D of the Rules, may also be explored.

(c) Administrative conferences may be convened, at the AAA's discretion or at the request of any party, at other times during the case to address case management matters that do not require the arbitrator's involvement.

R-12. Fixing of Locale (the city, county, state, territory and, if applicable, country of the arbitration)

The parties may mutually agree to the locale where the arbitration is to be held. Any disputes regarding the locale must be submitted to the AAA and all other

parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale and the parties are unable to agree upon a locale, the locale shall be the city nearest to the site of the project in dispute, as determined by the AAA, subject to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary hearing.

(b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, the locale shall be that specified in the arbitration agreement.

(c) If the reference to a locale in the arbitration agreement is ambiguous and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary hearing.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-13. Date, Time and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing and/or conference. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall provide notice of hearing to the parties at least seven calendar days in advance of the hearing date, unless otherwise agreed by the parties or so directed by the arbitrator.

R-14. Arbitrator Appointment from National Construction Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

(a) Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement is to be filed, the AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Construction Panel. The parties are encouraged to agree on an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree on an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA.

The parties shall not exchange arbitrator selection lists. If a party does not return the list within the time specified by the AAA, all persons named therein shall be deemed acceptable by that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve.

(c) If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the authority to make the appointment from among other members of the National Construction Panel without the submission of additional lists.

(d) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators without the submission of lists.

(e) In a three-arbitrator case, the parties shall first attempt to agree on the professional backgrounds for the composition of the arbitration panel. If the parties are unable to agree, then the AAA shall determine the professional composition of the panel, taking into account any preferences expressed by the parties.

The AAA may provide the parties with lists, separated by industry, in order for the parties to select arbitrators from different professional backgrounds. If separate lists are used, the total number of names will be no less than 15, unless the AAA determines otherwise.

R-15. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name, address, telephone number, fax number and email, if known, of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Construction Panel from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of R-20 with respect to impartiality and independence unless the parties have specifically agreed pursuant to R-20(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-16. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-15, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA and the parties have authorized those arbitrators to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Construction Panel, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-14, a list selected from the National Construction Panel, and the appointment of the chairperson shall be made as provided in that Section.

R-17. Nationality of Arbitrator in International Arbitration

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-18. Number of Arbitrators

(a) If the parties have not agreed on the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

(b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim must be made to the AAA and the other parties to the arbitration no later than seven calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

R-19. Disclosure

(a) Any person appointed or to be appointed as an arbitrator as well as the parties and their representatives shall disclose to the AAA, as promptly as practicable, any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-42.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) Disclosure of information pursuant to this Section R-19 is not to be construed as an indication that the arbitrator considers that the disclosed circumstances are likely to affect impartiality or independence.

R-20. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and may be subject to disqualification for:

i. partiality or lack of independence,

ii. inability or refusal to perform his or her duties with diligence and in good faith, and

iii. any grounds for disqualification provided by applicable law.

The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-15 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-21. Communication with Arbitrator and the AAA

(a) No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator except as follows: A party or anyone acting on behalf of a party may communicate *ex parte* with a candidate for direct appointment pursuant to Section R-15 in order to advise the candidate of the general nature of the controversy, and of the anticipated proceedings and to discuss the candidate's

qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) R-21(a) does not apply to arbitrators directly appointed by the parties who, pursuant to R-20(a), the parties have agreed in writing are non-neutral. Where the parties have so agreed under R-20(a), the AAA shall as an administrative practice suggest to the parties that they agree further that R-21(a) should nonetheless apply prospectively.

(c) In the course of administering an arbitration, the AAA and the parties or anyone acting on behalf of any of the parties may communicate with each other either jointly or individually.

(d) As set forth in R-44, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-22. Vacancies

(a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-23. Preliminary Management Hearing

(a) At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.

(b) At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

R-24. Pre-Hearing Exchange and Production of Information

(a) *Authority of arbitrator.* The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

(b) *Documents.* The arbitrator may, on application of a party or on the arbitrator's own initiative:

i. require the parties to exchange documents in their possession or custody on which they intend to rely;

ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;

iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-25. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-23 and R-24 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

(a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality;

(b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;

(c) allocating costs of producing documentation, including electronically stored documentation;

(d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or

making special allocations of costs or an interim award of costs arising from such non-compliance; and

(e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-26. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any person other than a party and its representative.

R-27. Representation

Any party may participate without representation (*pro se*), or by counsel or any other representative of that party's choosing, unless such choice is prohibited by applicable law. A party intending to have representation shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-28. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-29. Stenographic Record

(a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least seven calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.

(b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.

(c) If the transcript or any other recording is agreed on by the parties and determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

(d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

R-30. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-31. Postponements of Hearings

The arbitrator for good cause shown may postpone any hearing upon agreement of the parties, upon request of a party, or upon the arbitrator's own initiative.

R-32. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award in whatever form the arbitrator deems appropriate, including conducting the hearings through document submissions only, videoconference, or telephonically.

R-33. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence supporting its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must still afford a full opportunity for all

parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and when involving witnesses, provide an opportunity for cross-examination.

(d) The parties may agree to waive oral hearings in any case.

R-34. Dispositive Motions

Upon prior written application, the arbitrator may permit motions that dispose of all or part of a claim, or narrow the issues in a case.

R-35. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered. The arbitrator may request offers of proof and may reject evidence deemed by the arbitrator to be cumulative, unreliable, unnecessary, or of slight value compared to the time and expense involved. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where: 1) any of the parties is absent, in default, or has waived the right to be present, or 2) the parties and the arbitrators agree otherwise.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently. Parties who request that an arbitrator sign a subpoena shall provide a copy of the request and proposed subpoena to the other parties to the arbitration simultaneously upon making the request to the arbitrator.

R-36. Evidence by Affidavit and Post-Hearing Filing of Documents or Other Evidence

(a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, and shall give it such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

(b) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.

(c) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.

(d) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence, unless otherwise agreed by the parties and the arbitrator, shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-37. Inspection or Investigation

An arbitrator finding it necessary to make a site inspection or other investigation in connection with the arbitration shall set the date and time for such inspection or investigation and shall direct the AAA to so notify the parties. Any party who so desires may be present at such an inspection or investigation. Absent agreement of the parties, the arbitrator shall not undertake a site inspection unless all parties are present. In the event of a case proceeding in the absence of a party pursuant to Section R-32 of these Rules, agreement of the parties for the arbitrator to proceed without all parties present is not necessary so long as sufficient notice of the inspection or investigation is provided.

R-38. Interim Measures

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may be taken in the form of an interim award, and the arbitrator may require security for the costs of such measures. If it has been determined that an interim award is needed, the arbitrator shall establish a reasonable due date for issuing the interim award. In the event an arbitrator does not promptly establish such a due date, the AAA shall set the due date.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(d) The arbitrator shall have the discretion to apportion costs associated with the application for any interim relief in the interim award or in the final award.

R-39. Emergency Measures of Protection

(a) Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after July 1, 2015.

(b) A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

(c) Within one business day of receipt of notice as provided in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

(d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or videoconference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule 9, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 39.

(e) If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.

(f) Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

(g) Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.

(h) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a

special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in this rule and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

(i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

R-40. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If documents or responses are to be filed as provided in Section R-36 (d) or if briefs are to be filed, the hearing shall be declared closed as of the final due date set by the arbitrator for the receipt of documents, responses, or briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.

(c) The time limit in which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for the rendering of the award only in unusual and extreme circumstances.

R-41. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties, the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Fast Track Procedures).

R-42. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-43. Extensions of Time

(a) The parties may modify any period of time by mutual agreement, provided that any such modification that adversely affects the efficient resolution of the dispute is subject to review and approval by the arbitrator. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except as set forth in R-40 (c).

(b) The AAA shall notify the parties of any extension.

R-44. Serving of Notice

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made under these; rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery, electronic fax transmission (fax), or electronic mail (email) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-45. Majority Decision

(a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions; however, in a multi-arbitrator case, if all parties and all arbitrators agree, the chair of the panel may make procedural decisions.

(b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve or delegate to another member of the panel to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

R-46. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of

closing the hearing, or if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-47. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.

(b) In all cases, unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any monetary awards and, if there are non-monetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each non-monetary claim or counterclaim.

(c) The parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact, or conclusions of law no later than the conclusion of the first Preliminary Management Hearing. If the parties agree on a form of award other than that specified in R-47 (b) of these Rules, the arbitrator shall provide the form of award agreed upon. If the parties disagree with respect to the form of the award, the arbitrator shall determine the form of award. After the conclusion of the Preliminary Management Hearing, the parties may not change the form of the award without the arbitrator's express consent. In such event, the arbitrator shall confirm the nature of the change to the form of award.

R-48. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract.

(b) In addition to the final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess fees, expenses, and compensation as provided in Sections R-55, R-56, and R-57. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator may include:

- **i.** interest at such rate and from such date as the arbitrator may deem appropriate; and
- **ii.** an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-49. Award Upon Settlement

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation amounts have been paid in full.

R-50. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known address, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-51. Modification of Award

(a) Within 20 calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any party, upon notice to the other parties, may request that the arbitrator correct any clerical, typographical, technical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided.

(b) If the modification request is made by a party, the other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

(c) If applicable law provides a different procedural time frame, that procedure shall be followed.

R-52. Release of Documents

The AAA shall, upon the written request of a party to the arbitration, furnish to that party, at its expense, copies or certified copies of papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-53. Withdrawal of Claims or Counterclaims

(a) Once the AAA has provided notice to the parties that the filing requirements for a claim or counterclaim have been met, no claim or counterclaim may be withdrawn unless the parties agree or the arbitrator consents.

(b) Disputes regarding whether a claim or counterclaim is withdrawn with or without prejudice may be decided by the arbitrator.

R-54. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these Rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages, injunctive or declaratory relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these Rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-55. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees and service charges to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable.

The filing fee shall be advanced by the party or parties, subject to final apportionment by the arbitrator in the award.

The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-56. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-57. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.

(b) Absent an agreement of the parties otherwise, or as determined by an arbitrator appointed under the auspices of Section R-7, each party shall share equally in the compensation of the arbitrator, subject to reapportionment in the final award. In the event that multiple parties are participating in the arbitration through a single representative, the AAA may consider them a single party for the purpose of allocating arbitrator compensation.

(c) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the Association and confirmed to the parties.

(d) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

(e) The arbitrator's requests for payment shall be made available to the parties upon request.

R-58. Deposits

(a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

(b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity or length of each case.

(c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation of the arbitrator's request for deposits.

R-59. Remedies for Nonpayment

(a) If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

(b) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator issue an order directing what measures might be taken in light of a party's non-payment.

Such measures may include limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim. The arbitrator must provide the party opposing a request for such

measures with the opportunity to respond prior to making any such determination. In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments, to submit such evidence as the arbitrator may require for the making of an award.

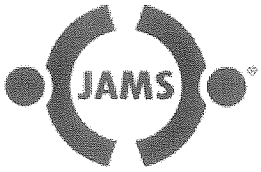
(c) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(d) If the arbitrator's compensation or administrative fees remain unpaid after a determination to suspend an arbitration due to nonpayment, the arbitrator has the authority to terminate the proceedings. Such an order shall be in writing and signed by the arbitrator.

R-60. Sanctions

(a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to the making of an award. The arbitrator may not enter a default award as a sanction.

(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanction's application.



JAMS Comprehensive Arbitration Rules & Procedures

JAMS Comprehensive Arbitration Rules & Procedures

Effective July 1, 2014

Download JAMS Comprehensive Arbitration Rules
in PDF Format in English or Spanish

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Summary of July 1, 2014 Revi
Comprehensive Arbitration Ru
Procedures

**OPTIONAL EXPEDITED ARBI
PROCEDURES:**
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and 16.2.

Rule 1. Scope of Rules

(a) The JAMS Comprehensive Arbitration Rules and Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, any disputed claim or counterclaim that exceeds $250,000, not including interest or attorneys' fees, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Comprehensive Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS as prescribed in the Agreement of the Parties and in these Rules shall be carried out by the JAMS National Arbitration Committee ("NAC") or the office of JAMS General Counsel or their designees.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term "Party" as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

(f) "Electronic filing" (e-file) means the electronic transmission of documents to and from JAMS and other Parties for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents via JAMS Electronic Filing System to a Party, attorney or representative under these Rules.

Rule 2. Party Self-Determination and Emergency Relief Procedures

(a) The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 15(i), 30 and 31). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

(b) When an Arbitration Agreement provides that the Arbitration will be non-administered or administered by an entity other than JAMS and/or conducted in accordance with rules other than JAMS Rules, the Parties may subsequently agree to modify that Agreement to provide that the Arbitration will be administered by JAMS and/or conducted in accordance with JAMS Rules.

(c) Emergency Relief Procedures. These Emergency Relief Procedures are available in Arbitrations filed and served after July 1, 2014, and where not otherwise prohibited by law. Parties may agree to opt out of these Procedures in their Arbitration Agreement or by subsequent written agreement.

(i) A Party in need of emergency relief prior to the appointment of an Arbitrator may notify JAMS and all other Parties in writing of the relief sought and the basis for an Award of such relief. This Notice shall include an explanation of why such relief is needed on an expedited basis. Such Notice shall be given by facsimile, email or personal delivery. The Notice must include a statement certifying that all other Parties have been notified. If all other Parties have not been notified, the Notice shall include an explanation of the efforts made to notify such Parties.

(ii) JAMS shall promptly appoint an Emergency Arbitrator to rule on the emergency request. In most cases the appointment of an Emergency Arbitrator will be done within 24 hours of receipt of the request. The Emergency Arbitrator shall promptly disclose any circumstance likely, on the basis disclosed in the application, to affect the Arbitrator's ability to be impartial or independent. Any challenge to the appointment of the Emergency Arbitrator shall be made within 24 hours of the disclosures by the Emergency Arbitrator. JAMS will promptly review and decide any such challenge. JAMS' decision will be final.

(iii) Within two business days, or as soon as practicable thereafter, the Emergency Arbitrator shall establish a schedule for the consideration of the request for emergency relief. The schedule shall provide a reasonable opportunity for all Parties to be heard taking into account the nature of the relief sought. The Emergency Arbitrator has the authority to rule on his or her own jurisdiction and shall resolve any disputes with respect to the request for emergency relief.

(iv) The Emergency Arbitrator shall determine whether the Party seeking emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief and whether the requesting Party is entitled to such relief. The Emergency Arbitrator shall enter an order or Award granting or denying the relief, as the case may be, and stating the reasons therefor.

(v) Any request to modify the Emergency Arbitrator's order or Award must be based on changed circumstances and may be made to the Emergency Arbitrator until such time as an Arbitrator or Arbitrators are appointed in accordance with the Parties' Agreement and JAMS' usual procedures. Thereafter, any request related to the relief granted or denied by the Emergency Arbitrator shall be determined by the Arbitrator(s) appointed in accordance with the Parties' Agreement and JAMS' usual procedures.

(vi) At the Emergency Arbitrator's discretion, any interim Award of emergency relief may be conditioned on the provision of adequate security by the Party seeking such relief.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration

(a) The Arbitration is deemed commenced when JAMS issues a Commencement Letter based upon the existence of one of the following:

(i) A post-dispute Arbitration Agreement fully executed by all Parties specifying JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim and specifying JAMS administration or use of any JAMS Rules or that the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules; or

(iv) The Respondent's failure to timely object to JAMS administration; or

(v) A copy of a court order compelling Arbitration at JAMS.

(b) The issuance of the Commencement Letter confirms that requirements for commencement have been met, that JAMS has received all payments required under the applicable fee schedule and that the Claimant has provided JAMS with contact information for all Parties along with evidence that the Demand for Arbitration has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate, and, pursuant to Rule 22(j), the Arbitrator, once appointed, shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter but is not intended to be applicable to any legal requirements such as the statute of limitations, any contractual limitations period or claims notice requirements. The term "commencement," as used in this Rule, is intended only to pertain to the operation of this and other Rules (such as Rules 3, 13(a), 17(a) and 31(a)).

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing, such factors as the subject matter of the dispute, the convenience of the Parties and witnesses, and the relative resources of the Parties shall be considered.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed, and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 24(f) and 31(c). An administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within thirty (30) calendar days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing, and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for thirty (30) calendar days following the conclusion of the Arbitration.

(e) Unless the Parties' Agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate the Arbitrations into a single Arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming Parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances he or she deems relevant and applicable.

Rule 7. Number and Neutrality of Arbitrators; Appointment and Authority of Chairperson

(a) The Arbitration shall be conducted by one neutral Arbitrator, unless all Parties agree otherwise. In these Rules, the term "Arbitrator" shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite Arbitration.

(b) In cases involving more than one Arbitrator, the Parties shall agree on, or, in the absence of agreement, JAMS shall designate, the Chairperson of the Arbitration Panel. If the Parties and the Arbitrators agree, a single member of the Arbitration Panel may, acting alone, decide discovery and procedural matters, including the conduct of hearings to receive documents and testimony from third parties who have been subpoenaed to produce documents.

(c) Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party, unless the Parties have agreed that they shall be non-neutral.

Rule 8. Service

(a) The Arbitrator may at any time require electronic filing and service of documents in an Arbitration. If an Arbitrator requires electronic filing, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of all documents filed through JAMS Electronic Filing System. Any document filed electronically shall be considered as filed with JAMS when the transmission to JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date. Upon completion of filing, JAMS Electronic Filing System shall issue a confirmation receipt that includes the date and time of receipt. The confirmation receipt shall serve as proof of filing.

(b) Every document filed with JAMS Electronic Filing System shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to JAMS Electronic Filing System, and shall bear the typed name, address and telephone number of a signing attorney. Documents containing signatures of third parties (i.e., unopposed motions, affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing Party in paper format.

(c) Delivery of e-service documents through JAMS Electronic Filing System to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service completes the transmission of the electronic document(s) to JAMS Electronic Filing System for e-filing and/or e-service. Upon actual or constructive receipt of the electronic document(s) by the Party to be served, a Certificate of Electronic Service shall be issued by JAMS Electronic Filing System to the Party initiating e-service, and that Certificate shall serve as proof of service. Any Party who ignores or attempts to refuse e-service shall be deemed to have received the electronic document(s) 72 hours following the transmission of the electronic document(s) to JAMS Electronic Filing System.

(d) If an electronic filing or service does not occur because of (1) an error in the transmission of the document to JAMS Electronic Filing System or served Party that was unknown to the sending Party; (2) a failure to process the electronic document when received by JAMS Electronic Filing System; (3) the Party being erroneously excluded from the service list; or (4) other technical problems experienced by the filer, the Arbitrator or JAMS may, for good cause shown, permit the document to be filed *nunc pro tunc* to the date it was first attempted to be sent electronically. Or, in the case of service, the Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period

within which any right, duty or other act must be performed.

(e) For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document.

(f) In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. mail, three (3) calendar days shall be added to the prescribed period.

Rule 9. Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Claimant's notice of claims is the Demand for Arbitration referenced in Rule 5. It shall include a statement of the remedies sought. The Demand for Arbitration may attach and incorporate a copy of a Complaint previously filed with a court. In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.

(c) Within fourteen (14) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and a statement of any affirmative defenses, including jurisdictional challenges, or counterclaims it may have.

(d) Within fourteen (14) calendar days of service of a counterclaim, a Claimant may submit to JAMS and serve on other Parties a response to such counterclaim and any affirmative defenses, including jurisdictional challenges, it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

(f) Jurisdictional challenges under Rule 11 shall be deemed waived, unless asserted in a response to a Demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability.

Rule 10. Changes of Claims

After the filing of a claim and before the Arbitrator is appointed, any Party may make a new or different claim against a Party or any third party that is subject to Arbitration in the proceeding. Such claim shall be made in writing, filed with JAMS and served on the other Parties. Any response to the new claim shall be made within fourteen (14) calendar days after service of such claim. After the Arbitrator is appointed, no new or different claim may be submitted, except with the Arbitrator's approval. A Party may request a hearing on this issue. Each Party has the right to respond to any new or amended claim in accordance with Rule 9(c) or (d).

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Rule 11. Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(c) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(d) The Arbitrator may, upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may be altered only in accordance with Rules 22(i) or 24.

Rule 12. Representation

(a) The Parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to the Case Manager and the other Parties of the name, address, telephone and fax numbers and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone and fax numbers and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

Rule 13. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5), except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and the Arbitrator. However, the opposing Parties may, within seven (7) calendar days of service of such notice, request that the Arbitrator condition the withdrawal upon such terms as he or she may direct.

Rule 14. *Ex Parte* Communications

(a) No Party may have any *ex parte* communication with a neutral Arbitrator, except as provided in section (b) of this Rule. The Arbitrator(s) may authorize any Party to communicate directly with the Arbitrator(s) by email or other written means as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have *ex parte* communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator's services and to assure the absence of conflicts, as well as in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive *ex parte* communication between a Party and a non-neutral Arbitrator. More extensive communication with a non-neutral Arbitrator may also be permitted by applicable law and rules of ethics.

Rule 15. Arbitrator Selection, Disclosures and Replacement

(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least five (5) Arbitrator candidates in the case of a sole Arbitrator and ten (10) Arbitrator candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service upon the Parties of the list of names, each Party may strike two (2) names in the case of a sole Arbitrator and three (3) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, or fails to respond according to the instructions provided by JAMS, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(f) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities are adverse for purposes of Arbitrator selection, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

(g) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. If a member of a panel of Arbitrators becomes unable to fulfill his or her duties after the beginning of a Hearing but before the issuance of an Award, a new Arbitrator will be chosen in accordance with this Rule, unless, in the case of a tripartite panel, the Parties agree to proceed with the remaining two Arbitrators. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.

(i) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties, who may respond within seven (7) calendar days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the

facts and any prejudice to the Parties. That decision will be final.

(j) Where the Parties have agreed that a Party-appointed Arbitrator is to be non-neutral, that Party-appointed Arbitrator is not obliged to withdraw if requested to do so only by the Party who did not appoint that Arbitrator.

Rule 16. Preliminary Conference

At the request of any Party or at the direction of the Arbitrator, a Preliminary Conference shall be conducted with the Parties or their counsel or representatives. The Preliminary Conference may address any or all of the following subjects:

(a) The exchange of information in accordance with Rule 17 or otherwise;

(b) The schedule for discovery as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law;

(c) The pleadings of the Parties and any agreement to clarify or narrow the issues or structure the Arbitration Hearing;

(d) The scheduling of the Hearing and any pre-Hearing exchanges of information, exhibits, motions or briefs;

(e) The attendance of witnesses as contemplated by Rule 21;

(f) The scheduling of any dispositive motion pursuant to Rule 18;

(g) The premarking of exhibits, the preparation of joint exhibit lists and the resolution of the admissibility of exhibits;

(h) The form of the Award; and

(i) Such other matters as may be suggested by the Parties or the Arbitrator.

The Preliminary Conference may be conducted telephonically and may be resumed from time to time as warranted.

Rule 16.1. Application of Expedited Procedures

(a) If these Expedited Procedures are referenced in the Parties' agreement to arbitrate or are later agreed to by all Parties, they shall be applied by the Arbitrator.

(b) The Claimant or Respondent may opt into the Expedited Procedures. The Claimant may do so by indicating the election in the Demand for Arbitration. The Respondent may opt into the Expedited Procedures by so indicating in writing to JAMS with a copy to the Claimant served within fourteen (14) days of receipt of the Demand for Arbitration. If a Party opts into the Expedited Procedures, the other side shall indicate within seven (7) calendar days of notice thereof whether it agrees to the Expedited Procedures.

(c) If one Party elects the Expedited Procedures and any other Party declines to agree to the Expedited Procedures, each Party shall have a client or client representative present at the first Preliminary Conference (which should, if feasible, be an in-person conference), unless excused by the Arbitrator for good cause.

Rule 16.2. Where Expedited Procedures Are Applicable

(a) The Arbitrator shall require compliance with Rule 17(a) prior to conducting the first Preliminary Conference. Each Party shall confirm in writing to the Arbitrator that it has so complied or shall indicate any limitations on full compliance and the reasons therefor.

(b) Document requests shall (1) be limited to documents that are directly relevant to the matters in dispute or to its outcome; (2) be reasonably restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and (3) not include broad phraseology such as "all documents directly or indirectly related to." The Requests shall not be encumbered with extensive "definitions" or "instructions." The Arbitrator may edit or limit the number of requests.

(c) E-Discovery shall be limited as follows:

> (i) There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.
>
> (ii) Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the requesting Party and convenient and economical for the producing Party. Absent a showing of compelling need, the Parties need not produce metadata, with the exception of header fields for email correspondence.
>
> (iii) The description of custodians from whom electronic documents may be collected

should be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

(iv) Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the Arbitrator may either deny such requests or order disclosure on the condition that the requesting Party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final Award.

(v) The Arbitrator may vary these Rules after discussion with the Parties at the Preliminary Conference.

(d) Depositions of percipient witnesses shall be limited as follows:

(i) The limitation of one discovery deposition per side (Rule 17(b)) shall be applied by the Arbitrator, unless it is determined, based on all relevant circumstances, that more depositions are warranted. The Arbitrator shall consider the amount in controversy, the complexity of the factual issues, the number of Parties and the diversity of their interests and whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.

(ii) The Arbitrator shall also consider the additional factors listed in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases.

(e) Expert depositions, if any, shall be limited as follows: Where written expert reports are produced to the other side in advance of the Hearing (Rule 17(a)), expert depositions may be conducted only by agreement of the Parties or by order of the Arbitrator for good cause shown.

(f) Discovery disputes shall be resolved on an expedited basis.

(i) Where there is a panel of three Arbitrators, the Parties are encouraged to agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone.

(ii) Lengthy briefs on discovery matters should be avoided. In most cases, the submission of brief letters will sufficiently inform the Arbitrator with regard to the issues to be decided.

(iii) The Parties should meet and confer in good faith prior to presenting any issues for the Arbitrator's decision.

(iv) If disputes exist with respect to some issues, that should not delay the Parties' discovery on remaining issues.

(g) The Arbitrator shall set a discovery cutoff not to exceed seventy-five (75) calendar days after the Preliminary Conference for percipient discovery and not to exceed one hundred five (105) calendar days for expert discovery (if any). These dates may be extended by the Arbitrator for good cause shown.

(h) Dispositive motions (Rule 18) shall not be permitted, except as set forth in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases or unless the Parties agree to that procedure.

(i) The Hearing shall commence within sixty (60) calendar days after the cutoff for percipient discovery. Consecutive Hearing days shall be established unless otherwise agreed by the Parties or ordered by the Arbitrator. These dates may be extended by the Arbitrator for good cause shown.

(j) The Arbitrator may alter any of these Procedures for good cause.

Rule 17. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, and names of individuals whom they may call as witnesses at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(b) Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition. If the Parties do not agree, these issues shall be determined by the Arbitrator. The necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(c) As they become aware of new documents or information, including experts who may be called upon to

testify, all Parties continue to be obligated to provide relevant, non-privileged documents to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(d) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

Rule 18. Summary Disposition of a Claim or Issue

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request.

Rule 19. Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date, unless the law of the relevant jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third-party witness.

Rule 20. Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least fourteen (14) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts; (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony; (3) any written expert reports that may be introduced at the Arbitration Hearing; and (4) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other copies of any such exhibits to the extent that they have not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit a concise written statement of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

Rule 21. Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 19(c). The subpoena or subpoena *duces tecum* shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

Rule 22. The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined to be reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise at the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be

immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Hearing, or any portion thereof, may be conducted telephonically or videographically with the agreement of the Parties or at the discretion of the Arbitrator.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial Awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date determined by the Arbitrator in order to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments. If post-Hearing briefs are to be submitted or closing arguments are to be made, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments, whichever is later.

(i) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or on application of a Party for good cause shown, reopen the Hearing. If the Hearing is reopened, the time to render the Award shall be calculated from the date the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing.

(i) The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator and may not be used in the proceeding, unless the Party arranging for the stenographic record agrees to provide access to the stenographic record either at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) If the Parties agree to the Optional Arbitration Appeal Procedure (Rule 34), they shall, if possible, ensure that a stenographic or other record is made of the Hearing and shall share the cost of that record.

(iv) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

Rule 23. Waiver of Hearing

The Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 24. Awards

(a) The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing, as defined in Rule 22(h) or (i), or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 22(i). The Arbitrator shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) Where a panel of Arbitrators has heard the dispute, the decision and Award of a majority of the panel shall constitute the Arbitration Award.

(c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific

performance of a contract or any other equitable or legal remedy.

(d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim or Partial Final Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses, unless such an allocation is expressly prohibited by the Parties' Agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys' fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator's discovery orders caused delay to the proceeding or additional costs to the other Parties.

(h) The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(i) After the Award has been rendered, and provided the Parties have complied with Rule 31, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. mail. It need not be sent certified or registered.

(j) Within seven (7) calendar days after service of a Partial Final Award or Final Award by JAMS, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31(c) or on account of the effect of an offer to allow judgment), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator may make any necessary and appropriate corrections to the Award within twenty-one (21) calendar days of receiving a request or fourteen (14) calendar days after his or her proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(k) The Award is considered final, for purposes of either the Optional Arbitration Appeal Procedure pursuant to Rule 34 or a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen (14) calendar days after service is deemed effective if no request for a correction is made, or as of the effective date of service of a corrected Award.

Rule 25. Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1, *et seq.*, or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

Rule 26. Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 27. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

Rule 28. Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree, pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request, unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 29. Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

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Rule 30. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

Rule 31. Fees

(a) Each Party shall pay its *pro rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation of fees and expenses. JAMS' agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration from time to time during the course of the proceedings and prior to the Hearing. The Arbitrator may preclude a Party that has failed to deposit its *pro rata* or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) The Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS' assessment of fees. JAMS shall determine whether the interests between entities are adverse for purpose of fees, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

Rule 32. Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon minimum and maximum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

Rule 33. Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 24(c). JAMS shall promptly provide copies of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award, the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable.

Rule 34. Optional Arbitration Appeal Procedure

The Parties may agree at any time to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration.

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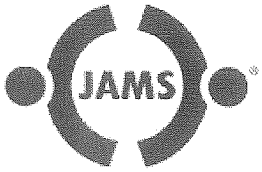

JAMS Streamlined Arbitration Rules & Procedures

JAMS Streamlined Arbitration Rules & Procedures

Effective July 1, 2014

Download JAMS Streamlined Arbitration Rules in PDF Format in English or Spanish

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Streamlined Arbitration Rules

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Rule 1. Scope of Rules

(a) The JAMS Streamlined Arbitration Rules and Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, no disputed claim or counterclaim exceeds $250,000, not including interest or attorneys' fees, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Streamlined Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS as prescribed in the Agreement of the Parties and in these Rules shall be carried out by the JAMS National Arbitration Committee ("NAC") or the office of the General Counsel or their designees.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term "Party" as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

(f) "Electronic filing" (e-file) means the electronic transmission of documents to and from JAMS and other Parties for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents via JAMS Electronic Filing System to a Party, attorney or representative under

these Rules.

Rule 2. Party Self Determination

(a) The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 12(j), 25 and 26). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

(b) When an Arbitration Agreement provides that the arbitration will be non-administered or administered by an entity other than JAMS and/or conducted in accordance with rules other than JAMS rules, the Parties may subsequently agree to modify that agreement to provide that the arbitration will be administered by JAMS and/or conducted in accordance with JAMS rules.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration and Service

(a) The Arbitration is deemed commenced when JAMS issues a Commencement Letter based upon the existence of one of the following:

(i) A post-dispute Arbitration Agreement fully executed by all Parties specifying JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim specifying JAMS administration or use of any JAMS Rules or that the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules, confirmed in writing by the Parties; or

(iv) The Respondent's failure to timely object to JAMS administration; or

(v) A copy of a court order compelling Arbitration at JAMS.

(b) The issuance of the Commencement Letter confirms that the requirements for commencement have been met, that JAMS has received all payments required under the applicable fee schedule and that the Claimant has provided JAMS with contact information for all Parties along with evidence that the Demand for Arbitration has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate, and, pursuant to Rule 14, the Arbitrator shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter but is not intended to be applicable to any legal requirements such as the statute of limitations any contractual limitations period or claims notice requirements. The term "commencement," as used in this Rule, is intended only to pertain to the operation of this and other Rules (such as Rule 3, 10(a) and 26(a)).

(e) Service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document. In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. mail, three (3) calendar days shall be added to the prescribed period.

(f) Electronic Filing. The Arbitrator may at any time require electronic filing and service of documents in an Arbitration. If an Arbitrator requires electronic filing, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of all documents filed through JAMS Electronic Filing System. Any document filed electronically shall be considered as filed with JAMS when the transmission to JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date. Upon completion of filing, JAMS Electronic Filing System shall issue a confirmation receipt that includes the date and time of receipt. The confirmation receipt shall serve as proof of filing.

Every document electronically filed or served shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to JAMS Electronic Filing System, and shall bear the typed name, address and telephone number of a signing attorney. Typographical signatures shall

be treated as personal signatures for all purposes under these Rules. Documents containing signatures of third parties (i.e., unopposed motions, affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing Party in paper format.

Delivery of e-service documents through JAMS Electronic Filing System to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service completes the transmission of the electronic document(s) to JAMS Electronic Filing System for e-filing and/or e-service. Upon actual or constructive receipt of the electronic document(s) by the Party to be served, a Certificate of Electronic Service shall be issued by JAMS Electronic Filing System to the Party initiating e-service, and that Certificate shall serve as proof of service. Any Party who ignores or attempts to refuse e-service shall be deemed to have received the electronic document(s) 72 hours following the transmission of the electronic document(s) to JAMS Electronic Filing System.

If an electronic filing or service does not occur because of (1) an error in the transmission of the document to JAMS Electronic Filing System or served Party that was unknown to the sending Party; (2) a failure to process the electronic document when received by JAMS Electronic Filing System; (3) the Party was erroneously excluded from the service list; or (4) other technical problems experienced by the filer, the Arbitrator or JAMS may, for good cause shown, permit the document to be filed *nunc pro tunc* to the date it was first attempted to be sent electronically. Or, in the case of service, the Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing, such factors as the subject matter of the dispute, the convenience of the Parties and witnesses, and the relative resources of the Parties shall be considered.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed, and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 19(e) and 26(c). An administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within thirty (30) calendar days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing, and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for thirty (30) calendar days following the conclusion of the Arbitration.

(e) Unless the Parties' Agreement or applicable law provides otherwise, JAMS may consolidate Arbitrations in the following instances:

> (i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate the Arbitrations into a single Arbitration.
>
> (ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators already appointed.
>
> (iii) Where a Demand or Demands for Arbitration is or are submitted naming parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances he or she deems relevant and applicable.

Rule 7. Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim, or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Claimant's notice of claims is the Demand for Arbitration referenced in Rule 5. It shall include a statement of the remedies sought. The Demand for Arbitration may attach and incorporate a copy of a Complaint previously filed with a court. In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.

(c) Within seven (7) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and a statement of any affirmative defenses, including jurisdictional challenges, or counterclaims it may have.

(d) Within seven (7) calendar days of service of a counterclaim, a Claimant may submit to JAMS and serve on other Parties a response to such counterclaim and any affirmative defenses, including jurisdictional challenges, it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

(f) Jurisdictional challenges under Rule 8 shall be deemed waived, unless asserted in a response to a Demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability.

Rule 8. Interpretation of Rules and Jurisdiction Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(c) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(d) The Arbitrator may, upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may only be altered in accordance with Rule 19.

Rule 9. Representation

(a) The Parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to JAMS and the other Parties of the name, address, telephone and fax numbers and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone and fax numbers and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

Rule 10. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5), except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and the Arbitrator. However, the opposing Parties may, within seven (7) calendar days of service of such notice, request that the Arbitrator condition the withdrawal upon such terms as he or she may direct.

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Rule 11. *Ex Parte* Communications

No Party will have any *ex parte* communication with the Arbitrator regarding any issue related to the Arbitration. The Arbitrator may authorize any Party to communicate directly with the Arbitrator by email or other written means as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

Rule 12. Arbitrator Selection, Disclosures and Replacement

(a) JAMS Streamlined Arbitrations will be conducted by one neutral Arbitrator.

(b) Unless the Arbitrator has been previously selected by agreement of the Parties, the Case Manager may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(c) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least three (3) Arbitrator candidates. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (d) below.

(d) Within seven (7) calendar days of service by the Parties of the list of names, each Party may strike one (1) name and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(e) If this process does not yield an Arbitrator, JAMS shall designate the Arbitrator.

(f) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, or fails to respond according to the instructions provided by JAMS, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(g) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities are adverse for purposes of Arbitrator selection, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

(h) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(i) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstances likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.

(j) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties, who may respond within seven (7) days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

Rule 13. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information (including electronically stored information ("ESI")) relevant to the dispute or claim, including copies of all documents in their possession or control on which they rely in support of their positions or that they intend to introduce as exhibits at the Arbitration Hearing, the names of all individuals with knowledge about the dispute or claim and the names of all experts who may be called upon to testify or whose reports may be introduced at the Arbitration Hearing. The Parties and the Arbitrator will make every effort to conclude the document and information exchange process within fourteen (14) calendar days after all pleadings or notices of claims have been received. The necessity of additional information exchange shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(b) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(c) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute.

Rule 14. Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least

thirty (30) calendar days prior to the scheduled date, unless the law of the relevant jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third-party witness.

Rule 15. Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts; (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony; and (3) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other copies of any such exhibits to the extent that they have not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit a concise written statement of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

Rule 16. Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 14(c). The subpoena or subpoena *duces tecum* shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

Rule 17. The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined to be reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise at the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Hearing, or any portion thereof, may be conducted telephonically or videographically with the agreement of the Parties or at the discretion of the Arbitrator.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial Awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date determined by the Arbitrator, to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter. If post-Hearing briefs are to be submitted, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs.

(i) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or upon the application of a Party for good cause shown, reopen the Hearing. If the Hearing is reopened, the time to render the Award shall be calculated from the date the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 14, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing.

(i) The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator and may not be used in the proceeding, unless the Party arranging for the stenographic record agrees to provide access to the stenographic record either at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

Rule 18. Waiver of Hearing

The Parties may agree to waive oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 19. Awards

(a) The Arbitrator shall render a Final Award or Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing as defined in Rule 17(h) or (i), or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 17(i). The Arbitrator shall provide the Final Award or Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator will be guided by the law or the rules of law that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

(c) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(d) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim or Partial Final Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(e) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses, unless such an allocation is expressly prohibited by the Parties' Agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 26(c).)

(f) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys' fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator's discovery orders caused delay to the proceeding or additional costs to the other Parties.

(g) The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(h) After the Award has been rendered, and provided the Parties have complied with Rule 26, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. mail. It need not be sent certified or registered.

(i) Within seven (7) calendar days after service of a Partial Final Award or Final Award by JAMS, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 26(c) or on account of the effect of an offer to allow judgment), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator may make any necessary and appropriate corrections to the Award within fourteen (14) calendar days of receiving a request or seven (7) calendar

days after his or her proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(j) The Award is considered final, for purposes of judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 20, fourteen (14) calendar days after service is deemed effective if no request for a correction is made, or as of the effective date of service of a corrected Award.

Rule 20. Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1, *et. seq.*, or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

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Rule 21. Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 22. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

Rule 23. Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator, unless the Parties so agree, pursuant to Rule 23(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request, unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 24. Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

Rule 25. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

Rule 26. Fees

(a) Each Party shall pay its *pro rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation of fees and expenses. JAMS' agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration from time to time during the course of the proceedings and prior to the Hearing. The Arbitrator may preclude a Party that has failed to deposit its *pro rata* or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) The Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may Award against any Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS' assessment of fees. JAMS shall determine whether the interests between entities are adverse for purpose of fees, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

Rule 27. Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon minimum and maximum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 19.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

Rule 28. Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 19(b). JAMS shall promptly provide copies of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award, the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 19(b). This provision modifies Rule 19(g) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 19, except that the Award shall thereafter be corrected to conform to the closest of the last proposals and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 19 shall be applicable.

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BBB® Rules of Binding Arbitration (Pre-Dispute)

BBB ARBITRATION

Your Better Business Bureau® (BBB) is a nonprofit organization supported by local businesses. BBB promotes trust in the marketplace by fostering the highest ethical relationship between businesses and the public.

Your BBB assists in the resolution of disputes between a business and its customers. BBBs have a national reputation for fairness because they remain impartial in a dispute. They do not take sides but work to get the problem settled as quickly as possible.

If you have a marketplace dispute, BBB can offer you several ways to resolve it. Arbitration is one dispute resolution (DR) option: BBB provides a professionally trained arbitrator who will listen to both sides, weigh the evidence and make a decision about the dispute.

What is arbitration?

Arbitration is an informal process in which two parties present their views of a dispute to an impartial third party, an arbitrator, who will decide how to resolve the dispute.

Who is the arbitrator?

BBB arbitrators are individuals from your community who have been approved as arbitrators by BBB. Arbitrators do not necessarily have specific expertise in the matter to be arbitrated, but can call upon the assistance of an expert when necessary. Arbitrators pledge to make an impartial decision, and do not have any affiliation with either party in the dispute.

The arbitration hearing

BBB will consult with the parties and the arbitrator(s) in scheduling an arbitration hearing. While most cases require only a single hearing, additional hearings may be scheduled if the arbitrator deems it necessary.

Do I need an attorney?

You may choose to consult with an attorney about arbitration under these Rules. Parties initiating arbitration may choose to consult with an attorney before the demand for arbitration is filed. It is important to consult with an attorney about the remedies that may be awarded in arbitration, and how to best present your case in arbitration. While you do not need to be represented by an attorney in the arbitration process, you may decide that it is in your best interests to do so.

How to prepare for arbitration

Before coming to your arbitration hearing, you should prepare an outline of your argument to help you in your presentation. You may want to use the checklist at the end of this section to assist you in your preparation.

Also before coming to the hearing, you should prepare a list of questions you want to ask the other party.

What will happen at the hearing?

You will have an opportunity to state the facts as you see them. Each party also will have the opportunity to ask questions of the other party.

The arbitrator may also ask questions to clear up uncertain areas and to gain a fuller understanding of the dispute.

After each side has presented its case and the questioning is completed, you should be prepared to give a summary of your position. Deal with any questions that have not been answered and tell the arbitrator exactly what you think the decision should be and why.

Remember that the sole purpose of the hearing is to allow the arbitrator to gather and sort the facts in order to make a fair decision. You should be prepared to convince the arbitrator that your position is right and that it supports the remedies/outcome you seek from the arbitration process. If you are uncertain about the possible remedies available in arbitration you may want to review your state arbitration laws or consult with an attorney.

A cooperative, good faith approach works best. You are there because a disagreement exists, but keep that disagreement factual and within the bounds of normal courtesy and conventional language. Arbitrators may not have technical expertise, so your presentation may be more productive if you can use layman's terms to describe what happened.

An arbitration checklist

This checklist will help you prepare for your arbitration hearing. Use whichever items are appropriate to your case; some may not apply.

1. Organize your materials in the order you wish to present them. This will help you present your case clearly and logically.
2. Clearly state what the problem is and why you think the arbitrator should rule in your favor.
3. List in chronological order the actions you took to resolve the dispute, including:
    - individuals with whom you spoke;
    - when you spoke with them;
    - what they told you and/or what actions they took;
    - other business/service persons involved:
        - Who were they?
        - When did they get involved?
        - How did they become involved?
        - What did they tell you and/or what actions did they take? Written statements or the presence of witnesses can help substantiate the facts of your case.
4. Collect and bring to the hearing all available written information relating to your dispute. Bring original documents, if possible, and bring copies for the arbitrator and the other party. If you do not have certain documents, you may be able to get copies from the business or your repair shop, bank or credit card company. Documents that might be useful include:
    - Any written agreements between you and the other party, including the agreement requiring arbitration of the dispute.
    - Any estimates, purchase order, finance/lease agreement, estimates, and proof of payment.
    - Any relevant warranty.

- Any repair, service and maintenance records and proof of payment for these services.
- If applicable to your dispute:
  - Property repair bills or estimates, including the charges for labor and material used or proposed for use in the repair of property.
  - Bills, records and reports of hospitals, doctors, or other health-care providers, or any other medical expenses.
  - A report of the rate of earnings and time lost from work or lost compensation prepared by your employer.
- A written statement of any witness or opinion of any expert whose testimony will be presented in writing rather than in person.
- Correspondence between you and the other party.
- Other documents which may support your case, e.g., newspaper/magazine articles, photographs, court decisions and legal documents, consumer group information, brochures and technical information.

5. List any witnesses who may have information about your complaint, such as mechanics or sales personnel. Try to contact them and ask them to testify in person or to submit written statements. You are responsible for your witness' submission of information. If you want them to testify in person, keep them informed about the time and place of the hearing.

The arbitrator will accept all relevant evidence presented at the hearing. The arbitrator will decide the importance of each piece of evidence after the hearing is closed. **It is better to be over prepared than under prepared**.

Evidence will not be accepted after the hearing if it was possible to present that evidence at the hearing, or if the arbitrator has already rendered a decision.

In summary

- Organize your case.
- Back up your position with evidence.
- A clear, concise and well-organized presentation supported by relevant facts and good documentation will help the arbitrator fulfill his or her responsibility.

BBB Rules of Binding Arbitration (Pre-Dispute)

1. **DEFINITIONS**

The following list defines key words as they are used in these Rules.

A. Arbitration is a process in which two or more parties agree to let an impartial person or panel decide their dispute.

B. Arbitrator refers to the individual or panel selected to conduct your arbitration and make a decision in your dispute. Any action taken or decision made by a panel shall be by majority vote.

C. BBB refers to the Better Business Bureau that is administering the arbitration.

D. Days refers to calendar days.

E. Decision refers to the written document signed by the arbitrator and mailed to the parties.

F. Parties refers to a business and its customer who have agreed in writing to arbitrate future disputes through BBB or under BBB binding rules.

G. Shall and must are mandatory; may is discretionary.

H. You refers to one or both of the parties.

2. SCOPE OF BBB ARBITRATION

These *Rules* apply to any dispute that the parties are required to arbitrate under a written agreement, signed by the parties prior to the time that the dispute arose, in which the parties have agreed to arbitrate future disputes through BBB or under BBB binding rules.

The arbitrator shall decide any dispute about whether a particular issue falls within the parties' arbitration agreement.

3. REMEDIES

The arbitrator may award any remedy that is permitted under applicable law; provided, however, that the arbitrator may not award any remedies that the parties have agreed in writing may not be awarded in arbitration.

4. FEES

BBB shall inform the parties of the fee schedule for handling the arbitration, and of the process for requesting a waiver or deferral of such fees in cases of hardship. BBB may decline to schedule an arbitration hearing if the parties do not pay administration fees when due.

5. DEMAND FOR ARBITRATION

A. In order to initiate arbitration, a party shall submit to BBB a written demand for arbitration that includes the following:

- The name and address of the other party;
- A concise statement of the issues to be arbitrated;
- A statement of the remedies sought in arbitration; and
- A copy of any written agreement between the parties to arbitrate disputes under BBB binding rules.

B. Unless otherwise provided by an agreement between the parties, the demand for arbitration must be received by BBB within the statute of limitations that would otherwise apply to a judicial action relating to the claim.

6. ANSWER AND COUNTERCLAIM

A. BBB shall send the written demand for arbitration to the other party, who may submit a concise answer and a counterclaim in response. A counterclaim shall include:

- A concise statement of the issues to be arbitrated; and

- A statement of the remedies sought in arbitration.

B. Any answer and/or counterclaim must be sent to BBB, with a copy to the other party, within 14 days after receipt of the demand for arbitration. BBB may, for good cause, extend this time period.

C. If a counterclaim is filed, the party against whom the counterclaim is filed may submit a concise answer to the counterclaim. The answer to the counterclaim must be sent to BBB, with a copy to the other party, within 14 days after receipt of the counterclaim. BBB may, for good cause, extend this time period.

D. It is not required that the parties submit an answer to a demand for arbitration or a counterclaim. If a party does not submit an answer, that party will be deemed to have denied all of the claims made by the other party.

7. AMENDING THE DEMAND FOR ARBITRATION OR COUNTERCLAIM

At any time prior to the scheduling of the hearing, a party may amend in writing that party's demand for arbitration, answer, or counterclaim.

Once the hearing has been scheduled, amendments to a party's demand for arbitration or counterclaim may only be made at the discretion of the arbitrator.

8. SELECTING YOUR ARBITRATOR

BBB shall select the arbitrator in a procedure designed to avoid any conflict of interest and to provide the parties with an impartial arbitrator to hear their case.

BBB maintains a pool of qualified, experienced arbitrators. BBB shall select the arbitrator, or arbitrators if applicable. BBB shall inform the arbitrator(s) of the identities of the parties and attorneys, if any. If an arbitrator finds that he or she has a conflict of interest with any party or attorney, the arbitrator(s) shall recuse himself or herself.

At BBB's option, or by agreement of the parties or when required by law, BBB may appoint a panel of three arbitrators. BBB shall determine which arbitrator will serve as the chair of the panel to preside over the hearing.

BBB may use variations of this selection process, provided that the alternative procedure shall also result in the appointment of an impartial arbitrator.

9. QUALIFYING THE ARBITRATOR

The arbitrator shall sign an oath pledging to make an impartial decision in your dispute. If the arbitrator believes that he or she cannot make an impartial decision, the arbitrator shall refuse to serve.

If a financial, competitive, professional, family or social relationship exists between the arbitrator and one of the parties (even if the arbitrator believes the relationship is so minor as to have no effect on the decision), it shall be revealed to all parties, and you may decide that this arbitrator should not serve in your case.

BBB reserves the right to reject an arbitrator for any reason that it believes will affect the credibility of the arbitration process.

10. COMMUNICATING WITH THE ARBITRATOR

You or anyone representing you shall not communicate in any way with the arbitrator about your dispute except a) at an inspection or hearing for which the other party has received notice but does not appear, or b) when all other parties are present or have given their written permission.

All other communication with the arbitrator must be sent through BBB.

Violation of this rule may result in your case being discontinued.

11. WHO MAY PRESENT YOUR CASE?
You may present your own case or have someone represent you.

If your representative is a lawyer, you must give the lawyer's name and address to BBB at least 21 days before the hearing. BBB shall notify the other parties to give them an opportunity to obtain a lawyer if they want. Your failure to give BBB advance notice of legal representation may result in a rescheduling of your hearing.

12.HEARING NOTICE
BBB shall set a date, time (during normal business hours) and place for your arbitration hearing. The hearing will be set with due regard for the schedule of the parties and the arbitrator. Notice of the date, time and place of the hearing will be sent to you at least 10 days in advance of the hearing unless the parties agree otherwise.

Contact BBB immediately if you object to the date, time or place stated in your notice. If an unforeseen emergency arises that prevents you from attending a hearing, call BBB before the scheduled hearing time. The arbitrator shall decide whether to reschedule the arbitration hearing or maintain the current hearing date permitting the absent party to present the case in accordance with Rule 14.

To the extent practical, BBB will arrange for the hearing to be held at a BBB location convenient to the customer.

BBB shall make the final decision as to the date, time and place for the arbitration hearing.

13.MANNER IN WHICH THE HEARING IS CONDUCTED
Most arbitrations involve in-person hearings. However, BBB, at a party's request or at BBB's option, may arrange to have one or both parties participate by telephone, in writing, or by electronic communication.

14.YOUR ABSENCE FROM THE HEARING
If one party does not attend a hearing after receiving proper notice from BBB, the arbitrator shall proceed with the hearing and receive evidence from the other party.

One party's absence will not result in an automatic decision against that party. The party who did not attend the hearing shall be given the opportunity to present its position in writing within time limits set by BBB. Any written testimony will be sent to other party for comments.

If the absent party does not submit its position within the specified time limits, the arbitrator shall make a decision without that party's position.

15.ATTENDANCE AT HEARING
BBB staff may attend the hearing in an administrative capacity.

The parties, any representatives, and their witnesses may attend the hearing, although the arbitrator may determine that one or more non-party witnesses should be present in the hearing room only while that witness is giving testimony.

For any observer to attend a hearing, BBB will first determine that reasonable accommodations exist and then make sure that the parties and the arbitrator

have no objection to the presence of an observer. If there is room and no objection, the observer shall be permitted to attend the hearing subject to BBB's directions regarding proper conduct.

16.CAMERAS AND RECORDING DEVICES

Unless there is approval of all parties and the arbitrator, no one is permitted to bring cameras, lights, recording devices or any other equipment into the hearing. However, BBB may make an audio recording of the hearing if requested by the arbitrator, and any such audio recording may only be used by the arbitrator for the sole purpose of assisting the arbitrator in writing his/her decision and reasons, or by BBB for training and administrative purposes.

17.INSPECTION BY THE ARBITRATOR

The arbitrator may request an inspection of the product or service involved in your dispute.

If possible, the inspection will be performed as part of the hearing; otherwise, the inspection will be scheduled for a later date and all parties will receive at least three days notice unless such notice is waived by all parties. In accordance with BBB's arbitration fee schedule, in some cases an inspection by the arbitrator may incur additional costs to the parties.

18.TECHNICAL EXPERTS

At the request of the arbitrator, BBB shall make reasonable efforts to obtain a volunteer impartial technical expert to inspect the product involved or the service performed. If BBB is unable to obtain a volunteer technical expert, BBB shall inform the parties and may give them the opportunity to incur the additional cost of a compensated technical expert.

The expert's findings shall be presented in writing or in person, at BBB's option, either before, during or after the hearing. In any case, you shall have an opportunity to evaluate and comment on the qualifications and findings of the expert.

You also have the right to have your own technical expert serve as a witness at your own expense.

19.SUBPOENAS

You may send BBB a request that the arbitrator subpoena witnesses or evidence that are relevant to your case. Any request shall include a statement as to why the witness or evidence is relevant, and why you believe a subpoena is necessary. If the arbitrator agrees with your request, a subpoena shall be signed by the arbitrator.

The party requesting a subpoena shall be responsible for serving the subpoena, including any expenses involved, and also for enforcement of the subpoena in court if necessary. BBB and the arbitrator do not have power to enforce a subpoena, but the arbitrator may consider any failure to produce subpoenaed evidence in the decision.

20.PRE-HEARING EXCHANGE OF INFORMATION

The arbitrator, at his or her discretion, may direct that the parties exchange documents or other information prior to the hearing. A copy of any such documents or information shall also be sent to BBB.

21.OATH OF PARTICIPANTS

You and your witnesses shall be placed under oath at the hearing by the arbitrator or BBB staff administering the hearing.

22.HEARING PROCEDURES

The arbitrator shall decide on the order and the procedures to follow for you to present your side of the dispute.

You shall be given an opportunity to make a personal presentation of your case, and you may present witnesses and evidence in support of your case. You shall also be given the opportunity to question the other parties, their witnesses and their evidence. After everyone has presented his or her case, each party shall be given the opportunity to make a closing statement.

In accordance with BBB's arbitration fee schedule, initial fees and costs may cover a limited hearing time, and additional time may incur additional costs to the parties.

If the arbitrator determines that additional information is necessary in order to make a fair decision, the arbitrator may direct that this additional evidence be submitted at a subsequent hearing or in any manner deemed appropriate by the arbitrator. If the arbitrator directs that written evidence be submitted after the initial hearing, the evidence shall be sent to BBB within the time frame specified by the arbitrator. BBB shall send a copy to the other party and solicit a response. Both the written evidence and any response shall be submitted by BBB to the arbitrator.

23.ADMISSION OF EVIDENCE AT HEARING

You may present your case without being restricted by courtroom rules of evidence. However, you should be sure your evidence is relevant to your case.

The arbitrator may limit your presentation if it is repetitious or irrelevant.

24.WRITTEN STATEMENTS/DOCUMENTS

If you have a witness who cannot attend the hearing, you may present that person's written statement to the arbitrator. You must make a copy for the other party to read and use for response.

If you present your case by telephone, you should submit to BBB at least seven days before your hearing any written documents on which you will rely. BBB will provide these documents to the other party before the hearing.

25.ADMISSION OF EVIDENCE AFTER INITIAL HEARING

During the hearing, you may ask the arbitrator to give you a reasonable number of days to respond to evidence presented by the other party at the hearing. The arbitrator may grant your request at his or her discretion. If granted, BBB shall send your response to the other party for comment and then forward all information to the arbitrator.

Before a decision is made, an arbitrator may schedule new or additional hearings or otherwise request new or additional evidence to get all possible facts relating to your dispute.

Before a decision is made, you may send BBB new information that was impossible to present at your original hearing and request that it be considered. BBB shall send it to the other parties for their response and then forward the information and any response to the arbitrator.

After the arbitrator has made a decision in your case, no more arguments or evidence may be presented, even if newly discovered or not available at the time of the hearing.

26.CLOSING THE HEARING

The arbitrator shall close the hearing when he or she determines that the parties have had sufficient opportunity to present all relevant evidence. The arbitrator will normally render a decision within five days after the hearing is closed.

27.SETTLEMENT

If all parties voluntarily decide to settle the dispute before the hearing, the settlement will end the dispute and no hearing will be held.

If a voluntary settlement is reached during the hearing, the arbitrator shall include the settlement in a final or interim consent decision. If a settlement is reached after the hearing but before the arbitrator's final decision, be sure to notify BBB at once.

28.TIME LIMITS

BBB shall make reasonable efforts to obtain a resolution of the dispute within 60 days, unless state or federal law provides otherwise. BBB or the arbitrator may extend this time at their sole discretion.

29.THE DECISION

When the arbitrator has reached a decision in your case, BBB shall send to all parties a written decision accompanied by the arbitrator's brief statement of reasons for the decision. BBB will not read a decision to you over the phone.

A. Scope of decision
A decision shall be one that:

the arbitrator considers fair;

is limited to the issues raised in the demand for arbitration and any counterclaim; and

falls within the scope of these Rules.

Unless otherwise provided by agreement of the parties, the arbitrator is not bound to apply legal principles in reaching what the arbitrator considers to be a fair resolution of the dispute.

The decision may order an action to be performed, money to be paid, or a combination of these remedies. The arbitrator may award all or part of what you seek or may decide to award no payment or performance at all.

B. Types of decisions
The arbitrator shall render either a final or an interim decision.

If the arbitrator renders a final decision, the arbitrator has no further authority over the decision unless a valid request is made pursuant to Rule 28(C), Clarifying the decision; Rule 28(D), Correcting the decision or reasons for decision; or Rule 28(E), Decision is impossible to perform or to perform timely.

An interim decision may be written when the decision requires some action to be taken. If the arbitrator renders an interim decision, the arbitrator maintains continuing authority over the execution of the decision in accordance with the specific terms set out in the decision.

An interim decision shall state a time within which the consumer must notify BBB if the action ordered in the interim decision was not performed or was performed unsatisfactorily. If an interim decision has been rendered and a reconvening is requested in accordance with the terms of the decision, BBB shall schedule a further hearing. In addition to the evidence presented at that hearing, the arbitrator may request additional evidence from the parties or from an impartial technical expert. The arbitrator will normally render a decision within five days after the hearing is closed.

C. Clarifying the decision
You may request that the arbitrator clarify a decision if you do not understand the decision, or if you and the other parties disagree about the specific action required by the decision. Requests for clarification must be in writing and must be received by BBB prior to the time that performance is required under the decision.

BBB will not accept a clarification request that attempts only to reargue your case or that is based solely upon your disagreement or disappointment with the decision.

BBB shall have sole discretion to determine if your written statement is an appropriate request for clarification of the decision. BBB shall send the request to the other parties, solicit their views, and send the request and any response to the arbitrator. The arbitrator may either clarify the decision or reject the request for clarification and let the decision stand as written.

You may not ask the arbitrator to clarify the reasons for decision.

D. Correcting the decision or reasons for decision
You may request correction of the decision or the reasons for decision if you believe the decision or reasons contain a mistake of fact, a miscalculation of figures, or exceed the arbitrator's authority. Requests for correction of a decision or reasons must be in writing and must be received by BBB prior to the time that performance is required under the decision.

A mistake of fact is not a conclusion of the arbitrator with which you disagree; it is a true error in such things as a date, time, place or name, and may justify a correction only if it concerns the essence of the decision.

A miscalculation of figures is not a dollar figure you consider to be unfair; it is a mathematical error.

The arbitrator's authority is limited to the scope of these Rules.

BBB will not accept a correction request that attempts only to reargue your case or that is based solely upon your disagreement or disappointment with the decision.

If your written statement to BBB is an appropriate request for correction, BBB shall send the request to the other parties, solicit their views, and send the request and any response to the arbitrator. The arbitrator may either correct the decision or reasons or reject the request for correction and let the decision or reasons stand as written.

E. Decision is impossible to perform or to perform timely
Unless otherwise specified in the decision, the time for performance shall generally be no longer than 30 days from the date BBB forwards the award to the parties. If you believe in good faith you cannot perform the arbitrator's

decision at all or within the established time limit, you should immediately inform BBB in writing. BBB shall process your submission in the same manner as a request for correction.

The arbitrator may request additional evidence, request another hearing, or do anything necessary to confirm or deny your claim of impossibility of performance. If the arbitrator confirms such impossibility, the original decision may then be changed to include any remedy falling within the scope of these Rules.

If a party has exceeded the time for performance, the other party should notify BBB in writing.

F. Suspending the time to perform
If you submit to BBB a written statement relating to correction, clarification or impossibility of performing the decision, the time performance of the decision shall be suspended until the issue is resolved by the arbitrator or by BBB.

G. After decision is issued
Once a decision in your case has been issued:

The parties will be legally bound to abide by the decision and must comply with the decision's terms (subject to modification/correction under these Rules or to any limited right of review that may be provided by state or federal law).

Each party gives up any right to sue the other party in court on any claim that has been resolved at the arbitration hearing, unless a party fails to perform according to the arbitrator's decision.

If a party fails to perform the decision, notify BBB and it will try to resolve the matter. In addition, you may have the right to enforce the decision in court or pursue other legal remedies under state or federal law.

H. Verification of performance
All parties must do what the decision requires within the time limits set by the arbitrator.

Unless otherwise stated in the decision, the time for performance shall begin when you receive the decision. Approximately two weeks after the performance date, BBB shall contact the parties to see if the decision has been performed.

30.TIMELY OBJECTIONS

Any failure to follow these Rules that may significantly affect the independence, impartiality or fairness of the arbitration process must be raised with BBB at the earliest opportunity. BBB shall make a final decision on the appropriate action to be taken if BBB determines that a failure to follow these Rules has significantly affected the independence, impartiality or fairness of the arbitration process.

31.CHANGE OF TIME

You and the other parties to the arbitration may jointly agree in writing to change any period of time stated in these Rules.

32.CONFIDENTIALITY

The dispute resolution process and any records of that process are private and confidential.

If the dispute originated as a complaint filed with BBB, BBB may include in its report on the business an indication of the business's failure to arbitrate or to perform an award in your individual case, excluding personally identifying information about any individual. Otherwise, BBB shall not release the terms of the arbitration decision to any person or group that is not a party to the arbitration unless all parties agree or unless such release is required by law or pertinent to judicial or governmental administrative proceedings.

33.JUDICIAL PROCEEDINGS/EXCLUSION OF LIABILITY

In submitting to arbitration under these Rules, the parties agree that, other than for purposes of authentication by staff of BBB, BBB and the arbitrator shall not be subpoenaed by either party in any subsequent legal proceeding. The parties further agree that BBB (including its staff), Council of Better Business Bureaus (including its staff) and/or the arbitrator shall not be liable for any act or omission in connection with your arbitration.

34.INTERPRETATION OF RULES/RIGHT TO DISCONTINUE ARBITRATION

BBB shall make the final decision on procedural questions and on any other question concerning the application and interpretation of these Rules.

BBB at all times reserves the right to decline or discontinue administration of arbitration for any case(s) due to a conflict with any BBB Policy or state/federal law or regulation, the conduct of a party, or failure to pay any fees required by BBB.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

George and Society Horizontal Property Regime,

Plaintiff,

v.

Twenty-One George Street, LLC, George Street Manager, LLC, Estates, Inc., Superior Construction Corporation, Steinberg Design Collaborative, LLP, Kyzer & Timmerman Structural Engineers, LLC f/k/a Kyzer Timmerman & Associates, LLC, Western Surety Company, John Doe 1, John Doe 2, John Doe 3, John Doe 4, and John Doe 5, All John Does being Members of the Board of Directors of the George and Society Horizontal Property Regime from Inception Through Turnover,

Defendants.

and

Brenda Spadoni and BJ Investment Limited Partnership, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs,

v.

Twenty-One George Street, LLC, George Street Manager, LLC, Estates, Inc., Superior Construction Corporation, Steinberg Design Collaborative, LLP, Kyzer & Timmerman Structural Engineers, LLC f/k/a Kyzer Timmerman & Associates, LLC, Western Surety Company, John Doe 1, John Doe 2, John Doe 3, John Doe 4, and John Doe 5, All John Does being Members of the Board of Directors of the George and Society Horizontal Property Regime from Inception Through Turnover,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-100-5206
and
CASE NO.: 2012-CP-10-5209

ORDER GRANTING MOTIONS TO COMPEL ARBITRATION

This matter is before the Court upon Motions by Defendants, Twenty-One George Street, LLC, Superior Construction Corporation, and Steinberg Design Collaborative, LLP ("Moving

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Defendants") to refer these cases, as to them, to binding arbitration. The Motion was heard by the Court on May 6, 2013. For the reasons set forth below, the Court determines that the Motions to Compel Arbitration must be granted as to Moving Defendants with regard to both the complaint brought by George and Society Horizontal Property Regime ("HPR Action") and the complaint brought by Brenda Spadoni and BJ Investment Limited Partnership ("Spadoni Action").

I. Factual Background

The HPR Action seeks money damages due to alleged defective design and construction of the George and Society condominium complex in Charleston, SC. The HPR brings its claims based on its interest in and responsibility for the common areas in the condominium complex. The Spadoni Action is brought by an entity, BJ Investment Limited Partnership, which holds title to a condominium unit and one of the corporation's members, Brenda Spadoni, for money damages due to the alleged defective design and construction of the same condominium complex. The Master Deed for the George and Society complex which created the HPR was dated May 16, 2007 and is filed in Book W625, Page 596 of the office of the Register Mesne Conveyance for Charleston County, South Carolina. The first page of the Master Deed contains the following notice: "THIS MASTER DEED IS SUBJECT TO BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT."

Article 14 of the Master Deed requires the Developer (Twenty One George Street, LLC), Association (HPR) and Owners (e.g., the plaintiffs in the Spadoni Action) to avoid the costs of litigation and submit disputes between them to alternative dispute resolution, up to and including arbitration. This agreement specifically contemplated disputes relating to the design and construction of the condominiums, such as the cases presently before the Court, as being subject to arbitration. Article 14 sets forth, *inter alia*:

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The Developer, Association, and Owners (collectively, the "Parties" and singularly, a "Party"), agree that any dispute, controversy or claim among them, including counterclaims and crossclaims, whether based upon contract, tort, statute, common law or otherwise (collectively, a "Dispute"), ... including, without limitation, Disputes relating to the design and construction of the Project, or any portion thereof ... except for "Exempt Claims" under Section 14.2, are subject to arbitration, as defined by the South Carolina Arbitration Act and the Federal Arbitration Act, in lieu of civil proceedings.

Exempt Claims under Section 14.2 of the Master Deed are:

a) any suit by the Association against a party to enforce any Assessments or other charges hereunder; and

b) any suit by the Association to obtain a temporary restraining order (or equivalent emergency equitable relief) and other relief the court may deem necessary in order to maintain the status quo and preserve any enforcement power of the Association until the matter may be resolved on the merits pursuant to Section 14.3 below; and

c) any suit between Owners which does not include the Developer or the Association as a party, if such suit asserts a claim which would constitute a cause of action independent of the Regime and the Project; and

d) any suit in which an indispensable party is not a Party, provided that any suit involving a Dispute between or among the Developer, the Association, one or more Owners, the Project architect, engineer or other design professional, and the Project construction contractor shall be resolved by non-jury trial, the Parties expressly hereby waiving all resort to trial-by-jury of any and all issues otherwise so triable

e) any suit which otherwise would be barred by any applicable statute of limitation; and

f) any suit involving a matter which is not an Exempt Claim under (a) or (b) above, but as to which matter the Party against whom the Claim is made waives the mandatory provisions of Section 14.3 below.

Section 14.3 of the Master Deed also includes a provision including other parties in the arbitration procedure:

Parties to be Joined. The Parties agree to arbitrate all disputes with each other and with the Project architect, engineer or other design professional, and the Project construction contractor to the extent those entities have agreed to participate in and be subject to arbitration of all Disputes.

Master Deed, Section 14.3 (a).

Plaintiffs in the Spadoni Action hold title to Unit 301 of the George and Society complex.

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Twenty One George Street, LLC conveyed Unit 301 to Jeffery J. Lamberson by deed recorded June 8, 2007 in the office of the Register Mesne Conveyance for Charleston County. The conveyance to Lamberson was specifically made subject to the Master Deed. Likewise, the contract signed by Mr. Lamberson specifically included an arbitration provision. See Spadoni Motion at Exhibit 4.

Mr. Lamberson conveyed title to Unit 301 to BJ Investment Limited Partnership by deed recorded December 2, 2010 in the office of the Register Mesne Conveyance for Charleston County. The conveyance to the Plaintiffs in the Spadoni Action was specifically made subject to the Master Deed.

II. Law/Analysis

"There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." Under both the federal and state statutes, arbitration provisions are presumed to be "valid, irrevocable, and enforceable. Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (internal citations omitted). Under both the South Carolina Uniform Arbitration Act (S.C. Code Ann. § 15-48-10, *et. seq.*, "SCAA") and the Federal Arbitration Act ("FAA"), agreements to arbitrate are subject to "general contract principles of state law." See *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001).

1. The Master Deed is Controlled by the Federal Arbitration Act

The FAA controls these cases because they involve interstate commerce. Although land development within South Carolina's borders could be an example of a purely intrastate activity, the construction of the George and Society condominium complex involved interstate commerce

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as contemplated by the FAA. See *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 542 SE 2d 360 (2001), applying the FAA to a construction contract involving out-of-state parties even though plaintiffs may not have contemplated a transaction in interstate commerce, and *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001), applying the FAA to a transaction involving the sale and development of real property in South Carolina using out-of-state materials, contractors, and investors and noting that the FAA takes an expansive view of interstate commerce.

Factually, this case clearly involves interstate commerce:

- the general contractor, Superior, is a North Carolina corporation;
- the architect, Steinberg, is a Texas entity;
- the surety, Western Surety Company is a foreign corporation; and
- fifteen of the unit buyers are from outside South Carolina. See the two affidavits of Janet Safran filed in support of the Motion to Compel Arbitration.

Accordingly, the condominiums at issue fall within the FAA's expansive view of interstate commerce.

Where the FAA controls, any action that disfavors an arbitration clause will be preempted. The *Munoz* case involved a state **statute**.[1] The United States Supreme Court in *AT&T Mobility LLC v. Concepcion et ux.*, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) applied the same logic to a **judicial decision**. *Id.* at 1747. *Concepcion* struck down a California judicial rule known as the *Discover Bank* rule which placed restrictions on arbitration in the class action context. See *Id.* at 1753 ("California's *Discover Bank* rule is preempted by the FAA.")

[1] "A state law that places arbitration clauses on an unequal footing with contracts generally, however, is preempted if the FAA applies. Accordingly, our state Arbitration Act, which applies specifically and exclusively to arbitration agreements, is pre-empted in this case." *Munoz* 343 S.C. at 539-540, 542 S.E.2d at 364. (internal citations omitted).

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Therefore, the FAA prevents this court from ruling simply that any master deed cannot have an arbitration clause due to lack of negotiating power between owners and the developer.

2. The Master Deed is not Unconscionable

The Master Deed is valid and enforceable because it is geared toward achieving an unbiased decision by a neutral decision-maker. Under both the SCAA and the FAA, agreements to arbitrate are subject to "general contract principles of state law." See *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364. Such general principles include that a contract may be revoked for grounds "including fraud, duress, and unconscionability." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. Here, Plaintiffs have alleged that the arbitration agreement is "oppressive, one-sided, unconscionable, overreaching and contrary to the law and public policy of South Carolina." (See Spadoni Complaint ¶ 70, HPR Complaint ¶ 65.) It is none of the above.

Plaintiff's position boils down to an allegation that the contract is unconscionable. Under South Carolina law, "unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). Stated differently, South Carolina courts "determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

a. Meaningful Choice

As to whether there was meaningful choice, first, the condominiums are subject to S. C. Code 27-31-100(f) which requires that the Master Deed contain a description of the full legal rights and obligations of the owners and the person establishing the regime. In this context, the developer had not only the full approval but the requirement of the General Assembly to make

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the Master Deed the same for every buyer. Allowing a negotiation for different terms for any of the buyers would contravene the HPR statute. Accordingly, due to the particular legal nature of the HPR, the Master Deed cannot be considered a contract of adhesion.

Notwithstanding the foregoing, Plaintiffs argue that the Master Deed, which contains the arbitration provision, is a contract of adhesion and inherently unconscionable as if any contract where one party will not or cannot negotiate is unconscionable. However, the United States Supreme Court disagrees. In *AT&T Mobility LLC v. Concepcion et ux.*, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), the Supreme Court recently cited several examples of such contracts with arbitration clauses that are routinely enforced and have been upheld for many years. First, *Concepcion* cited *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S.Ct. 1647, 1655, 114 L.Ed.2d 26 (1991) ("Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we [have] nevertheless held . . . that agreements to arbitrate in that context are enforceable."); see also *id.* at 32-33, 111 S.Ct. at 1655-56 (allowing arbitration of claims arising under the Age Discrimination in Employment Act of 1967 despite allegations of unequal bargaining power between employers and employees).

The rule *Concepcion* struck down was *limited* to adhesion contracts: "California's *Discover Bank* rule similarly interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.* The rule is limited to adhesion contracts." *Concepcion* at 1749.

The *Concepcion* court made the point that "the times in which consumer contracts were anything other than adhesive are long past." *Id.* at 1750. The court cited *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) (involving take it or leave it tax service contracts) and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997) (involving an arbitration clause in a warranty that came packed in a computer box). *Id.* at 1750.

The case before the court presents a situation where it is much easier to uphold the

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arbitration clause than any of the cases cited by the United States Supreme Court. Here, the buyers, like Ms. Spadoni who paid $488,000 for her unit, purchased pursuant to individual contracts which are emblazoned with notice of the arbitration provision. See Exhibit 3 to the Motion to Compel Arbitration in the *Spadoni* action (2012-CP-10-5209) for Ms. Spadoni's deed and Exhibit 4 for Mr. Lamberson's contract. If these investors did not want to buy units subject to arbitration clauses they could do exactly what the consumers could have done in the *Concepcion* case and the cases *Concepcion* cited: refrain from buying.

In conclusion, contracts that for various reasons cannot be negotiated, like the master deed here, often have arbitration clauses that are routinely enforced. There is no basis for refraining from enforcing the terms of the Master Deed simply because it calls for dispute resolution to take place in an arbitration forum rather than in court.

b. The Terms were not One-sided

The second inquiry is whether the terms were oppressive or one-sided. The arbitration provision in the Master Deed does not contain oppressive, one-sided terms. The only limitations Plaintiffs pointed to at the hearing or in their brief were the loss of the right to a jury trial and right to appeal. The arbitration provision in the Master Deed limits only the *forum* in which Plaintiffs may seek their remedies. This is a natural result of any arbitration provision. See *Munoz* at 542, 542 S.E.2d at 365 ("An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined.") (emphasis in original). Just as the arbitration agreement which was upheld in *Munoz*, the arbitration provision in the Master Deed limits the forum but not the remedy. Further, as noted by the South Carolina Supreme Court in *Munoz*, generalized attacks on arbitration founded on suspicion of arbitration as a method of resolving disputes have consistently been rejected. *Munoz* at 540, 542 S.E.2d at 364 (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 521, 148 L.Ed.2d 373 (2000). Where all arbitration

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provisions by their essential nature necessarily restrict the right to a jury trial, Plaintiffs' argument that such restriction in the present Master Deed is unconscionable can only be considered a generalized attack on arbitration of the very sort that was explicitly rejected by the Supreme Court in *Munoz*.

Furthermore, one-sided, oppressive clauses have been examined in several South Carolina cases, and the clauses before the court do not fit with that characterization. In *Simpson*, the arbitration provision was held to be one-sided or oppressive because it prohibited the arbitrator from awarding damages that would have otherwise been available to the plaintiff under her South Carolina Unfair Trade Practices Act (SCUTPA) claim. Specifically, the arbitration provision at issue in *Simpson* prohibited double or treble damages. The *Simpson* Court distinguished an earlier decision which declined to overturn an arbitration provision prohibiting "punitive damages" generally, and reasoned that the specific prohibition against multiple damages in direct contradiction of the SCUTPA both violated the statute itself and the policy underlying the statute. *Simpson* at 29-30, 644 S.E.2d at 670-71 (citing *Carolina Care Plan.*, 361 S.C. 544, 606 S.E.2d 752.) More recently, the South Carolina Court of Appeals relied on *Simpson* and ruled that an arbitration provision which disclaims all monetary damages of any kind was unconscionable. *Smith v. D.R. Horton, Inc., et al.* Op. No. 5118 (filed April 17, 2013).

Unlike the provisions that were invalidated in *Simpson* and *Smith*, the arbitration provision in the Master Deed does not eliminate any remedies available to Plaintiffs. In fact, the present agreement to arbitrate is less restrictive than even that of *Carolina Care Plan* which was not held unconscionable. Accordingly, the agreement to arbitrate comports with federal and South Carolina public policy, both of which favor arbitration. See *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668.

The arbitration provision in the Master Deed is not one-sided. In fact, it even exempts some claims by the HPR for the convenience of the HPR. In *Munoz*, the Supreme Court of

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South Carolina held that an agreement to arbitrate claims by home owners against a builder and creditor was enforceable even though the creditor retained the right to pursue foreclosure in court. 343 S.C. at 542, 542 S.E.2d at 365. Similarly, Section 14.2 of the Master Deed exempts collection actions by the HPR from the agreement to arbitrate. In *Munoz*, although the plaintiffs may have been required to arbitrate counterclaims, defenses to foreclosure litigation were not precluded by the arbitration provision. *Id.* There is nothing in the Master Deed that would prevent the Plaintiffs from litigating in court any defenses to any Exempt Claim under 14.2(a) or (b). Therefore, just as in *Munoz*, the arbitration agreement here does not deprive Plaintiffs of any remedies, it only controls the forum in which the remedy is determined.

3. Plaintiffs' Claims Herein Are Within the Scope of the Agreement To Arbitrate

As noted above, the Master Deed specifically contemplated disputes relating to the design and construction of the condominiums, such as the cases presently before the Court, as being subject to arbitration. The Master Deed also enumerates certain categories of claims which are not subject to arbitration. (Master Deed § 14.2, "Exempt Claims"). Nevertheless, the cases before the Court should be referred to arbitration because Plaintiffs' claims arise out of the design or construction of the Project and are not Exempt Claims.

As set out in the Factual Background above, the agreement to arbitrate exempts six categories of claims. Plaintiffs have argued their claims are exempt under either 14.2(d) for lack of indispensable party(ies) or under 14.2(f) for waiver. However, Plaintiffs have failed to point to any indispensable parties, and the parties' minimal actions in these cases do not rise to the level of a waiver of the agreement to arbitrate, particularly where the developer has the right in arbitration to exactly what it obtained in court.

a. Section 14.2(d) of the Master Deed is Inapplicable.

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1. *Twenty-One George's May 6, 2013 Amended Motion did not Consent to a finding of the Existence of an Indispensable Party or a Non-jury Trial.*

Twenty-One George filed its Motion to Compel Arbitration April 11, 2013. A week before the May 7, 2013 hearing, Twenty-One George filed an Amended Motion which said it would "move before the court for an order compelling George and Society Horizontal Property Regime, Plaintiff, to submit all claims and demands asserted in this action to binding arbitration or, in the alternative, to require a non-jury trial, pursuant to the terms of the Master Deed...." Twenty-One George incorporated the Master Deed by reference. The Amended Motion further said:

> "The dispute which is the subject of this action does not fall under ¶14.2 and is expressly contemplated by ¶14.1 as a dispute arising out of the design or construction of the project."

The quoted sentence clearly expressed Twenty-One George Street's position that the claim pursuant to ¶14.1 should be referred to arbitration. Only if that motion were denied on the grounds of a missing indispensable party, did the motion seek the alternative relief of a non-jury trial. The Amended Motion quoted section 14.2(d) pertaining to missing indispensable parties and non-jury trial without argument or characterization.

The motion was heard May 7, 2013. Twenty-One George argued that a condition precedent to a ruling based on the exemption from arbitration found at section 14.2(d) was the existence of a missing indispensable party and that none have been identified. The court took the motion under advisement and sought proposed orders by May 17, 2013.

The court views the issue over the characterization of the statements in the Amended Motion as form over substance. The issue before the court is whether the dispute arose out of the design or construction of the Project and if so, whether an exemption applies. Regardless of whether the Amended Motion mentions section 14.2(d), the original Motion attached the Master Deed which contained section 14.2(d). Therefore, the issue is before the court and the Court

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must interpret the Master Deed in light of the facts before the court. Twenty-One George made it clear in the motion hearing that it does not consent to a finding that there is a missing indispensable party and does not consent to a non-jury trial.

2. *Plaintiffs have not Identified Any Indispensable Parties.*

In Section 14.1, the Developer, Association and Owners agree to arbitrate any dispute arising out of the design and construction of the Project except for "Exempt Claims" under Section 14.2. Section 14.2 (d) exempts "any suit in which an indispensable party is not a party" and requires the resolution of the exempt suit by non-jury trial. See Exhibit 1 in support of the Motion to Compel Arbitration in the *Spadoni* case which is the Master Deed and is the same Master Deed at issue in the *George and Society Horizontal Property Regime* case.

All indispensable parties are subject to arbitration. The Developer (Twenty One George Street, LLC), Association (HPR) and Owners (e.g., the plaintiffs in the Spadoni Action) all expressly agreed to submit disputes such as the present cases to arbitration. Master Deed, § 14.1. Further, disputes with the Project architect (Steinberg) and the Project construction contractor (Superior) are also subject to arbitration to the extent those entities have agreed to participate in and be subject to arbitration. Master Deed, § 14.3(a). Accordingly, where the cases presently before the Court pertain to alleged design and construction defects and the parties subject to arbitration include those primarily responsible for design and construction, no other parties, against whom claims may or may not be subject to arbitration, are indispensable.

An "indispensable party" is one in whose absence "the case must be dismissed." Black's Law Dictionary 1232 (9th ed. 2009) ("A party who, having interests that would inevitably be affected by a court's judgment, must be included in the case. If such a party is not included, the case must be dismissed.") In contrast, a "necessary party" is merely one "who, being closely connected to a lawsuit, should be included in the case if feasible, but whose absence will not require dismissal of the proceedings." *Id.* Further, "the number of cases in which there is truly

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an 'indispensable party' in whose absence the court should not proceed are very rare," and "[o]nly if pragmatic considerations strongly indicate that it would be preferable to dismiss the action rather than proceed with the parties before it, should the court conclude that the absent party is truly 'indispensable.'" Rule 19, SCRCP, notes.

S.C. R. Civ. P. 19(b) sets forth the following factors to be considered in determining whether a party is indispensable:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder

Id. Plaintiffs argued the absent parties include Superior's subcontractors and the structural engineer Kyzer and Timmerman ("Kyzer").

Superior's subcontractors and Kyzer do not rise to the level of "indispensable parties." In fact, the subcontractors are not even "necessary parties." *Tucker v. Craig*, 245 S.C. 94, 138 S.E.2d 838 (1964). In *Tucker*, the plaintiff, South Carolina Mental Health Commission ("Commission"), contracted with Charles J. Craig Construction Co. ("Craig") to construct a building. *Id.* at 95, 138 S.E.2d at 839. Craig, in turn, subcontracted the tile work. *Id.* Defects appeared in the tile floor which ultimately led to a lawsuit by the Commission against Craig and its performance bond surety. *Id.* at 96, 138 S.E.2d at 839. The only issue in the lawsuit was the construction of the tile floor by Craig's subcontractor. *Id.* Nevertheless, the Court held that "[a]lthough Frazier [tile subcontractor] may be ultimately liable to Craig under the provisions of the contract between them, Frazier, although a proper party, is not a necessary party to the complete determination of the controversy between Craig and the Commission." *Id.* at 96, 138 S.E.2d at 839-40.

In the instant case, Twenty-One George Street, LLC contracted with Steinberg to design

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the buildings and Superior to construct the buildings. There is uncertainty about who contracted with Kyzer to perform certain structural design services[2]. Plaintiffs' predecessor in interest agreed to purchase Unit 301 from Twenty-One George Street, LLC (and agreed to arbitrate claims with Twenty-One George Street, LLC). Plaintiffs allege defects in design and construction and the parties subject to arbitration include those primarily responsible for design and construction. While some subcontractors or Kyzer may be ultimately liable to Superior and/or Steinberg, those subs are not necessary parties to the present cases. Accordingly, all necessary parties to a complete determination of the controversy, as defined in *Tucker*, are subject to arbitration, such that the Plaintiffs' claims in the present cases are not exempt from arbitration under § 14.2(d) of the Master Deed.

Turning to SCRCP 19(b), the factors favor characterizing the allegedly absent subs and Kyzer as not indispensable. As to the first factor, neither subs nor Kyzer would be prejudiced by a judgment in their absence. Developer, Steinberg and Kyzer have identical interests in defending the allegations of design defects.[3] Superior and its subs have identical interests in defending the allegations of construction defects. As to the third factor, the holding in *Tucker* supports the conclusion that a judgment in the absence of the subs will be adequate. As to the fourth factor, dismissing the present cases for failure to join the subs would work to deprive the Plaintiffs of an adequate remedy. In other words, if Plaintiffs' actions were dismissed because Kyzer or the subs were found to be indispensable, the Plaintiffs would not only have an inadequate remedy, they would have no remedy at all.

b. **The Right to Arbitrate has not been waived**.

The minimal court proceedings thus far in this case do not rise to the level of a waiver of

[2] The structural design work is contemplated in Steinberg's contract which would make Kyzer a sub-consultant to Steinberg, but there is also reason to believe Estates Management Co. contracted with Kyzer. Consequently, the record is uncertain on this point.

[3] The second factor contemplates taking measures to reduce prejudice to a missing party. Since the so-called missing parties are not prejudiced by being absent, discussion of the second factor is unnecessary.

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the agreement to arbitrate. In determining whether a party has waived its right to compel arbitration, a court must consider

> (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration;
> (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and
> (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). Further, "[t]here is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) (citing *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 199) and *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 417 S.E.2d 622 (Ct.App.1992)).

The first two factors are interrelated. Decisions on the length of time are also influenced by the extent of discovery within that time. Nineteen months and ten months have been found "a substantial length of time," whereas thirteen months and eight months have been found not substantial. See *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), which surveyed prior cases.

The cases cited in *Davis* overlap. Ten months has been found "substantial," whereas thirteen months has been found not substantial. The distinction lies in the extent of discovery. In both cases cited by *Davis* where a substantial length of time was found, written interrogatories and requests to produce had been exchanged, and depositions had been conducted. *Id.* at 132, 713 S.E.2d at 807 (citing *Evans* and *Rhodes).* In both cases cited by *Davis* where a substantial length of time was not found, discovery was limited and no depositions had been taken. *Id.* (citing *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003) and *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001).

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In this case, the Motions to Compel Arbitration were filed eight months after the Complaint. The time lapse in this case is less than in *Toler's Cove* (where a thirteen-month period was not substantial) and the same as in *Gen. Equip. & Supply Co.* Moreover, during the short time lapse, discovery has been modest. The only discovery initiated by Twenty-One George Street, LLC was document subpoenas to three non-parties. No depositions have been conducted in the instant case. Twenty-One George Street, LLC has only responded to other parties' written discovery requests and has not issued any requests. No documents have been produced. Twenty-One George Street, LLC has not allowed a substantial period of time to transpire nor has it engaged in extensive discovery before moving to compel arbitration, and thus has not waived its right to compel arbitration in this matter. Moreover, Superior Construction Corporation has not engaged in the exchange of written discovery or taken depositions. Meanwhile, Steinberg merely served Plaintiffs with discovery requests the same day it filed Answers to the Complaint, but Plaintiffs have not responded.

As to the third factor, "[a] party seeking to establish waiver must show prejudice through an undue burden caused by delay in demanding arbitration. Mere inconvenience to an opposing party is not sufficient to establish prejudice." *Evans* at 550, 575 S.E.2d at 76-77 (emphases added, internal citations omitted). Prejudice has been found where the opposing party incurred costs and attorney's fees as a result of the discovery process and where the moving party availed itself of discovery tools unavailable in arbitration, thereby prejudicing its opponent by obtaining information from him or her it might not have been able to otherwise obtain. See *Evans* at 551, 575 S.E.2d at 77.

In this case, the Moving Defendants have not obtained any information *from Plaintiffs* nor have they obtained information they would not otherwise have been able to obtain. Plaintiffs did not incur costs or attorney's fees in responding to the subpoenas because the subpoenas did not require a response from Plaintiffs.

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The Subpoenas Twenty-One George Street, LLC issued are available to it in arbitration. The Master Deed, at Section 14.3(c), requires: "Any Dispute that cannot be settled by negotiation or mediation shall be settled by binding arbitration ... governed by the commercial or construction arbitration rules of the American Arbitration Association (AAA), whichever is applicable." The applicable AAA rules, which were provided to the Court during the hearing, allow the "arbitrator or other person authorized by law to subpoena witnesses or documents." AAA, *Construction Arbitration Rules & Mediation Procedures*, Aug. 2011, R-33(d). Thus, the Moving Defendants have not obtained information they would not have otherwise been able to obtain. Finally, Plaintiffs have not been unduly burdened or prejudiced. Consequently, the Moving Defendants have not waived their right to compel arbitration in this matter.

4. **The Project architect, Steinberg, and the Project construction contractor, Superior, are intended third-party beneficiaries of the Master Deed's arbitration provision.**

Plaintiffs argue that arbitration is not available to Steinberg or Superior, as they are not parties to the Master Deed. However, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)).

Section 14.3 of the Master Deed clearly states that "[t]he Parties agree to arbitrate all Disputes with each other **and with the Project architect . . . and the Project construction contractor**." Master Deed § 14.3 (emphasis added).

Third persons, like Steinberg and Superior, "may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 164 (4th Cir. 2004) (quoting *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827,

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833 (1997)). "In order to determine whether the parties intended [Steinberg and Superior] to be [] third-party beneficiar[ies], [the Court] must look within 'the four corners of the deed.'" *Id.* (quoting *Gardner v. Mozingo*, 293 S.C. 23, 358 S.E.2d 390, 392 (1987)).

In *Griffin*, the Fourth Circuit undertook this analysis in a construction case and upheld the district court's denial of the general contractor's motion to compel arbitration where the general contractor claimed to be a third-party beneficiary to the subject master deed's arbitration provision. *Id.* at 164-65. In that case, the arbitration provision only named the developer/grantor under the master deed and did not refer to Griffin, the general contractor, "either directly or indirectly, in any part of the master deed." *Id.* at 165. The court went on to state that "[u]nder South Carolina law the "terms of an unambiguous deed may not be varied or contradicted by evidence drawn from sources other than the deed itself." *Id.* (quoting *Mozingo*, 358 S.E.2d at 392.) In *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392 (4th Cir. 2005), the Fourth Circuit again undertook the same analysis, citing *Griffin*, but this time in the context of a mortgage insurance provider seeking to compel arbitration pursuant to the terms of an arbitration agreement between the plaintiffs and the mortgage lender. There, the court again upheld the district court's denial of the motion because the "underlying contract makes no reference to" the company or its transaction with the plaintiffs. *Brantley* at 396-97.

Of course, in this case, the Court is presented with precisely opposite facts from both *Griffin* and *Brantley*. Under the "four corners" analysis, the Master Deed's arbitration provision is clear and unambiguous on its face in its reference to the "Project architect" and "Project construction contractor" and the Parties' intent to include them in arbitration of all "Disputes relating to the design and construction of the Project." (Master Deed § 14.1.) Accordingly, the third-party beneficiary analysis undertaken in *Griffin* and *Brantley*, as set forth by the Fourth

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Circuit, and based on South Carolina law, must yield the opposite result in this case.[4] Because the Project architect and Project construction contractor are expressly identified in the arbitration provision of the Master Deed, Steinberg's and Superior's motions to compel arbitration must be granted along with that of the Master Deed's signatory, Twenty-One George Street, LLC.

IT IS THEREFORE ORDERED that the Plaintiffs' claims against Twenty-One George Street, LLC, Superior Construction Corporation and Steinberg Design Collaborative, LLP in both of the above-captioned cases be and hereby are referred to arbitration.

IT IS SO ORDERED.

Judge Kristi L. Harrington

Charleston, South Carolina

May 2, 2013

[4] See also E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 195 (3d Cir. 2001) ("In a series of cases, courts have allowed non-signatory third party beneficiaries to compel arbitration against signatories of arbitration agreements. John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 59-61 (2d Cir.2001) (member of NASD which was bound by its membership to arbitrate disputes, was properly compelled to arbitrate by third party beneficiary of that agreement); Spear, Leeds & Kellogg v. Central Life Assurance Co., 85 F.3d 21, 29-30 (2d Cir.1996) (same with respect to NYSE rules)").

(f) In the event that there is a dispute relating to any Claim Notice or Contested Amount (whether it is a matter between the Indemnitee, on the one hand, and the Selling Stockholder, on the other hand, or it is a matter that is subject to a claim or Proceeding asserted or commenced by a third party brought against the indemnitee or any of the Acquired Companies in a litigation or arbitration), such dispute (an "***Arbitrable Dispute***") shall be settled by binding arbitration. Notwithstanding the preceding sentence, nothing in this Exhibit D shall prevent the Indemnitee from seeking preliminary injunctive relief from a court of competent jurisdiction pending settlement of any Arbitrable Dispute.

(i) Except as herein specifically stated, any Arbitrable Dispute shall be resolved by arbitration in the State of Delaware in accordance with JAMS' Comprehensive Arbitration Rules and Procedures (the "***JAMS Rules***") then in effect. However, in all events, the provisions contained herein shall govern over any conflicting rules which may now or hereafter be contained in the JAMS Rules. Any judgment upon the award rendered by the arbitrator shall be entered in any court having jurisdiction over the subject matter thereof. The arbitrator shall have the authority to grant any equitable and legal remedies that would be available if any judicial proceeding was instituted to resolve an Arbitrable Dispute. The final decision of the arbitrator, as entered by a court of competent jurisdiction, will be furnished by the arbitrator to the Selling Stockholder and the Indemnitee in writing and will constitute a final, conclusive and non-appealable determination of the issue in question, binding upon the Selling Stockholder and the Indemnitee, and an order with respect thereto may be entered in any court of competent jurisdiction.

(ii) Any such arbitration will be conducted before a single arbitrator who will be compensated for his or her services at a rate to be determined by the Indemnitee and the Selling Stockholder or by JAMS, but based upon reasonable hourly or daily consulting rates for the arbitrator in the event the parties are not able to agree upon his or her rate of compensation.

(iii) The arbitrator shall be mutually agreed upon by the Indemnitee and the Selling Stockholder. In the event the Indemnitee and the Selling Stockholder are unable to agree within 20 days following submission of the dispute to JAMS by one of the parties, JAMS will have the authority to select an arbitrator from a list of arbitrators who satisfy the criteria set forth in clause "(iv)" hereof.

(iv) No arbitrator shall have any past or present family, business or other relationship with the Indemnitee, the Company, the Selling Stockholder or any "affiliate" (as such term is defined in Rule 12b-2 of the Securities Act of 1933, as amended (the "***Securities Act***")), director or officer thereof, unless following full disclosure of all such relationships, the Indemnitee and the Selling Stockholder agree in writing to waive such requirement with respect to an individual in connection with any dispute.

(v) The arbitrator shall be instructed to hold an up to eight hour, one day hearing regarding the disputed matter within 60 days of his designation and to render an award (without written opinion) no later than 10 days after the conclusion of such hearing, in each case unless otherwise mutually agreed in writing by the Indemnitee and the Selling Stockholder.

(vi) No discovery other than an exchange of relevant documents may occur in any arbitration commenced under the provisions of this Exhibit D. The Indemnitee and the Selling Stockholder agree to act in good faith to promptly exchange relevant documents.

South Carolina Arbitration Certification Training

Cases

Arbitrability

Guyden v. Actna - Sept. 2006
Simpson v. Addy Harbor Dodge – March 2007
Chassereau v. Global-Sun Pools, et al - April 2007
Garrison v. Palmas Del Mar – March 2008
Timmons v. Starkey et al – Nov. 2008
Argus Media, Ltd. V. Tradition Financial Services, Inc. – Dec. 2009
Carlson v. S.C. State Plastering, LLC et al – June 2013
Davis v. KB Homes (Supreme Court) – Jan. 2014
Carolina Care Plan v. United Health Care Services – Oct. 2014
Thompson v. Pruitt Corp – March 2016
New Prime v. Oliveria—October 2018
Henry Schein, Inc. v. Archer & White Sales, Inc.

Discovery

Comsat Corp v. National Science Foundation – August 1999
Odfjell Asa v. Celanese AG – Dec. 2004
Stolt-Nielsen SA v. Celanese AG – Nov. 2005
Hay Group Inc v. EBS Acquisition Corp – March 2014

Preemption & Implied Power to Conduct Class Action Arbitration

Soil Remediation v. Nu Way – August 1996
Munoz v. Green Tree Financial – March 2001
Stolt-Nielson v. Animal Feeds International 130 S.Ct. 1758 - April 2010

Federal Preemption

AT&T Mobility v. V. Concepcion 131 S. Ct. 1740 Supreme Court – April 2011

2006 WL 2772695
Only the Westlaw citation is currently available.
United States District Court,
D. Connecticut.

Linda GUYDEN, Plaintiff,
v.
AETNA INC., Defendant.

No. 3:05cv1652 (WWE).
|
Sept. 25, 2006.

Attorneys and Law Firms

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RULING ON DEFENDANT'S MOTION TO COMPEL ARBITRATION AND TO DISMISS FEDERAL PROCEEDINGS, OR IN THE ALTERNATIVE, TO STAY

WARREN W. EGINTON, Senior District Judge.

***1** In this action, plaintiff Linda Guyden charges her former employer, defendant Aetna, with retaliatory discharge in violation of the whistleblower provision of the Sarbanes–Oxley Act ("SOX"), 18 U.S.C.A. § 1514A. Defendant has moved to compel arbitration and to dismiss the federal proceedings, or in the alternative, to stay the proceedings. For the following reasons, defendant's motion to compel and to dismiss will be granted.

FACTUAL BACKGROUND

In December 2003, Aetna hired Guyden to serve as Director of its Internal Audit Department.

In its employment application, Aetna provided the following notice in bold font above the signature line signed by Guyden: "**I understand that if I am offered employment that begins on or after January 1, 2003, a condition of the offer and my acceptance of that offer is that I agree to use Aetna's mandatory/binding arbitration program rather than the courts to resolve my employment-related legal disputes.**"

In its offer letter, Aetna also informed Guyden that any employment-related claim would be subject to mandatory arbitration.

The offer letter stated, in relevant part:

> This offer and your acceptance of that offer ... are contingent upon your agreement to use the Company's mandatory/binding arbitration program rather than the courts to resolve employment-related disputes. In arbitration, an arbitrator instead of a judge or jury resolves the dispute and the decision of the arbitrator is final and binding. WITH RESPECT TO CLAIMS SUBJECT TO THE ARBITRATION REQUIREMENT, ARBITRATION REPLACES YOUR RIGHT AND THE COMPANY'S RIGHT TO SUE OR PARTICIPATE IN A LAWSUIT. YOU ARE ADVISED TO, AND MAY TAKE THE OPPORTUNITY TO, OBTAIN LEGAL ADVICE BEFORE FINAL ACCEPTANCE OF THE TERMS OF THIS OFFER.

On April 22, 2004, approximately three months into her employment, Guyden signed a Stock Option Grant Acknowledgement and Acceptance form and an Aetna Performance Unit Award Agreement. Both of these documents referred to the binding arbitration of employment-related disputes.

The terms of arbitration are contained within the 2000 Stock Incentive Plan, which sets forth that arbitration will be administered by the American Arbitration Association ("AAA") and will be conducted pursuant to the AAA's National Rules for Dispute Resolution. The arbitrator

"shall have the authority to order the same remedies (but no others) as would be available in a court proceeding." The terms require plaintiff to pay a $100 fee, while Aetna is responsible for the remaining costs and fees of the arbitration. The agreement also provides for "limited pre-hearing discovery," and affords the parties the right to seek judicial review of the arbitration award.

Within the first seven months of her employment with defendant, plaintiff believed that drastic changes were needed to prevent the company from violating SEC regulation 17 C.F.R. § 229.308(a). Plaintiff alleges that her efforts to prompt these changes and alert senior Aetna executives to the problems resulted in defendant terminating her employment in violation of the SOX.

***2** Defendant contends that plaintiff was employed by defendant for ten months before she was terminated for performance-related reasons on November 22, 2004.

Plaintiff initially filed her retaliatory termination claim with the Occupational Safety and Health Administration of the U.S. Department of Labor. That agency took no action.

Plaintiff proceeded to file this action in federal court.

DISCUSSION

Congress enacted the Federal Arbitration Act, 9 U.S.C. §§ 1 et *seq.*, to codify a strong national policy in favor of arbitration. Section 2 provides:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable.

Courts confronted with a dispute between parties subject to arbitration must "construe arbitration clauses as broadly as possible." *S.A. Mineracao de TridadeSamitri v. Utah Int'l. Inc.,* 745 F.2d 190, 194 (2d Cir.1984). "Arbitration should be ordered unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *McMahan Securities Co. L.P. v. Forum Capital Markets L.P.,* 35 F.3d 82, 88 (2d Cir.1994). In evaluating a motion under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24–25 (1983).

The Court should consider: 1) whether the parties agreed to arbitrate; 2) whether the scope of the arbitration clause covers the plaintiff's claims; and 3) whether Congress intended the federal statutory claims asserted to be non-arbitrable. *See Genesco, Inc. v. T. Kakiuchi,* 815 F.2d 840, 845 (2d Cir.1987).

A party should be held to a valid bargain to arbitrate unless Congress has evinced an intention to preclude a waiver of judicial remedies for any statutory rights at issue. *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 26 (1990). *Gilmer* instructs that such congressional intention will be manifested in the statutory text, its legislative history, or an "inherent conflict" between arbitration and the statutory purpose. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U .S. 614, 637 (1985). The burden of demonstrating that Congress intended to preclude arbitration rests with the party opposing arbitration. *Bird v. Shearson Lehman/Am. Exp., Inc.,* 926 F.2d 116, 119 (2d Cir.1991).

Plaintiff's challenge to arbitration does not touch upon whether a valid contract exists or whether her claim falls within the scope of the arbitration clause. Plaintiff advances objections grounded upon: 1) the arbitral forum's inherent conflict with the statutory purpose of the SOX; and 2) alleged deficiencies in the procedures afforded by the arbitration agreement. Plaintiff's arguments are unavailing to circumvention of arbitration.

Inherent Conflict with SOX's Statutory Purpose

***3** In considering whether an inherent conflict exists, the Court first reviews the SOX's statutory purpose and the relevant whistleblower protection provision. The SOX represents a legislative effort "to improve the quality of and transparency in financial reporting and auditing of public companies." *Carnero v. Boston Scientific Corp.,* 433 F.3d 1, 9 (1st Cir.2006).

> Congress enacted the Sarbanes–Oxley Act of 2002 ("Act") in response to an acute crisis: Revelations of mass corporate fraud, most vividly in connection with the Enron Corporation, threatened to destroy investors' faith in the American financial markets and, in so doing, to jeopardize those markets and the American economy. Congress recognized that the problem was an intractable one, and that a number of strong enforcement tools would be necessary—from new regulations and reporting requirements, to expanded oversight, to new criminal provisions. Congress also recognized that for any of these tools to work, the law had to protect whistleblowers from retaliation, because "often, in complex fraud prosecutions, ... insiders are the only firsthand witnesses to the fraud." S.Rep. No. 107–146, at 10 (2002). Congress therefore made whistleblower protection central to the Act, creating a procedure whereby wrongfully discharged employees can seek redress, including *immediate* preliminary reinstatement, first through the Department of Labor and then through the courts.

Bechtel v. Competitive Technologies, Inc., 448 F.3d 469, 484 (2d Cir.2006) (Straub, J. dissenting).

Relevant to this action, Congress provided that an employee of a publicly traded company discharged in retaliation for whistleblowing is entitled to enforceable civil remedies, including reinstatement and backpay. 28 U.S.C. § 1514A. In addition to section 1514A, two other provisions of the SOX provide protection for whistleblowers. Retaliation against individuals providing truthful information to law enforcement officers concerning the commission of any federal offense is subject to criminal sanctions. 18 U.S.C. § 1513(e). The SOX also directs audit committees of the relevant corporations to establish procedures for "receipt, retention, and treatment of complaints" concerning accounting and auditing matters, and "confidential, anonymous submission by employees ... of concerns regarding questionable accounting or auditing matters." 18 U.S.C. § 78j–1 m(4).

Section 1514A was born out of congressional recognition that inconsistent whistleblower protection among the states encouraged a "corporate code of silence" among employees who discover corporate misconduct. *See* S. Rep. 107–146 (2002), 2002 WL 863249 at *5 (discussing examples of corporate culture, "supported by law," that "discourage[d] employees from reporting fraudulent behavior ...."); *see also Carnero,* 433 F.3d at 12 (citing portions of legislative history evincing objective to provide nationwide protection for whistleblowers). Senator Leahy elaborated upon the need for the whistleblower protection:

> ***4** Corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, although most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions.... The bill does not supplant or replace state law, but sets a national floor for employee protections in the context of publicly traded companies.

S. Rep. 107–146, 2002 WL 863249 at *10, 20.

Specific to arbitrability of a Section 1514A claim, the legislative history reveals that Congress eliminated a provision providing that "[n]o employee may be compelled to adjudicate his or her rights under this section pursuant to an arbitration agreement." *See* S.2010, 107th Con. § 7 (2002); S. Rep. 107–146, 2002 WL 863249 at *22.

With no explicit directive against mandatory arbitration within the statutory text or legislative history, plaintiff is left to argue that arbitration will frustrate the legislative intent to place the whistleblower in the role of a private attorney-general who can "put a permanent dent" in the "corporate code of silence." *See* 148 Cong. Rec. S6436–02, S6437 (2002). Two points fuel plaintiff's assertion of an "inherent conflict": 1) mandatory arbitration of whistleblower disputes will subject employees to the whims of an arbitrator, thereby discouraging employees from reporting misconduct; and 2) arbitration thwarts the SOX's purpose of promoting corporate transparency since arbitration awards are generally not published.

The Supreme Court has repeatedly upheld enforcement of arbitration agreements over objections that arbitration undermines the role of a private attorney-general as a protector of the public interest. In *Mitsubishi Motors Corp.,* the Supreme Court, after consideration of the

antitrust plaintiff's role "as a private attorney-general who protects the public's interest ....", held that nothing in the nature of the federal antitrust laws prohibited parties from arbitrating the relevant antitrust claims. 473 U.S. at 635. In reasoning that an arbitration agreement should be enforced "so long as the prospective litigant may vindicate its statutory cause of action in the arbitral forum," the Court emphasized the relevant antitrust provision's compensatory or private function as opposed to its deterrent effect. *Id.* at 636–7.

Following *Mitsubishi,* the Supreme Court considered an arbitration agreement between brokerage firms and their customers relevant to claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220, 222 (1987). The Court, while recognizing the congressional intent "to provide vigorous incentives for plaintiffs to pursue RICO claims that would advance society's fight against organized crime ....", held that "[t]he private attorney general role for the typical RICO plaintiff ... does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute." *Id.* at 242; *see also Gilmer,* 500 U.S. at 26 (no "inherent inconsistency" between arbitration of age discrimination claims and advancement of social policies underlying Age Discrimination in Employment Act).

***5** Under this constellation of Supreme Court authority, the Second Circuit has rejected analogous public interest arguments against arbitration. *See Oldroyd v. Elmira Savings Bank, FSB,* 134 F.3d 72, 78 (2d Cir.1998) ("In examining Oldroyd's contention that the purposes of [Financial Reform, Recovery, and Enforcement Act] FIRREA will be contravened by the use of arbitration, rather than enforcement in federal courts, we find no basis for concluding that FIRREA is distinguishable from ADEA, ERISA and the Sherman Antitrust Act."); *Bird v. Shearson Lehman/American Express, Inc.,* 926 F.2d 116, 121 (2d Cir.1991) (remedial purpose of Employee Retirement Income Security Act is not compromised by arbitration).

Compelling arbitration of plaintiff's SOX whistleblower claim is consonant with the reasoning of *Mitsubishi, McMahon* and *Gilmore.* The legislative history reveals that Congress created provisions of the SOX directed at the encouragement and protection of employees who report corporate misconduct. At the same time, the SOX's legislative history underscores the compensatory function of section 1514A to relieve whistleblowing employees from the vagaries of state law and to provide such litigants uniform civil remedies. Such private remedies of reinstatement and backpay can be provided through arbitration. *See Gilmore,* 500 U.S. at 32 (rejecting argument that arbitration procedures cannot adequately provide for broad equitable relief); *McMahon,* 482 U.S. at 232 ("the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights").

Plaintiff faults the arbitration process for subjecting the SOX's whistleblower legislation to the whim of an arbitrator who is not bound to apply the relevant law. However, plaintiff's concern is unfounded. "Such generalized attacks on arbitration res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, and as such, they are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer,* 500 U.S. at 30 (declining to presume that arbitrators will not be competent, conscientious and impartial) (quotations omitted); *see also McMahon,* 482 U.S. at 232 (rejecting assumption that arbitrators will not follow the law). Thus, plaintiff has not sustained her burden to prove an inherent conflict between the SOX and arbitration of her section 1514A claim.

Inadequate Procedures

Plaintiff challenges the provisions relative to confidentiality of the arbitration decision and limited discovery as set forth in Aetna's Stock Incentive Plan.

Plaintiff complains that the agreement to arbitrate prevents publication of the arbitrator's decision without Aetna's consent and thereby perpetuates the "corporate code of silence" so decried by Congress. Plaintiff contends that publication of a decision in favor of plaintiff is important for other employees to know that they would be protected from retaliation.

***6** However, as some courts have held, such confidentiality agreements are not so offensive as to render the arbitration agreement invalid, even though such agreements may favor the employer, which will have access to any prior decisions of similar claims. *See Caley v. Gulfstream Aerospace Corp.,* 428 F.3d 1359, 1379

(11th Cir.2005); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,* 379 F.3d 159, 175 (5th Cir.2004) ("attack on confidentiality provision is attack on the character of arbitration itself"). The informational advantage to the employer may be diminished by "plaintiffs' lawyers and arbitration appointing agencies like the AAA, who can scrutinize arbitration awards and accumulate a body of knowledge on a particular company...." *See Ting v. AT & T,* 319 F.3d 1126, 1152 (9th Cir.2003). [1]

In this instance, even with the confidentiality provision, arbitration of plaintiff's section 1514A claim will not vitiate the SOX's purpose of encouraging breach of the "corporate code of silence" and informing employees, shareholders and investors of corporate misconduct. Such goals may also be effectuated through section 78j–1 m(4) (internal audit procedures relevant to complaints of misconduct) and section 1513e (criminal sanctions for retaliation against whistleblowers). Accordingly, plaintiff has not proved the confidentiality agreement so offensive as to invalidate the agreement to arbitrate.

Plaintiff impugns the adequacy of the arbitration agreement's limited discovery provision. Specifically, she attacks the agreement's limitation upon each party to one deposition of a fact witness and its failure to provide for production requests.

The Supreme Court has recognized that discovery in arbitration "might not be as extensive as in federal courts," yet it has found arbitrable ADEA, RICO and antitrust claims. *See Gilmer,* 500 U.S. at 31. However, discovery must not be so minimal that plaintiff will not have an opportunity to present her claims. *Martin v. SCI Management L.P.,* 296 F.Supp.2d 462, 468 (S.D.N.Y.2003). Generally, courts have upheld limitations on discovery where the provision applied equally to all parties, provided for additional discovery upon a showing of need, and allowed for effective vindication of the claim at issue. *See Ostroff v. Alterra Healthcare Corp.,* 433 F.Supp.2d 538, 545 (E.D.Pa.2006) (collecting cases upholding and voiding arbitration agreements with discovery limitations); *Wilks v. The Pep Boys,* 241 F.Supp.2d 860, 864 (M.D .Tenn.2003). Cases voiding arbitration provisions that curtail discovery have done so where the terms for selection of the arbitrators gave rise to a potentially biased arbitration panel that "would stymie a party's attempt to marshal the evidence to prove or defend a claim." *Walker v. Ryan's Family Steak Houses, Inc.,* 400 F.3d 370, 388 (6th Cir.2005); *cf. Domingo v. Ameriquest Mortgage Co.,* 70 Fed.Appx. 919, 2003 WL 2167550 (9th Cir.2003) (holding arbitration agreement unfairly advantaged Ameriquest through terms dictating forum selection, discovery limitation, and dispositive motions).

***7** Here, the arbitration agreement provides:

> Each [party] may take the deposition of one person and anyone designated by the other as an expert witness.... Each party also has the right to submit one set of ten written questions ... and to request and obtain all documents on which the other party relies in support of its answers to the written questions. Additional discovery may be permitted by the arbitrator upon a showing that it is necessary for the party to have a fair opportunity to present a claim or defense.

In this instance, Aetna's discovery provision appears neutral on its face. However, "employment disputes are often extremely fact-intensive battles between witnesses ...", and limited discovery comprising one deposition of a fact witness is unlikely to be adequate to advancement of plaintiff's whistleblowing claim. *Penn v. Ryan's Family Steak Houses, Inc.,* 269 F.3d 753, 757 (7th Cir.2001). In effect, defendant will be advantaged by the contract's discovery limitation since the employee generally requires more discovery than the employer, which generally has ready access to most information relevant to the claim and can often present a defense based only on the deposition of the complaining employee. *Walker v. Ryan's Family Steak Houses, Inc.,* 289 F.Supp.2d 916, 925 (M.D.Tenn.2003). Thus, plaintiff will bear the burden of proving to the arbitrator that additional discovery is necessary. Nevertheless, absent provisions affording Aetna a favorable bias, the Court cannot indulge in the presumption that the arbitrator will act without equanimity to deny plaintiff's request. *See Gilmer,* 500 U.S. at 30.

Plaintiff complains she will be crippled in her ability to obtain third-party discovery because arbitrators do not have the power to subpoena non-party witnesses for depositions. She argues that depositions of employees

from Deloitte & Touche, with whom she discussed irregularities found within Aetna's internal audit reports, are critical to advancement of her proof.

Here, the agreement to arbitrate is subject to the FAA, which confers upon arbitrators the power to "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...." 9 U.S .C. § 7. Ample authority supports plaintiff's concern with regard to the arbitrator's lack of subpoena power. *See Hay Group, Inc. v. E .B.S. Acquisition Corp.,* 360 F.3d 404, 408 (3rd Cir.2004); *COMSAT Corp. v. National Science Foundation,* 190 F.3d 269, 271 (4th Cir.1999); *Odfjell ASA v. Celanese AG,* 328 F.Supp.2d 505, 507 (S .D.N.Y.2004).

Although plaintiff may be precluded from taking depositions of non-party witnesses, she may obtain necessary information through a pre-merits hearing before the arbitrator. *Stolt–Nielsen v. Celanese AG,* 430 F.3d 567, 578–9 (2d Cir.2005). The Second Circuit has instructed that the "language of Section 7 [of the FAA] is broad" and limited only by the requirement that the witness be summoned to appear before the arbitrator and that the requested evidence be material to the case. *Id.*

> ***8** Under section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA. In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence.

Hay Group, 360 F.3d at 413 (Chertoff, J. concurring). Accordingly, arbitration may not present plaintiff with the full range of discovery afforded in federal court. However, plaintiff may adequately vindicate her rights in the arbitral forum.

CONCLUSION

For the foregoing reasons, the defendant's motion to compel arbitration [doc. 8–1 and 2] is GRANTED, and defendant's motion to stay [8–3] is DENIED as moot. The clerk is instructed to close this case.

All Citations

Not Reported in F.Supp.2d, 2006 WL 2772695

Footnotes

1 *Ting* concerned a private attorney-general action challenging AT & T's Consumer Services Agreement ("CSA") pursuant to California's Consumer Legal Remedies Act and the Unfair Practices Act. The Ninth Circuit, in holding the confidentiality provision at-issue unconscionable, was particularly troubled by AT & T's informational advantage since it would affect seven million Californians, among whom would be potential plaintiffs prevented from obtaining necessary information to present claims of intentional misconduct or unlawful discrimination. *Id.* The instant confidentiality agreement does not yield an equally broad impact upon potential plaintiffs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sherry H. Simpson, Respondent,

v.

MSA of Myrtle Beach, Inc. d/b/a Addy's Harbor Dodge, Daimler Chrysler Services NA, LLC, and CrossCheck, Inc., Defendants,

of whom MSA of Myrtle Beach, Inc. d/b/a Addy's Harbor Dodge, is the Appellant.

Appeal from Horry County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 26293
Heard November 1, 2006 - Filed March 26, 2007

AFFIRMED

Joseph Gregory Studemeyer, of Columbia, for Appellant.

Lawrence Sidney Connor, IV, of Kelaher, Connell & Connor, of Surfside Beach, for Respondent.

CHIEF JUSTICE TOAL: This case arises out of an arbitration clause in an automobile trade-in contract between an automobile dealership and a customer. The automobile dealership filed a motion for protective order and/or to stay and to compel arbitration in response to the customer's civil action. The trial court denied the dealership's motion on the grounds that the arbitration clause was unconscionable. This appeal followed.

FACTUAL/PROCEDURAL BACKGROUND

Appellant MSA of Myrtle Beach, Inc d/b/a Addy's Harbor Dodge ("Addy"), a car dealership, and Respondent Sherry H. Simpson ("Simpson") entered into a contract whereby Simpson traded in her 2001 Toyota 4Runner for a new 2004 Dodge Caravan. Directly above the signature line on the first page of the contract, the signee was instructed in bold to "SEE ADDITONAL TERMS AND CONDITIONS ON OPPOSITE PAGE." The additional terms and conditions contained an arbitration clause stating the following:

10. ARBITRATION Any and all disputes, claims or controversies between Dealer and Customer or between any officers, directors, agents, employees, or assignees of Dealer and Customer arising out of or relating to: (a) automobile warranty, workmanship, or repair; (b) the terms or enforceability of the sale, lease, or financing of any vehicle; (c) any claim of breach of contract, misrepresentation, conversion, fraud, or unfair and deceptive trade practices against Dealer or any officers, directors, agents, employees, or assignees of Dealer; (d) any and all claims under any consumer protection statute; and (e) the validity and scope of this contract, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties expressly waive all rights to trial by jury on such claims. Provided, however, that nothing in this contract shall require Dealer to submit to arbitration any claims by Dealer against customer for claim and delivery, repossession, injunctive relief, or monies owed by customer in connection with the purchase or lease of any vehicle and any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration. The filing fees for arbitration shall be paid by the party initiating arbitration. The arbitrator may allocate the other arbitration fees as he/she deems appropriate. In addition to any discovery permitted by the Commercial Arbitration rules, any party may take one disposition [sic] of an opposing party. The parties agree to exchange all exhibits to be used in arbitration 7 days before arbitration. The arbitrator shall determine the controversy in accordance with the terms of this contract between the parties and shall not consider any parole evidence which purports to alter, modify, vary, add to, or contradict such contract. The arbitrator shall give effect to all applicable statutes of limitation. Any arbitration under this agreement shall take place in Horry County, South Carolina and Customer agrees that the courts of Horry County , South Carolina shall have exclusive jurisdiction over enforcement of this contract and any award made by any arbitrator pursuant to this contract. In no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party. Unless otherwise agreed in writing, no claims against Dealer shall be consolidated with other claims in the nature of a class action.

Six months later, Simpson filed a complaint in the Horry County court of common pleas alleging Addy violated the South Carolina Unfair Trade Practices Act and the South Carolina Manufacturers, Distributors, and Dealers Act by misrepresenting the trade-in value of the vehicle, artificially increasing the purchase price, and failing to provide all rebates promised. Simpson sought damages consistent with the maximum statutory remedies permitted for violations of these statutes.

Addy's answer denied Simpson's allegations and asserted that the contract between the parties contained an arbitration clause such that the matter should be stayed and that Simpson's only remedy was to file for arbitration. Addy contemporaneously filed a motion for protective order and/or to stay and compel arbitration. Thereafter, Simpson filed a memorandum in opposition to Addy's motion alleging that the arbitration clause was unconscionable and unenforceable.

At the motion hearing, the trial court ordered the parties to attempt mediation. After the parties notified the trial court that mediation failed, the trial court issued an order denying Addy's motion on the grounds that the arbitration clause was unconscionable. Addy filed this appeal.

The case was certified to this Court from the court of appeals pursuant to Rule 204(b), SCACR, and Addy raises the following issues for review:

I. Did the lower court err in ruling that the arbitration clause was unenforceable without first submitting the issue of enforceability to arbitration?

II. Did the lower court err in denying Addy's motion to stay the civil litigation pending arbitration?

STANDARD OF REVIEW

Arbitrability determinations are subject to *de novo* review. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

LAW/ANALYSIS

I. The appropriate forum for determining the validity of the arbitration clause.

As a preliminary matter, Addy contends that the trial court erred in ruling on the arbitration clause's enforceability rather than first submitting that issue of enforceability to arbitration. We disagree.

The South Carolina Uniform Arbitration Act (UAA) generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. S.C. Code Ann. § 15-48-20(a)(2005). If no agreement is found to exist, the court must deny any application to arbitrate. [1] *Id.*

Our precedents in this area echo the UAA's policy that the trial court should determine the threshold validity of the arbitration agreement. *See Zabinski,* 346 S.C. at 596, 553 S.E.2d at 118 ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003) ("The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties."). Such rulings are based on the contractual nature of arbitration agreements. *See Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999) ("Arbitration is available only when the parties involved contractually agreed to arbitrate.").

This proposition finds support in other jurisprudence. The United States Supreme Court has noted that, in limited circumstances, a court should assume that the parties intended the court to decide certain arbitration issues in the absence of "clear and unmistakable" evidence to the contrary. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). These limited circumstances typically involve certain "gateway matters," such as whether the parties have a valid arbitration agreement at all, or whether an arbitration clause applies to a certain type of controversy. *Id.* Thus, the prevailing authority supports the notion that courts may have at least a limited role where an arbitration clause otherwise applies.

In this case, the trial court was the proper forum for determining the enforceability of the arbitration clause in the contract between Simpson and Addy. Although the clause specifically stated that arbitration applied to issues involving "the validity and scope of this contract," Simpson challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place. Under the UAA, the question of this clause's validity was for the court to decide. *See* S.C. Code Ann. § 15-48-20(a) (2005).

Furthermore, because Simpson has challenged the validity of the entire arbitration clause on grounds of unconscionability, there can be no "clear and unmistakable" evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clause's validity. Accordingly, the trial court did not err in ruling on the issue of validity instead of submitting the issue itself to arbitration.

II. Denial of Addy's motion for protective order and/or to stay and compel arbitration.

Addy argues that the trial court erred in denying Addy's motion for protective order and/or to stay and compel arbitration. We disagree.

There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Towles*, 338 S.C. at 34, 524 S.E.2d at 842. The South Carolina Uniform Arbitration Act (UAA) provides that in any contract evidencing a transaction involving commerce, a written provision to settle by

arbitration shall be valid, irrevocable, and enforceable. S.C. Code Ann. § 15-48-10(a) (2005). Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

Despite these clear rules, arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44. Accordingly, a party may seek revocation of the contract under "such grounds as exist at law or in equity," including fraud, duress, and unconscionability. S.C. Code Ann. § 15-48-10(a). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364. In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). It is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

A. Absence of meaningful choice

Addy argues that the facts do not show that Simpson had no meaningful choice in agreeing to arbitrate. We disagree.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989). In determining whether a contract was "tainted by an absence of meaningful choice," *id.* at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at 293. *See also Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A Am.Jur.2d *Contracts* § 279 (2004))).

There are many cases in this jurisdiction and others involving the enforceability of arbitration clauses in adhesion contracts between commercial entities and consumers. Each transaction is analyzed on its own particular facts in conjunction with the federal and/or state policies favoring arbitration. We begin our inquiry with a focus on the decisions of courts in Ohio, which have heard numerous cases in the very recent past specifically addressing issues of unconscionability of arbitration clauses embedded in adhesion contracts between automobile retailers and consumers. *See Long v. N. Ill. Classic Auto Brokers,* 2006 WL 3783507 (Ohio Ct. App. 9th Dist. 2006); *Felix v. Ganley Chevrolet, Inc.*, 2006 WL 2507469 (Ohio Ct. App. 8th Dist. 2006), *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 9th Dist. 2004); *Battle v. Bill Swad Chevrolet,* Inc., 746 N.E.2d 1167 (Ohio Ct. App. 10th Dist. 2000).

The Ohio courts characterize automobiles as a "necessity" and factor this characterization into a determination of whether a consumer had a "meaningful choice" in negotiating the arbitration agreement. *See, e.g., Eagle*, 809 N.E.2d at 1175; *Cf. Henningsen v. Bloomfield Motors, Inc*., 161 A.2d 69, 85 (N.J. 1960) (invalidating auto manufacturer's standard-form disclaimers of implied warranties because such disclaimers frustrated consumer protection legislation given that in modern times, "automobiles are a common and necessary adjunct of daily life"). In this same context, the Ohio courts have adhered to the idea that sales agreements between consumers and retailers "are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties." *Eagle,* 809 N.E.2d at 1179. Under the Ohio courts' rationale, "the presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 866 (Ohio 1998).

Turning to the instant case, we first note that under general principles of state contract law, an adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Neither party disputes that the contract entered into by Simpson and Addy was an adhesion contract as such contracts are standard in the automobile retail industry. Adhesion contracts, however, are not per se unconscionable. Therefore, finding an adhesion contract is merely the beginning point of the analysis. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998).

We agree with the rationale of the Ohio courts and proceed to analyze this contract between a consumer and automobile retailer with "considerable skepticism." Under this approach, we first observe that the contract between Simpson and Addy involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society. Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson's claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any

assistance in the matter. *But see Munoz*, 343 S.C. 531, 542 S.E.2d 360 (failing to factor in the weaker party's status as a consumer in analyzing an unconscionability claim in an arbitration agreement between a consumer and a lender). Similarly, we note Simpson's allegation that the contract was "hastily" presented for her signature.

Moreover, regardless of the general legal presumptions that a party to a contract has read and understood the contract's terms,[2] we also find it necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Simpson to forego certain remedies that were otherwise required by statute.[3] While certain phrases within other provisions of the additional terms and conditions were printed in all capital letters,[4] the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page. Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law. Furthermore, and contrary to Addy's argument, the present transaction may be distinguished from that in *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004), where both parties were sophisticated business interests in an arms-length negotiation.

Accordingly, we find that when considered as a whole and in the context of an adhesion contract for a vehicle trade-in, the circumstances reveal that Simpson had no meaningful choice in agreeing to arbitrate claims with Addy.

B. Oppressive and one-sided terms

1. Limitation on statutory remedies in an arbitration clause

Addy contends that the arbitration clause's limitation on statutory remedies was not oppressive and one-sided. We disagree.

The arbitration clause in Simpson's contract with Addy provides that "[i]n no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party." Simpson's underlying complaint filed in civil court alleged, among other things, that Addy violated the South Carolina Uniform Trade Practices Act (SCUPTA) and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act). The SCUPTA requires a court to award treble damages for violations of the statute.[5] Similarly, the Dealers Act requires a court to award double damages for violations of the statute.[6]

In arguing that this provision was not oppressive and one-sided, Addy relies on *Carolina Care Plan*. In that case, this Court held that the issue of whether an arbitration clause

prohibiting an arbitrator from awarding "punitive damages" violated the public policy of the SCUTPA was not ripe for review. 361 S.C. 544, 606 S.E.2d 752. The Court explained that "an arbitrator may or may not choose to award treble damages in accordance with the SCUTPA, depending upon whether an arbitrator finds the SCUPTA was violated and whether the arbitrator finds that statutory treble damages are punitive or compensatory damages." *Id.* at 557, 606 S.E.2d at 759 (discussing *PacifiCare Health Systems v. Book*, 538 U.S. 401 (2003) (holding it was premature to conclude that meaningful relief for the plaintiff under RICO was unavailable in arbitration because the arbitrator may conclude that a restriction on "punitive damages" in an arbitration clause did not preclude the authorization of treble damages under RICO)).

Addy's comparison falls short. In fact, the present case requires the *Carolina Care Plan* analysis to be taken one step further because the arbitration clause at issue here goes beyond banning "punitive" damages generally and specifically prohibits an arbitrator from awarding statutorily required treble or double damages. Therefore, an arbitrator's ultimate classification of an award as "compensatory" or "punitive" is no longer relevant in an analysis of whether this particular clause is unconscionable: under this arbitration clause, treble and double damages - whether classified as compensatory or punitive - are prohibited outright.

The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 361 S.C. at 555, 606 S.E.2d at 758. In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest.[7] Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Accordingly, we find the provision prohibiting double and treble damages to be oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker. In conjunction with Simpson's lack of meaningful choice in agreeing to arbitrate, this provision is an unconscionable waiver of statutory rights, and therefore, unenforceable.

2. Dealer's remedies not stayed pending outcome of arbitration

Addy argues that the arbitration clause's provision reserving certain judicial remedies to the dealer and authorizing the award of the dealer's remedies even if the consumer's arbitration proceedings have not concluded is not oppressive and one-sided. We disagree.

While stating that "all disputes, claims or controversies between Dealer and Customer" are to be settled in binding arbitration, the arbitration clause notes several exceptions. Specifically, the clause provides:

Nothing in this contract shall require the Dealer to submit to arbitration any claims by Dealer against Customer for claim and delivery, repossession, injunctive relief, or monies owed by Consumer in connection with the purchase or lease of any vehicle and *any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration*. [emphasis added].

Our courts have held that lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable. *See Munoz*, 343 S.C. at 542, 542 S.E.2d at 365 (holding that an arbitration agreement between a consumer and a lender was not unconscionable where it allowed the lender to seek foreclosure while requiring the consumer to arbitrate any counterclaim in the foreclosure action); *Lackey v. Green Tree Financial Corp.*, 330 S.C. at 402, 498 S.E.2d at 905 (same). The primary basis for this conclusion in *Munoz* and *Lackey* was that requiring one party to seek a remedy through arbitration rather than the judicial system did not deprive that party of a remedy altogether. *See Munoz*, 343 S.C. at 542, 542 S.E.2d at 365. The *Lackey* court additionally explained that the judicial remedies which the lender in that case had reserved for itself (*i.e.* replevin and foreclosure actions) provided specific procedures for protecting the collateral and the parties during the pendency of the arbitration proceedings. *Lackey*, 330 S.C. at 401, 498 S.E.2d at 905. Because these protections related to both parties and were facilitated by enforcement procedures specified by law, the court of appeals concluded that, regardless of the lack of mutuality of remedy, the arbitration clause bore "a reasonable relationship to the business risks" inherent in secured transactions. *Id.*

However, the essence of Simpson's unconscionablity claim is not the general lack of mutuality of remedy, but rather the arbitration agreement's express stipulation that the dealer may bring a judicial proceeding that completely disregards any pending consumer claims that require arbitration. The clauses at issue in *Munoz* and *Lackey* contained no such directives. To this effect, we can easily envision a scenario in which a dealer's claim and delivery action is initiated in court, completed, and the vehicle sold prior to an arbitrator's determination of the consumer's rights in the same vehicle. As the arbitration agreement between Simpson and Addy is written, the dealer collects on a judgment awarded in a judicial proceeding regardless of any protections for the collateral afforded by law.

Addy's suggestion that there are procedural motions[8] available to the consumer which offset any potentially inconsistent effects of this provision, in our opinion, shows an informal acknowledgement on the part of Addy that such a provision on its face is indeed one-sided. These procedural mechanisms only act to place an additional burden on the consumer to ensure that the vehicle in controversy is not disposed of in a court proceeding initiated by the dealer before the adjudication of the consumer's claims in arbitration.

We continue to abide by our previous holdings in *Munoz* and *Lackey* that lack of mutuality of remedy will not invalidate an arbitration agreement. However, we find that the provision in the arbitration clause dictating that the dealer's judicial remedies supersede the consumer's arbitral remedies is one-sided and oppressive and does not promote a neutral and unbiased arbitral forum. Accordingly, in light of Simpson's lack of meaningful choice in agreeing to arbitrate, the provision is unconscionable and unenforceable.

3. Limitation on bringing warranty claims in a judicial forum

Addy argues that Simpson may not attack the arbitration clause on the grounds that it violates the Magnuson-Moss Warranty Act (MMWA), 15 U.S.C.A § 2301 *et seq.* (1997), because Simpson's underlying claims alleged no violation of the MMWA. We disagree.

The arbitration clause in the contract between Simpson and Addy states that it applies to "any and all disputes" including "automobile warranty" and "any consumer protection statute" - all of which implicate the MMWA. The provision further specifies that such matters are to be resolved only by "binding arbitration."

Rules promulgated by the Federal Trade Commission (FTC) state that informal dispute resolution procedures set forth in written warranties under the MMWA are not to be legally binding on any person. 16 C.F.R. § 703.5(j) (2006). *See also Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321 (11th Cir. 2001). Moreover, the MMWA has been interpreted to supersede the FAA with respect to consumer claims for breach of written warranty. *See Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423, 1437-38 (M.D. Ala. 1997). Therefore, the federal government has made it clear that parties may not agree to arbitrate an MMWA claim as the arbitration clause between Simpson and Addy attempted to do here.

This Court will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 361 S.C. at 555, 606 S.E.2d at 758. The fact that Simpson did not bring a claim under the MMWA is irrelevant to our conclusion that the inclusion of the MMWA in the scope of the arbitration clause is unenforceable as a matter of public policy. Accordingly, we hold that this provision of the arbitration clause is an unconscionable and unenforceable violation of public policy.

C. Severability

In the alternative to its argument that the arbitration clause is not unconscionable, Addy suggests that any provision found by this Court to be unconscionable may be severed from the clause and arbitration allowed to otherwise proceed. In fact, it seems as though the "Additional Terms and Conditions" section of the contract anticipated just such a scenario. Paragraph fifteen (15) articulates a severability clause providing that:

In the event any provision of this contract shall be held invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not be affected or impaired thereby.

We disagree.

In consideration of the federal and state policies favoring arbitration agreements, severability clauses have been used to remove the unenforceable provisions in an arbitration clause while saving the parties' overall agreement to arbitrate. *See Healthcomp Evaluation Servs. Corp. v. O'Donnell*, 817 So. 2d 1095, 1098 (Fla. Ct. App. 2d Dist. 2002) (holding that an arbitration clause was divisible and therefore a severability provision acted to remove the unenforceable provision from the arbitration clause without affecting the intent of the parties); *Primerica Fin. Servs. v. Wise*, 456 S.E.2d 631, 635 (Ga. Ct. App. 1995) (upholding the trial court's application of a severability clause to an arbitration agreement "in light of the liberal federal policy favoring arbitration agreements and the parties' intentions in entering into those agreements"). Additionally, legislation permits this Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result." S.C. Code Ann. § 36-2-302(1) (2003).

At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Intn'l Inc*, 413 F.3d 77, 84-85 (D.C. Cir. 2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for parties. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

In this case, we find the arbitration clause in the adhesion contract between Simpson and Addy wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause. While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions.[9]

Additionally, we note that there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability. Therefore, in holding today that the arbitration clause in the vehicle trade-in contract between Addy and Simpson is unconscionable due to a multitude of one-sided terms, we do not overrule our decision in *Munoz* where we held that an adhesion contract between a consumer and a lender was not unconscionable because it lacked mutuality of remedy. Instead, we emphasize the importance of a case-by-case

analysis in order to address the unique circumstances inherent in the various types of consumer transactions.

Accordingly, we affirm the trial court's denial of the motion to compel arbitration.

III. Presentation of evidence to determine unconscionability

Addy argues that the trial court erred in failing to provide Addy a reasonable opportunity to present evidence as to the commercial setting, purpose, and effect of the arbitration clause in order to aid the court in making a determination on unconscionability. We disagree.

S.C. Code Ann. § 36-2-302(2) (2003) provides:

When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Simpson filed her memorandum in opposition to Addy's motion alleging the unconscionability of the arbitration clause on March 16. After a motion hearing that same day, the trial court ordered mediation. When mediation failed, the court ordered Addy to submit a memorandum in support of its motion, which it did on July 13. The court considered the arguments in both memoranda before issuing its order on August 12.

In our opinion, the four months that passed between Simpson's memorandum and Addy's response was a "reasonable opportunity" for Addy to consider Simpson's arguments and respond with respect to the commercial setting, purpose, and effect of the arbitration clause. Accordingly, the trial court's consideration of the parties' memoranda without a hearing did not deny Addy a reasonable opportunity to present its evidence in order to aid the court's determination.

CONCLUSION

For the foregoing reasons, we find the arbitration clause between Simpson and Addy unconscionable and unenforceable in its entirety. Accordingly, we affirm the trial court's denial of Addy's motion to stay litigation pending arbitration.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

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[1] The Federal Arbitration Act (FAA), 9 U.S.C.A. § 1 *et. seq.* (1999) codifies federal policy on arbitration and arbitration agreements. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement

regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Although the vehicle trade-in contract at issue in the instant case involves interstate commerce, the contract contains a choice of law provision designating South Carolina law as governing law. Therefore, the UAA governs where, as here, the validity of the choice of law provision is not in issue. Additionally, FAA pre-emption of the UAA is not an issue in this case because the state laws applicable to this case do not operate to completely invalidate the parties' agreement to arbitrate. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001).

This distinction is insignificant in the instant case because the UAA and FAA provisions that apply to the issues are nearly identical. *See* S.C. Code Ann. § 15-48-10(a) (2005) and 9 U.S.C.A. § 2 (1999). Therefore, the analysis under state law is ultimately the same as the analysis under federal law. Moreover, even in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

[2] *See Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 ("[A] person who can read is bound to read an agreement before signing it."); *Towles*, 338 S.C. at 39, 524 S.E.2d at 845 ("[T]he law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents simply from reading the document.").

[3] Specifically, the arbitration clause prohibited an arbitrator from awarding double or treble damages.

[4] This included phrases in the "Disclaimer of Warranties" provision and the "Used Vehicle Disclosure." We note that S.C. Code Ann. § 36-2-316 (2003) requires disclaimers of implied warranties to be "conspicuous."

[5] *See* S.C. Code Ann. § 39-5-140(a) (1976) (providing that a "court *shall* award three times the actual damages sustained and may provide such other relief as it deems necessary or proper" [emphasis added]).

[6] *See* S.C. Code Ann. § 56-15-110(1) (2006) (providing that an individual "s*hall* recover double the actual damages by him sustained" [emphasis added]).

[7] This Court has previously recognized the strong public policy notions behind the enactment of the SCUPTA and the Dealers Act. *See deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 263, 536 S.E.2d 399, 404 (Ct. App. 2000) ("It is a violation of the Dealers Act for any manufacturer or motor vehicle dealer 'to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.'"(citing S.C. Code Ann. §56-15-40(1) (1991))); *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 326, 396 S.E.2d 105, 108 (Ct. App. 1989) (defining an unfair trade practice as a practice which is "offensive to public policy or which is

immoral, unethical, or oppressive"), *aff'd in part, rev'd in part, on other grounds*, 309 S.C. 263, 422 S.E.2d 103 (1992) (per curiam). The Dealers Act also specifically provides that "any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." S.C. Code Ann. § 56-15-130 (2006).

[8] Specifically, Addy suggests that a motion for protective order or a motion to stay pending arbitration.

[9] We acknowledge that in light of the state and federal policies favoring arbitration, many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause. However, we find the present case is distinguishable from those cases prescribing severability such that the invalidation of the arbitration clause in its entirety is the more appropriate remedy.

First, the arbitration clause in the contract between Simpson and Addy contained a total of three unconscionable provisions while arbitration clauses examined by courts prescribing severability generally contained only one offending provision. *See Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (severing a provision in an arbitration clause that prohibited the award of treble damages); *Safranek v. Copart, Inc*., 379 F. Supp. 2d 927 (D. Ill. 2005) (severing a provision in an arbitration clause that violated Title VII by requiring each party to bear its own attorney's fees and costs); *Ex parte Celtic Life Ins. Co.*, 834 So. 2d 766 (Ala. 2002) (severing a provision in an arbitration clause that was void as a violation of public policy by prohibiting the award of punitive damages); *Healthcomp Evaluation Servs. Corp.*, 817 So. 2d 1095 (severing a provision in an arbitration clause that violated state law by not permitting the parties to appeal or review an arbitration award). *But see Primerica Fin. Servs. v. Wise*, 456 S.E.2d 631 (severing two provisions governing the eligibility of arbitrators and the judicial review of an arbitration). Second, two of the provisions in this case were found unconscionable because the provisions contravened state and federal consumer protection law. The sheer magnitude of unconscionability present in a provision that prevents a party from vindicating the party's statutory rights, along with the fact that such a grossly unconscionable provision occurred not once, but *twice*, requires that we give significant consideration to a remedy in this situation that best serves the interests of public policy. *See Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994) (noting that severance of illegal provisions is inappropriate when the entire arbitration clause represents an "integrated scheme to contravene public policy" (citations omitted)).

Accordingly, while this Court generally would encourage severability of an unconscionable provision, we do not view the arbitration agreement between Simpson and Addy to be a proper candidate for the application of this remedy. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003); (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable

aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Cotton Yarn Antitrust Litig.*, 406 F. Supp. 2d 585, 604 (M.D.N.C. 2005) ("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights . . ., the Court finds that the better course of action in this case is to excise the arbitration clauses altogether.").

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Vicki F. Chassereau, Respondent,

v.

Global-Sun Pools, Inc. and Ken Darwin, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Hampton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 26318
Heard February 13, 2007 - Filed April 23, 2007

AFFIRMED

Michael H. Montgomery and Frank S. Potts, both of Montgomery Patterson Potts & Willard, of Columbia, for Petitioners.

John E. Parker and Lee D. Cope, both of Peters Murdaugh Parker Eltzroth & Detrick, of Hampton, for Respondent.

CHIEF JUSTICE TOAL: This case involves the interpretation of an arbitration agreement. The trial court denied Petitioners' motion to compel arbitration of several claims Respondent asserted as a result of Petitioners' aggressive debt collection practices, and the court of appeals affirmed the trial court's decision. We granted certiorari, and we now affirm.

FACTUAL/PROCEDURAL BACKGROUND

In April 2003, Respondent Vicki Chassereau ("Chassereau") contracted with Petitioner Global Sun Pools ("Global-Sun") to purchase an above ground pool. Chassereau contends that sometime thereafter, the pool began malfunctioning or was otherwise in need of repair. After Global-Sun allegedly refused to remedy the problems, Chassereau ceased making payments on the pool.

According to Chassereau, Petitioner Ken Darwin ("Darwin"), an employee of Global-Sun, began systematically harassing her as a result of her cessation of payments on the pool. Specifically, Chassereau alleges that Darwin repeatedly phoned her at her workplace; disclosed private information to Chassereau's friends, relatives, and co-workers; and also made false and defamatory statements about Chassereau to these same people. Ultimately, Chassereau sued Darwin and Global-Sun for defamation, intentional infliction of emotional distress, and a violation of S.C. Code Ann. § 16-17-430 (2003) (defining the criminal offense of "unlawful communication").

Global-Sun and Darwin moved to compel arbitration of Chassereau's claims, arguing principally that two documents executed during the course of the sale of the pool required that these claims be arbitrated.[1] The trial court disagreed and denied the motion to compel arbitration. Global-Sun and Darwin appealed.

The court of appeals affirmed the trial court's decision. *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 611 S.E.2d 305 (2005). In determining whether Chassereau's claims were required to be arbitrated, the court of appeals examined only the arbitration clause contained in the Installation Agreement. *Id*. at 633 n.8, 611 S.E.2d at 307 n.8. The court held that because the trial court's order relied only on the arbitration clause in the Installation Agreement, any argument regarding the arbitration clause contained in the Financing Agreement was not preserved for review. *Id*. Ultimately, the court of appeals agreed with the trial court's conclusion that Chassereau's claims were "based upon tortious conduct of the employees of [Global-Sun Pools] unrelated to the contract," and that the claims did not arise out of or relate to the contract. *Id*. at 635, 611 S.E.2d at 308. Accordingly, the court held that the arbitration clause in the Installation Agreement did not require that Chassereau's claims be arbitrated. *Id*.

Global-Sun and Darwin unsuccessfully petitioned the court of appeals to supplement the record on appeal with the Financing Agreement and to grant rehearing in the matter. This Court granted certiorari to review the court of appeals' decision, and Global-Sun and Darwin present the following issue for review:

Did the court of appeals err in determining that the Installation Agreement's arbitration clause did not apply to Chassereau's claims?

STANDARD OF REVIEW

Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The determination of whether a claim is subject to arbitration is subject to *de novo* review. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005); *United States v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir. 2001). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

LAW/ANALYSIS

Global-Sun and Darwin argue that the court of appeals erred in determining that the Installation Agreement's arbitration clause did not apply to Chassereau's claims. We disagree.

Both state and federal policy favor arbitration of disputes. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. *Id.* at 597, 553 S.E.2d at 118-119. However, arbitration is a matter of contract, and a party cannot be required to arbitrate any dispute which he has not agreed to arbitrate. *Id.* at 596, 553 S.E.2d at 118.

The resolution of this case is controlled by our recent pronouncement in *Aiken v. World Finance Corporation of South Carolina*, Op. No. 26313 (S.C. Sup. Ct. filed April 23, 2007). In that case, we refused to interpret an arbitration agreement with similar, though not identical, language to apply to illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate. We instructed:

Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

Id.

From the beginning of her relationship with Global-Sun, Chassereau certainly knew that she would be required to make payments on the pool she purchased. Furthermore, Chassereau must have expected that Global-Sun employees would contact her and request that she make payments on the pool if she ceased doing so. However, we believe a reasonable person would not have foreseen and would not have expected (and ought not to expect) Global-Sun employees to commit acts historically associated with the common law tort of outrage in seeking to collect an overdue debt. Our opinion in *Aiken* unequivocally provides that although these types of uncivilized acts often arise in the course of performance of contracts containing arbitration clauses, South Carolina

courts will not interpret arbitration clauses to apply to such acts which are outrageous and unforeseen.

Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis. While actions taken in an arrangement such as the one entered into by these parties might have the potential to generate several legal claims and causes of action, we have no doubt that Chassereau did not intend to agree to arbitrate the claims she asserts in the instant case. Accordingly, we hold that these claims are not covered by the arbitration agreement at issue in the instant case. [2]

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. The majority does not explicitly find that the claims alleged by Mrs. Chassereau do not arise in any matter relating to her agreements with Global-Sun, yet nonetheless holds that the arbitration clause contained in the Installation Agreement does not require Mrs. Chassereau's claims to be arbitrated.

We must decide whether Mrs. Chassereau's claims arise in any manner or are related to her agreement with Global-Sun.[3] Because I would hold that these claims qualify on both counts, I would reverse the decision of the court of appeals.

In examining whether an arbitration agreement extends to a particular tort claim, South Carolina courts must focus on the factual allegations supporting the claim to determine whether the allegations implicate the contractual agreement, regardless of the legal label assigned to the claim. *See* Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). We have held that a tort claim that does not arise under the governing contract is nevertheless required to be arbitrated if there is a "significant relationship" between the tort claim and the contract in which the arbitration clause is contained. Zabinski, 346 S.C. at 598, 553 S.E.2d at 119. Nothing relates more significantly to a contract than efforts to collect amounts due thereunder.

Case law from other jurisdictions supports this conclusion. In Green Tree Fin. Corp. v. Shoemaker, 775 So.2d 149 (Ala. 2000), the purchasers of a mobile home sued the company which financed the purchase. The purchasers claimed that after they became delinquent in their payments, the finance company began a systematic course of harassing them and invading their privacy. *Id*. at 150. Although the arbitration clause

in Shoemaker was broader than the clause at issue in the instant case, the Alabama Supreme Court held:

The plain language of this provision requires the plaintiffs to submit to arbitration all controversies that arise from, or relate to, the contract. That language clearly encompasses the plaintiffs' claim alleging invasion of privacy, a claim that arose out of the underlying business transaction of collecting delinquent monthly payments.

Id. at 151.[4]

The case of In re Conseco Fin. Servicing Corp., 19 S.W.3d 562 (Tx. Ct. App. 2000), also arose out of a financed purchase of a mobile home. Interpreting whether an arbitration clause identical to the clause at issue in *Shoemaker* applied to virtually identical claims, the court held:

[The complaint] arises from Conseco's alleged efforts to collect the amounts due under the terms of the agreement. Absent the contract, there would be no relationship between [the parties], and there would have been no debt collection . . . . Therefore, we conclude that [the plaintiff's] claims based on Conseco's acts in collecting the debt owed on the contract arise from or relate to the contract and so are within the scope of the arbitration clause.

Id. at 570.

I believe the reasoning of both Shoemaker and Conseco applies with equal force in the instant case. In my view, it is difficult to imagine something more related to a debt agreement than actions taken to collect the debt. Under any conceivable definition of the word "significant," actions taken in seeking to collect a debt *must* be significantly related to the debt.

The rule the majority announces is troubling in several regards. Primarily, the rule is inconsistent with the notion that all doubts regarding the question of arbitration are to be construed in favor of arbitration. *See* Zabinski, 346 S.C. at 597, 553 S.E.2d at 118. Similarly, the rule runs afoul of the oft repeated notion that unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. *See id*. Admittedly, these arbitration principles run counter to general notions of contract interpretation; namely, that a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement. *See* Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (citing 17A C.J.S. *Contracts* § 324). In contrast to the majority's rule, however, the principle that doubts are construed in favor of arbitration is rooted in a statutory proscription. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (stating that § 2 of the Federal Arbitration Act, 9 U.S.C. § 1, et seq., is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary).

Mrs. Chassereau's claims unquestionably arise out of and are significantly related to the Installation Agreement. Accordingly, I would reverse the decision of the Court of Appeals.

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[1] The parties refer to these documents as the "Installation Agreement" and the "Retail Installment Agreement." For the sake of convenience, we will refer to the latter document as the "Financing Agreement."

[2] On appeal, Global-Sun and Darwin also contend that the court of appeals erred in holding that any argument regarding the arbitration clause contained in the Financing Agreement was not preserved for review. In light of the foregoing analysis, however, it is unnecessary for us to address this contention. *See Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address additional issues if the resolution of another issue is dispositive).

[3] This limitation of our inquiry is based on the fact that the arbitration agreement at issue provides that "any disputes *arising in any manner relating to this agreement* . . . shall be subject to mandatory, exclusive and binding arbitration." (emphasis added).

[4] The arbitration clause in Shoemaker purported to apply not only to all claims arising out of or relating to the agreement, but also to all claims *between the parties*. *Id*. at 150. This distinction is insignificant, however, because the court in Shoemaker rests its holding only on the relationships of the claims to the agreement. *See id*. at 151. Thus, Mrs. Chassereau's attempt to distinguish Shoemaker on this ground is unpersuasive.

538 F.Supp.2d 468
(Cite as: 538 F.Supp.2d 468)

United States District Court,
D. Puerto Rico.
Earl A. GARRISON, et al, Plaintiffs,
v.
PALMAS DEL MAR HOMEOWNERS ASSOCIATION, INC., et al, Defendants.

Civil No. 06-2062 (GAG/MEL).
March 10, 2008.

Background: Homeowners brought action against homeowners association, its architectural review board, its direct, and their neighbors alleging that their refusal to permit them to perform construction work on their property violated their rights under deeds. Association, director, and neighbors moved to compel arbitration.

Holdings: The District Court, Marcos E. Lopez, United States Magistrate Judge, held that:
(1) Federal Arbitration Act (FAA) did not apply;
(2) owners' claim that they had right to make repairs to their property was subject to arbitration; and
(3) architectural review board was covered by deed's dispute resolution clause.

Motion granted.

West Headnotes

[1] Alternative Dispute Resolution 25T 134(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(1) k. In General. Most Cited Cases

Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In General. Most Cited Cases

Alternative Dispute Resolution 25T 182(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) k. In General. Most Cited Cases

Under Federal Arbitration Act (FAA), when deciding motion to compel arbitration, court must determine whether: (1) there exists written agreement to arbitrate, (2) dispute falls within scope of that arbitration agreement, and (3) party seeking arbitral forum has not waived its right to arbitration. 9 U.S.C.A. § 1 et seq.

[2] Commerce 83 80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases

Federal Courts 170B 403

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk403 k. Arbitration. Most Cited Cases

Deeds establishing and regulating rights, restrictions, conditions, and constitution of restrictive covenants affecting properties located in develop-

ment did not involve interstate commerce, and thus Federal Arbitration Act (FAA) did not apply in determining whether dispute over deeds' interpretation was subject to arbitration, even though parties were citizens of different states. 9 U.S.C.A. § 1 et seq.

[3] Federal Courts 170B ⚿403

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk403 k. Arbitration. Most Cited Cases

Under Federal Arbitration Act (FAA), validity and enforceability of arbitration agreements are matters of state contract law. 9 U.S.C.A. § 1 et seq.

[4] Alternative Dispute Resolution 25T ⚿251

25T Alternative Dispute Resolution
25TII Arbitration
25TII(F) Arbitration Proceedings
25Tk251 k. Mode and Course of Proceedings in General. Most Cited Cases

Alternative Dispute Resolution 25T ⚿329

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk327 Mistake or Error
25Tk329 k. Error of Judgment or Mistake of Law. Most Cited Cases

Under Puerto Rico law, where parties so provide in arbitration agreement, arbitrators must follow rules of law and make their awards in accordance with prevailing legal doctrines, but if arbitration agreement is silent with regard thereto, arbitrators may declare law as they please, and no award will be vitiated because of their legal errors. 32 L.P.R.A. § 3201.

[5] Alternative Dispute Resolution 25T ⚿200

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 k. Arbitrability of Dispute. Most Cited Cases

Under Puerto Rico law, dispute's arbitrability, that is, finding of whether agreement binds the parties to arbitrate given controversy, is judicial task.

[6] Alternative Dispute Resolution 25T ⚿151

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk150 Operation and Effect
25Tk151 k. In General. Most Cited Cases

Under Puerto Rico law, provision of deed stating that property owners "shall attempt" to resolve all claims not specifically excepted through alternative dispute resolution methods was mandatory in nature.

[7] Alternative Dispute Resolution 25T ⚿143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In General. Most Cited Cases

Under Puerto Rico law, homeowners' claim that they had right to make repairs to their property was subject to arbitration, even though deed's arbitration clause excepted state law claims not based on, or related to, deed or homeowners association's bylaws or rules, and owners asserted state law claims for declaratory judgment, injunction, breach of contract, negligence, bad faith, and tort, where owners' claims related to association's interpretation, application, and enforcement of deed provisions regarding its approval of construction design plans submitted by owners.

[8] Alternative Dispute Resolution 25T ⚿141

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk141 k. Persons Affected or Bound. Most Cited Cases

Under Puerto Rico law, homeowners association's architectural review board was covered by dispute resolution clause in deed defining homeowners' rights in development, where association was party to deed, deed permitted association to appoint agent to perform duties contained in deed, and association created board in order to perform those tasks.

[9] Alternative Dispute Resolution 25T ⚿141

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk141 k. Persons Affected or Bound. Most Cited Cases

Under Puerto Rico law, where principal is bound to arbitration and complaint arises out of agent's conduct on behalf of that principal, agent is bound by principal's agreement to arbitrate dis- putes.

***469** Roberto Ramos-Antonmattei, Cancio, Nadal, Rivera & Diaz, San Juan, PR, for Plaintiffs.

Jose E. Otero-Matos, Irizarry, Otero & Lopez, Victor J. Quinones-Martinez, Goldman Antonetti & Cordova, Raul Serrano-Diaz, Luis A. Rivera Cabrera, PSC, San Juan, PR, for Defendants.

OPINION AND ORDER

MARCOS E. LÓPEZ, United States Magistrate Judge.

I. PROCEDURAL BACKGROUND

On October 20 and 27, 2006, respectively, plaintiffs Earl A. Garrison, his wife Antonia J. Garrison and the conjugal legal partnership constituted by them filed a complaint and an amended complaint in this case against: (1) Palmas del Mar Homeowners Association, Inc., ("PDMHA"); (2) Palmas del Mar Architectural Review Board, Inc., ("PDMARB"); (3) Wilfredo López ("López"), PDMARB's Executive Director, his wife and the conjugal legal partnership constituted by them; and (4) David E. Melnyk, his wife Marlo Melnyk and the conjugal legal partnership constituted by them (collectively, "the Melnyks"), for declaratory judgment and injunction, breach of contract, negligence, bad faith and damages. Docket Nos. 1, 3.

Plaintiffs and the Melnyks are next door neighbors in the Palmas del Mar complex in Humacao, Puerto Rico. Their properties are separated by a party wall that is co-owned by plaintiffs and the Melnyks. As property owners in the Palmas del Mar complex, they are bound by the provisions contained in Deed No. 2 of August 27, 1997, authorized by Notary Public Rafael Cuevas Kuinlan, titled "Deed of Amended and Restated Declaration of Rights, Restrictions, conditions and Constitution of Restrictive Covenants and Establishment of Provisions for Palmas del Mar Homeowners Association Incorporated" ("Deed No. 2") and by Deed No. 130 of April 19, 1974, authorized by Notary Public Guillermo A. Nigaglioni, titled "Deed of Declaration of Rights, Restriction Covenants and Constitution of Restrictive Covenants for Single Family Residential Areas and Other Special Restrictions" ("Deed No. 130"). In general terms, the complaint claims that defendants have objected to or impeded construction work that plaintiffs want to perform within their property. Plaintiffs claim that said work is essential in order to rectify the safety hazards imposed by the deteriorated conditions of their property ***470** and that defendants' bad faith and negligent failure to allow them to make the improvements constitute a breach of the contractual duties imposed by Deed No. 2, and have resulted in damages to plaintiffs and their property. Docket No. 1, ¶¶ 43, 46, 49 and 53. On December 26, 2006, PDMHA answered the amended complaint. Docket No. 8. PDMARB and López answered the amended complaint on January 4, 2007. Docket 9.

On May 11, 2007, PDMARB and López filed a Motion to Dismiss and/or Compel Arbitration. Docket No. 22. In said motion, PDMARB and López moved the court to dismiss the amended complaint and compel the parties to arbitrate their claims under certain dispute resolution clauses contained in Deed No. 2 and Deed No. 130. The dispute resolution clause in Deed No. 2 provides that:

> The Association, Developer, Owners, all Persons subject to the Declaration, and any person not otherwise subject to this Declaration who agrees to submit to this Article (collectively, "Bound Parties") agree to encourage the amicable resolution of disputes involving the Properties and to avoid the emotional and financial costs of litigation if at all possible. Accordingly, each Bound Party Covenants and agrees that it shall attempt to resolve all claims, grievances or disputes, between such Bound Party involving the Properties, including, without limitation, claims, grievances or disputes arising out of, or relating to, the interpretation, application or enforcement of this Declaration, Bylaws, the Association rules, or the Certificate of Incorporation (collectively, "Claim") through alternative dispute resolution methods, such as mediation and arbitration.
>
> Bound Parties may pursue any lawful means, including alternative dispute resolution methods, to resolve (a) any suit by the Association against any Bound Party to enforce the provisions of Article V; or (b) any suit by the Association to obtain a temporary restraining order (or equivalent emergency equitable relief) and such other ancillary relief as the court may deem necessary in order to maintain the status quo and preserve the Association's ability to enforce the provisions of Article VII and Article IX; or (c) any suit between Owners (other than the Developer) seeking redress on the basis of a Claim which would constitute a cause of action under the laws of the Commonwealth of Puerto Rico in the absence of a claim based on the Declaration, Bylaws, Articles or rules of the Association, if the amount in controversy exceeds $5,000. Any Bound Party may submit such Claims to alternative dispute resolution methods, but there shall be no obligation to do so.
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> To foster the amicable resolution of disputes, the Board may adopt alternative dispute resolution procedures applicable to all Bound Parties.

Docket No. 22, Exhibit 1 (Deed No. 2, Part XIII (General Provisions), § K); *see also* Docket No. 32, Exhibit 1.[FN1]

> FN1. For purposes of Deed No. 2, the term "Association" refers to PDMHA. *See* Docket No. 2, Exhibit 1 (Deed No. 2, Part I (Amendment by Restatement), § I, ¶ C). The term "Developer" refers to Palmas del Mar Company, its successors and its assignees to which all or any portion of the rights of the Developer hereunder are assigned by written instruments recorded in the Registry of Property of Puerto Rico, Humacao Section. *Id.,* ¶ J. "Declaration" refers to the Declaration of Rights, Restrictions, Covenants and Constitution of Restrictive Covenants and Establishment of Provisions for the Palmas del Mar Homeowners Association, Inc. *Id.,* ¶ K. The term "Owner" refers to "the Owner as shown by the records in the Registry of the Property of Puerto Rico, Humacao Section whether it be one or more persons, firms, associations, corporations, or other legal entities, of fee simple title to any Residential Lot, Family Dwelling Unit, Community Facilities Lot, Commercial Lot, Community Facilities, Commercial Unit or Rural Tract situated upon the Properties but, notwithstanding any applicable theory of a mortgage shall not mean or refer to the mortgagee, its successors and assigns, unless and until such mortgagee has acquired title pursuant to foreclosure or a proceeding of deed in lieu of foreclosure." *Id.,* ¶ S.

> It does not refer, however, to "any lessee or tenant of an Owner." *Id.*

***471** The dispute resolution clause in Deed No. 130 provides that: "In the event of any disputes concerning a party wall, or under the provisions of this Part, each party shall choose one arbitrator, and such arbitrators shall choose one additional arbitrator, and the decision of the majority of all the arbitrators shall be final and conclusive of the question involved." Docket No. 42, Exhibit 1.

Plaintiffs opposed the Motion to Dismiss and/or Compel Arbitration on June 25, 2007, alleging that even though they are encouraged by said clauses to seek an amicable resolution of disputes through mediation or arbitration, they are by no means obligated to mediate or arbitrate and "may pursue any lawful means to resolve their claim against [d]efendants." Docket No. 32, at 4.

On July 13, 2007, the Melnyks filed a "Motion to Dismiss Pursuant to Rule 12(b)(6) for Failure to State a Claim on Which Relief can be Granted", and a Memorandum of Law in support thereof. Docket Nos. 35 and 36, respectively.[FN2] In said motion and memorandum of law, the Melnyks contend that plaintiffs do not state a valid claim under Article 1802 of the Puerto Rico Civil Code, P.R. Laws Ann., tit. 31, § 5141, are foreclosed from asserting any claim against defendants "due to the fact that the [p]laintiffs have a contractual obligation to bear a dispute resolution mechanism prior to initiate any proceeding before [the court]", and are not entitled to any compensatory damages, attorneys fees or any other relief. Docket No. 35, at 2. On July 19, 2007, PDMARB and López replied to plaintiffs' opposition to the request for dismissal and/or to compel arbitration filed by PDMARB and López. Docket No. 37.

> FN2. The Melnyks have not submitted themselves to the jurisdiction of the court and have not answered the amended complaint yet. They were served with summons by publication sometime between May 18 and June 20, 2007.
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> *See* Docket Nos. 24 and 30.

On July 23, 2007, the court entered an order denying the requests for dismissal filed by PDMARB, López and the Melnyks. The court, however, referred the requests to compel arbitration to the undersigned for disposition pursuant to *González v. GE Group Administrators, Inc.,* 321 F.Supp.2d 165, 166-67 (D.Mass.2004) and *Herko v. Metropolitan Life Ins. Co.,* 978 F.Supp. 141 n. 1 (W.D.N.Y.1997). Docket Nos. 38 and 39.

On August 6, 2007, plaintiffs opposed the request to compel arbitration contained in the Melnyks' "Motion to Dismiss Pursuant to Rule 12(b)(6) for Failure to State a Claim on Which Relief can be Granted." Docket No. 41. The Melnyks replied on August 13, 2007. Docket No. 45.

II. LEGAL ANALYSIS

A. The Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA").

PDMARB and López seek to compel arbitration relying only on state law, namely, the Puerto Rico Commercial Arbitration Act, P.R. Laws Ann., tit. 32, §§ 3201-3229 ("PRCAA"). *See* Docket No. 22, at 6-7. The Melnyks support their request to compel arbitration by briefly ***472** citing two cases decided by the U.S. Supreme Court which interpret the FAA, namely, *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) and *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). *See* Docket No. 36, at 12-13. Plaintiffs, on the other hand, rely solely on the language of the dispute resolution clause contained in Deed No. 2 in opposing the requests to compel arbitration.

[1] Congress enacted the FAA in order "[t]o overcome judicial resistance to arbitration." *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)

; *see also Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 474, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) ("The [FAA] was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate' (citation omitted), and to place such agreements 'upon the same footing as other contracts' ", *quoting Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 219-220, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) and *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). Thus, "[t]he FAA is intended to encourage speedy resolution of disputes and to bind parties to their voluntary agreements." *Ideal Unlimited Services Corp. v. Swift-Eckrich, Inc.,* 727 F.Supp. 75, 76 (D.P.R.1989). Therefore, the FAA allows "parties to an arbitrable dispute to move out of court and into arbitration as quickly and easily as possible." *Southland Corp. v. Keating,* 465 U.S. 1, 7, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *quoting Moses H. Cone Memorial Hospital,* 460 U.S. at 22, 103 S.Ct. 927.[FN3]

> FN3. Under the FAA, "[w]hen deciding a motion to compel arbitration, a court must determine whether '(i) there exists a written agreement to arbitrate, (ii) the dispute falls within the scope of that arbitration agreement, and (iii) the party seeking an arbitral forum has not waived its right to arbitration.' *Bangor Hydro-Electric Co. v. New England Tel. & Tel. Co.,* 62 F.Supp.2d 152, 155 (D.Me.1999). Only if all three prongs of the test are satisfied will a motion to compel arbitration be granted." *Combined Energies v. CCI, Inc.,* 514 F.3d 168, 2008 WL 274064, at *2 (1st Cir.2008) .

Section 2 of the FAA provides that:

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

9 U.S.C. § 2. By enacting this section, "Congress declared a national policy favoring arbitration and took away from the States the power to require a judicial forum for the resolution of the claims that the contracting parties had agreed to resolve through arbitration." *Southland Corp.,* 465 U.S. at 10, 104 S.Ct. 852.

The language contained in Section 2 of the FAA reveals that the FAA applies only to arbitration agreements involving "maritime transactions" or "contracts evidencing a transaction involving commerce." 9 U.S.C. § 2. For purposes of the FAA, "commerce" refers to "commerce among the several States or with foreign nations", or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.... 9 U.S.C. § . 1.

***473** The term "involving commerce" is to be broadly construed as a result of the strong federal policy favoring arbitration. *See Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 273-77, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *see also Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems Co.,* 643 F.2d 863, 867 (1st Cir.1981); *Medika Intern., Inc. v. Scanlan Intern., Inc.,* 830 F.Supp. 81, 84 (D.P.R.1993). Thus, if the contract at issue involves "commerce" as defined by the FAA, then said statute will govern the dispute; however, if the contract does not involve "commerce" as defined by FAA, then the dispute will be governed by state law. *See e.g., H.L. Libby Corp. v. Skelly and Loy, Inc.,* 910 F.Supp. 195, 197 (M.D.Pa., 1995) ("In the present case, if the contract at issue involves commerce, as that term is defined in the FAA, the FAA governs

the dispute. 'If, however, the transaction does not implicate interstate commerce, the *Erie* rules governing diversity jurisdiction will apply,' and we apply the substantive law of Pennsylvania, ...") (internal citations omitted); *Cecala v. Moore,* 982 F.Supp. 609 (N.D.Ill.1997) (applying Illinois' arbitration law instead of the FAA because contract for sale of real estate did not evidence a transaction involving interstate commerce); *Brown v. Hyatt Corp.,* 128 F.Supp.2d 697 (D.Hawai'i, 2000) (applying Hawaii's arbitration law instead of the FAA because plaintiff was asserting a tort claim that involved neither a "maritime transaction" nor "a contract evidencing a transaction involving commerce" as defined by the FAA); *see also Medina Betancourt et al. v. Cruz Azul de P.R.,* 155 D.P.R. 735, 742-43, 2001 WL 1617211 (2001) (Since Congress promulgated the FAA under the Commerce Clause, it only applies when the parties allege and prove that the transaction at issue involved interstate commerce; in this case, neither the FAA nor its interpretative case law applied to petitioner's claims insofar she did not alleged nor proved that employment contract was covered by the FAA because it involved interstate commerce). Therefore, the court must determine whether Deed No. 2 and Deed No. 130, which contain the dispute resolution clauses, relate to or involve "transactions involving commerce" within the meaning of the FAA.

The FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce, regardless of whether said transactions involve out-of-state purchasers. *See e.g., Saneii v. Robards,* 289 F.Supp. 2d 855 (W.D.Ky., 2003); *see also Cecala,* 982 F.Supp. 609; *SI V, LLC v. FMC Corp.,* 223 F.Supp.2d 1059 (N.D.Cal.2002). In *Saneii,* the court stated that:

> Notwithstanding its congenial effects on interstate commerce, the sale of residential real estate is inherently intrastate. Contracts strictly for the sale of residential real estate focus entirely on a commodity-the land-which is firmly planted in one particular state. The citizenship of immediate parties (the buyer and the seller) or their movements to or from that state are incidental to the real estate transaction. Those movements are not part of the transaction itself. All of the legal relationships concerning the land are bound by state law principles. Single residential real estate transactions of this type have no substantial or direct connection to interstate commerce. For all these reasons, logic suggests that such transactions are not among those considered as involving interstate commerce.
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> To characterize a residential real estate as involving interstate commerce under these circumstances would actually promote a lack of uniformity in the law, which is exactly contrary to one of ***474** the FAA's stated purpose. If the FAA applied to out-of-state purchasers of Kentucky real estate, different rules would apply in that considerable volume of transactions concerning property here. Applying Kentucky law to all Kentucky real estate transactions creates a more uniform and, therefore, a more equitable body of law.
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> [...]
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> On the other hand, more complex transactions related to land may involve interstate commerce. For instance, in *Allied-Bruce,* the United States Supreme Court found that a termite extermination contract between an Alabama homeowner and a local Terminix franchise did involve interstate commerce. 513 U.S. at 269, 115 S.Ct. 834, 130 L.Ed.2d 753. The Court came to this conclusion by applying the broad interpretation of § 2 of the FAA. *Id.* The Court's analysis was that Terminix was a commercial entity, the parties were from multi-states, and the termite-treating and house-repairing materials used by the defendants came from outside Alabama. *Id.* at 281, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753. More importantly, the Court articulated and emphasized the purposes behind the FAA and why a broad interpretation of "a contract evidencing a transaction

involving commerce" was necessary in order to be consistent with those purposes. *Id.* ....

Other courts have also held that contracts for the construction of various commercial buildings, and even the construction of sewers, involved interstate commerce for purposes of the FAA. *See Monte v. Southern Delaware County Authority,* 321 F.2d 870 (3rd Cir.1963); *Sears Roebuck and Co. v. Glenwal Co.,* 325 F.Supp. 86 (S.D.N.Y.1970); *Fite and Warmath Construction Co., Inc. v. MYS Corp.,* 559 S.W.2d 729 (Ky.1977). Although these cases concerned facilities which are located in one state and remained in one state, ... the scope of these contracts was much broader because of the interstate, commercial aspect of the transactions. None of these cases involves a straightforward residential real estate transaction.

Bearing in mind the historical intrastate nature of residential property transactions, as well as the Supreme Court's analysis of purposes of the FAA, the Court concludes that a residential real estate sales contract does not evidence or involve interstate commerce. This is true despite the broad reach of "interstate commerce," as articulated by the United States Supreme Court in *Allied-Bruce,* 513 U.S. at 265, 115 S.Ct. 834, 130 L.Ed.2d 753....

Saneii, 289 F.Supp.2d at 858-60 (footnotes omitted). Similarly, the court in *Cecala* expressed that:

In *Mathews v. Fluor Corp.,* 312 S.C. 404, 440 S.E.2d 880, 881 (1994), the purchasers of real estate alleged that the sellers had fraudulently misrepresented the condition of the property. The sellers moved to stay the proceedings and compel arbitration pursuant to the FAA. The property at issue was in South Carolina, the seller was a California entity and the buyer was a Pennsylvania partnership. In addition, transactions incident to the sale took place in jurisdictions outside South Carolina. Nevertheless, the Supreme Court of South Carolina held that the contract "did not involve interstate commerce as defined in the Federal Arbitration Act," and that it was therefore outside the scope of the FAA. *Id.* at 881-82.

Cecala, 982 F.Supp. at 611-12.

[2] As their titles suggest, Deed No. 2 and Deed No. 130 establish and regulate ***475** the rights, restrictions, conditions and constitution of restrictive covenants affecting the properties located in the Palmas del Mar complex and their owners. Deed No. 2 and Deed No. 130 focus essentially, if not entirely, on a commodity (that is, the land and properties of the Palmas del Mar complex), which is located in, and subjected to the laws of, Puerto Rico. Both deeds regulate real estate transactions in the sense that they impose terms and conditions applicable to purchasers of real estate properties at Palmas del Mar. Thus, these deeds are inherently intrastate and do not constitute "transactions involving commerce" within the meaning of the FAA. The fact that for jurisdictional purposes plaintiffs are citizens of New York while PDMHA and PDMARB are citizens of Puerto Rico is incidental to the real estate provisions and agreements executed through these deeds. *See Saneii,* 289 F.Supp.2d at 858; *Cecala,* 982 F.Supp. at 612.

[3] Furthermore, even if the FAA were applicable to the case at bar, the court would still have to resort to Puerto Rico law to ultimately adjudicate whether the dispute resolution clauses are valid and enforceable. Under the FAA, "the validity and enforceability of arbitration agreements are still matters of state contract law." *Colón De Sánchez v. Morgan Stanley Dean Witter,* 376 F.Supp.2d 132, 136 n. 3 (D.P.R.2005); *see also First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (courts should generally apply state contract law principles when deciding whether parties agreed to arbitrate a certain matter); *Perry v. Thomas,* 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) ("An agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, ... 'save upon

such grounds as exist at law or in equity for the revocation of any contract.' ... A state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."); *Campbell v. Gen. Dynamics Gov't Sys. Corp.,* 407 F.3d 546, 552 (1st Cir.2005) ("[F]or the most part, general principles of state contract law control the determination of whether a valid agreement to arbitrate exists."); *Sánchez-Santiago v. Guess, Inc.,* 512 F.Supp.2d 75, 78 (D.P.R.2007) ("In analyzing the first requisite, whether a valid agreement to arbitrate exists, the Court looks mainly to state law on contracts."). The court will therefore adjudicate the present arbitration dispute pursuant to Puerto Rico law.

B. The Puerto Rico Commercial Arbitration Act.

The PRCAA "authorizes and regulates in a sweeping manner the commercial arbitration agreements and it provides the way in which said agreements shall be enforced by the courts." *Autoridad Sobre Hogares v. Trib. Superior,* 82 D.P.R. 344, 359 (1961). The PRCAA is "substantially patterned on the arbitration legislation of California and on similar laws of other states, on the New York proceedings, and on the United States Arbitration Act." *Id.*

Article 1 of the PRCAA states that:

> Two (2) or more parties may agree in writing to submit to arbitration ... any dispute which may be the object of an existing action between them at the time they agree to the arbitration; or they may include in a written agreement a provision for the settlement by arbitration of any dispute which may in future arise between them from such settlement or in connection therewith. Such an agreement shall be valid, requirable and irrevocable except for the grounds ***476** prescribed by law for the reversal of an agreement.

P.R. Laws Ann., tit. 32, § 3201.[FN4] The Supreme Court of Puerto Rico has reiterated in many occasions that the PRCAA embodies a vigorous policy favoring arbitration and that all doubts about the existence of arbitration must be resolved in favor of that proceeding. *Medina Betancourt et al. v. Cruz Azul de P.R.,* 155 D.P.R. 735, 738, 2001 WL 1617211 (2001); *Paine Webber Inc. v. Soc. de Gananciales,* 151 D.P.R. 307, 312, 2000 WL 796054 (2000); *Universidad Católica de Puerto Rico v. Triangle Engineering Corp.,* 136 D.P.R. 133, 142-43, 1994 WL 932018 (1994); *McGregor-Doniger v. Tribunal Superior,* 98 D.P.R. 864, 869 (1970); *see also Sears Roebuck & Co. v. Herbert H. Johnson Assoc., Inc.,* 325 F. Supp. 1338, 1340 (D.P.R.1971). Although the courts are not barred from intervening in an arbitration agreement, judicial abstention is highly recommended. *Universidad Católica de Puerto Rico v. Triangle Engineering Corp.,* 136 D.P.R. 133, 142 (1994). [FN5]

FN4. Under the PRCAA, "[a]ny of the parties to a written arbitration agreement who claims negligence or refusal on the part of another party to resort to arbitration according to the agreement, may move the court for an order compelling the parties to resort to arbitration in conformity with the agreement between them.... If, after hearing both parties, the court finds that no substantial dispute exists as regards the existence or validity of the arbitration agreement, or the nonperformance thereof, said court shall issue an order commanding the parties to resort to arbitration in conformity with the terms of the agreement." P.R. Laws Ann. tit. 32, § 3204.

FN5. Article 3 of the PRCAA states that: "If any of the parties to a written arbitration agreement institutes action or other legal remedy, the court before which said action or remedy is pending shall, after being satisfied that any dispute involved in said action or remedy may be submitted to arbitration under said agreement, and on motion of any of the parties to the arbitration agreement, order said action or rem-

edy stayed, until such time as the arbitration has been proceeded with, according to the agreement." P.R. Laws Ann., tit. 32, § 3203.

[4] "Arbitration may arise from a clause accessory to a principal contract through which the parties agree to submit their future disagreements to arbitration, or may arise from a written agreement to settle an existing controversy. [The PRCAA] covers both situations." *Rivera v. Samaritano & Co. Inc.,* 108 D.P.R. 604, 608 (1979). "Where the parties so provide in the arbitration agreement, arbitrators must follow rules of law and make their awards in accordance with the prevailing legal doctrines. If the arbitration agreement is silent with regard thereto, the arbitrators may declare law as they please, and no award will be vitiated because of their legal errors." *Rivera*, 108 D.P.R. at 609 (*citing Autoridad Sobre Hogares de P.R.,* 82 D.P.R. at 353 (1961)). That is, "in the absence of a provision in the arbitration agreement or of a statutory requirement to that effect, the arbitrator is free to ignore substantive rules of law." *Rivera,* 108 D.P.R. at 609 .

[5] Notwithstanding the policy favoring arbitration embodied by the PRCAA, the arbitration mechanism is to be employed only if agreed by the parties and in the manner agreed upon. Thus, "a dispute's arbitrability, that is, the finding of whether an agreement binds the parties to arbitrate a given controversy, is a judicial task." *Crufon Const. v. Autoridad Edificios Públicos,* 156 D.P.R. 197, 202, 2002 WL 253784 (2002), *citing World Films, Inc. v. Paramount Pict. Corp.,* 125 D.P.R. 352, 361 (1990) and *Mun. de Ponce v. Gobernador,* 136 D.P.R. 776-783 (1994).

C. The dispute resolution clauses.

Defendants seek to compel arbitration of plaintiffs' claims relying on the dispute ***477** resolution clauses contained in Deed No. 2 and Deed No. 130.[FN6] The court will first address the applicability of the dispute resolution clause contained in Deed No. 2 inasmuch said clause may be determinative as to whether all of plaintiffs' claims must be submitted to arbitration.

FN6. The Melnyks, and PDMARB in particular, allege that even if Deed No. 2 does not compel plaintiffs to arbitrate their claims, the dispute resolution clause in Deed No. 130 would still require arbitration of said claims, insofar said clause specifically deals with disputes concerning party walls. *See* Docket No. 36, at 12-13, ¶¶ 2-3.

Defendants contend that the language of the resolution clauses in Deed No. 2 is mandatory, that plaintiffs are "contractually bound to arbitrate any claim [s] against [defendants] and are precluded from bringing said claim[s] before a court of justice", and therefore, that plaintiffs do not "have the option of refusing to arbitrate their claim[s]." Docket No. 22, at 5; *see also* Docket No. 36, at 3. Plaintiffs, on the other hand, contend that the language of the clauses is permissive and that they "may pursue any lawful means to resolve their claim against [d]efendants", including filing the present lawsuit. Docket No. 32, at 4.

[6] A fair and reasonable reading of the pertinent clause in Deed No. 2 suggests that the parties bound by Deed No. 2 agreed to submit all "Claims", as defined therein, to alternative dispute resolution methods such as mediation or arbitration, with the exception of those "Claims" that fall under any of the three specific situations listed in the second paragraph of said clause. To interpret the dispute resolution clause in Deed No. 2 as allowing any bound party the choice of whether to submit all "Claims" to arbitration, mediation or any other alternative dispute resolution method, or to proceed directly to litigate said "Claims" in court without first exhausting such alternative dispute resolution mechanisms would render the clause superfluous and without any practical effect. If the parties bound by Deed No. 2 were able to decide whether to arbitrate or mediate their "Claims" or not, then there would have been no need for the dispute res-

olution clause in the first place. The dispute resolution clause, by using in its first paragraph the words "shall attempt", is mandatory in nature and requires the bound parties to submit their "Claims" to alternative dispute resolution mechanisms, except for the three type of "Claims" that are specified in the second paragraph of the clause, "where there shall be no obligation to do so."

The question then, becomes, whether plaintiffs' claims fall under any of the three exceptions established in the second paragraph of the dispute resolution clause contained in Deed No. 2. Said exceptions are the following:

> (a) any suit by the Association against any Bound Party to enforce the provisions of Article V; or
>
> (b) any suit by the Association to obtain a temporary restraining order (or equivalent emergency equitable relief) and such other ancillary relief as the court may deem necessary in order to maintain the status quo and preserve the Association's ability to enforce the provisions of Article VII and Article IX; or
>
> (c) any suit between Owners (other than the Developer) seeking redress on the basis of a Claim which would constitute a cause of action under the laws of the Commonwealth of Puerto Rico in the absence of a claim based on the Declaration, Bylaws, Articles or rules of the Association, if ***478** the amount in controversy exceeds $5,000.

Docket No. 22, Exhibit 1 (Deed No. 2, Part XIII (General Provisions), § K); *see also* Docket No. 32, Exhibit 1.[FN7]

> FN7. Article V of Deed No. 2 is titled "Covenants for Maintenance Assessments". Article VII is titled "Architectural Standards" and provides for the creation of the PDMARB as an agent appointed by PDMHA with authority to perform all architectural review functions related to the properties located at Palmas del Mar complex. Article IX is titled "Use of Property" and, as suggested by its title, contains regulations regarding the use of said properties. Docket No. 22, Exhibit 1 (Deed No. 2, Part XIII (General Provisions), § K); *see also* Docket No. 32, Exhibit 1.

In the case at bar, it is clear that the first two exceptions do not apply inasmuch as PDMHA is not a plaintiff in this case and therefore the present case is not a "suit by the Association" for purposes of subsections (a) and (b) of the second paragraph of the dispute resolution clause in Deed No. 2.

As to subsection (c), it is clear from its language that the same only applies if the following three elements are present:

> (1) the claims are actionable under Puerto Rico law;
>
> (2) the claims are not based on, related to or do not stem from Deed No. 2 or PDMHA's bylaws or rules; and
>
> (3) the claims exceed the amount of five thousand dollars.

Plaintiffs describe this action as "an action for declaratory judgment, seeking relief and money damages against defendants ... for their unreasonable, unlawful and bad faith actions which undoubtedly constitute a clear breach of their obligations under [Deed No. 2] and the 'Palmas del Mar Architectural Review Board Design Codes.' " Docket No. 1, ¶ 1. Thus, plaintiffs announce in the very first paragraph of the complaint that their claims relate to and stem from defendants' alleged interpretation, application or enforcement of several provisions contained in Deed No. 2.

[7] The complaint asserts several causes of action under Puerto Rico law, namely, declaratory judgment and request for injunction, breach of contract, negligence, bad faith ("dolo") and tort.[FN8] Insofar these claims are actionable under Puerto Rico law, plaintiffs' claims meet the first element

required for subsection (c) of the second paragraph of the dispute resolution clause in Deed No. 2 to apply. Furthermore, plaintiffs also satisfy the third element of subsection (c) inasmuch the complaint requests compensation in an amount of not less than ten million dollars. *See* Docket No. 3, ¶¶ 43, 46, 49 and 53. Plaintiffs, however, fail to meet the second element required by subsection (c). As plaintiffs themselves allege and acknowledge throughout the complaint, their claims relate to or stem from defendants' alleged interpretation, application or enforcement of the provisions contained in Deed No. 2 regarding the approval by PDMARB of the construction design plans submitted by plaintiffs.[FN9] Therefore, plaintiffs' claims do ***479** not fall under any of the exceptions listed in the second paragraph of the dispute resolution clause in Deed No. 2. Plaintiffs' claims must be submitted to arbitration, mediation or any other alternative dispute resolution mechanisms consistent with said clause.

FN8. The cause of action for declaratory judgment and request for injunction is brought pursuant to Rules 59 and 65(a) of the Puerto Rico Rules of Civil Procedure, P.R. Laws Ann., tit. 32, App. III R. 59 and 65(e), as well as Fed. R. Civ. Proc. R. 57, 28 U.S.C. § 2001. *See* Docket No. 3, ¶ 40.

FN9. In the opposition to the Melnyks' request to compel arbitration, plaintiffs argue that the dispute resolution clause in Deed No. 2 does not preclude them from litigation their tort claims brought pursuant to article 1802 of the Puerto Rico Civil Code, because said claims "go beyond the issue of party walls." Docket No. 41, at 4 ("In any event, the above described arbitration dispositions do not preclude this suit brought pursuant to Article 1802 of the Puerto Rico Civil Code, as the claims of this action go beyond the issue of party walls."). In the complaint, plaintiffs allege several times that PDMARB's, PDMHA's, the Lopez's and the Melnyks' negligent actions or omissions in interpreting, applying or enforcing Deed No. 2 and their failure to comply with their duties thereunder constitute the basis of the tort claims under article 1802. Docket No. 3, ¶¶ 45-46,48-49, 51-53. The damages that plaintiffs claim to have suffered as a result of these actions and omissions include the inability to use and peacefully enjoy their property, a decrease in the value of the same, emotional and mental distress, as well as a "deteriorated health condition as evidenced by a recent stroke caused by the [PDMARB's] failure to perform its duties." *Id.* Inasmuch plaintiffs are essentially claiming that the damages allegedly suffered by them arise from or are related to defendants' interpretation, application and/or enforcement (or lack thereof) of Deed No. 2, said claims also fall within the very broad definition of "Claims" contained in the first paragraph of the dispute resolution clause. Furthermore, plaintiffs can not litigate their tort claims until the "issue of the party walls" is first ventilated through arbitration. Allowing plaintiffs to litigate said claims at this juncture of the proceedings would not promote an efficient use of judicial resources.

Finally, the court must consider plaintiffs' argument that the dispute resolution clause in Deed No. 2 does not apply to PDMARB because said entity is not a "Bound Party" for purposes of the clause. In particular, plaintiffs allege that the dispute resolution clause contained in Deed No. 2 does not apply to PDMARB because PDMARB "is an entity different from the PDMHA" and that PDMARB "merely acts as an agent appointed by the PDMHA to perform the duties contained in Article VII" of Deed No. 2. Thus, plaintiffs contend that PDMARB does not qualify as a "Bound Party" that is subject to the dispositions of the dispute resolution clause. *See* Docket No. 32, at 4-5. PDMARB argues that

the disputes resolution clause includes "all Persons subject to [Deed No. 2]" in its definition of "Bound Parties" and that although PDMARB is an entity apart from PDMHA, "it is nonetheless a [B]ound [P]arty ... precisely because it was specifically created pursuant to, and performs its duties and functions of architectural review under, and in strict compliance with, the dispositions of Articles VI and VII of [Deed No. 2]." *See* Docket No. 37, at 2-3.

[8] Deed No. 2 defines as a "Bound Party" any person subject to said deed. Thus, the question becomes whether PDMARB is subject to Deed No. 2. The answer to this question is in the affirmative. PDMARB was created as an agent of PDMHA pursuant to Article VII of Deed No. 2, which states that:

> [PDMHA] shall have the right, but not the obligation, to appoint an agent to perform the duties contained in this Article. The agent may be the Palmas del Mar Architectural Review Board, Inc., its successors or assignee, or any other agent [PDMHA] deems proper to perform the architectural review functions. Reference to the Architectural Review Board ("ARB") in this Article shall include, if applicable, any agent appointed by [PDMHA] to perform the duties of the ARB.

Docket No. 22, Exhibit 1 (Deed No. 2, Part VII (Architectural Standards); *see also* Docket No. 32, Exhibit 1). Article VII assigns the PDMARB broad authority and jurisdiction to perform the following functions, among others, to: (1) "review and approve all original construction on any portion of the Properties"; (2) "prepare and promulgate design and development ***480** guidelines and application and review procedures"; (3) "authorize variances from compliance with any of its guidelines and procedures" under certain specific circumstances; and (4) seek enforcement of any decision of the PDMARB in the courts of competent jurisdiction, as well as any other remedy, at law or in equity, including without limitation specific performance and injunctive relief. Thus, because PDMARB is subject to Deed No. 2 inasmuch it was created pursuant to said deed to perform the duties specified therein, PDMARB also falls under the definition of "Bound Party" and is covered by the dispute resolution clause.

[9] Furthermore, where a principal is bound to arbitration and the complaint arises out of the agent's conduct on behalf of that principal, the agent is bound by the principal's agreement to arbitrate disputes. *See e.g., Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 7 F.3d 1110, 1121 (3d Cir.1993) ("Because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements."); *Roby v. Corporation of Lloyd's,* 996 F.2d 1353, 1360 (2nd Cir.1993) ("Courts in this and other circuits have consistently held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement."); *Davidson v. Becker,* 256 F. Supp. 2d 377, 384 (D.Md.2003) (agent of corporation providing dental services could compel former employee to arbitrate racial discrimination claims against corporation, even though agent was not signatory to agreement containing arbitration provision). Thus, PDMARB is also covered by and can invoke the protection of the dispute resolution clause in Deed No. 2.[FN10]

> FN10. Having reached the conclusion that the dispute resolution clause in Deed No. 2 mandates arbitration of all of plaintiffs' claims, it is unnecessary to entertain an analysis as to whether the dispute resolution clause in Deed No. 130 also requires arbitration of said claims.

III. Conclusion

In view of the foregoing, the requests to compel arbitration (Docket Nos. 22 and 35) are hereby GRANTED.

IT IS SO ORDERED.

D.Puerto Rico,2008.

538 F.Supp.2d 468
(Cite as: 538 F.Supp.2d 468)

Garrison v. Palmas Del Mar Homeowners Ass'n, Inc.
538 F.Supp.2d 468

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elizabeth N. Timmons, Individually and through her Attorney-in-Fact, Charles T. Timmons, Respondent,

v.

Jane T. Starkey and UBS Financial Services, Inc., Defendants,

of whom:

UBS Financial Services, Inc. is the Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4459
Submitted October 1, 2008 – Filed November 20, 2008

REVERSED and REMANDED

George C. Covington, of Charlotte, North Carolina, for Appellant.

Jan L. Warner, Matthew E. Steinmetz, of Columbia, for Respondent.

GEATHERS, J.: This action involves several tort and contract claims arising from the alleged conversion of account funds by Jane Starkey (Starkey), a securities broker employed with Appellant UBS Financial Services, Inc. (UBS). Starkey is also the daughter of Respondent Elizabeth Timmons (Timmons), who filed this action against Starkey and UBS.

UBS appeals the circuit court's denial of its motion to compel arbitration.[1] UBS challenges the circuit court's ruling that arbitration is inappropriate because Timmons' claims are independent of the parties' contract. We reverse.

FACTS/PROCEDURAL HISTORY

In June 1995, Timmons executed a durable power of attorney naming her daughter, Starkey, as her attorney-in-fact. This instrument was not recorded with the Greenville County Register of Deeds until June 3, 2004.[2] Article III of the Power of Attorney includes the following language:

No person who may act in reliance upon the representations of Attorney for the scope of authority granted to Attorney shall incur any liability to me or to my estate as a result of permitting Attorney to exercise any power, nor shall any person dealing with Attorney be responsible to determine or insure the proper application of funds or property.

(emphasis added).

In April 1996, Timmons entered into a contract with J.C. Bradford & Co. (J.C. Bradford) for investment services. The contract form included a broadly-worded arbitration clause:

I agree . . . that all controversies which may arise between us concerning any transaction or the construction, performance or breach of this or any other agreement between us . . . shall be determined by arbitration.

(emphasis added).

As UBS became the successor-in-interest to J.C. Bradford, Timmons' account with J.C. Bradford was converted to an account with UBS. In November 2004, Timmons executed an investment services contract with UBS. That contract also contained a broadly-worded arbitration clause. The UBS contract states, in part,

BY SIGNING BELOW, I UNDERSTAND, ACKNOWLEDGE AND AGREE . . . that in accordance with the last paragraph of the Master Account Agreement entitled 'Arbitration[,]' I am agreeing in advance to arbitrate any controversies which may arise with . . . UBS Financial Services in accordance with the terms outlined therein[.]

(emphasis in original).

The arbitration clause of the Master Account Agreement states, in part,

Client agrees . . . that any and all controversies which may arise between UBS Financial Services, any of UBS Financial Services' employees or agents and Client concerning any account, transaction, dispute or the construction, performance or breach of this Agreement or any other agreement . . . shall be determined by arbitration.

(emphasis added).[3]

According to the allegations of Timmons' complaint, Starkey removed over $129,000 from Timmons' accounts at UBS and Branch Banking & Trust and used those funds for Starkey's personal benefit. Timmons then filed an action against Starkey and UBS, seeking damages for Starkey's alleged conversion of funds from Timmons' accounts. Timmons asserted causes of action against Starkey and UBS for breach of fiduciary duty, negligence, conversion, influenced transactions, intentional infliction of emotional distress, and violation of the Omnibus Adult Protection Act.[4] Timmons' complaint also included the following causes of action against Starkey alone: breach of contract, breach of contract accompanied by a fraudulent act, and constructive trust.

Both UBS and Starkey filed separate motions to compel arbitration of Timmons' claims. The circuit court concluded that the allegations of the complaint fell outside the scope of the arbitration clause in the investment services contract and that the claims asserted by Timmons were completely independent of the contract. Therefore, the circuit court denied both motions to compel arbitration. This appeal follows.

STANDARD OF REVIEW

The determination of whether a claim is subject to arbitration is subject to de novo review. **Chassereau v. Global-Sun Pools, Inc.**, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings. Id.

LAW/ANALYSIS

UBS argues that the circuit court erred in denying its motion to compel arbitration because Timmons' claims against UBS fell within the scope of the arbitration clause in the parties' contract. In the alternative, UBS argues that there was a significant relationship between Timmons' claims and the parties' contract and that, therefore, arbitration was required. We agree.

Both South Carolina and federal policy favor the arbitration of legal disputes. Zabinski v. Bright Acres Assoc(s)., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Arbitration is required when (1) an arbitration clause specifically encompasses the asserted claims; or (2) there exists a significant relationship between the asserted claims and the parties' contract. Id. at 596-598, 553 S.E.2d at 118-119 (internal citations omitted).

A. Scope of Arbitration Clause

To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. Id. at 597, 553 S.E.2d at 118. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Id. Unless the court can say with "positive assurance" that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. Id.

UBS asserts that all of Timmons' claims are based on the underlying allegation that UBS failed to prevent Starkey from removing funds from Timmons' account and that such an allegation is within the scope of the arbitration clause. UBS argues that Starkey's removal of the funds was a "transaction" contemplated by the arbitration clause in both the J.C. Bradford contract and the UBS contract. We agree.

The respective arbitration clauses in the J.C. Bradford and UBS contracts provide that all controversies which may arise between UBS and Timmons concerning any transaction or the performance or breach of any contract between the parties shall be determined by arbitration. Additionally, the arbitration clause in the UBS agreement expands the scope of arbitrable controversies to include those concerning any account or dispute.

Unquestionably, Starkey's removal of funds from Timmons' account constituted a "transaction" within the scope of the respective arbitration clauses in the J.C. Bradford contract and the UBS contract. Further, Starkey's removal of funds concerned an "account" within the scope of the arbitration clause in the UBS contract. Moreover, all of Timmons' claims depend on the allegation that UBS failed to prevent Starkey from removing funds from Timmons' account.[5] Any duty that UBS owed toward Timmons arose solely from their contractual relationship. Therefore, the respective arbitration clauses in the J.C. Bradford contract and the UBS contract encompass Timmons' claims.

B. Significant Relationship

UBS alternatively argues that a significant relationship exists between Timmons' claims and the parties' contract because the underlying allegations involve alleged duties created solely by the parties' contractual relationship. We agree.

Even if a dispute does not arise under the parties' contract, a broadly-worded arbitration clause in the contract applies to that dispute when a "significant relationship" exists between the asserted claims and the contract. See Zabinski, 346 S.C. at 598, 553 S.E.2d at 119. An instructive discussion of the "significant relationship" test is set forth in Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). In Aiken, a borrower's claims against a lender were based on an allegation that the lender's employees conspired to use the borrower's personal information to obtain sham loans and to embezzle the proceeds. Aiken, 373 S.C. at 147, 644 S.E.2d at 707. The South Carolina Supreme Court declined to find a significant relationship between the borrower's claims and his loan contract with the lender. Id. at 151, 644 S.E.2d at 709. The Court stated that it would refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings. Id.

The Court also emphasized that a determination of foreseeability is to be made from the standpoint of the injured party, i.e., the expectations of a reasonable man, rather than from the standpoint of the reviewing court. Id. at 151 n. 6, 644 S.E.2d at 709 n.6. The

Court made it clear that it did not seek to exclude all intentional torts from the group of claims subject to arbitration, but that it sought only to distinguish those outrageous torts that are legally distinct from the contractual relationship between the parties. Aiken, 373 S.C. at 152, 644 S.E.2d at 709.

Here, Timmons' claims depend on the underlying assertion that UBS failed to prevent Starkey from removing Timmons' funds from her account. Any duty to prevent the removal of funds from Timmons' account arises solely from the parties' contractual relationship. Further, we agree with UBS's argument that the exception for outrageous and unforeseeable conduct does not apply to Timmons' claims, so as to preclude arbitration of those claims. In light of Timmons' execution of the power of attorney, it was foreseeable that UBS could determine that Starkey had the authority to withdraw funds from Timmons' account.

Starkey's alleged misappropriation of the funds after she withdrew them from Timmons' account may have been unforeseeable and certainly outrageous. However, the relevant inquiry does not focus on the foreseeability of Starkey's betrayal of Timmons' trust, but rather on the foreseeability of UBS's inaction prior to and during Starkey's withdrawal of the funds from the UBS account.

Further, foreseeability must be examined from the standpoint of the injured party, i.e., the expectations of a reasonable person in Timmons' position at the time she entered into the contract with UBS. See Aiken, 373 S.C. at 151 n. 6, 644 S.E.2d at 709 n. 6. In applying the reasonable person standard to the facts of Timmons' case, it is impossible to ignore her execution of the power of attorney. That instrument gave Starkey clear legal authority to withdraw funds from Timmons' accounts and expressly held harmless anyone who might rely on the power of attorney while doing business with Starkey. By the time Timmons signed the investment services contract with UBS in November 2004, the power of attorney had been recorded.[6] Therefore, it was foreseeable to a reasonable person in the context of normal business dealings that UBS would allow Starkey to withdraw funds from Timmons' account.

CONCLUSION

Arbitration is required when either (1) an arbitration clause specifically encompasses the asserted claims; or (2) there exists a significant relationship between the asserted claims and the parties' contract. The respective arbitration clauses in the J.C. Bradford contract and the UBS contract specifically encompass Timmons' claims against UBS because they all concern a transaction involving her UBS account.

Further, there is a significant relationship between the parties' contract and Timmons' claims. Those claims depend on the allegation that UBS breached a duty to prevent Starkey from transferring Timmons' funds from her UBS account. That alleged duty was created solely by the contractual relationship between the parties. Moreover, the exception for outrageous and unforeseeable conduct that would preclude arbitration does not apply to UBS because the possibility that UBS could rely on the power of

attorney was foreseeable to Timmons when she signed the J.C. Bradford and UBS contracts. Based on the foregoing, the circuit court must compel arbitration of Timmons' claims against UBS.

Accordingly, the circuit court's order is

REVERSED and REMANDED.[7]

HEARN, C.J., and HUFF, J., concur.

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[1] Starkey has not appealed the circuit court's denial of her motion to compel arbitration.

[2] S.C. Code Ann. § 62-5-501(C) (Supp. 2007) requires a durable power of attorney to be recorded to be effective, unless the authority of the attorney-in-fact relates solely to the person of the principal.

[3]Timmons argues that UBS'S Master Account Agreement should not have been included in the Record on Appeal because UBS failed to present it to the circuit court. We disagree. While the Master Account Agreement was not included with UBS'S pleadings, it was incorporated into the UBS contract by direct reference, and the UBS contract was included in UBS'S Motion to Compel Arbitration. In any event, the circuit court's order sets forth the pertinent language of the arbitration clause in the J.C. Bradford contract and includes a finding that Timmons signed a similar contract with UBS. Timmons did not appeal this finding, and as such, it is the law of the case. See Charleston Lumber Co., Inc. v. Miller Hous. Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871-72 (2000) (holding that an unappealed ruling is the law of the case).

[4] S.C. Code Ann. §§ 43-35-5 to -595 (Supp. 2007).

[5]None of Timmons' claims include any allegations of improper management of her account, such as churning or making improper investments, prior to Starkey's removal of funds from the account.

[6] Even when Timmons signed the J.C. Bradford contract, she should have been aware that the hold-harmless language in the existing power of attorney, once recorded, could induce those doing business with Starkey to honor her full control over the account funds.

[7] Pursuant to Rule 215, SCACR, we decide this appeal without oral arguments.

2009 WL 5125113
United States District Court,
S.D. New York.

ARGUS MEDIA LTD., Plaintiff,
v.

TRADITION FINANCIAL SERVICES INC. and TFS Energy LLC, Defendants.

No. 09 Civ. 7966(HB).Dec. 29, 2009.

Opinion

OPINION & ORDER

Hon. HAROLD BAER, JR., District Judge.

*1 Plaintiff Argus Media Ltd. ("Argus" or "Plaintiff") filed its Complaint in this action against Tradition Financial Services, Inc. and TFS Energy LLC ("Defendants") on September 16, 2009, alleging two claims of copyright infringement under the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* Defendants now move to dismiss the Complaint, or in the alternative, to stay this action pending the outcome of two parallel litigations currently pending in arbitration in Houston, Texas and in the High Court of Justice in the United Kingdom. For the reasons set forth below, Defendants' motion to stay this action is granted.

I. FACTUAL BACKGROUND

Argus, a UK company, publishes and sells business intelligence reports, market assessments and special studies relating to the energy, transport and emissions markets. Specifically, with respect to the allegations in this action, Argus develops, publishes and sells energy price indices and writes, publishes and sells news stories and analytical commentary regarding the energy markets. The two publications that Argus produces that are the subject of the instant Complaint are the *Argus Coal Daily International* newsletter (*"Coal Daily"*) and the *Argus Air Daily* newsletter (*"Air Daily"*).

By agreement dated November 8, 2001, a predecessor-in-interest to Argus entered into a license to send by electronic mail a single copy of *Coal Daily* to Daniel James, an employee of Tradition Financial Services Limited ("Tradition UK"), an affiliate of Defendants located in the United Kingdom. Pursuant to the *Coal Daily* License, one copy of each issue was emailed as a PDF attachment to Mr. James between November 2001 and expiration of the License on February 18, 2009. The *Coal Daily* License provided that "[t]his Agreement is regulated by English law and the parties agree to the non-exclusive jurisdiction of the English Courts." In its instant Complaint, Argus alleges that Mr. James routinely made and distributed unauthorized copies of *Coal Daily* to Defendants' employees in the United States, who in turn made and distributed unauthorized copies to other employees and to third parties. On June 26, 2009 Argus brought suit against Tradition UK in the High Court of Justice in the United Kingdom alleging infringement of the *Coal Daily* copyright under UK law (the "UK Action").

Separately, by agreement dated September 11, 2006, Argus Media U.S. (an affiliate of Argus) agreed to send by electronic mail a single copy of *Air Daily* to Eric Klein, and employee of Defendant TFS. Pursuant to the *Air Daily* License, one copy of each *Air Daily* was emailed as a PDF attachment to Mr. Klein from September 2006 until TFS terminated the License in September 2008. Although not explicitly stated in the Complaint, it appears that Argus Media U.S. continued to send daily copies of *Air Daily* to Mr. Klein even after the License had been terminated. Argus alleges that Mr. Klein made and distributed unauthorized copies of *Air Daily* to other employees and to third parties in the United States. The *Air Daily* License contained a binding arbitration clause as follows: "[A]ll claims arising under this Agreement shall be brought before a single arbitrator with expertise concerning copyright matters pursuant to the Commercial Arbitration Rules of the **American Arbitration Association**." After they had received cease and desist letters from Argus, Defendants filed a demand for arbitration in Houston, Texas for a declaratory judgment that it had never infringed any of Argus's copyrights (the "Texas Arbitration"). In its answer, Argus counterclaimed with identical allegations and prayers for relief that it asserts in this action under the same *Air Daily* License. The only difference between the claims pending before this Court and those pending before the arbitrator is the timeframe covered by each claim: in this case, Argus alleges violations of the *Air Daily* copyright from November 2007 to April 2009-a period that covers both pre- and post-termination of the License-while in the arbitration it seeks relief on infringement claims from September 2006 to September 2008, the exact term of the License.

II. DISCUSSION

A. The *Air Daily* Claim

1. Prior Action Pending

*2 Defendants argue that the *Air Daily* claim (Count Two of the Complaint) should be dismissed, or in the alternative, stayed because of the pending Texas Arbitration. Defendants' argument is based primarily on the "prior action pending" doctrine; that is, Defendants argue that the *Air Daily* claim should be dismissed to avoid duplicative litigation under the abstention doctrine set forth in *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). However, as the Supreme Court itself recognized in *Colorado River,* abstention by a federal court with jurisdiction to adjudicate a claim before it "is an extraordinary and narrow exception" and is justified only in "exceptional circumstances." *Id.* Moreover, the precise issue before the *Colorado River* Court involved concurrent jurisdiction of a federal court over a claim that was contemporaneously pending in the state court system. A related principle has been applied when a federal court permits a parallel litigation to proceed in another federal jurisdiction. *See, e.g., Curtis v. Citibank, N.A.,* 226 F.3d 133 (2d Cir.2000); *Adam v. Jacobs,* 950 F.2d 89 (2d Cir.1991). However, Defendants have cited no cases-and this Court has not located any-where the "rare" and "exceptional" principles of the prior action pending doctrine have been used by a federal court to stay its hand in favor of a parallel arbitration. The doctrine appears to be inapplicable in this case, therefore, and the Court finds that dismissal of the *Air Daily* claim in favor of the Texas Arbitration is inappropriate under the prior action pending doctrine.

2. Stay Pending Arbitration

Alternatively, Defendants contend that the Court should stay the *Air Daily* claim under the Federal Arbitration Act ("FAA") or pursuant to its inherent authority. If the claim is arbitrable, the FAA requires the Court to stay the action pending the outcome of the arbitration.1 To determine whether a claim is arbitrable, four questions must be considered: (1) Did the parties agree to arbitrate? (2) If so, what is the scope of that agreement? (3) If federal statutory claims are asserted, did Congress intend those claims to be non-arbitrable? (4) If some, but not all, of the claims are arbitrable, should the balance of the proceeding be stayed pending arbitration? *See, e.g., Genesco, Inc. v. T. Kakiuchi & Co., Ltd.,* 815 F.2d 840, 844 (2d Cir.1987).

1 Section 3 of the FAA gives courts the power to stay an action upon being satisfied that the issue before the court is referable to arbitration. *See* 9 U.S.C. § 3. However, the power to dismiss and compel arbitration is limited in terms of venue, and a court may only compel arbitration within the judicial district in which the petition to compel has been filed. *Id.* § 4. Thus, where arbitration is to proceed in another district, as in this case, only a stay is available. *See Provident Bank v. Kabas,* 141 F.Supp.2d 310, 318 (E.D.N.Y.2001) (citing *Ryan v. Allen,* 992 F.Supp. 152, 154-55 (N.D.N.Y.1998)).

In general, "the issue of whether the parties agreed to arbitrate a matter is to be decided by the courts and not the arbitrators, unless the parties clearly and unmistakably provide otherwise." *Alliance Bernstein Inv. Res. & Mgmt., Inc. v. Schaffran,* 445 F.3d 121, 125 (2d Cir.2006) (quoting *AT & T Techs., Inc. v. Communications Workers of Am.,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). The Second Circuit has expressly held that "when ... parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Contec v. Corp. v. Remote Solution Co., Ltd.,* 398 F.3d 205, 208 (2d Cir.2005). In *Contec,* the arbitration clause in question provided that "the controversy shall be determined by arbitration ... in accordance with the Commercial Arbitration Rules of the **American Arbitration Association** ." *Id.* Rule 7 of the AAA Commercial Rules, in turn, provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Rule **R-7**(a). The Second Circuit found that incorporation of this Rule into the contract by reference was a clear manifestation of the parties' intent to submit all questions of arbitrability and jurisdiction to the arbitrator. *Id.*2

2 The language of Rule 7 of the Commercial Rules of the AAA remains the same today as the version that was in place at the time *Contec* was decided in 2005. *Compare Contec,* 398 F.3d at 208 *with* AAA Rule **R-7**(a).

*3 The arbitration clause contained in the *Air Daily* License is indistinguishable from the provision at issue in *Contec:* it provides that "all claims arising under this Agreement shall be brought before a single arbitrator ... pursuant to the Commercial Arbitration Rules of the **American Arbitration Association** ." As in *Contec,* the parties' incorporation of the AAA Commercial Rules has manifested their intent to reserve to the arbitrator all questions of arbitrability. *See Contec,* 398 F.3d at 208; *see also Shaw Group, inc. v. Triplefine Int'l Corp.,* 322 F.2d 115, 123 (2d Cir.2003) (applying New York law). Contrary to Plaintiffs' machinations, the fact that certain of their claims before this Court arose after the *Air Daily* License had terminated does not alter this result. That is,

having been granted the authority to determine "the existence, scope or validity of the arbitration agreement," the arbitrator likewise has the sole authority to determine whether claims that arose post-expiration of the arbitration clause are within the scope of the clause. *S*

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R-7 On Point as for allowing arbitrator to consider disputes that arose post-expiration of arbitration clause

ee, e.g., Maisel v. McDougal Little, 06 Civ. 0765(LMM), 2006 U.S. Dist. LEXIS 32501, at *5-8 & n. 4, 2006 WL 1409019 (S.D.N.Y. May 22, 2006). Thus, although both parties have devoted many pages to the merits of whether the *Air Daily* claim is arbitrable-and in particular, whether post-termination claims are arbitrable-this Court cannot usurp the authority the parties have granted to the arbitrator to determine that question. Accordingly, the *Air Daily* claim must be stayed at least until the arbitrator has determined whether the claim is arbitrable. Pursuant to the FAA, if the arbitrator answers this question in the affirmative, and proceeds to adjudicate the entirety of the *Air Daily* infringement claims, then the *Air Daily* claims currently before the Court must be stayed pending the outcome of the arbitration.

The question then arises as to what, if anything, this Court should do in the event the arbitrator decides, as Plaintiffs press the Court to do here, that post-termination claims are not arbitrable. Should the Court then proceed to adjudicate those claims while essentially identical claims for a different time period proceed in the Texas Arbitration? In such situations-that is, where certain claims are not subject to an arbitration clause while other, related claims are subject to arbitration-courts retain substantial discretion to stay the remainder of the proceedings pending arbitration as a means to promote judicial efficiency and to control their dockets. *See, e.g., WorldCrisa Corp. v. Armstrong,* 129 F.3d 71, 76 (2d Cir.1997); *Genesco,* 815 F.2d at 856; *Provident Bank,* 141 F.Supp. at 318. Thus, numerous courts have held that where arbitrable and non-arbitrable claims arise out of the same set of facts, a stay usually is appropriate in the interest of judicial efficiency, because the arbitration may decide the same facts at issue in the litigation. *E.g., Sierra Rutile Ltd. v. Katz,* 937 F.2d 743, 750 (2d Cir.1991); *Aekyung Co. Ltd. v. Intra & Co., Inc.,* 99 CIV. 11773(LMM), 2000 WL 1522302, at *2 (S.D.N.Y. Oct. 13, 2000). A party that moves for a stay pending arbitration in such circumstances must first establish that "there are issues common to the arbitration and the courts, and that those issues will finally be determined by the arbitration." *Orange Chicken, L.L.C. v. Nambé Mills, Inc.,* No. 00 Civ. 4730(AGS), 2000 WL 1858556, at *8 (S.D.N.Y. Dec.19, 2000).

*4 In opposition to a stay, Plaintiff argues primarily that the *Air Daily* claim that is to be litigated in the Texas Arbitration does not "predominate" here because the two claims involve different time periods. Yet, Plaintiff overlooks the fact that it is the exact same type of conduct that is the subject of both this action and the Texas Arbitration, to wit, the redistribution of *Air Daily* by Mr. Klein and the continued redistribution by those recipients to other employees and third-parties. That is, the question of Argus's rights and Defendants' authority to engage in such conduct will be finally resolved in the arbitration, regardless of the time period to which the claim relates. Indeed, the time periods at issue are not quite as dissimilar as Plaintiffs contends-the *Air Daily* claim before this Court covers approximately eighteen months, ten months of which are at issue in Plaintiff's counterclaim in the Texas Arbitration. Moreover, Defendants' claim in the arbitration is for a declaratory judgment that they have *never* infringed Plaintiff's copyright in the *Air Daily* publication; this claim, by its very nature, overlaps entirely with the *Air Daily* claim before this Court. Moreover, it is clear that Defendants will not act to hinder the arbitration, as they were the parties to demand arbitration in the first instance, and while Defendants have not represented to the Court exactly how long the arbitration is expected to last, they maintain that it is proceeding at a normal pace and a hearing before the arbitrator is expected during the summer of 2010. Argus, for its part, has demonstrated no undue hardship or prejudice that might befall it by proceeding with its claims before the arbitrator.

For these reasons, Plaintiff's *Air Daily* claim will be stayed pending the outcome of the Texas Arbitration, irrespective of whether the arbitrator determines that the post-termination claims are arbitrable under the License Agreement.

B. The *Coal Daily* Claim

Separately, Defendants argue that the *Coal Daily* claim should be dismissed under the doctrine of forum non conveniens or, in the alternative, under the prior action pending doctrine.3 Defendants contend that, although the UK Action and the instant action have been brought against different Tradition entities, the crux of the dispute is the alleged copyright infringement by an employee of Tradition UK. Not surprisingly, Plaintiffs paint the nature of this action differently, arguing that while the UK Action involves alleged infringement of a UK copyright by a UK company in the UK, the instant action involves alleged infringement of a United States copyright by a United States company in the United States.

3 Defendants also appear to argue that the choice-of-law and forum selection clause dictates that the suit is

> destined to go forward in England. There are several problems with this argument. First, Defendants are not parties to the *Coal Daily* License. This, however, is not dispositive. *See, e.g., Universal Grading Serv. v. eBay, Inc.*, 08-CV-3557 (CPS), 2009 U.S. Dist. LEXIS 49841, at *54-55, 2009 WL 2029796 (E.D.N.Y. June 10, 2009); *see also Aguas Lenders Recovery Group LLC v. Suez, S.A.*, No. 08-1589-cv, 2009 U.S.App. LEXIS 23331, at *12, 2009 WL 3403172 (2d Cir. Oct. 23, 2009) ("We find ample support for the conclusion that the party is a non-signatory to an agreement is insufficient, standing alone, to preclude the enforcement of a forum selection clause."). The larger problem is that the forum selection clause provides only that the parties submit to the *non-exclusive* jurisdiction of the UK courts; as such, the clause is not mandatory and need not be enforced. *See, e.g., Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383 (2d Cir.2007). As for the choice-of-law provision, while the fact that the parties agreed to apply English law to the interpretation of the License may weigh in favor of dismissal to some degree, it does not dictate that result.

1. Forum Non Conveniens

The Second Circuit has established a three-step framework to resolve motions brought under the doctrine of forum non conveniens: (1) the court must first determine the degree of deference to be given to the plaintiff's choice of forum; (2) the court must determine whether an adequate alternative forum exists; and (3) the court balances the private and public factors enumerated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). *See Iragorri v. United Tech. Corp.*, 274 F.3d 65, 73-74 (2d Cir.2001) (en banc).

*5 "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Cavlam Bus. Ltd. v. Certain Underwriters at Lloyd's, London*, No. 08 Civ. 2225(JGK), 2009 WL 667272, at *2 (S.D.N.Y. Mar.16, 2009) (quoting *Gulf Oil*, 330 U.S. at 508). However, the degree of deference due to a plaintiff's choice of forum is determined on a sliding scale, and varies depending on the circumstances of each individual case. *See Iragorri*, 274 F.3d at 71-72. For example, less deference is owed to foreign citizens that sue in the United States. *See id.* at 71. Argus argues that its choice of forum should be given a great deal of deference because it has sued in Defendants' home forum. However, as the Second Circuit has found, the decision of a foreign company to sue where the Defendants are located and amenable to jurisdiction is not a reason necessarily to give more deference to its choice of forum where there is no other connection to the forum. *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 74 (2d Cir.2003).

An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute. *Id.* at 75 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)). Argus argues that the UK is not an adequate alternative forum for two reasons: first, Defendants have not shown that they are amenable to service of process in the UK, and second, its copyright infringement claims under the Copyright Act cannot be adjudicated in UK courts. I agree on both scores. First, neither of the Defendants has made any representations-either in their briefs or at oral argument-that they will submit to jurisdiction in the UK; rather, they aver only that *Tradition UK* is amenable to process there. Absent any such consent, the UK would not be an adequate forum for the Defendants in this action and dismissal should be denied on that basis alone. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 157 (2d Cir.2005). Moreover, by letter dated December 16, 2009, Plaintiffs brought to this Court's attention the recent decision of the Court of Appeal (Civil Division) of the High Court of Justice in the United Kingdom, in which the court held that "English law regards claims for infringement of foreign, non-EU (or Lugano) copyrights [such as U.S. copyrights] as non-justiciable." *Lucasfilm Limited v. Ainsworth*, [2009] EWCA Civ. 1328 at ¶ 174. In so holding, the court expressed its view that "[i]nfringement of an IP right (especially copyright, which is largely unharmonised) is essentially a local matter involving local policies and local public interest. It is a matter for local judges ." *Id.* at ¶ 175. Although Defendants attempt to distinguish the *Lucasfilm* case by once again casting this case as one involving solely UK facts and UK law, the Court cannot overlook the Plaintiff's having framed this case as one that also involves United States conduct and U.S. copyright law. Regardless of the wisdom of the English court's determination, it seems clear that Argus cannot litigate its Copyright Act claims in England. Accordingly, England is not an adequate alternative forum in this circumstance.

*6 Finally, even if England were an adequate forum for Argus's claims, the Court cannot find that either the private interest factors or the public interest factors weigh in favor of a forum non conveniens dismissal in this case. The private factors to be considered are: (1) the relative ease of access to sources of proof; (2) the convenience of willing witnesses; (3) the availability of compulsory process to obtain attendance of unwilling witnesses; and (4) other practical problems that make trial easy, expeditious and inexpensive. *See, e.g., Gulf Oil*, 330 U.S. at 508. As noted, each party paints this case as having its locus of operative facts in a different forum. Under the circumstances, it does not appear that the private interest

factors cut strongly in favor of either forum. The public interest factors to be considered are: (1) court congestion; (2) avoidance of difficult problems in conflict of laws and the application of foreign law; (3) unfairness of imposing jury duty on a community with no relation to the case; and (4) the interest of communities in having local disputes decided at home. Numerous courts have found that the public interest factors often favor dismissal where there is a parallel litigation arising out of the same or similar facts already pending in the foreign jurisdiction. *See, e.g., Transunion Corp. v. PepsiCo, Inc.*, 811 F.3d 127, 129 (2d Cir.1987); *Otor, S.A. v. Credit Lyonnais, S.A.*, 04 CV 6978(RO), 2006 U.S. Dist. LEXIS 64885, at *20 & n. 16, 2006 WL 2613775 (S.D.N.Y. Sept. 11, 2006) (collecting cases). Here, although there can be no doubt that the Southern District of New York has a crowded docket, this fact need not weigh heavily in the analysis. *See ESI, Inc. v. Coastal Power Prod. Co.*, 995 F.Supp. 419, 428 (S.D.N.Y.1998). Further, while the infringement of the *Coal Daily* newsletter might have begun in the UK by Mr. James, Argus alleges that it continued when Mr. James forwarded the publication to employees in the United States who in turn redistributed unauthorized copies in New York and beyond. Thus, this is not a case that, based on the allegations of the Complaint, has absolutely no relation to the forum. Finally, Argus's claim arises under United States copyright law and does not involve complex issues of foreign law. On balance, therefore, the public interest factors do not tilt strongly in favor of dismissal under forum non conveniens.

2. Prior Action Pending

Notwithstanding the impropriety of dismissal for forum non conveniens, the Court nonetheless acknowledges that "[c]ourts have the inherent power to stay or dismiss an action based on the pendency of a related proceeding in a foreign jurisdiction." *Evergreen Marine Corp. v. Welgrow Int'l Inc.*, 954 F.Supp. 101, 103 (S.D.N.Y.1997) (quoting *In re Houbigant, Inc.*, 914 F.Supp. 996, 1003 (S.D.N.Y.1996)). Factors to be considered as to whether it is appropriate to stay or dismiss include: (1) the similarity of parties and issues involved, (2) promotion of judicial efficiency, (3) adequacy of relief available in the alternative forum, (4) considerations of fairness to all parties or prejudice to any party; and (5) the temporal filing of each action. *Id.* (quoting *Caspian Inv., Ltd. v. Vicom Holdings, Ltd.*, 770 F.Supp. 880, 884 (S.D.N.Y.1991)). Although in general I am reticent to stay an action for any significant amount of time, it appears that there are sufficient similarities between this action and the UK Action that counsel a stay. At theire core, both actions involve Defendants' (and/or their affiliates') right to copy and distrivute Argus's copyrighted work. At the very least, to allow the UK Action to proceed without parallel litigation in this Court would be instructive on the ultimate resolution of the *Coal Daily* claim here. Accordingly, in its discretion and in the interest of judicial economy, the Court will grant a stay of the *Coal Daily* claim pending the resolution of the UK Action, so long as it is completed within a reasonable period of time. As detailed below, the parties are directed to advise the Court of the status of the proceedings of the foreign litigation; if the UK Action is not resolved within the time permitted, the stay will be lifted and this Court will proceed to adjudicate the *Coal Daily* claim before it.

III. CONCLUDSION

*7 For the foregoing reasons, Defendants' motion to stay this action is GRANTED. The parties are instructed to advise the Court by letter within ten (10) days from the date of any of the following events: (a) a resolution by the Texas arbitrator as to whether the post-termination *Air Daily* claims are arbitrable; (b) final disposition of the Texas Arbitration; and (c) final disposition of the UK Action. In the meantime, this action will ge placed on the Court's suspense docket. In all events if either the Texas Arbitration or the UK Action is not finally resolved within twelve (12) months of the date hereof, this stay shall be lifted and this Court will proceed to adjudicate the merits of both claims. The Clerk of this Court is instructed to close this motion (Docket No. 10) and to place this matter on suspense for a period of twelve (12) months.

IT IS SO ORDERED.

Parallel Citations

2009 Copr.L.Dec. P 29,862

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roger F. Carlson and Mary Jo Carlson, Respondents,

v.

South Carolina State Plastering, LLC, Peter Conley, Individually, Del Webb Communities, Inc., and Pulte Homes, Inc., Defendants,

Of whom Del Webb Communities, Inc. and Pulte Homes, Inc. are the Appellants.

Appellate Case No. 2011-202907

Appeal From Beaufort County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5143
Heard April 3, 2013 – Filed June 12, 2013

REVERSED

Robert L. Widener, of Columbia, and A. Victor Rawl, Jr., of Charleston, both of McNair Law Firm, PA, for Appellants.

W. Jefferson Leath, Jr. and Michael S. Seekings, both of Leath, Bouch & Seekings, LLP, of Charleston; John T. Chakeris, of The Chakeris Law Firm, of Charleston; and Phillip W. Segui, Jr., of Segui Law Firm, LLC, of Mount Pleasant, for Respondents.

WILLIAMS, J.: Del Webb Communities, Inc. (Del Webb) and Pulte Homes, Inc.[1] (Pulte) appeal the circuit court's order denying their motion to compel arbitration based on its finding that they waived any right to arbitration. We reverse.

FACTS

On March 8, 2002, Roger F. Carlson and Mary Jo Carlson entered into a purchase agreement with Del Webb whereby they agreed to purchase a home in the Sun City development in Hilton Head, South Carolina. The purchase agreement contained the following arbitration clause:

> Any controversy or claim arising out of or relating to this Agreement or Your purchase of the Property shall be finally settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for the Real Estate Industry and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.
>
> . . .
>
> After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act.

The deed to the home, which a representative for Del Webb executed on March 15, 2002, did not include an arbitration clause.

In September 2008, the Carlsons commenced the instant action against Del Webb and Pulte, alleging construction defects in their home's stucco siding. The Carlsons' case is one of about 140 cases currently pending against Del Webb and Pulte involving stucco-clad homes in the Sun City development. Del Webb and Pulte answered in December 2008 and asserted various defenses, including: (1) the alleged failure of the Carlsons to comply with sections 40-59-810 to -860 of the

[1] Del Webb is a subsidiary of Pulte.

South Carolina Code (2011) (Right to Cure Act[2] or the Act), and (2) that the Carlsons' claim was subject to mandatory arbitration.

In February 2009, the Carlsons sent Del Webb and Pulte a letter purportedly providing notice as required by the Right to Cure Act along with a proposed consent order staying the action to allow for compliance with the Act. Del Webb and Pulte responded with a letter requesting clarification of the defects as allowed by the Act. Del Webb and Pulte allege the Carlsons did not respond to the request.

In May 2009, the circuit court entered a consent order finding that the Carlsons filed the instant action without first complying with the requirements of the Right to Cure Act and staying the case until the Carlsons complied with the Act. The stay expired ninety days after it was entered. Del Webb and Pulte allege that, at a status conference in April 2010 addressing all 140 cases, they advised the circuit court that the two threshold issues to decide in the cases were the Right to Cure Act and arbitration. Also in April 2010, the Carlsons moved to amend their complaint to add class action allegations pursuant to Rule 23(a), SCRCP. Del Webb and Pulte opposed the motion, and the circuit court granted the motion on December 10, 2010. The Carlsons filed their amended complaint on December 29, 2010.

On May 24, 2010, Del Webb and Pulte filed a motion to dismiss based on noncompliance with the Right to Cure Act in a related case, *Amadeo v. South Carolina State Plastering, LLC, Peter Conley, Individually, Del Webb, & Pulte*, No. 09-CP-2904 (hereinafter, *Amadeo* case). The case was one of the 140 cases brought against Del Webb and Pulte alleging defective stucco on homes in the Sun City development. In the alternative, Del Webb and Pulte moved to stay the case and compel compliance with the Act.

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[2] The Right to Cure Act requires claimants to give notice to a contractor ninety days before filing an action against the contractor arising out of the construction of a dwelling. S.C. Code Ann. § 40-59-840 (2011). After receiving such notice, the contractor has fifteen days to request clarification of the alleged defects if the defect is not sufficiently stated. *Id.* Otherwise, the contractor has thirty days after receipt of such notice to "inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects." S.C. Code Ann. § 40-59-850 (2011). If a claimant files an action in court before complying with the Right to Cure Act, upon motion of a party, the court shall stay the action until the claimant has complied with the Act. S.C. Code Ann. § 40-59-830 (2011).

In a status conference on July 13, 2010, the circuit court imposed a seventy-day briefing schedule to brief the Right to Cure Act issue. Del Webb and Pulte assert they again informed the court during this status conference that the two threshold issues to address were the Right to Cure Act and arbitration, and the circuit court indicated its intent to address the Right to Cure Act issue first.

In an order filed January 11, 2011, the circuit court denied Del Webb and Pulte's motion to dismiss in the *Amadeo* case. The circuit court noted that because it had not yet certified the class, the order technically only applied to the *Amadeo* case, but that "all parties are aware that there are multiple pending similarly situated civil claims."

Del Webb and Pulte moved to compel arbitration in the current action on February 14, 2011. In an order filed October 20, 2011, the circuit court denied the motion, finding that Del Webb and Pulte had waived the right to compel arbitration based on their delay in bringing the motion. This appeal followed.

LAW/ANALYSIS

I. Standard of Review

"In reviewing a circuit court's decision regarding a motion to stay an action pending arbitration, the determination of whether a party waived its right to arbitrate is a legal conclusion subject to *de novo* review . . . ." *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) (internal quotation marks omitted).

II. Waiver

Del Webb and Pulte argue the circuit court erred in finding they waived their right to enforce the arbitration clause in the purchase contract by engaging in litigation for over two years before filing a motion to compel arbitration. Specifically, Del Webb and Pulte argue (1) the Carlsons did not suffer any prejudice as the result of the delay; (2) Del Webb and Pulte did not engage in any discovery before filing the motion; and (3) Del Webb and Pulte did not file the motion sooner because they were waiting on the resolution of the Right to Cure Act issue. We agree.

"The right to enforce an arbitration clause may be waived." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct. App. 2011). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658,

665, 521 S.E.2d 749, 753 (Ct. App. 1999). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.* (internal quotation marks omitted).

This court has previously recognized three factors to consider when determining whether a party has waived its right to compel arbitration:

> (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Davis, 394 S.C. at 131, 713 S.E.2d at 807 (internal quotation marks omitted). "To establish prejudice, the non-moving party must show something more than mere inconvenience." *Id.* (internal quotation marks omitted). In addition to the above factors, this court has also considered the extent to which the parties have availed themselves of the circuit court's assistance. *See id.* at 133, 713 S.E.2d at 808.

Based on the above factors, we find the circuit court erred in denying Del Webb and Pulte's motion to compel arbitration. First, we acknowledge that a relatively substantial length of time transpired in the instant case between the commencement of the action and the commencement of the motion to compel arbitration. Specifically, the Carlsons commenced the instant action in September 2008, and Del Webb and Pulte did not file their motion to compel until February 2011, over two years after the filing of the complaint. Nevertheless, Del Webb and Pulte had raised the issue of arbitration since the inception of the action. The history of activity in the instant case indicates that the delay in filing the motion to compel was the result of the circuit court's decision to address the Right to Cure Act issue first and not because of any dilatory actions or tactics by Del Webb and Pulte.

Second, no discovery has occurred in the instant case. In its order, the circuit court relied in part on a list of more than forty actions undertaken by Del Webb and Pulte in support of its ruling denying the motion to compel arbitration. However, the majority of the actions on the list were taken in other cases against Del Webb and Pulte. Although we recognize that similar cases are currently pending against Del Webb and Pulte, we find it would be inappropriate to consider actions undertaken in other cases for purposes of determining the extent of discovery that

has been undertaken in the instant case. Accordingly, we find the lack of discovery conducted by Del Webb and Pulte weighs in favor of granting the motion to compel arbitration. *See Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 557, 544 S.E.2d 643, 645 (Ct. App. 2001) (finding an eight-month period in which the "litigation consisted of routine administrative matters and limited discovery [that] did not involve the taking of depositions or extensive interrogatories" did not establish waiver).

Finally, due to the relatively limited amount of activity occurring in the instant case, the Carlsons will not be prejudiced by Del Webb and Pulte's delay in filing their motion to compel arbitration. Further, the record reveals the Carlsons were on notice from the inception of Del Webb and Pulte's involvement in the case that they would be seeking to compel arbitration. Aside from the mere passage of time, the Carlsons can point to no prejudice they will suffer as the result of Del Webb and Pulte's delay in moving to compel arbitration. Accordingly, we find this factor weighs in favor of granting the motion to compel arbitration. Based on the foregoing, we find the circuit court erred in denying Del Webb and Pulte's motion to compel arbitration.

III. Unconscionability

The Carlsons argue as an additional sustaining ground that the purchase agreement, including the arbitration clause, is unconscionable and, thus, unenforceable.[3] We disagree.

"General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* at 24-25, 644 S.E.2d at 668. In making this determination, courts must consider that "[t]he policies of the United States and this State favor arbitration of disputes." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008). Accordingly, "[t]here is a strong

[3] The Carlsons raised this argument and the following two arguments to the circuit court, but the court declined to rule on the issues because it denied the motion to compel arbitration based on waiver.

presumption in favor of the validity of arbitration agreements." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668.

The Carlsons point to the *Simpson* case cited above in support of their argument that the arbitration clause in the purchase agreement was unconscionable. However, we find the facts of the instant case distinguishable. In *Simpson*, the supreme court found an arbitration clause in a contract involving the sale of an automobile to be unconscionable. *Id.* The court first determined that the purchaser had no meaningful choice in agreeing to arbitrate because (1) the contract she signed was an adhesion contract; (2) the arbitration clause was inconspicuous in the contract; and (3) the purchase was for a necessity. *Id.* at 26-28, 644 S.E.2d at 669-670. The court then determined that the arbitration clause was substantively oppressive and one-sided because it prohibited the recovery of punitive, exemplary, double, or treble damages. *Id.* at 28, 644 S.E.2d at 670. The court found this limitation on damages violated statutory law because it precluded the plaintiff from receiving mandatory statutory remedies under the South Carolina Unfair Trade Practices Act and the Dealers Act and undermined the statutes' purposes of punishing acts that adversely affect the public interest. *Id.* at 30, 644 S.E.2d at 671. In addition, the court found the arbitration clause's stipulation that the dealer could bring a judicial proceeding irrespective of any pending consumer claims requiring arbitration to be oppressive. *Id.* at 31-32, 644 S.E.2d at 672. Specifically, the court noted that this created the possibility of a scenario "in which a dealer's claim and delivery action is initiated in court, completed, and the vehicle sold prior to an arbitrator's determination of the consumer's rights in the same vehicle." *Id.* at 32, 644 S.E.2d at 672.

In contrast to the facts in *Simpson*, no evidence in the record indicates whether the purchase agreement was an adhesion contract, and the clause is clearly identified in the purchase agreement. In addition, the arbitration clause in the purchase agreement does not waive any rights or remedies otherwise available by law. Although the Carlsons point to other limitations in the purchase agreement, such as a provision limiting the statute of limitations for bringing claims to two years, these provisions are not part of the arbitration clause and are irrelevant to a determination of whether the arbitration clause is unconscionable. *See Davis*, 394 S.C. at 125, 713 S.E.2d at 804 (noting that arbitration clauses are severable from the contracts in which they are contained and, therefore, that the issue of the arbitration clause's validity is distinct from the substantive validity of the contract as a whole). Finally, the arbitration clause does not lack mutuality and applies to Del Webb and Pulte as well as the Carlsons. Based on the foregoing, we find the Carlsons' argument that the arbitration clause was unconscionable is without merit.

IV. Merger

The Carlsons also argue as an additional sustaining ground that the doctrine of merger precludes arbitration of their claims. Specifically, the Carlsons argue that because the deed, which contained no arbitration clause, superseded the purchase agreement, their claims are not subject to arbitration. We disagree.

The merger by deed doctrine provides that "a deed made in in full execution of a contract of sale of land merges the provisions of the contract therein." *Charleston & W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957); *see also Wilson v. Landstrom*, 281 S.C. 260, 264, 315 S.E.2d 130, 133 (Ct. App. 1984) ("A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract . . . ." (quoting *Charleston & W. Carolina Ry. Co.*, 231 S.C. at 505, 99 S.E.2d at 193)). However, agreements that are not intended to be merged in a deed are not merged into the deed. *See Hughes v. Greenville Country Club*, 283 S.C. 448, 450-51, 322 S.E.2d 827, 828 (Ct. App. 1984). "[T]he party denying merger has the burden of proving by clear and convincing evidence that merger was not intended." *Id.*

In the instant case, we find the parties did not intend for the arbitration clause to be superseded by the subsequently-executed deed. The purchase agreement in the instant case expressly provides, "The covenants, disclaimers and agreements contained in this Agreement shall not be deemed to be merged into or waived by the instruments executed at Closing, but shall expressly survive the Closing and continue to be binding upon both parties." In addition, the arbitration clause in the purchase agreement specifically states that "[a]fter closing, every controversy or claim arising out of or relating to this Agreement . . . shall be settled by binding arbitration." Pursuant to the clear and unambiguous terms of the purchase agreement, clear and convincing evidence supports a finding that the parties did not intend for the arbitration clause to be merged into the deed at closing. Accordingly, this argument has no merit, and we decline to affirm the circuit court's order on this ground.

V. Scope of Arbitration Clause

As a third additional sustaining ground, the Carlsons argue that because their claims arise in tort, they are not subject to the purchase agreement's arbitration clause because the clause only applies to claims arising in contract. We disagree.

"Arbitration is a matter of contract[,] and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *New Hope Missionary*

Baptist Church, 379 S.C. at 627, 667 S.E.2d at 4. "A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." *Landers v. FDIC*, 402 S.C. 100, __, 739 S.E.2d 209, 213-14 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). Courts have held that such broad clauses "appl[y] to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.* at __, 739 S.E.2d at 214. "Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract, but embraces every dispute between the parties having a significant relationship to the contract." *Id.* (alterations and internal quotation marks omitted). Accordingly, the "court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

Based on the above standard, we find the Carlsons' tort claims fall within the scope of the arbitration clause in the instant case. The arbitration clause in the purchase agreement executed by the Carlsons applies to "every controversy or claim arising out of or relating to this Agreement, or the breach thereof . . . ." We hold the factual allegations underlying the Carlsons' claims have a significant relationship between the purchase agreement, such that the arbitration clause should be read to encompass the Carlsons' tort claims. The Carlsons' claims all arise from Del Webb and Pulte's allegedly defective construction of their home. The purchase agreement encompassed the parties' agreements regarding the construction of the Carlsons' home and includes Del Webb and Pulte's agreement to construct a home free from defective materials. Therefore, we find the arbitration clause in the purchase agreement was not intended to apply to claims arising in contract only and encompasses the Carlsons' tort claims as well. This conclusion is supported by recent case law in this state. *See, e.g.*, *Landers*, 402 S.C. at __, 739 S.E.2d at 214-15 (finding plaintiff's tort claims for slander and intentional infliction of emotional stress arising from his employment with the defendant were encompassed by an arbitration clause in his employment contract that requires arbitration for "any controversy or claim arising out of or relating to this contract, or the breach thereof"). Accordingly, we find this argument is without merit and decline to affirm the circuit court's decision on this ground.

CONCLUSION

Based on the foregoing, we reverse the order of the circuit court denying Del Webb and Pulte's motion to compel arbitration.

REVERSED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lonnie J. Davis, Respondent,

v.

KB Home of South Carolina, Inc. and Jeff Meyer,
Petitioners.

Appellate Case No. 2011-199587

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27386
Submitted January 8, 2014 – Filed January 29, 2014

AFFIRMED IN PART, VACATED IN PART

D. Michael Henthorne, of Littler Mendelson, PC, of Columbia, for Petitioners.

Allan R. Holmes and Allan Riley Holmes, Jr., both of Gibbs & Holmes, of Charleston, for Respondent.

PER CURIAM: KB Home and Jeff Meyer (collectively KB Home) seek review of the Court of Appeals' decision in *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), finding the trial judge had authority to determine

the validity of an arbitration clause contained in an employment application submitted by Lonnie Davis and finding KB Home waived the right to compel arbitration. We deny the petition for a writ of certiorari as to KB Home's Question I and affirm with regard to the trial judge's authority to determine the validity of the arbitration clause. However, we grant the petition as to KB Home's Question II, dispense with further briefing, and vacate the portion of the Court of Appeals' opinion regarding waiver of the right to compel arbitration.

After properly concluding, pursuant to *Buckeye Check Cashing, Inc. v. Cardegna*,[1] that the trial judge had the authority to determine the validity of the arbitration clause contained in the employment application, the Court of Appeals went on to hold that the application, and the arbitration clause therein, were superseded and rendered invalid by the presence of a merger clause in the employment contract between KB Home and Davis. Having concluded such, it was unnecessary to address Davis' argument that KB Home waived the right to compel arbitration because a substantial length of time had passed, the parties engaged in extensive discovery, and the parties had availed themselves of the circuit court's assistance. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive). We therefore vacate part II of the Court of Appeals' opinion addressing the issue of waiver.

AFFIRMED IN PART, VACATED IN PART.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[1] 546 U.S. 440, 444 (2006) (stating a challenge to an arbitration agreement is considered by the trial judge, whereas a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolina Care Plan, Inc. (f/k/a Physicians Health Plan, Inc.), Appellant,

v.

United HealthCare Services, Inc., United Health Group, Incorporated, United HealthCare Insurance Co., Ronald H. Harms, and Edward L. Graves, Respondents.

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 25879
Heard March 4, 2004 - Filed October 18, 2004

AFFIRMED

C. Mitchell Brown, Kevin A. Hall, Jeffrey S. Patterson, and Elizabeth H. Campbell, all of Nelson Mullins Riley & Scarborough, of Columbia, for Appellant.

Eliott R. Good, Michael J. Zaretsky, and Michael W. DeWitt, all of Chorpenning Good & Pandora, of Columbus, OH; Gregory S. Coleman, of Well, Gotshal & Manges, LLP, of Austin, TX; Susan P. McWilliams and Angus H. Macaulay, Jr., both of Nexsen, Pruet, Jacobs & Pollard, of Columbia, for Respondents.

JUSTICE WALLER: The trial court granted respondents' 12(b)(6), SCRCP, motion to dismiss three of appellant's causes of action, granted respondents' motion to compel arbitration, and stayed petitioner's remaining claims pending the outcome of arbitration. Appellants appealed to the Court of Appeals, and this Court certified the case for review pursuant to Rule 204(b), SCACR. We affirm.

FACTS

Appellant (CCP) is a health maintenance organization (HMO), originally organized as a non-profit South Carolina corporation. [1] Respondents United HealthCare Services

(UHS), United Health Group (UHG), and United HealthCare Insurance (UHI), (collectively "United"), provide managed health care services for HMO's.

In 1984, CCP and UHS entered into an Administrative Services Agreement, whereby UHS agreed to provide various services in furtherance of CCP's business as a South Carolina HMO. CCP had few, if any, employees, and outsourced virtually all of its work to United.

In 1996, the parties entered into a new agreement. Section 11.14 of the 1996 Services Agreement stated that:

[a]ny controversy, dispute or claim arising out of or relating to this Agreement or a breach of the Agreement, except as otherwise provided shall be resolved by binding arbitration in accordance with the rules of the American Arbitration Association. Upon such submission, UHS and [CCP] shall each choose one arbitrator and those two arbitrators shall mutually agree on the selection of the third arbitrator. Matters submitted to arbitration shall be determined by a majority vote of the arbitrators, and such decision shall be binding upon the parties. The arbitrators shall have no power to award any punitive or exemplary damages or to vary or ignore the terms of this Agreement and shall be bound by controlling law. It is the intent of the parties that all disputes arising under this Agreement which are not otherwise resolved be resolved by binding arbitration and not by other forms of legal proceedings.

In May 2001, CCP filed suit against UHS, UHG, UHI, Ronald Harms, and Edward Graves. Harms was a former chief financial officer of CCP, and Graves was a former chief executive officer of CCP. Harms and Graves were United employees at the time they served on the CCP board of directors, and are still employed by United. CCP alleged, among other things, that all the defendants failed to cooperate in good faith with CCP to promote CCP's economic interests, failed to properly account for funds that United held as a fiduciary to CCP, and generally put the economic interests of United ahead of CCP.

United moved to dismiss or stay the proceedings and compel arbitration. In response, CCP filed an amended complaint, which included new causes of action for fraud, fraud in the inducement, and fraudulent concealment in the making of the arbitration clause. CCP also alleged that the arbitration provision was unconscionable and violated South Carolina public policy because it limited discovery and limited CCP's rights and remedies under the South Carolina Unfair Trade Practices Act (SCUTPA).

United moved to dismiss the three causes of action related to the making of the arbitration clause pursuant to Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute a cause of action. United argued the arbitration agreement was valid and enforceable, and that the Federal Arbitration Act (FAA) required that all of the claims be submitted to arbitration.

CCP moved to file a second amended complaint, which the trial court granted. However, the trial court then granted United's motion to compel arbitration and to dismiss three of CCP's causes of action related to the making of the arbitration clause. [2] The trial court also ruled that the inclusion of defendants Harms and Graves as defendants did not defeat United's right to arbitrate the dispute, despite the fact that Harms and Graves were not parties to the 1996 Services Agreement containing the arbitration clause. Accordingly, the trial court ordered that the remaining claims be arbitrated pursuant to the rules of the American Arbitration Association and stayed the proceedings pending the outcome of arbitration.

ISSUES

1. Did the trial court err in dismissing CCP's causes of action for fraud, unconscionability, and a violation of public policy pursuant to Rule 12(b)(6)?
2. Did the trial court err in finding that the arbitration clause was applicable to individual defendants and in staying the remaining claims pending arbitration?

1. 12(b)(6) Motions

CCP contends the trial court erred in dismissing the causes of action for fraudulent inducement, unconscionability, and violation of public policy pursuant to Rule 12(b)(6). We disagree.

The ruling on a Rule 12(b)(6), SCRCP, motion to dismiss must be based solely upon the allegations set forth in the complaint. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999); Washington v. Lexington County Jail, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999). A 12(b)(6) motion should not be granted if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The question to be considered is whether, when viewed in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail. Gentry, id. at 5, 522 S.E.2d at 139.

A. Fraud and Concealment

South Carolina law generally favors arbitration. McMillan v. Gold Kist, Inc., 353 S.C. 353, 359, 577 S.E.2d 482, 485 (Ct. App. 2003). In interpreting agreements within the scope of the FAA, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 610, 571 S.E.2d 711, 714 (Ct. App. 2002) (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). Any doubts concerning the scope of arbitrable issues should be resolved in

favor of arbitration. Zabinski v. Bright Acres Associates, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). Further, unless the Court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. Id. at 597, 553 S.E.2d at 118.

A written provision in any contract evidencing a transaction involving commerce to settle by arbitration shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C.A. § 2 (2000). A party cannot avoid arbitration through rescission of an entire contract when there is no independent challenge to the arbitration clause itself. There must be fraud in the inducement of the arbitration agreement to avoid arbitration of the contract. South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc., 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.E.2d 1270 (1967)). "Fraud as a defense to an arbitration clause must be fraud *specifically as to the arbitration clause and not the contract generally*." South Carolina Pub. Serv. Auth., id. at 563, 437 S.E.2d at 24 (emphasis added).

In the present case, CCP alleged that at the time it was considering and negotiating the 1996 Services Agreement with United, CCP relied on and utilized the employees and services of United to run virtually all of CCP's business. Further, CCP had no employees of its own, and used United employees to fill all of its officer positions.

CCP alleged that, during the 1996 negotiations, Bill Martin [3] was both its CEO and a paid employee of UHS. CCP alleged that as its CEO, Martin was responsible for negotiating and reviewing proposed contracts. CCP further alleged that Martin failed to object to the inclusion of the arbitration clause in the 1996 Services Agreement because Martin knew United had committed various torts and other wrongful acts against CCP and Martin knew that United planned to commit additional torts and wrongful acts against CCP in the future. Alternatively, CCP alleged that Martin knew United inserted the arbitration clause into the 1996 Services to limit CCP's ability to discover the extent of United's misconduct and to limit its ability to recover punitive or exemplary damages. CCP further alleged that Martin failed to disclose to CCP's board of directors why United wanted the arbitration clause included or to explain the impact of the provision, and that Martin told CCP's board that the 1996 Services Agreement was merely changing the method of payment between CCP and United.

The trial court found that the pleadings failed to state a claim that CCP was fraudulently induced into agreeing to the arbitration provision. The trial court found that any reliance on the alleged misconduct only went to the entire 1996 Services Agreement and not solely to the arbitration clause. Accordingly, the trial court ruled that, pursuant to Prima Paint, any claims regarding the making of the 1996 Service Agreement must be arbitrated.

CCP argues on appeal that the fraud alleged in the complaint is particular to the arbitration clause and does not go to the entire agreement. CCP essentially alleges that

the contract was procured through fraud and that the arbitration clause was a vehicle used by United to further the fraud, to prevent its discovery, and to prevent recovery if the fraud was discovered. CCP also argues that, had Martin performed his duties as CEO and informed CCP that United was committing torts, breaches of the 1984 contract, and various other malfeasances against CCP, CCP would never have agreed to a clause mandating arbitration and limiting punitive damages. However, CCP claims that because United controlled so much of its business and possessed so many of its records and files, CCP was held captive by United and would have been forced to sign the 1996 Services Agreement regardless of whether Martin informed CCP of United's misconduct and its intent to commit future misconduct. [4] Therefore, CCP contends in its brief that, had it known United was acting improperly, CCP would have still signed the 1996 Services Agreement, but would not have agreed to the arbitration clause within the contract. [5]

We hold that CCP made no allegation of fraud specifically as to the arbitration clause, but only challenged the contract generally in its assertion that United committed fraud as to the contract. CCP has not alleged that United lied or committed fraud to induce CCP to enter into the arbitration clause or that United lied or misrepresented the effect of the arbitration agreement, its validity, CCP's ability to recover punitive damages, or CCP's ability to demand a jury trial. Therefore, the issue of whether the entire contract was fraudulently induced is the proper question here; meaning the matter must be decided in arbitration. South Carolina Pub. Serv. Auth., id. at 563, 437 S.E.2d at 24.

The dissent argues that CCP's allegation that the arbitration provision was inserted to limit CCP's ability to discover the extent of the misconduct and to limit punitive damages is sufficient under notice pleading rules to survive a 12(b)(6) motion. However, the dissent ignores the rationale behind Prima Paint and the strong presumption favoring arbitration of disputes. Further, in very similar cases, other courts have held an allegation that an arbitration clause was used to further a scheme to defraud is not sufficient to allege fraud as to the arbitration clause specifically. Garten v. Kurth, 265 F.3d 136, 133-44 (2nd Cir. 2001) (citing Campaniello Imports, Ltd., v. Saporiti Italia, S.p.A., 117 F.3d 655 (2nd Cir. 1997) (where there is merely a link between the arbitration clause and general fraud alleged by the plaintiff, and nothing deficient in an arbitration clause itself, a plaintiff may not establish a connection between the alleged fraud and the arbitration clause merely by adding the allegation that the arbitration clause was a part of the overall scheme to defraud); Phillips v. Home Equity Services, Inc., 179 F.Supp.2d 840, 845 (N.D. Ill. 2001) (where there was no evidence that the defendants misrepresented the purpose or the operation of the arbitration clause, there was no evidence to conclude that the parties never agreed to arbitrate their dispute); Hayes Children Leasing Co. v. NCR Corp., 37 Cal.App.4th 775 (Cal. App. 1 Dist. 1995) (holding that it is not enough to allege that the arbitration clause was inserted to further a fraudulent scheme; the question in all cases simply is whether the agreement to arbitrate itself was induced by some fraud).

We can find no allegation in the complaint that the arbitration clause itself was induced by fraud. CCP has simply alleged that United was engaged in fraudulent conduct

throughout negotiations, and that the arbitration clause was inserted in a scheme to further that fraud. To follow the dissent's rationale would violate the holding in Prima Paint [6] and undermine the policy favoring arbitration.

B. Unconscionability and Public Policy

CCP argues that it adequately pled the arbitration provision was unconscionable and in violation of public policy. We disagree.

Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996).

The trial court ruled that CCP's allegations of unconscionability and violation of public policy as to the arbitration clause were based on the same claims the trial court rejected; that had CCP known of the alleged misconduct by United and Martin, it would have still entered into the 1996 Services Agreement but would not have agreed to the arbitration clause. Therefore, the trial court dismissed both causes of action for failure to state a claim pursuant to Rule 12(b)(6).

CCP argues it sufficiently pled the arbitration clause was unconscionable because Martin, in his capacity as CEO, breached his fiduciary duties by acting in the best interests of United. Again, CCP argues that Martin should have informed CCP about the arbitration clause and the rights being forsaken by CCP. CCP further contends the arbitration clause was one-sided in favor of United because it prevents discovery [7] and prohibits an award of punitive damages.

We hold that CCP has failed to allege any facts that would show the clause was unconscionable. Both parties were sophisticated entities and, as United points out in its brief, CCP was apparently represented by independent counsel. While CCP alleged it lacked a meaningful choice as to the entire contract, CCP has simply failed to allege that it lacked a meaningful choice as to the arbitration clause specifically. Therefore, we agree with the trial court's ruling that any misconduct by Martin affected whether the entire agreement was unconscionable, not simply the arbitration clause.

As to the substantive claim involving the public policy issue, CCP alleged that because the clause sought to limit CCP's rights and remedies, the clause was unenforceable as a matter of law. In its complaint, CCP also alleged that its rights and remedies under the SCUTPA were limited by the clause. This Court has not addressed whether it violates South Carolina public policy for parties to voluntarily forgo punitive damages in an arbitration agreement.

The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. Beach Co. v. Twillman, Ltd., 351

S.C. 56, 64, 566 S.E.2d 863, 866-67 (Ct. App. 2002). As noted in 83 A.L.R.3d 1037, 1039 (1978):

courts in some cases have held that an arbitrator has the power, at least in certain circumstances, to award punitive damages. Thus, the court in one case has held that arbitrators possess the power, apparently without limitation in a labor law context, to award punitive damages. In other cases, however, the courts have taken the position that arbitrators have the power to award punitive damages only when they are given such power by express language in the contract authorizing arbitration or in the submission papers.

A number of courts in other jurisdictions have held that an arbitration agreement limiting or excluding punitive damages is enforceable. Martin v. SCI Mgt. L.P., 296 F.Supp.2d 462 (S.D.N.Y. 2003) (parties to an arbitration agreement may expressly preclude an arbitrator from awarding punitive damages); Investment Partners, L.P. v. Glamour Shots Licensing, Inc., 298 F.3d 314 (Miss. App. 2002) (holding provisions in arbitration agreements that prohibit punitive damages are generally enforceable); 7-Eleven, Inc. v. Dar, 757 N.E.2d 515 (Ill. App. 2001) (holding arbitrators may award punitive damages only where the parties have expressly agreed to the arbitrator's authority to award punitive damages).

Other courts have held that an arbitration agreement excluding punitive damages violates public policy. Ex parte Thicklin, 824 So.2d 723 (Ala. 2002) (holding that it violates Alabama public policy for a party to contract away its liability for punitive damages, regardless of whether the provision was intended to operate in an arbitral or a judicial forum); State ex rel. Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002) (holding prohibitions on punitive damages and class action relief that would be the result of the application of a purchase and finance agreement are clearly unconscionable).

CCP cites In re Managed Care Litig., 132 F.Supp.2d 989 (S.D. Fla. 2000), in support of its public policy argument. In that case, the U.S. District Court for the Southern District of Florida ruled that a similar clause [8] excluding punitive or exemplary damages was unenforceable as a matter of public policy as it related to the plaintiff's RICO [9] claims. However, the United States Supreme Court overturned that decision in PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003). The Supreme Court held that the issue of whether statutory treble damages under the RICO statute were barred was not yet ripe because there was some question as to whether treble damages were punitive or compensatory, and it was unclear how an arbitrator would rule on the issue. PacifiCare, 538 U.S. at 1535-36.

Based on PacifiCare, it is clear an arbitrator may or may not choose to award treble damages in accordance with the SCUTPA, depending upon whether an arbitrator finds the SCUTPA was violated and whether the arbitrator finds that statutory treble damages are punitive or compensatory damages. Accordingly, we hold that the question of whether the clause preventing punitive damages violates public policy as to the SCUTPA is not yet ripe because an arbitrator has not ruled on the issue.

However, CCP is also seeking punitive damages in several common law causes of action. We hold that this issue is also not ripe for two reasons. First, it is unclear whether CCP will prevail on the merits in arbitration. Second, it is unclear whether an arbitrator would find that punitive damages are warranted. Accordingly, we hold that any challenge that the clause violates public policy is premature. See Hawkins v. Aid Assn. for Lutherans, 338 F.3d 801 (7th Cir. 2003) (holding that complaints about the unavailability of punitive damages must first be presented to the arbitrator).

Additionally, we note that our holding in no way limits CCP's ability to pursue its claims of fraud in the inducement of the arbitration clause, unconscionability, and public policy violations in arbitration. See Larry's United Super, Inc. v. Werries, 253 F.3d 1083, 1086-87 (8th Cir. 2001) (holding that whether federal public policy prohibits an individual from waiving certain statutory remedies is an issue that may be raised when challenging an arbitrator's award).

2. Non-Signatory Defendants; Stay of Proceedings

CCP also contends that, even assuming the arbitration clause is enforceable, the claims against Harms and Graves fall outside of its scope and must be litigated. CCP also contends the trial court erred in staying the proceedings. We disagree, and hold that the trial court's order is not immediately appealable.

This Court has held that the FAA does not preempt South Carolina state law in regard to procedural rules on the appealability of arbitration orders. Toler's Cove Homeowners Assn., Inc. v. Trident Const. Co., Inc., 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (2003) (holding there is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate; therefore, South Carolina law is not invalidating the arbitration agreement or undermining the goals and policies of the FAA). Pursuant to S.C. Code Ann. § 15-48-200(a) (2003), an appeal may be taken from:

(1) An order denying an application to compel arbitration made under § 15-48-20;

(2) An order granting an application to stay arbitration made under § 15-48-20(b);

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of this chapter.

Section 15-48-200 does not expressly permit an appeal from an order granting an application to compel arbitration or from an order to stay claims pending

arbitration. Therefore, the order compelling arbitration of the claims against Harms and Graves and staying the remaining claims is not immediately appealable.

CONCLUSION

We affirm the trial court's dismissal of CCP's fraud, public policy, and unconscionability claims pursuant to Rule 12(b)(6). Any claims related to the making of the contract or the arbitration clause may be pursued in arbitration. We also hold the trial court's order compelling arbitration of the claims against the non-signatories and staying the proceedings is not immediately appealable.

AFFIRMED.

MOORE and PELICONES, JJ., concur. Acting Justice Roger M. Young dissenting in a separate opinion in which TOAL, C.J., concurs.

ACTING JUSTICE YOUNG: I concur in Part 1. B. and Part 2 of the majority's opinion. I respectfully dissent from Part 1. A., in which the majority holds that the Appellant's complaint does not specifically allege fraud in the inducement of the making of the arbitration clause contained in the contract. The majority finds the complaint alleges fraud in the inducement of only the contract. I disagree. I read the Second Amended Complaint as pleading a cause of action that sufficiently alleges fraud in the inducement of the arbitration clause to comply with precedents of this Court and Rule 12(b)(6), SCRCP. Therefore, I would reverse the trial court's grant of the Respondents' Rule 12(b)(6) motion to dismiss and remand to the trial court for further proceedings on that cause of action.

As the majority notes, in S.C. Pub. Serv. Auth. v. Great W. Coal (Ky), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993), this Court adopted the Prima Paint rule, which holds that to avoid arbitration through the rescission of the entire contract, a party must allege fraudulent inducement in the making of the arbitration clause specifically. A party may not avoid arbitration by alleging fraudulent inducement in the making of the contract generally. I find the Appellant has met this burden.

The Appellant's 21st cause of action in the Second Amended Complaint alleges that the United Respondents [10] inserted the arbitration clause into the contract to limit Appellant's ability to discover the extent of the United Respondents' misconduct and to limit Appellant's right to recover punitive damages. Specifically, the amended complaint alleges that Bill Martin, an employee of the United Respondents and, allegedly, an agent of Appellant, knew the true reason the United Respondents wanted the arbitration clause inserted, knew of the Appellant's Board of Directors reliance on him to advise the Board concerning contractual matters, and failed to disclose to the Board why the United Respondents wanted the arbitration clause inserted or of its impact. The complaint alleges that Martin informed the Appellant's Board that the contract merely changed the method of payment between the parties and that the United Respondents required Martin and other United employees to provide Appellant with false information

regarding their true intentions concerning the fulfillment of contract obligations. This cause of action further alleges the United Respondents planned to commit additional torts, breaches of contract and fiduciary duties, as well as other unspecified wrongs. The complaint specifically alleges the United Respondents had the arbitration clause inserted in an effort to prevent the Appellant from discovering these past and future planned wrongdoings, as well as to limit the Appellant's right to recover punitive damages for this misconduct. Finally, the cause of action alleges the United Respondents required their employees to hide both the reason for the insertion of the arbitration clause and the impact of the clause.

At no point does the Second Amended Complaint allege the Respondents fraudulently induced Appellant into entering the contract generally. This cause of action appears to be carefully drafted and is very specific in its averment of facts that allege the arbitration clause was fraudulently inserted in an attempt by the United Respondents to limit the Appellant's ability to discover other wrongful acts committed by the United Respondents as well as to limit the Appellant's right to recover punitive damages for those wrongful acts.

The Appellant's original complaint and its first amendment would not have survived a S.C. Pub. Serv. Auth. v. Great W. Coal (Ky), Inc. challenge. However, the trial court allowed the Appellant to amend the complaint a second time, and in my opinion this last amendment corrected the earlier defects. The Appellant should not be penalized for these earlier shortcomings when analyzing the Second Amended Complaint. When viewed in a light most favorable to the Appellant as required in a Rule 12(b)(6) motion, the Second Amended Complaint sets forth facts that specifically allege the arbitration clause itself was the subject of the fraudulent inducement, and not the contract generally. Therefore, I would remand the case to the trial court with instructions to proceed on the fraudulent inducement cause of action while staying the remainder of the case until such time as that issue has been resolved.

TOAL, C.J., concurs.

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[1] The parent company of CCP was originally known as Physicians Heath Plan of South Carolina (PHPSC). At some point the name appears to have been changed to Physicians Health Plan, Inc. (PHP). In 1996, the company was reorganized and CCP was created as a for-profit subsidiary of PHP. For simplicity's sake, we refer to appellant as CCP throughout.

[2] The trial court also implicitly found that the FAA applied because the contract was one evidencing a transaction involving commerce pursuant to 9 U.S.C.A. § 2 (2000).

[3] Despite CCP's allegations of wrongdoing against Martin, he is not a named defendant.

[4] It is unclear from the record why CCP allowed itself to become so entangled with United. However, it appears that at some point after it signed the 1996 Services Agreement, CCP decided to become more independent of United and discovered the alleged fraud.

[5] CCP supports its argument with the affidavit of Dr. Rice Holcombe, who became Chairman of the Board of Directors in 1996. Dr. Holcombe claims that, had he been informed of the prior misconduct by United or its intent to commit future misconduct, he would not have agreed to the inclusion of the arbitration clause in its current form, or would have insisted the arbitration clause be removed altogether. Ordinarily, if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the trial court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, SCRCP. Rule 12(c), SCRCP; Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997) (holding that where the trial court dismisses a cause of action based upon matters outside the pleadings, a 12(b)(6) motion is converted into Rule 56 motion for summary judgment). However, while United claims in its brief that Dr. Holcombe's affidavit cannot be considered because the affidavit relates to factual issues that are inappropriate to take into consideration at the 12(b)(6) stage, neither party argues that the motion should have been converted into a motion for summary judgment. Further, CCP states in its reply brief that the affidavit is not needed to decide the issue because the second amended complaint is sufficient standing alone. Accordingly, we have not considered the affidavit in our decision.

[6] A minority of courts have rejected Prima Paint on state law grounds. Shaffer v. Jeffery, 915 P.2d 910 (allegations of fraud in the inducement of a contract or agreement generally, apart from the clause to arbitrate, must be resolved by the court prior to either compelling arbitration or dismissing the case); Blaine v. John Coleman Hayes & Associates, Inc., 818 S.W.2d 33 (1991) (adopting the minority viewpoint that if there are allegations the contract in general was procured by fraud, that a court, not an arbitrator should make that determination). However, this Court adopted the Prima Paint rule in South Carolina Pub. Serv. Auth. Further, as noted above, the parties have not challenged the judge's implicit ruling that the transaction involves interstate commerce.

[7] We note that the arbitration clause does not expressly prevent discovery, and the American Arbitration Association rules provide that arbitrators have broad authority to order and control discovery, including depositions.

[8] The case involved several similar arbitration clauses that excluded punitive damages. UHG was one of the defendants.

[9] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961 et seq.

[10] United HealthCare Services, Inc., United Healthcare Group, Incorporated, and United Healthcare Insurance Co.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mae Ruth Davis Thompson, Individually and as the appointed Personal Representative of the Estate of Eula Mae Davis, deceased, Respondent,

v.

Pruitt Corporation d/b/a UHS-Pruitt Corporation; UHS-Pruitt Holdings, Inc.; UHS of South Carolina-East, LLC; United Health Services of South Carolina, Inc.; United Clinical Services, Inc.; United Rehab, Inc.; Rock Hill Healthcare Properties, Inc.; Uni-Health Post Acute Care-Rock Hill, LLC d/b/a UniHealth Post Acute Care-Rock Hill, Appellants.

Appellate Case No. 2014-001624

Appeal From York County
S. Jackson Kimball, III, Circuit Court Judge

Opinion No. 5384
Heard February 2, 2016 – Filed March 2, 2016

AFFIRMED

Monteith Powell Todd, Robert E. Horner, John Michael Montgomery, and Alexander Erwin Davis, all of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for Appellants.

John Gressette Felder, Jr., of Columbia, and Jordan Christopher Calloway, of Rock Hill, both of McGowan, Hood & Felder, LLC, for Respondent.

GEATHERS, J.: In this wrongful death and survival action, Appellants, Pruitt Corporation d/b/a UHS-Pruitt Corporation, UHS-Pruitt Holdings, Inc., UHS of South Carolina-East, LLC, United Health Services of South Carolina, Inc., United Clinical Services, Inc., United Rehab, Inc., Rock Hill Healthcare Properties, Inc., and Uni-Health Post Acute Care-Rock Hill, LLC d/b/a UniHealth Post Acute Care-Rock Hill, challenge the circuit court's order denying their motion to compel arbitration. We affirm.

FACTS/PROCEDURAL HISTORY

On January 11, 2011, Respondent, Mae Ruth Davis Thompson (Daughter), and her brother, Andrew Phillip Davis (Son), had their mother, Eula Mae Davis (Mother), transferred from Piedmont Medical Center to a nearby nursing home facility owned or operated by Appellant UniHealth Post Acute Care-Rock Hill (UniHealth). A UniHealth employee presented an Admission Agreement, an Arbitration Agreement (AA), and several other documents to Son for his signature on behalf of Mother, who suffered from dementia. Mother was not present at this time as she was in the process of being transported to UniHealth.

Within five hours of being admitted to UniHealth, Mother died as a result of falling out of a bed with a malfunctioning side rail. Subsequently, Daughter filed a wrongful death and survival action against Appellants. Appellants later filed a motion to dismiss Daughter's action and to compel arbitration of Daughter's claims or, in the alternative, to compel arbitration and stay Daughter's action.

The circuit court denied the motion to compel on the ground that Son did not have authority to execute the AA on Mother's behalf under either common law agency principles or the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (2002 & Supp. 2012)). Appellants filed a motion for reconsideration; however, the circuit court denied the motion. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in concluding Mother's estate could not be bound by the AA under the Adult Health Care Consent Act?

2. Did the circuit court err in concluding Mother's estate could not be bound by the AA under common law agency principles?

3. Did the circuit court err in concluding Mother's estate could not be bound by the AA under a third-party beneficiary theory?

4. Did the circuit court err in concluding Mother's estate could not be equitably estopped from refusing to comply with the AA?

STANDARD OF REVIEW

"Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012).

LAW/ANALYSIS

I. Merger

Appellants contend the circuit court erred in concluding Mother's estate could not be bound by the AA under the Adult Health Care Consent Act (the Act). Appellants argue the AA "merged" with the Admission Agreement, which Son was authorized to execute under the Act, making both agreements one and the same. We disagree.

Initially, we note this issue is not preserved for our review. Appellants did not raise this issue below; rather, Daughter raised the issue during both motions hearings, citing our supreme court's recent opinion in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 453 (2014), and its interpretation of the Act. Appellants addressed the merger concept in the second motions hearing only to respond to Daughter's argument that she could be not be equitably estopped because under the analysis provided by *Coleman*, the AA and the Admission Agreement had not been merged. Appellants attempted to distinguish *Coleman* as follows: "[I]t doesn't discuss equitable estoppel other than to basically discuss merger and say if your argument is premised on merger, we found no merger;

therefore, this argument must fail. My argument is not premised upon a merger . . . ."

Based on the foregoing, Appellants are precluded from arguing the doctrine of merger in this appeal. *See Richland Cty. v. Carolina Chloride, Inc*., 382 S.C. 634, 656, 677 S.E.2d 892, 903 (Ct. App. 2009) (holding the appellant was barred on appeal from asserting its argument concerning governmental estoppel because it expressly waived this argument during trial), *aff'd in part, rev'd in part on other grounds*, 394 S.C. 154, 714 S.E.2d 869 (2011). Even if Appellants' merger argument had been properly preserved, we would affirm on the merits.

The Act confers authority on a health care surrogate to consent on the patient's behalf "to the provision or withholding of medical care" and to make financial decisions obligating the patient to pay for the medical care provided. *Coleman*, 407 S.C. at 351-52, 755 S.E.2d at 453.

> Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:
>
> (1) a guardian appointed by the [Probate Court], if the decision is within the scope of the guardianship;
>
> (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant to [section 62-5-501 of the South Carolina Code (2009 & Supp. 2015)], if the decision is within the scope of his authority;
>
> (3) a person given priority to make health care decisions for the patient by another statutory provision;
>
> (4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:
>
> > (a) entry of a pendente lite order in a divorce or separate maintenance action;

> (b) formal signing of a written property or marital settlement agreement;
>
> (c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
>
> (5) a parent or adult child of the patient;
>
> (6) an adult sibling, grandparent, or adult grandchild of the patient;
>
> (7) any other relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient;
>
> (8) a person given authority to make health care decisions for the patient by another statutory provision.

S.C. Code Ann. § 44-66-30(A) (2002).

In *Coleman*, our supreme court held an arbitration agreement signed by the surrogate in that case was separate from the agreement to admit the patient to a health care facility and "concerned neither health care nor payment, but instead provided an optional method for dispute resolution between [the facility] and [the patient or her surrogate] should issues arise in the future." 407 S.C. at 353-54, 755 S.E.2d at 454. The court further held, "Under the Act, [the surrogate] did not have the capacity to bind [the patient] to this voluntary arbitration agreement." *Id.* at 354, 755 S.E.2d at 454.

Here, in its order denying Appellants' motion to compel arbitration, the circuit court stated,

> The manifest purpose of the Act is to enable contracting parties in a healthcare situation to enter into a binding agreement when express authority has not been conferred upon an agent for that purpose. It further eliminates the

> need to deal with questions of apparent agency or authority in order to make such a contract binding.
>
> However, *the Act does not confer such authority with respect to an Arbitration Agreement[] such as the one in issue in this case*. *See Coleman v. Mariner Health Care, Inc.*, Supreme Court, Opinion No. 27362, filed March 12, 2014. As the Arbitration Agreement does not deal with healthcare decisions, the provisions of the Act do not apply to establish the necessary principal-agent relationship. *Id.*

(emphasis added). We agree with the circuit court's analysis.

Like the arbitration agreement in *Coleman*, the AA signed by Son in the present case was separate from the Admission Agreement. Therefore, any authority Son had to sign the AA on Mother's behalf could not come from the Act. *See id.* at 353-54, 755 S.E.2d at 454 (holding that under the Act, the patient's surrogate did not have authority to bind the patient to a voluntary arbitration agreement that was separate from the agreement to admit the patient to a health care facility and "concerned neither health care nor payment").

Appellants argue the terms of the Admission Agreement indicate it either incorporated, or merged with, the AA and thus, Son's authority to execute the Admission Agreement covered the terms of the AA as well. We disagree.

After holding the Act did not authorize the surrogate to sign an arbitration agreement on the patient's behalf, the court in *Coleman* addressed the health care facility's alternative argument that the surrogate was equitably estopped to deny the arbitration agreement's enforceability because that agreement merged with the admission agreement:

> The general rule is that, *in the absence of anything indicating a contrary intention*, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

407 S.C. at 346, 355, 755 S.E.2d at 455 (emphasis added) (quoting *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). The court then explained the evidence of the parties' intent to keep the two agreements separate by highlighting the admission agreement's recognition of the arbitration agreement as a separate document, i.e., "This Agreement, including all Exhibits hereto, and the Arbitration Agreement . . . supersede all other agreements . . . and contain all of the promises and agreements between the parties." *Id.* The court also highlighted the arbitration agreement's provision allowing it to be disclaimed within thirty days and noted the admission agreement did not include such a provision, "evidencing an intention that each contract remain separate." *Id.* Finally, the court stressed that even if the language of the admission agreement created "an ambiguity as to merger, the law is clear that any ambiguity in such a clause is *construed against the drafter*, in this case, [the facility]." *Id.* at 355-56, 755 S.E.2d at 455 (emphasis added).

Here, as in *Coleman*, the AA contained language that provided it could be disclaimed within thirty days, yet the Admission Agreement did not include such a provision. Appellants argue the Admission Agreement could have been "disclaimed" at any time by Mother leaving the facility and thus, the right to disclaim the AA does not show the parties intended for the AA to be separate from the Admission Agreement. This is not a valid comparison. Because there are no provisions in the Admission Agreement allowing Mother to disclaim it, leaving the facility would be the only way she could "disclaim" the agreement, whereas the AA allows the patient to disclaim the AA unconditionally. Therefore, Mother's right to disclaim the AA without having to terminate her residency at the facility indicates the parties' intent to keep the AA separate from the Admission Agreement. This is consistent with the AA's statement that its execution was not a condition precedent for being admitted to the nursing home: "The signing of this Agreement is not a precondition to admission, expedited admission, or the furnishing of services to the Patient/Resident by the Healthcare Center[.]" This demonstrates the parties' intent that the two agreements retain their separate identities.

Appellants also argue the Admission Agreement incorporates by reference all exhibits to the agreement and the AA is one of the exhibits. However, the Admission Agreement is ambiguous on this point because (1) it does not define the term "exhibit" or cross-reference any specific exhibits and (2) the AA does not include any labels or other language indicating it serves as an exhibit or addendum

to the Admission Agreement.[1] Therefore, the Admission Agreement's provision incorporating all "exhibits" must be construed against Appellants. *See Coleman*, 407 S.C. at 355-56, 755 S.E.2d at 455 (holding any ambiguity in the patient's admission agreement as to its merger with the arbitration agreement was to be construed against the health care facility); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004) ("A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear."). As to Appellants' contention they relied on Son's written representation he was authorized to sign the AA, we see no true reliance. Appellants represented the AA to be a voluntary agreement that was not a condition to Mother's admission to the facility and was unconditionally revocable within thirty days of execution.

Based on the foregoing, we affirm the circuit court's conclusion that the particular AA in the present case did not require the type of decision for which the Act confers authority on a surrogate, i.e., health care or payment for health care.

II. Common Law Agency

Appellants maintain the circuit court erred in concluding no common law agency relationship existed between Son and Mother when Son executed the AA. Appellants argue Son had apparent authority to execute the AA on Mother's behalf. We disagree.

To establish apparent authority, the proponent must show (1) "the purported principal consciously or impliedly represented another to be his agent;" (2) the proponent relied on the representation; and (3) "there was a change of position to the [proponent's] detriment." *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013) (quoting *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991)).

> Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the *principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.

[1] In fact, the front page of the AA is labeled "Arbitration Agreement," indicating the parties' intent for it to stand by itself as an independent contract.

Id. (emphasis added) (quoting *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244-45, 473 S.E.2d 865, 868 (Ct. App. 1996)). "Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* (quoting *Frasier*, 323 S.C. at 245, 473 S.E.2d at 868). "Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent." *Id.*

Here, Appellants assert Mother "allowed, passively or otherwise, [Son] to not only sign her into [UniHealth], but also to handle multiple other financial affairs for her." While the evidence indicates Son handled Mother's finances in the years leading up to her admission to UniHealth, the evidence also indicates Mother had dementia prior to being admitted to UniHealth. Therefore, her incapacity prevented her from "consciously or impliedly" representing another to be her agent. *See id*. at 47, 748 S.E.2d at 630 (holding that to establish apparent authority, the proponent must show, among other things, "the purported principal consciously or impliedly represented another to be his agent"); *id.* ("Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief."); *see also Cook v. GGNSC Ripley, LLC*, 786 F. Supp. 2d 1166, 1171 (N.D. Miss. 2011) (holding a patient's daughter could not bind the patient through apparent authority because the patient was incapacitated and unable to acquiesce in her daughter's actions).

Further, the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial. *See Dickerson v. Longoria*, 995 A.2d 721, 736-37 (Md. 2010) ("[T]he decision to enter into an arbitration agreement primarily concerns the signatory's decision to waive his or her right of access to the courts and right to a trial by jury."); *id.* at 739 ("The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement."); *id.* at 736 (concluding the medical and financial decisions of the patient's companion on the patient's behalf suggested the patient may have conferred on his companion "the authority to make health care and financial decisions on his behalf, but no more than that"); *id.* at 735 (holding the patient's companion was the patient's "agent for purposes of health care and financial decisions, but that the scope of this consensual relationship did not include the authority to bind [the patient] to the arbitration agreement in this

case"); *id.* at 735 (holding an agent's statement will bind the principal only if the statement is within the scope of the agency and, therefore, an agent may not enlarge the actual authority by his own acts without the principal's assent or acquiescence); *see also Cook*, 786 F. Supp. 2d at 1171 ("An arbitration agreement is not considered to be a health-care decision when admission is not contingent upon its execution."); *cf. Coleman*, 407 S.C. at 354, 755 S.E.2d at 454 ("The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between [the health care facility] and [the patient] or [surrogate] should issues arise in the future. Under the Act, [the surrogate] did not have the capacity to bind [the patient] to this voluntary arbitration agreement."); *id.* ("We therefore affirm the circuit court's holding that the Act did not confer authority on [the surrogate] to execute a document which involved neither health care nor financial terms for payment of such care.").

Based on the foregoing, the evidence does not show that Son had either actual or apparent authority to execute the AA on Mother's behalf. Therefore, the circuit court properly concluded Son did not have the authority to bind Mother to the AA. *See Pearson*, 400 S.C. at 286, 733 S.E.2d at 599 ("Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings.").

III. Third-Party Beneficiary

Appellants contend the circuit court erred in concluding that Mother's estate was not bound by the AA under a third-party beneficiary theory. Appellants maintain Mother was a third-party beneficiary of the AA as executed by Son in either his representative or individual capacity and Mother's third-party beneficiary status made the AA binding on her estate. We disagree.

"A third-party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). However, there can be no third-party beneficiary unless a valid contract exists. *See Dickerson*, 995 A.2d at 742 ("Before one can enforce a contract, however, whether as a party to the contract or as a third-party beneficiary, there must be a contract to enforce."). Here, Son was not authorized to execute the AA on Mother's behalf. Therefore, she could not be the third-party beneficiary of the alleged AA between herself and Appellants.

As to the AA between Appellants and Son in his individual capacity, "a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement." *Id.* Here, Daughter is not attempting to enforce the AA on behalf of Mother's estate. Rather, she has asserted tort claims against Appellants arising out of the patient-provider relationship created by the separate Admission Agreement. Further, Mother's diminished mental capacity prevented her from assenting to the AA's terms. Therefore, her estate cannot be bound by the AA. *See Drury v. Assisted Living Concepts, Inc.*, 262 P.3d 1162, 1166 n.5 (Or. Ct. App. 2011) ("[U]nless the third-party beneficiary in some way assents to a contract containing an arbitration clause, the contracting parties have waived the beneficiary's right to a jury trial without her consent.").

Appellants also assert that even if Mother was not a third-party beneficiary of the AA, it is still binding on Mother's estate because "the claims of the other beneficiaries of the Estate are inextricably intertwined with [Son's] claims and the members of the group share a close relationship." Appellants cite *Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001), in support of this argument. In *Long*, the Fourth Circuit held that the facts and claims against a close corporation and its shareholders were "so closely intertwined that [the plaintiff's] claims against the non-signatory shareholders of the [c]orporation [were] properly referable to arbitration even though the shareholders [were] not formal parties" to the agreement containing the arbitration clause. *Id.*

Daughter correctly points out that the basis for the Fourth Circuit's holding in *Long* was the "ordinary state-law principles of agency or contract." *Id.* ("A non-signatory may invoke an arbitration clause under ordinary state-law principles of agency or contract."). Further, agency is inherent in the nature of a relationship between a corporation and its shareholders. *See id.* ("In this context, we see little difference between a parent and its subsidiary and a corporation and its shareholders, where, as here, the shareholders are all officers and members of the Board of Directors and, *as the only shareholders*, control all of the activities of the corporation." (emphasis added)). In contrast, the evidence in the present case does not show Son met the legal requirements for an agency relationship with Mother. *See supra*. Therefore, Appellants' "inextricably intertwined" argument has no relevance to the present case.

IV. Equitable Estoppel

Finally, Appellants assert the circuit court should have concluded that Mother's estate was equitably estopped from refusing to comply with the AA. Appellants argue Mother benefited from the AA because she was admitted to UniHealth, received medical care, and became capable of enforcing the AA. We disagree.

Initially, we note the recent conflict between the United States Supreme Court and our state courts concerning the application of state law in determining whether a non-signatory is bound by an arbitration agreement. *Compare Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 632 (2009) (holding that a nonparty to an agreement is entitled to invoke the Federal Arbitration Act (FAA) "if the relevant state contract law allows him to enforce the agreement"), *and id.* at 631 ("Because 'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,' the Sixth Circuit's holding that nonparties to a contract are categorically barred from [FAA] relief was error." (citation omitted)), *with Pearson*, 400 S.C. at 289-90, 733 S.E.2d at 601 (decided in 2012 and holding "[b]ecause the determination of whether a non[-]signatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question").

Nonetheless, the doctrine of equitable estoppel does not apply to Mother's estate under either South Carolina law or federal substantive law concerning arbitrability. We first examine the doctrine as it has been developed under federal substantive law:

> In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

Pearson, 400 S.C. at 290, 733 S.E.2d at 601 (emphasis omitted) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)). In other words, "[w]hen 'a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a "direct benefit" from a contract containing an arbitration clause.'" *Id.* at 295, 733

S.E.2d at 604 (quoting *Jackson v. Iris.com*, 524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007)).

Notably, in those opinions addressing equitable estoppel in the arbitration context, the nonsignatory's contractual benefit is not typically an alleged benefit of arbitration such as "avoiding the expense and delay of extended court proceedings" or being "capable of enforcing the [AA]," as touted by Appellants in the present case—rather, the contractual benefit typically arises from another provision of the same contract that includes the arbitration provision. *See Pearson*, 400 S.C. at 296-97, 733 S.E.2d at 605 (ability to work at the defendant's hospital facility and receive payment for work); *see also Int'l Paper Co.*, 206 F.3d at 418 (warranty provisions); *Jackson*, 524 F. Supp. 2d at 750 (entitlement to retain a $150,000 payment pursuant to the contract's liquidated damages provision); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (lower insurance rates on a yacht and the ability to sail under the French flag); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993) (continuing use of a name).

Here, the AA is not incorporated into the Admission Agreement; therefore, Appellants' assertion that Mother received benefits under the Admission Agreement, i.e., being admitted to the facility and receiving medical care, is of no moment. The two agreements are independent of one another, as reflected in the language of the AA indicating its execution is not a condition for being admitted to the nursing home. Further, any possible benefit emanating from the AA alone is offset by the AA's requirement that Mother waive her right to access to the courts and her right to a jury trial. Therefore, equitable estoppel under federal substantive law has no application to the present case.

Under South Carolina law, the elements of equitable estoppel as to the party to be estopped are

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is *calculated* to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) *intention*, or at least expectation, that such conduct shall be acted upon by the other party; and (3) *knowledge*, actual or constructive, of the real facts. As related to the party

> claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006) (emphases added).

Here, Mother had dementia prior to being admitted to UniHealth. Therefore, her incapacity prevented her from forming the intent or having the requisite knowledge to mislead Appellants or to assent to the AA's terms. In their brief, Appellants side-step this inconvenient fact by substituting both Daughter, in her individual capacity, and Son for Mother in the estoppel analysis:

> [Son] represented in the contract itself that he was authorized to sign it. . . . [Daughter] was present while the agreements were signed and made no effort to repudiate [Son's] representations that he was authorized to sign the agreements on [Mother's] behalf. . . . Now, however, [Daughter] seeks to repudiate these agreements on the basis that [Son] was not authorized to sign them on [Mother's] behalf. [Daughter] should be estopped from taking this contrary position. Additionally, . . . the very last sentence of the [AA] notes that in signing the [AA], the Patient/Resident Representative binds both the Patient/Resident and the Patient/Resident Representative. [Son], [Daughter], and the Estate should be estopped from denying that [Son] had the authority to sign the [AA], or that they are bound by it . . . .

This argument necessarily implies that Daughter, in her individual capacity, or Son may serve as the legal equivalent of Mother's estate. However, at least one jurisdiction has rejected this type of premise. In *Dickerson*, the Maryland Court of Appeals addressed an argument identical to Appellants' estoppel argument in the present case:

> Respondent is attempting to use equitable estoppel against [the patient's] [e]state based on actions that

> [patient's companion] took *in her individual capacity*. The fact that [the patient's companion] is *now the personal representative for [the patient's] [e]state* is of no moment; we will not hold this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [the patient's companion] in *her capacity as Personal Representative* of [the patient's] [e]state, that has affected Respondent's position. This, too, is a necessary element of an equitable estoppel defense.

995 A.2d at 743 (emphases added). The court also noted the absence of evidence that the owner of the nursing home facility had changed its position for the worse based on the assertion of the patient's companion that she was acting on the patient's behalf when she signed the arbitration agreement. *See id.* Like the facility owner in *Dickerson*, Appellants have failed to show how they have changed their position for the worse based on Son's representation that he was acting on Mother's behalf when he signed the AA. As we stated previously, the AA was separate from the Admission Agreement, and Appellants represented the AA to be a voluntary agreement that was not a condition to Mother's admission to the facility and was unconditionally revocable within thirty days of execution.

The *Dickerson* court also addressed the facility owner's argument that the doctrine of unclean hands should apply to the patient's estate because the patient's companion was an heir to the estate:

> Respondent notes that [the patient's companion] is 'the heir of [the patient's] [e]state,' suggesting that we should apply the doctrine of unclean hands because [the patient's companion] may benefit if the [e]state's claims against Respondent are successful. We decline to do so. First, as we have explained, we will not hold against the Estate acts that [the patient's companion] may have performed *in her individual capacity*. Second, the [e]state may well have other beneficiaries or creditors. We will not hold [the patient's companion's] *individual acts* against these other entities for the same reasons.

Id. at 744 n.23 (emphases added). Likewise, Appellants in the present case may not hold Mother's estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities. Therefore, the circuit court properly rejected Appellants' equitable estoppel theory.

CONCLUSION

Accordingly, the circuit court's denial of Appellants' motion to compel arbitration is

AFFIRMED.

HUFF, A.C.J, and KONDUROS, J., concur.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NEW PRIME INC. *v.* OLIVEIRA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 17–340. Argued October 3, 2018—Decided January 15, 2019

Petitioner New Prime Inc. is an interstate trucking company, and respondent Dominic Oliveira is one of its drivers. Mr. Oliveira works under an operating agreement that calls him an independent contractor and contains a mandatory arbitration provision. When Mr. Oliveira filed a class action alleging that New Prime denies its drivers lawful wages, New Prime asked the court to invoke its statutory authority under the Federal Arbitration Act to compel arbitration. Mr. Oliveira countered that the court lacked authority because §1 of the Act excepts from coverage disputes involving "contracts of employment" of certain transportation workers. New Prime insisted that any question regarding §1's applicability belonged to the arbitrator alone to resolve, or, assuming the court could address the question, that "contracts of employment" referred only to contracts that establish an employer-employee relationship and not to contracts with independent contractors. The District Court and First Circuit agreed with Mr. Oliveira.

Held:

1. A court should determine whether a §1 exclusion applies before ordering arbitration. A court's authority to compel arbitration under the Act does not extend to all private contracts, no matter how emphatically they may express a preference for arbitration. Instead, antecedent statutory provisions limit the scope of a court's §§3 and 4 powers to stay litigation and compel arbitration "accord[ing to] the terms" of the parties' agreement. Section 2 provides that the Act applies only when the agreement is set forth as "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce." And §1 helps define §2's terms, warning, as relevant here, that "nothing" in the Act "shall apply" to "contracts of em-

ployment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." For a court to invoke its statutory authority under §§3 and 4, it must first know if the parties' agreement is excluded from the Act's coverage by the terms of §§1 and 2. This sequencing is significant. See, *e.g.*, *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198, 201–202. New Prime notes that the parties' contract contains a "delegation clause," giving the arbitrator authority to decide threshold questions of arbitrability, and that the "severability principle" requires that both sides take all their disputes to arbitration. But a delegation clause is merely a specialized type of arbitration agreement and is enforceable under §§3 and 4 only if it appears in a contract consistent with §2 that does not trigger §1's exception. And, the Act's severability principle applies only if the parties' arbitration agreement appears in a contract that falls within the field §§1 and 2 describe. Pp. 3–6.

2. Because the Act's term "contract of employment" refers to any agreement to perform work, Mr. Oliveira's agreement with New Prime falls within §1's exception. Pp. 6–15.

(a) "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.' " *Wisconsin Central Ltd.* v. *United States*, 585 U. S. ___, ___ (quoting *Perrin* v. *United States*, 444 U. S. 37, 42). After all, if judges could freely invest old statutory terms with new meanings, this Court would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. *INS* v. *Chadha*, 462 U. S. 919, 951. The Court would risk, too, upsetting reliance interests by subjecting people today to different rules than they enjoyed when the statute was passed. At the time of the Act's adoption in 1925, the phrase "contract of employment" was not a term of art, and dictionaries tended to treat "employment" more or less as a synonym for "work." Contemporaneous legal authorities provide no evidence that a "contract of employment" necessarily signaled a formal employer-employee relationship. Evidence that Congress used the term "contracts of employment" broadly can be found in its choice of the neighboring term "workers," a term that easily embraces independent contractors. Pp. 6–10.

(b) New Prime argues that by 1925, the words "employee" and "independent contractor" had already assumed distinct meanings. But while the words "employee" and "employment" may share a common root and intertwined history, they also developed at different times and in at least some different ways. The evidence remains that, as dominantly understood in 1925, a "contract of employment" did not necessarily imply the existence of an employer-employee rela-

Syllabus

tionship. New Prime's argument that early 20th-century courts sometimes used the phrase "contracts of employment" to describe what are recognized today as agreements between employers and employees does nothing to negate the possibility that the term also embraced agreements by independent contractors to perform work. And its effort to explain away the statute's suggestive use of the term "worker" by noting that the neighboring terms "seamen" and "railroad employees" included only employees in 1925 rests on a precarious premise. The evidence suggests that even "seamen" and "railroad employees" could be independent contractors at the time the Arbitration Act passed. Left to appeal to the Act's policy, New Prime suggests that this Court order arbitration to abide Congress' effort to counteract judicial hostility to arbitration and establish a favorable federal policy toward arbitration agreements. Courts, however, are not free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal. Rather, the Court should respect "the limits up to which Congress was prepared" to go when adopting the Arbitration Act. *United States* v. *Sisson*, 399 U. S. 267, 298. This Court also declines to address New Prime's suggestion that it order arbitration anyway under its inherent authority to stay litigation in favor of an alternative dispute resolution mechanism of the parties' choosing. Pp. 10–15.

857 F. 3d 7, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which all other Members joined, except KAVANAUGH, J., who took no part in the consideration or decision of the case. GINSBURG, J., filed a concurring opinion.

SUPREME COURT OF THE UNITED STATES

No. 17–340

NEW PRIME INC., PETITIONER *v.*
DOMINIC OLIVEIRA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[January 15, 2019]

JUSTICE GORSUCH delivered the opinion of the Court.

The Federal Arbitration Act requires courts to enforce private arbitration agreements. But like most laws, this one bears its qualifications. Among other things, §1 says that "nothing herein" may be used to compel arbitration in disputes involving the "contracts of employment" of certain transportation workers. 9 U. S. C. §1. And that qualification has sparked these questions: When a contract delegates questions of arbitrability to an arbitrator, must a court leave disputes over the application of §1's exception for the arbitrator to resolve? And does the term "contracts of employment" refer only to contracts between employers and employees, or does it also reach contracts with independent contractors? Because courts across the country have disagreed on the answers to these questions, we took this case to resolve them.

I

New Prime is an interstate trucking company and Dominic Oliveira works as one of its drivers. But, at least on paper, Mr. Oliveira isn't an employee; the parties' contracts label him an independent contractor. Those agree-

ments also instruct that any disputes arising out of the parties' relationship should be resolved by an arbitrator—even disputes over the scope of the arbitrator's authority.

Eventually, of course, a dispute did arise. In a class action lawsuit in federal court, Mr. Oliveira argued that New Prime denies its drivers lawful wages. The company may call its drivers independent contractors. But, Mr. Oliveira alleged, in reality New Prime treats them as employees and fails to pay the statutorily due minimum wage. In response to Mr. Oliveira's complaint, New Prime asked the court to invoke its statutory authority under the Act and compel arbitration according to the terms found in the parties' agreements.

That request led to more than a little litigation of its own. Even when the parties' contracts mandate arbitration, Mr. Oliveira observed, the Act doesn't *always* authorize a court to enter an order compelling it. In particular, §1 carves out from the Act's coverage "contracts of employment of . . . workers engaged in foreign or interstate commerce." And at least for purposes of this collateral dispute, Mr. Oliveira submitted, it doesn't matter whether you view him as an employee or independent contractor. Either way, his agreement to drive trucks for New Prime qualifies as a "contract[] of employment of . . . [a] worker[] engaged in . . . interstate commerce." Accordingly, Mr. Oliveira argued, the Act supplied the district court with no authority to compel arbitration in this case.

Naturally, New Prime disagreed. Given the extraordinary breadth of the parties' arbitration agreement, the company insisted that any question about §1's application belonged for the arbitrator alone to resolve. Alternatively and assuming a court could address the question, New Prime contended that the term "contracts of employment" refers only to contracts that establish an employer-employee relationship. And because Mr. Oliveira is, in fact as well as form, an independent contractor, the company argued, §1's exception doesn't apply; the rest of the

statute does; and the district court was (once again) required to order arbitration.

Ultimately, the district court and the First Circuit sided with Mr. Oliveira. 857 F. 3d 7 (2017). The court of appeals held, first, that in disputes like this a court should resolve whether the parties' contract falls within the Act's ambit or §1's exclusion before invoking the statute's authority to order arbitration. Second, the court of appeals held that §1's exclusion of certain "contracts of employment" removes from the Act's coverage not only employer-employee contracts but also contracts involving independent contractors. So under any account of the parties' agreement in this case, the court held, it lacked authority under the Act to order arbitration.

II

In approaching the first question for ourselves, one thing becomes clear immediately. While a court's authority under the Arbitration Act to compel arbitration may be considerable, it isn't unconditional. If two parties agree to arbitrate future disputes between them and one side later seeks to evade the deal, §§3 and 4 of the Act often require a court to stay litigation and compel arbitration "accord[ing to] the terms" of the parties' agreement. But this authority doesn't extend to *all* private contracts, no matter how emphatically they may express a preference for arbitration.

Instead, antecedent statutory provisions limit the scope of the court's powers under §§3 and 4. Section 2 provides that the Act applies only when the parties' agreement to arbitrate is set forth as a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce." And §1 helps define §2's terms. Most relevant for our purposes, §1 warns that "nothing" in the Act "shall apply" to "contracts of employment of seamen, railroad employees, or any other class of workers

engaged in foreign or interstate commerce." Why this very particular qualification? By the time it adopted the Arbitration Act in 1925, Congress had already prescribed alternative employment dispute resolution regimes for many transportation workers. And it seems Congress "did not wish to unsettle" those arrangements in favor of whatever arbitration procedures the parties' private contracts might happen to contemplate. *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 121 (2001).

Given the statute's terms and sequencing, we agree with the First Circuit that a court should decide for itself whether §1's "contracts of employment" exclusion applies before ordering arbitration. After all, to invoke its statutory powers under §§3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§1 and 2. The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum.

Nothing in our holding on this score should come as a surprise. We've long stressed the significance of the statute's sequencing. In *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198, 201–202 (1956), we recognized that "Sections 1, 2, and 3 [and 4] are integral parts of a whole. . . . [Sections] 1 and 2 define the field in which Congress was legislating," and §§3 and 4 apply only to contracts covered by those provisions. In *Circuit City*, we acknowledged that "Section 1 exempts from the [Act] . . . contracts of employment of transportation workers." 532 U. S., at 119. And in *Southland Corp.* v. *Keating*, 465 U. S. 1, 10–11, and n. 5 (1984), we noted that "the enforceability of arbitration provisions" under §§3 and 4 depends on whether those provisions are "part of a written maritime contract or a contract 'evidencing a transaction in-

volving commerce'" under §2—which, in turn, depends on the application of §1's exception for certain "contracts of employment."

To be sure, New Prime resists this straightforward understanding. The company argues that an arbitrator should resolve any dispute over §1's application because of the "delegation clause" in the parties' contract and what is sometimes called the "severability principle." A delegation clause gives an arbitrator authority to decide even the initial question whether the parties' dispute is subject to arbitration. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 68–69 (2010). And under the severability principle, we treat a challenge to the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the validity of the entire contract in which it appears. *Id.*, at 70–71. Unless a party specifically challenges the validity of the agreement to arbitrate, both sides may be required to take all their disputes—including disputes about the validity of their broader contract—to arbitration. *Ibid.* Applying these principles to this case, New Prime notes that Mr. Oliveira has not specifically challenged the parties' delegation clause and submits that any controversy should therefore proceed only and immediately before an arbitrator.

But all this overlooks the necessarily antecedent statutory inquiry we've just discussed. A delegation clause is merely a specialized type of arbitration agreement, and the Act "operates on this additional arbitration agreement just as it does on any other." *Id.*, at 70. So a court may use §§3 and 4 to enforce a delegation clause only if the clause appears in a "written provision in . . . a contract evidencing a transaction involving commerce" consistent with §2. And only if the contract in which the clause appears doesn't trigger §1's "contracts of employment" exception. In exactly the same way, the Act's severability principle applies only if the parties' arbitration agreement

appears in a contract that falls within the field §§1 and 2 describe. We acknowledged as much some time ago, explaining that, before invoking the severability principle, a court should "determine[] that the contract in question is within the coverage of the Arbitration Act." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 402 (1967).

III

That takes us to the second question: Did the First Circuit correctly resolve the merits of the §1 challenge in this case? Recall that §1 excludes from the Act's compass "contracts of employment of . . . workers engaged in . . . interstate commerce." Happily, everyone before us agrees that Mr. Oliveira qualifies as a "worker[] engaged in . . . interstate commerce." For purposes of this appeal, too, Mr. Oliveira is willing to assume (but not grant) that his contracts with New Prime establish only an independent contractor relationship.

With that, the disputed question comes into clear view: What does the term "contracts of employment" mean? If it refers only to contracts that reflect an employer-employee relationship, then §1's exception is irrelevant and a court is free to order arbitration, just as New Prime urges. But if the term *also* encompasses contracts that require an independent contractor to perform work, then the exception takes hold and a court lacks authority under the Act to order arbitration, exactly as Mr. Oliveira argues.

A

In taking up this question, we bear an important caution in mind. "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" *Wisconsin Central Ltd.* v. *United States*, 585 U. S. ___, ___ (2018) (slip op., at 9)

(quoting *Perrin* v. *United States*, 444 U. S. 37, 42 (1979)). See also *Sandifer* v. *United States Steel Corp.*, 571 U. S. 220, 227 (2014). After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. *INS* v. *Chadha*, 462 U. S. 919, 951 (1983). We would risk, too, upsetting reliance interests in the settled meaning of a statute. Cf. 2B N. Singer & J. Singer, Sutherland on Statutes and Statutory Construction §56A:3 (rev. 7th ed. 2012). Of course, statutes may sometimes refer to an external source of law and fairly warn readers that they must abide that external source of law, later amendments and modifications included. *Id.*, §51:8 (discussing the reference canon). But nothing like that exists here. Nor has anyone suggested any other appropriate reason that might allow us to depart from the original meaning of the statute at hand.

That, we think, holds the key to the case. To many lawyerly ears today, the term "contracts of employment" might call to mind only agreements between employers and employees (or what the common law sometimes called masters and servants). Suggestively, at least one recently published law dictionary defines the word "employment" to mean "the relationship between master and servant." Black's Law Dictionary 641 (10th ed. 2014). But this modern intuition isn't easily squared with evidence of the term's meaning at the time of the Act's adoption in 1925. At that time, a "contract of employment" usually meant nothing more than an agreement to perform work. As a result, most people then would have understood §1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work.

What's the evidence to support this conclusion? It turns out that in 1925 the term "contract of employment" wasn't defined in any of the (many) popular or legal dictionaries

the parties cite to us. And surely that's a first hint the phrase wasn't then a term of art bearing some specialized meaning. It turns out, too, that the dictionaries of the era consistently afforded the word "employment" a broad construction, broader than may be often found in dictionaries today. Back then, dictionaries tended to treat "employment" more or less as a synonym for "work." Nor did they distinguish between different kinds of work or workers: All work was treated as employment, whether or not the common law criteria for a master-servant relationship happened to be satisfied.[1]

What the dictionaries suggest, legal authorities confirm. This Court's early 20th-century cases used the phrase "contract of employment" to describe work agreements involving independent contractors.[2] Many state court cases did the same.[3] So did a variety of federal statutes.[4] And state stat-

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[1]See, *e.g.*, 3 J. Murray, A New English Dictionary on Historical Principles 130 (1891) (defining "employment" as, among other things, "[t]he action or process of employing; the state of being employed. The service (of a person). That on which (one) is employed; business; occupation; a special errand or commission. A person's regular occupation or business; a trade or profession"); 3 The Century Dictionary and Cyclopedia 1904 (1914) (defining "employment" as "[w]ork or business of any kind"); W. Harris, Webster's New International Dictionary 718 (1st ed. 1909) (listing "work" as a synonym for "employment"); Webster's Collegiate Dictionary 329 (3d ed. 1916) (same); Black's Law Dictionary 422 (2d ed. 1910) ("an engagement or rendering services" for oneself or another); 3 Oxford English Dictionary 130 (1933) ("[t]hat on which (one) is employed; business; occupation; a special errand or commission").

[2]See, *e.g.*, *Watkins* v. *Sedberry*, 261 U. S. 571, 575 (1923) (agreement between trustee and attorney to recover bankrupt's property); *Owen* v. *Dudley & Michener*, 217 U. S. 488, 494 (1910) (agreement between Indian tribe and attorneys to pursue claims).

[3]See, *e.g.*, *Lindsay* v. *McCaslin (Two Cases)*, 123 Me. 197, 200, 122 A. 412, 413 (1923) ("When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law"); *Tankersley* v. *Webster*, 116 Okla. 208, 210, 243 P.

utes too.[5] We see here no evidence that a "contract of employment" necessarily signaled a formal employer-employee or master-servant relationship.

More confirmation yet comes from a neighboring term in the statutory text. Recall that the Act excludes from its coverage "contracts of employment of . . . any . . . class of *workers* engaged in foreign or interstate commerce." 9 U. S. C. §1 (emphasis added). Notice Congress didn't use the word "employees" or "servants," the natural choices if

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745, 747 (1925) ("[T]he contract of employment between Tankersley and Casey was admitted in evidence without objections, and we think conclusively shows that Casey was an independent contractor"); *Waldron* v. *Garland Pocahontas Coal Co.*, 89 W. Va. 426, 427, 109 S. E. 729 (1921) (syllabus) ("Whether a person performing work for another is an independent contractor depends upon a consideration of the contract of employment, the nature of the business, the circumstances under which the contract was made and the work was done"); see also App. to Brief for Respondent 1a–12a (citing additional examples).

[4]See, *e.g.*, Act of Mar. 19, 1924, ch. 70, §5, 43 Stat. 28 (limiting payment of fees to attorneys "employed" by the Cherokee Tribe to litigate claims against the United States to those "stipulated in the contract of employment"); Act of June 7, 1924, ch. 300, §§2, 5, 43 Stat. 537–538 (providing same for Choctaw and Chickasaw Tribes); Act of Aug. 24, 1921, ch. 89, 42 Stat. 192 (providing that no funds may be used to compensate "any attorney, regular or special, for the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation unless the contract of employment has been approved by the Attorney General of the United States"). See also App. to Brief for Respondent 13a (citing additional examples).

[5]See, *e.g.*, Act of Mar. 10, 1909, ch. 70, §1, 1909 Kan. Sess. Laws p. 121 (referring to "contracts of employment of auditors, accountants, engineers, attorneys, counselors and architects for any special purpose"); Act of Mar. 4, 1909, ch. 4, §4, 1909 Okla. Sess. Laws p. 118 ("Should the amount of the attorney's fee be agreed upon in the contract of employment, then such attorney's lien and cause of action against such adverse party shall be for the amount so agreed upon"); Act of Mar. 4, 1924, ch. 88, §1, 1924 Va. Acts ch. 91 (allowing extension of "contracts of employment" between the state and contractors with respect to the labor of prisoners); App. to Brief for Respondent 14a–15a (citing additional examples).

the term "contracts of employment" addressed them alone. Instead, Congress spoke of "workers," a term that everyone agrees easily embraces independent contractors. That word choice may not mean everything, but it does supply further evidence still that Congress used the term "contracts of employment" in a broad sense to capture any contract for the performance of *work* by *workers*.

B

What does New Prime have to say about the case building against it? Mainly, it seeks to shift the debate from the term "contracts of employment" to the word "employee." Today, the company emphasizes, the law often distinguishes between employees and independent contractors. Employees are generally understood as those who work "in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." Black's Law Dictionary, at 639. Meanwhile, independent contractors are sometimes described as those "entrusted to undertake a specific project but who [are] left free to do the assigned work and to choose the method for accomplishing it." *Id.*, at 888. New Prime argues that, by 1925, the words "employee" and "independent contractor" had already assumed these distinct meanings.[6] And given that, the company contends, the phrase "contracts of *employment*" should be understood to refer only to relationships between *employers and employees*.

Unsurprisingly, Mr. Oliveira disagrees. He replies that, while the term "employment" dates back many centuries, the word "employee" only made its first appearance in English in the 1800s. See Oxford English Dictionary (3d ed., Mar. 2014), www.oed.com/view/Entry/61374 (all In-

[6] See, *e.g.*, *Atlantic Transp. Co.* v. *Coneys*, 82 F. 177, 178 (CA2 1897); *Nyback* v. *Champagne Lumber Co.*, 109 F. 732, 741 (CA7 1901).

ternet materials as last visited Jan. 9, 2019). At that time, the word from which it derived, "employ," simply meant to "apply (a thing) to some definite purpose." 3 J. Murray, A New English Dictionary on Historical Principles 129 (1891). And even in 1910, Black's Law Dictionary reported that the term "employee" had only "become somewhat naturalized in our language." Black's Law Dictionary 421 (2d ed. 1910).

Still, the parties do share some common ground. They agree that the word "employee" eventually came into wide circulation and came to denote those who work for a wage at the direction of another. They agree, too, that all this came to pass in part because the word "employee" didn't suffer from the same "historical baggage" of the older common law term "servant," and because it proved useful when drafting legislation to regulate burgeoning industries and their labor forces in the early 20th century.[7] The parties even agree that the development of the term "employee" may have come to influence and narrow our understanding of the word "employment" in comparatively recent years and may be why today it might signify to some a "relationship between master and servant."[8]

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[7]See Carlson, Why the Law Still Can't Tell an Employee When It Sees One and How It Ought To Stop Trying, 22 Berkeley J. Emp. & Lab. L. 295, 309 (2001) (discussing the "historical baggage" of the term "servant"); Broden, General Rules Determining the Employment Relationship Under Social Security Laws: After Twenty Years an Unsolved Problem, 33 Temp. L. Q. 307, 327 (1960) (describing use of the term "employer-employee," in contradistinction to "master-servant," in the Social Security laws). Legislators searched to find a term that fully encompassed the broad protections they sought to provide and considered an "assortment of vague and uncertain terms," including "'servant,' . . . 'employee,' . . . 'workman,' 'laborer,' 'wage earner,' 'operative,' or 'hireling.'" Carlson, 22 Berkeley J. Emp. & Lab. L., at 308. Eventually "'employee' prevailed, if only by default, and the choice was confirmed by the next wave of protective legislation—workers' compensation laws in the early years of the Twentieth Century." *Id.*, at 309.

[8]Black's Law Dictionary 641 (10th ed. 2014); see also P. Durkin, Re-

But if the parties' extended etymological debate persuades us of anything, it is that care is called for. The words "employee" and "employment" may share a common root and an intertwined history. But they also developed at different times and in at least some different ways. The only question in this case concerns the meaning of the term "contracts of *employment*" in 1925. And, whatever the word "employee" may have meant at that time, and however it may have later influenced the meaning of "employment," the evidence before us remains that, as dominantly understood in 1925, a contract of *employment* did not necessarily imply the existence of an employer-employee or master-servant relationship.

When New Prime finally turns its attention to the term in dispute, it directs us to *Coppage* v. *Kansas*, 236 U. S. 1, 13 (1915). There and in other cases like it, New Prime notes, courts sometimes used the phrase "contracts of employment" to describe what today we'd recognize as agreements between employers and employees. But this proves little. No one doubts that employer-employee agreements to perform work qualified as "contracts of employment" in 1925—and documenting that fact does nothing to negate the possibility that "contracts of employment" *also* embraced agreements by independent contractors to perform work. Coming a bit closer to the mark, New Prime eventually cites a handful of early 20th-century legal materials that seem to use the term "contracts of employment" to refer *exclusively* to employer-employee agreements.[9] But from the record amassed

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lease Notes: The Changes in Empathy, Employ, and Empire (Mar. 13, 2014) ("Over time" the meaning of several employ-related words have "reflect[ed] changes in the world of work" and their meaning "shows an increasingly marked narrowing"), online at https://public.oed.com/blog/march-2014-update-release-notes/.

[9]See, *e.g.*, 1 T. Conyngton, Business Law: A Working Manual of Every-day Law 302–303 (2d ed. 1920); *Newland* v. *Bear*, 218 App. Div.

before us, these authorities appear to represent at most the vanguard, not the main body, of contemporaneous usage.

New Prime's effort to explain away the statute's suggestive use of the term "worker" proves no more compelling. The company reminds us that the statute excludes "contracts of employment" for "seamen" and "railroad employees" as well as other transportation workers. And because "seamen" and "railroad employees" included *only* employees in 1925, the company reasons, we should understand "any other class of workers engaged in . . . interstate commerce" to bear a similar construction. But this argument rests on a precarious premise. At the time of the Act's passage, shipboard surgeons who tended injured sailors were considered "seamen" though they likely served in an independent contractor capacity.[10] Even the term "railroad employees" may have swept more broadly at the time of the Act's passage than might seem obvious today. In 1922, for example, the Railroad Labor Board interpreted the word "employee" in the Transportation Act of 1920 to refer to anyone "engaged in the customary work directly contributory to the operation of the railroads."[11] And the Erdman Act, a statute enacted to address disruptive railroad strikes at the end of the 19th century, seems to evince an equally broad understanding of "railroad

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308, 309, 218 N. Y. S. 81, 81–82 (1926); *Anderson* v. *State Indus. Accident Comm'n*, 107 Ore. 304, 311–312, 215 P. 582, 583, 585 (1923); N. Dosker, Manual of Compensation Law: State and Federal 8 (1917).

[10] See, *e.g.*, *The Sea Lark*, 14 F. 2d 201 (WD Wash. 1926); *The Buena Ventura*, 243 F. 797, 799 (SDNY 1916); *Holt* v. *Cummings*, 102 Pa. 212, 215 (1883); *Allan* v. *State S. S. Co.*, 132 N. Y. 91, 99, 30 N. E. 482, 485 (1892) ("The work which the physician does after the vessel starts on the voyage is his and not the ship owner's").

[11] Transportation Act of 1920, §§304, 307, 41 Stat. 456; *Railway Employees' Dept., A. F. of L.* v. *Indiana Harbor Belt R. Co.*, Decision No. 982, 3 R. L. B. 332, 337 (1922).

employees."[12]

Unable to squeeze more from the statute's text, New Prime is left to appeal to its policy. This Court has said that Congress adopted the Arbitration Act in an effort to counteract judicial hostility to arbitration and establish "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983). To abide that policy, New Prime suggests, we must order arbitration according to the terms of the parties' agreement. But often and by design it is "hard-fought compromise[]," not cold logic, that supplies the solvent needed for a bill to survive the legislative process. *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. 361, 374 (1986). If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to "tak[e] . . . account of" legislative compromises essential to a law's passage and, in that way, thwart rather than honor "the effectuation of congressional intent." *Ibid.* By respecting the qualifications of §1 today, we "respect the limits up to which Congress was prepared" to go when adopting the Arbitration Act. *United States* v. *Sisson*, 399 U. S. 267, 298 (1970).

Finally, and stretching in a different direction entirely, New Prime invites us to look beyond the Act. Even if the statute doesn't supply judges with the power to compel arbitration in this case, the company says we should order it anyway because courts always enjoy the inherent au-

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[12]The Act provided for arbitration between railroads and workers, and defined "employees" as "all persons actually engaged in any capacity in train operation or train service of any description." Act of June 1, 1898, ch. 370, 30 Stat. 424. The Act also specified that the railroads would "be responsible for the acts and defaults of such employees in the same manner and to the same extent as if . . . said employees [were] directly employed by it." *Id.*, at 425. See Dempsey, Transportation: A Legal History, 30 Transp. L. J. 235, 273 (2003).

thority to stay litigation in favor of an alternative dispute resolution mechanism of the parties' choosing. That, though, is an argument we decline to tangle with. The courts below did not address it and we granted certiorari only to resolve existing confusion about the application of the Arbitration Act, not to explore other potential avenues for reaching a destination it does not.

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When Congress enacted the Arbitration Act in 1925, the term "contracts of employment" referred to agreements to perform work. No less than those who came before him, Mr. Oliveira is entitled to the benefit of that same understanding today. Accordingly, his agreement with New Prime falls within §1's exception, the court of appeals was correct that it lacked authority under the Act to order arbitration, and the judgment is

Affirmed.

JUSTICE KAVANAUGH took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 17–340

NEW PRIME INC., PETITIONER *v.*
DOMINIC OLIVEIRA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[January 15, 2019]

JUSTICE GINSBURG, concurring.

"[W]ords generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" *Ante*, at 6 (quoting *Wisconsin Central Ltd.* v. *United States*, 585 U. S. ___, ___ (2018) (slip op., at 9)). The Court so reaffirms, and I agree. Looking to the period of enactment to gauge statutory meaning ordinarily fosters fidelity to the "regime . . . Congress established." *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 234 (1994).

Congress, however, may design legislation to govern changing times and circumstances. See, *e.g.*, *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___ (2015) (slip op., at 14) ("Congress . . . intended [the Sherman Antitrust Act's] reference to 'restraint of trade' to have 'changing content,' and authorized courts to oversee the term's 'dynamic potential.'" (quoting *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 731–732 (1988))); *SEC* v. *Zandford*, 535 U. S. 813, 819 (2002) (In enacting the Securities Exchange Act, "Congress sought to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* . . . . Consequently, . . . the statute should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." (internal quotation marks and paragraph break omitted)); *H. J. Inc.* v.

Northwestern Bell Telephone Co., 492 U. S. 229, 243 (1989) ("The limits of the relationship and continuity concepts that combine to define a [Racketeer Influenced and Corrupt Organizations] pattern . . . cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists. The development of these concepts must await future cases . . . ."). As these illustrations suggest, sometimes, "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West* v. *Gibson*, 527 U. S. 212, 218 (1999).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NEW PRIME INC. *v.* OLIVEIRA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 17–340. Argued October 3, 2018—Decided January 15, 2019

Petitioner New Prime Inc. is an interstate trucking company, and respondent Dominic Oliveira is one of its drivers. Mr. Oliveira works under an operating agreement that calls him an independent contractor and contains a mandatory arbitration provision. When Mr. Oliveira filed a class action alleging that New Prime denies its drivers lawful wages, New Prime asked the court to invoke its statutory authority under the Federal Arbitration Act to compel arbitration. Mr. Oliveira countered that the court lacked authority because §1 of the Act excepts from coverage disputes involving "contracts of employment" of certain transportation workers. New Prime insisted that any question regarding §1's applicability belonged to the arbitrator alone to resolve, or, assuming the court could address the question, that "contracts of employment" referred only to contracts that establish an employer-employee relationship and not to contracts with independent contractors. The District Court and First Circuit agreed with Mr. Oliveira.

Held:

1. A court should determine whether a §1 exclusion applies before ordering arbitration. A court's authority to compel arbitration under the Act does not extend to all private contracts, no matter how emphatically they may express a preference for arbitration. Instead, antecedent statutory provisions limit the scope of a court's §§3 and 4 powers to stay litigation and compel arbitration "accord[ing to] the terms" of the parties' agreement. Section 2 provides that the Act applies only when the agreement is set forth as "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce." And §1 helps define §2's terms, warning, as relevant here, that "nothing" in the Act "shall apply" to "contracts of em-

ployment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." For a court to invoke its statutory authority under §§3 and 4, it must first know if the parties' agreement is excluded from the Act's coverage by the terms of §§1 and 2. This sequencing is significant. See, *e.g.*, *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198, 201–202. New Prime notes that the parties' contract contains a "delegation clause," giving the arbitrator authority to decide threshold questions of arbitrability, and that the "severability principle" requires that both sides take all their disputes to arbitration. But a delegation clause is merely a specialized type of arbitration agreement and is enforceable under §§3 and 4 only if it appears in a contract consistent with §2 that does not trigger §1's exception. And, the Act's severability principle applies only if the parties' arbitration agreement appears in a contract that falls within the field §§1 and 2 describe. Pp. 3–6.

2. Because the Act's term "contract of employment" refers to any agreement to perform work, Mr. Oliveira's agreement with New Prime falls within §1's exception. Pp. 6–15.

(a) "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.' " *Wisconsin Central Ltd.* v. *United States*, 585 U. S. ___, ___ (quoting *Perrin* v. *United States*, 444 U. S. 37, 42). After all, if judges could freely invest old statutory terms with new meanings, this Court would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. *INS* v. *Chadha*, 462 U. S. 919, 951. The Court would risk, too, upsetting reliance interests by subjecting people today to different rules than they enjoyed when the statute was passed. At the time of the Act's adoption in 1925, the phrase "contract of employment" was not a term of art, and dictionaries tended to treat "employment" more or less as a synonym for "work." Contemporaneous legal authorities provide no evidence that a "contract of employment" necessarily signaled a formal employer-employee relationship. Evidence that Congress used the term "contracts of employment" broadly can be found in its choice of the neighboring term "workers," a term that easily embraces independent contractors. Pp. 6–10.

(b) New Prime argues that by 1925, the words "employee" and "independent contractor" had already assumed distinct meanings. But while the words "employee" and "employment" may share a common root and intertwined history, they also developed at different times and in at least some different ways. The evidence remains that, as dominantly understood in 1925, a "contract of employment" did not necessarily imply the existence of an employer-employee rela-

Syllabus

tionship. New Prime's argument that early 20th-century courts sometimes used the phrase "contracts of employment" to describe what are recognized today as agreements between employers and employees does nothing to negate the possibility that the term also embraced agreements by independent contractors to perform work. And its effort to explain away the statute's suggestive use of the term "worker" by noting that the neighboring terms "seamen" and "railroad employees" included only employees in 1925 rests on a precarious premise. The evidence suggests that even "seamen" and "railroad employees" could be independent contractors at the time the Arbitration Act passed. Left to appeal to the Act's policy, New Prime suggests that this Court order arbitration to abide Congress' effort to counteract judicial hostility to arbitration and establish a favorable federal policy toward arbitration agreements. Courts, however, are not free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal. Rather, the Court should respect "the limits up to which Congress was prepared" to go when adopting the Arbitration Act. *United States* v. *Sisson*, 399 U. S. 267, 298. This Court also declines to address New Prime's suggestion that it order arbitration anyway under its inherent authority to stay litigation in favor of an alternative dispute resolution mechanism of the parties' choosing. Pp. 10–15.

857 F. 3d 7, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which all other Members joined, except KAVANAUGH, J., who took no part in the consideration or decision of the case. GINSBURG, J., filed a concurring opinion.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HENRY SCHEIN, INC., ET AL. *v.* ARCHER & WHITE SALES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17–1272. Argued October 29, 2018—Decided January 8, 2019

Respondent Archer & White Sales, Inc., sued petitioner Henry Schein, Inc., alleging violations of federal and state antitrust law and seeking both money damages and injunctive relief. The relevant contract between the parties provided for arbitration of any dispute arising under or related to the agreement, except for, among other things, actions seeking injunctive relief. Invoking the Federal Arbitration Act, Schein asked the District Court to refer the matter to arbitration, but Archer & White argued that the dispute was not subject to arbitration because its complaint sought injunctive relief, at least in part. Schein contended that because the rules governing the contract provide that arbitrators have the power to resolve arbitrability questions, an arbitrator—not the court—should decide whether the arbitration agreement applied. Archer & White countered that Schein's argument for arbitration was wholly groundless, so the District Court could resolve the threshold arbitrability question. The District Court agreed with Archer & White and denied Schein's motion to compel arbitration. The Fifth Circuit affirmed.

Held: The "wholly groundless" exception to arbitrability is inconsistent with the Federal Arbitration Act and this Court's precedent. Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 67. The parties to such a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also "'gateway' questions of 'arbitrability.'" *Id.*, at 68–69. Therefore, when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless.

That conclusion follows also from this Court's precedent. See *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649–650.

Archer & White's counterarguments are unpersuasive. First, its argument that §§3 and 4 of the Act should be interpreted to mean that a court must always resolve questions of arbitrability has already been addressed and rejected by this Court. See, *e.g.*, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944. Second, its argument that §10 of the Act—which provides for back-end judicial review of an arbitrator's decision if an arbitrator has "exceeded" his or her "powers"—supports the conclusion that the court at the front end should also be able to say that the underlying issue is not arbitrable is inconsistent with the way Congress designed the Act. And it is not this Court's proper role to redesign the Act. Third, its argument that it would be a waste of the parties' time and money to send wholly groundless arbitrability questions to an arbitrator ignores the fact that the Act contains no "wholly groundless" exception. This Court may not engraft its own exceptions onto the statutory text. Nor is it likely that the exception would save time and money systemically even if it might do so in some individual cases. Fourth, its argument that the exception is necessary to deter frivolous motions to compel arbitration overstates the potential problem. Arbitrators are already capable of efficiently disposing of frivolous cases and deterring frivolous motions, and such motions do not appear to have caused a substantial problem in those Circuits that have not recognized a "wholly groundless" exception.

The Fifth Circuit may address the question whether the contract at issue in fact delegated the arbitrability question to an arbitrator, as well as other properly preserved arguments, on remand. Pp. 4–8.

878 F. 3d 488, vacated and remanded.

KAVANAUGH, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 17–1272

HENRY SCHEIN, INC., ET AL., PETITIONERS *v.*
ARCHER AND WHITE SALES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January 8, 2019]

JUSTICE KAVANAUGH delivered the opinion of the Court.

Under the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute. Who decides that threshold arbitrability question? Under the Act and this Court's cases, the question of who decides arbitrability is itself a question of contract. The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 68–70 (2010); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 943–944 (1995).

Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is "wholly

groundless." The question presented in this case is whether the "wholly groundless" exception is consistent with the Federal Arbitration Act. We conclude that it is not. The Act does not contain a "wholly groundless" exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract. We vacate the contrary judgment of the Court of Appeals.

I

Archer and White is a small business that distributes dental equipment. Archer and White entered into a contract with Pelton and Crane, a dental equipment manufacturer, to distribute Pelton and Crane's equipment. The relationship eventually soured. As relevant here, Archer and White sued Pelton and Crane's successor-in-interest and Henry Schein, Inc. (collectively, Schein) in Federal District Court in Texas. Archer and White's complaint alleged violations of federal and state antitrust law, and sought both money damages and injunctive relief.

The relevant contract between the parties provided:

> "Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina." App. to Pet. for Cert. 3a.

After Archer and White sued, Schein invoked the Federal Arbitration Act and asked the District Court to refer the

parties' antitrust dispute to arbitration. Archer and White objected, arguing that the dispute was not subject to arbitration because Archer and White's complaint sought injunctive relief, at least in part. According to Archer and White, the parties' contract barred arbitration of disputes when the plaintiff sought injunctive relief, even if only in part.

The question then became: Who decides whether the antitrust dispute is subject to arbitration? The rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions. Schein contended that the contract's express incorporation of the American Arbitration Association's rules meant that an arbitrator—not the court—had to decide whether the arbitration agreement applied to this particular dispute. Archer and White responded that in cases where the defendant's argument for arbitration is wholly groundless—as Archer and White argued was the case here—the District Court itself may resolve the threshold question of arbitrability.

Relying on Fifth Circuit precedent, the District Court agreed with Archer and White about the existence of a "wholly groundless" exception, and ruled that Schein's argument for arbitration was wholly groundless. The District Court therefore denied Schein's motion to compel arbitration. The Fifth Circuit affirmed.

In light of disagreement in the Courts of Appeals over whether the "wholly groundless" exception is consistent with the Federal Arbitration Act, we granted certiorari, 585 U. S. ___ (2018). Compare 878 F. 3d 488 (CA5 2017) (case below); *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F. 3d 522 (CA4 2017); *Douglas* v. *Regions Bank*, 757 F. 3d 460 (CA5 2014); *Turi* v. *Main Street Adoption Servs., LLP*, 633 F. 3d 496 (CA6 2011); *Qualcomm, Inc.* v. *Nokia Corp.,* 466 F. 3d 1366 (CA Fed. 2006), with *Belnap* v. *Iasis Healthcare*, 844 F. 3d 1272 (CA10 2017); *Jones* v. *Waffle*

House, Inc., 866 F. 3d 1257 (CA11 2017); *Douglas*, 757 F. 3d, at 464 (Dennis, J., dissenting).

II

In 1925, Congress passed and President Coolidge signed the Federal Arbitration Act. As relevant here, the Act provides:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2.

Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. *Rent-A-Center,* 561 U. S., at 67. Applying the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.,* at 68–69; see also *First Options*, 514 U. S., at 943. We have explained that an "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U. S., at 70.

Even when the parties' contract delegates the threshold arbitrability question to an arbitrator, the Fifth Circuit and some other Courts of Appeals have determined that the court rather than an arbitrator should decide the threshold arbitrability question if, under the contract, the argument for arbitration is wholly groundless. Those courts have reasoned that the "wholly groundless" excep-

tion enables courts to block frivolous attempts to transfer disputes from the court system to arbitration.

We conclude that the "wholly groundless" exception is inconsistent with the text of the Act and with our precedent.

We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

That conclusion follows not only from the text of the Act but also from precedent. We have held that a court may not "rule on the potential merits of the underlying" claim that is assigned by contract to an arbitrator, "even if it appears to the court to be frivolous." *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649–650 (1986). A court has "'no business weighing the merits of the grievance'" because the "'agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.'" *Id.,* at 650 (quoting *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960)).

That *AT&T Technologies* principle applies with equal force to the threshold issue of arbitrability. Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.

In an attempt to overcome the statutory text and this Court's cases, Archer and White advances four main arguments. None is persuasive.

First, Archer and White points to §§3 and 4 of the Federal Arbitration Act. Section 3 provides that a court must

stay litigation "upon being satisfied that the issue" is "referable to arbitration" under the "agreement." Section 4 says that a court, in response to a motion by an aggrieved party, must compel arbitration "in accordance with the terms of the agreement" when the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."

Archer and White interprets those provisions to mean, in essence, that a court must always resolve questions of arbitrability and that an arbitrator never may do so. But that ship has sailed. This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by "clear and unmistakable" evidence. *First Options*, 514 U. S., at 944 (alterations omitted); see also *Rent-A-Center*, 561 U. S., at 69, n. 1. To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. See 9 U. S. C. §2. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.

Second, Archer and White cites §10 of the Act, which provides for back-end judicial review of an arbitrator's decision if an arbitrator has "exceeded" his or her "powers." §10(a)(4). According to Archer and White, if a court at the back end can say that the underlying issue was not arbitrable, the court at the front end should also be able to say that the underlying issue is not arbitrable. The dispositive answer to Archer and White's §10 argument is that Congress designed the Act in a specific way, and it is not our proper role to redesign the statute. Archer and White's §10 argument would mean, moreover, that courts presumably also should decide frivolous merits questions that have been delegated to an arbitrator. Yet we have already rejected that argument: When the parties' contract assigns a matter to arbitration, a court may not

resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous. *AT&T Technologies*, 475 U. S., at 649–650. So, too, with arbitrability.

Third, Archer and White says that, as a practical and policy matter, it would be a waste of the parties' time and money to send the arbitrability question to an arbitrator if the argument for arbitration is wholly groundless. In cases like this, as Archer and White sees it, the arbitrator will inevitably conclude that the dispute is not arbitrable and then send the case back to the district court. So why waste the time and money? The short answer is that the Act contains no "wholly groundless" exception, and we may not engraft our own exceptions onto the statutory text. See *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 556–557 (2005).

In addition, contrary to Archer and White's claim, it is doubtful that the "wholly groundless" exception would save time and money systemically even if it might do so in some individual cases. Archer and White assumes that it is easy to tell when an argument for arbitration of a particular dispute is wholly groundless. We are dubious. The exception would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is *wholly* groundless, as opposed to groundless. We see no reason to create such a time-consuming sideshow.

Archer and White further assumes that an arbitrator would inevitably reject arbitration in those cases where a judge would conclude that the argument for arbitration is wholly groundless. Not always. After all, an arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious. It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way.

Fourth, Archer and White asserts another policy argument: that the "wholly groundless" exception is necessary to deter frivolous motions to compel arbitration. Again, we may not rewrite the statute simply to accommodate that policy concern. In any event, Archer and White overstates the potential problem. Arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable. And under certain circumstances, arbitrators may be able to respond to frivolous arguments for arbitration by imposing fee-shifting and cost-shifting sanctions, which in turn will help deter and remedy frivolous motions to compel arbitration. We are not aware that frivolous motions to compel arbitration have caused a substantial problem in those Circuits that have not recognized a "wholly groundless" exception.

In sum, we reject the "wholly groundless" exception. The exception is inconsistent with the statutory text and with our precedent. It confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.

We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options,* 514 U. S., at 944 (alterations omitted). On remand, the Court of Appeals may address that issue in the first instance, as well as other arguments that Archer and White has properly preserved.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

190 F.3d 269
United States Court of Appeals,
Fourth Circuit.

COMSAT CORPORATION, Plaintiff–Appellee,
v.
NATIONAL SCIENCE FOUNDATION,
Defendant–Appellant,
and
National Science Foundation Document Custodian; Robert J. Dickman; Hugh Van Horn, Defendants.
Comsat Corporation, Plaintiff–Appellee,
v.
National Science Foundation; National Science Foundation Document Custodian; Robert J. Dickman; Hugh Van Horn, Defendants–Appellants.

Nos. 99–1348, 99–1446.
|
Argued: June 8, 1999.
|
Decided: Aug. 23, 1999.

In arbitration proceeding involving contract claims arising out of telescope project funded by the National Science Foundation (NSF), arbitrator issued prehearing subpoenas requiring NSF to produce certain documents and employee testimony. Upon claimant's motion to compel, the United States District Court for the Eastern District of Virginia, James C. Cacheris, Senior District Judge, issued order requiring NSF to comply with subpoenas, and NSF appealed. The Court of Appeals, Ervin, Circuit Judge, held that: (1) Federal Arbitration Act (FAA) did not authorize arbitrator to subpoena third parties during prehearing discovery, absent a showing of special need or hardship; (2) NSF's refusal to comply with subpoenas would be reviewed under standards established for final agency actions by Administrative Procedure Act (APA); and (3) NSF did not violate its own regulations or APA when it decided not to comply with arbitrator's prehearing subpoenas.

Reversed.

West Headnotes (14)

[1] **Administrative Law and Procedure**
Further Review

Although its review of the district court's legal conclusions is de novo, the Court of Appeals' review of an administrative agency's refusal to comply with subpoenas is governed by the Administrative Procedure Act (APA). 5 U.S.C.A. §§ 702, 704, 706.

1 Cases that cite this headnote

[2] **Administrative Law and Procedure**
Nature and Form of Remedy

When the government is not a party, the Administrative Procedure Act (APA) provides the sole avenue for review of an agency's refusal to permit its employees to comply with subpoenas. 5 U.S.C.A. §§ 702, 704, 706.

14 Cases that cite this headnote

[3] **Administrative Law and Procedure**
Finality;ripeness

Administrative agency action may be considered "final," for purposes of Administrative Procedure Act's review provision, only when the action signals the consummation of an agency's decisionmaking process and gives rise to legal rights or consequences. 5 U.S.C.A. § 702.

11 Cases that cite this headnote

[4] **Administrative Law and Procedure**
Discretion of Administrative Agency

Administrative Law and Procedure
Arbitrary, unreasonable or capricious action; illegality

Reviewing court may set aside a final administrative agency action when the action is arbitrary, capricious, an abuse of discretion,

or otherwise not in accordance with the law. 5 U.S.C.A. § 706.

6 Cases that cite this headnote

[5] **Alternative Dispute Resolution**
Subpoenas

Letter from National Science Foundation's (NSF) general counsel advising claimant that NSF would not produce materials demanded in arbitrator's subpoena was a final agency action that was ripe for review under the Administrative Procedure Act (APA) provision limiting judicial review to final agency action. 5 U.S.C.A. § 704; 45 C.F.R. § 615.5.

10 Cases that cite this headnote

[6] **Alternative Dispute Resolution**
Subpoenas

Subpoena powers of an arbitrator are limited to those created by the express provisions of the Federal Arbitration Act (FAA). 9 U.S.C.A. § 7.

4 Cases that cite this headnote

[7] **Alternative Dispute Resolution**
Subpoenas

Federal Arbitration Act (FAA) does not authorize an arbitrator to subpoena third parties during prehearing discovery, absent a showing of special need or hardship. 9 U.S.C.A. §§ 1–307.

25 Cases that cite this headnote

[8] **Alternative Dispute Resolution**
Subpoenas

Federal Arbitration Act's (FAA) enforcement provision does not expand the arbitrator's subpoena authority, which remains simply the power to compel non-parties to appear before the arbitration tribunal. 9 U.S.C.A. § 7.

14 Cases that cite this headnote

[9] **Alternative Dispute Resolution**
Subpoenas

Once subpoenaed by an arbitrator the recipient is under no obligation to move to quash the subpoena and, by failing to move to quash, the recipient does not waive the right to challenge the subpoena on the merits if faced with a petition to compel.

2 Cases that cite this headnote

[10] **Alternative Dispute Resolution**
Subpoenas

National Science Foundation, as nonparty to contractor's arbitration action against NSF awardee, involving NSF-funded telescope project, did not violate its own housekeeping regulations or the Administrative Procedure Act (APA) when it decided not to comply with arbitrator;s prehearing subpoenas; most if not all the documents sought were available through contractor's Freedom of Information Act (FOIA) request or from awardee, and NSF reasonably determined its taxpayer-funded mission was not furthered by compliance. 5 U.S.C.A. § 702 et seq.

6 Cases that cite this headnote

[11] **United States**
Particular Claims and Actions

It is sovereign immunity, not housekeeping regulations, that gives rise to the Government's power to refuse compliance with a subpoena.

9 Cases that cite this headnote

[12] **Administrative Law and Procedure**
Nature and Form of Remedy

In the context of an administrative agency's response to a third-party subpoena, the proper method for judicial review of the agency's final decision pursuant to its regulations is through the Administrative Procedure Act. 5 U.S.C.A. § 702 et seq.

3 Cases that cite this headnote

[13] Witnesses
Subpoena

When an administrative agency is not a party to an action, its choice of whether to comply with a third-party subpoena is essentially a policy decision about the best use of the agency's resources, which is entitled to deference.

16 Cases that cite this headnote

[14] Witnesses
Persons Who May Be Required to Appear and Testify

When the Government is not a party to an underlying action, the decision to permit subpoenaed employee testimony is committed to the administrative agency's discretion.

7 Cases that cite this headnote

Attorneys and Law Firms

***270 ARGUED:** William Barnett Schultz, Deputy Assistant Attorney General, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C., for Appellant. Peter Buscemi, Morgan, Lewis & Bockius, L.L.P., Washington, D.C., for Appellee. **ON BRIEF:** David W. Ogden, Acting Assistant Attorney General, ***271** Helen F. Fahey, United States Attorney, Arthur E. Peabody, Assistant United States Attorney, John C. Hoyle, August E. Flentje, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C.; Lawrence Rudolph, General, Theodore Miles, Deputy General, Charisse Carney–Nunes, Assistant General, National Science Foundation, Washington, D.C., for Appellant. Jacob B. Pankowski, Brian O. Quinn, Morgan, Lewis & Bockius, L.L.P., Washington, D.C., for Appellee.

Before ERVIN, HAMILTON, and WILLIAMS, Circuit Judges.

Reversed by published opinion. Judge Ervin wrote the opinion, in which Judge HAMILTON and Judge WILLIAMS joined.

OPINION

ERVIN, Circuit Judge:

The National Science Foundation ("NSF") appeals from an order requiring the agency to comply with subpoenas issued by an arbitrator during prehearing discovery. The subpoenas demanded that the agency, which was not a party to the arbitration agreement, produce documents and employee testimony related to a construction contract between appellee COMSAT, Inc. ("COMSAT"), and an NSF awardee. We reverse the district court's order and hold as follows: (1) The Federal Arbitration Act, 9 U.S.C.A. §§ 1–307 (West 1999) (the "FAA"), does not authorize an arbitrator to subpoena third parties during prehearing discovery, absent a showing of special need or hardship; (2) when the government is not a party to the underlying action, an agency's refusal to comply with a subpoena must be reviewed under the standards established for final agency actions by the Administrative Procedure Act ("APA"), 5 U.S.C.A. §§ 702—8301 (West 1996 & Supp.1999); and (3) NSF did not violate its own regulations or the APA when the agency decided not to comply with the subpoenas at issue in this case.

I.

Appellant NSF is the government agency charged with supporting much of this nation's federally-funded basic science and engineering research. *See* 42 U.S.C.A. § 1862(a) (West 1994). In accordance with its congressional mandate, NSF awards grants and fellowships to researchers and enters contractual or cooperative agreements with research institutions. [1] The agency does not engage directly in scientific research. *See* 42 U.S.C.A. §§ 1862(a)-(c).

Associated Universities, Incorporated ("AUI") is a not-for-profit corporation organized for the purpose of conducting scientific research and education. In 1988 AUI entered a cooperative agreement with NSF, by the terms of which AUI agreed to administer the

National Radio Astronomy Observatory, a network of research telescopes. The cooperative agreement imposed no obligation upon NSF or the government ***272** to fund AUI operations beyond the upper limits of the award, which was provisional and subject to congressional appropriations. NSF retained the right to terminate the agreement due to a lack of available funds or for other reasons. The agreement also specified that in the absence of written notice to the contrary from NSF's Grants and Contracts Officer, "the Government shall not be obligated to reimburse the Awardee for any costs in excess of the total amount then allotted to the agreement."

On October 19, 1990, AUI entered into a contract with COMSAT[2] to build a state-of-the art radio telescope in Green Bank, West Virginia (the "Green Bank telescope"), at a cost of $55 million. Some years later, in October of 1997, a dispute arose between the parties over AUI's liability for cost overruns. COMSAT claimed that various acts and omissions by AUI, including after-the-fact changes to the telescope specifications, entitled the contractor to $29 million in additional costs. The contract between AUI and COMSAT contained a mandatory arbitration clause, and pursuant to the contract, the parties submitted the claim to the American Arbitration Association for resolution.

At COMSAT's request, on July 10, 1998, the arbitrator issued a subpoena to NSF requiring the agency to produce all documents related to the Green Bank telescope. NSF declined to comply with this subpoena. The agency responded in writing to COMSAT's counsel, justifying its decision not to comply with citations to NSF regulations governing subpoenas.[3] *See* 45 C.F.R. § 615.5. By way of further explanation, NSF noted in this letter that COMSAT had already sought substantially the same documents with an August, 1997 Freedom of Information Act ("FOIA") request. *See* 5 U.S.C.A. § 552(a) (West 1996 & Supp.1999). NSF had suspended its efforts to comply with that voluminous request because COMSAT had been delinquent in paying the associated photocopying charges.[4]

On August 20, 1998, COMSAT moved the arbitrator to issue the three subpoenas that are the subject of this litigation. One of these subpoenas required the NSF's "Document Custodian" to appear and to produce "[a]ll documents relating to the Green Bank Telescope project."[5] The two additional subpoenas ordered NSF employees Robert Dickman, a liaison to AUI for the telescope program, and Hugh Van Horn, Dickman's supervisor and a former member of the AUI board of trustees, to appear and produce all documents in their possession related to the telescope project. The subpoenas were issued returnable to COMSAT's counsel.

***273** NSF responded on August 25, 1998, with a letter to COMSAT indicating that the agency's prior decision not to produce documents was a final agency decision. This letter also described the agency's analysis of the relevant considerations under its housekeeping or "*Touhy* " regulations.

Pursuant to NSF's *Touhy* regulations, when responding to a subpoena in a legal proceeding to which the NSF is not a party, NSF's General Counsel must consider the following:

> (1) Whether allowing testimony and document production would serve the stated purposes of the regulation (these are promoting efficient NSF operations, avoiding the involvement of NSF in tangential and controversial issues, maintaining NSF impartiality in relation to private litigants, and protecting sensitive, confidential information and the agency's deliberative process);
>
> (2) Whether allowing testimony or document production is necessary to prevent a miscarriage of justice;
>
> (3) Whether NSF has an interest in the decision that will be rendered in the legal proceeding; and
>
> (4) Whether compliance with the subpoena is in the best interests of NSF and the United States.

See 45 C.F.R. § 615.5(b).

NSF's General Counsel concluded in his written response to COM–SAT that NSF would not produce the subpoenaed documents. The Counsel's *Touhy* analysis reached these conclusions:

> (1) Production of the documents would be uneconomical, as the demand is substantially duplicative of COMSAT's earlier FOIA request;

(2) Production would be unnecessarily burdensome because many of the documents originated from AUI and may be discovered from that organization;

(3) NSF has no indemnity or joint defense agreement with AUI, so production would not further the goal of maintaining NSF's neutrality as a third party;

(4) Because the documents are available via FOIA or through AUI, compliance is unnecessary to prevent a miscarriage of justice; thus,

(5) The balance of NSF's and the public's interests favor non-compliance.

In this same August 25, 1998, letter to COMSAT's counsel, NSF requested further clarification of COMSAT's justification for seeking to depose Van Horn and Dickman. COMSAT responded with the explanation that these NSF employees had discussed the Green Banks project with AUI officials. NSF responded in turn with a request for additional clarification from COMSAT, and in a September 28, 1998, letter the agency indicated that it had not reached a final decision with respect to the deposition subpoenas. COMSAT then petitioned the federal district court to compel NSF's compliance.

On December 4, 1998, NSF and COMSAT argued the motion to compel before a magistrate judge. COMSAT insisted that by naming NSF in the caption of its motion, it had made the agency a party to the underlying dispute and thereby subjected it to the requirements of Federal Rule of Civil Procedure 45 governing responses to a subpoena. *See* Fed.R.Civ.P. 45. The magistrate judge accepted this argument and ruled from the bench that NSF could not assert sovereign immunity as a defense to enforcement of the subpoenas.

The magistrate judge concluded further that NSF had waived its right to object to the subpoenas because the agency had ignored its own regulations, which state

> [i]f a response to a demand is required before the General Counsel has made the determination [whether to respond] ... the General Counsel shall provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand is being reviewed, and seek a ***274** stay of the demand pending a final determination.

45 C.F.R. § 615.6(c). The magistrate judge then entered an order requiring NSF to comply with the COMSAT subpoenas.

NSF immediately appealed this order to the district court. On January 8, 1999, the parties appeared for a hearing at which the NSF argued that the court should reject the magistrate's finding of waiver because the agency had effectively lodged a Rule 45 objection through its letters to COMSAT. NSF also argued that the FAA does not grant an arbitrator the authority to subpoena third parties for pre–arbitration discovery; that the agency's actions must be reviewed under the standards of the APA; and that, at least with respect to the deposition subpoenas, jurisdiction was lacking because the agency had not reached a final decision regarding compliance. [6]

The district court read the FAA as a broad grant of full subpoena power to arbitrators. The court reviewed NSF's refusal to comply with the arbitration subpoenas under the standards of the Federal Rules of Civil Procedure. Because the NSF did not seek judicial relief before the return date for the subpoenas, the court found that the agency had violated its own *Touhy* regulations and thereby waived any right to object or to seek a protective order. The court then affirmed the ruling of the magistrate judge.

II.

The situs of the pending arbitration is Reston, Virginia; therefore the district court for the Eastern District of Virginia properly assumed jurisdiction pursuant to § 7 of the FAA. *See* 9 U.S.C.A. § 7 (West 1999). Our jurisdiction over an appeal from the court's order enforcing the subpoenas arises from 28 U.S.C.A. § 1291 (West 1993).

[1] **[2]** At the outset, we note that although our review of the district court's legal conclusions is *de novo, see Burgin v. Office of Personnel Management,* 120 F.3d 494, 497 (4th Cir.1997), our review of NSF's refusal to comply with the subpoenas is governed by the Administrative Procedure Act ("APA"). *See* 5 U.S.C.A. §§ 702, 704, 706 (West 1996). When the government is not a party, the

APA provides the sole avenue for review of an agency's refusal to permit its employees to comply with subpoenas. *See Smith v. Cromer,* 159 F.3d 875, 881 (4th Cir.1998) ("Cromer's remedy, if any, for the Justice Department's [refusal to permit its employees to testify] may be found in the [APA]....").

[3] **[4]** The APA waives the government's sovereign immunity from suit and permits federal court review of final agency actions, when the relief sought is other than money damages and the plaintiff has stated a claim "that an agency or an officer or employee thereof acted or failed to act in an official capacity...." 5 U.S.C.A. § 702. As the Supreme Court has instructed, an agency action may be considered "final" only when the action signals the consummation of an agency's decisionmaking process *and* gives rise to legal rights or consequences. *See Bennett v. Spear,* 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). A reviewing court may set aside a final agency action when the action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 5 U.S.C. § 706.

Additionally, we preface our analysis with the observation that, despite COMSAT's attempts to characterize NSF as a party-in-interest in the arbitration proceeding, NSF was not a party to the Green ***275** Bank telescope contract and is not liable to pay any judgment that the arbitrator might award. [7] Moreover, the arbitration hearing had not yet commenced when the subpoenas issued. Thus, this case tests the scope of an arbitrator's authority, pursuant to the FAA, to subpoena witnesses and documents from a third-party federal agency for the purpose of pre-hearing discovery.

A.

Before we assert subject matter jurisdiction in this case we must decide whether any of NSF's responses to the subpoenas were "final" agency actions. *See* 5 U.S.C.A. § 704 (limiting review to "[a]gency action made reviewable by statute and final agency action ...").

[5] Prior to the return date for the document subpoenas, NSF's general counsel advised COMSAT in writing that the agency would not produce the materials demanded. This was a final agency action that is ripe for our review under the APA.

Prior to the date scheduled for Van Horn and Dickman's depositions, NSF notified COMSAT's counsel that the agency required additional information to decide whether to allow its employees to comply with the subpoenas issued to them. NSF subsequently stated in its brief to this Court that the agency has not reached a final decision as to whether to permit its employees to comply with the deposition subpoenas. Yet during oral argument NSF's counsel appeared to concede that the agency had in fact reached a final decision not to permit its employees to testify. Counsel then invited this Court to review that decision.

Ordinarily we would consider whether the decision as it was announced by counsel at oral argument was sufficiently "final" to permit review, before we would proceed to address the merits of the agency's action. Further analysis of this issue is unnecessary, however. We may assume without deciding that NSF reached a final decision not to comply with the deposition subpoenas because our holding turns, not on finality or lack thereof in this particular agency action, but rather on the scope of an arbitrator's subpoena power under the FAA.

B.

[6] The subpoena powers of an arbitrator are limited to those created by the express provisions of the FAA. The statute provides, in pertinent part:

> arbitrators ... 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....

9 U.S.C.A. § 7.

[7] Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear "before them;" that is,

to compel testimony by non-parties at the arbitration hearing. *See id.*

[8] In disregard of the plain language of the statute, COMSAT cites a provision of the FAA that permits a federal district court to enforce an arbitrator's subpoena, *see* 9 U.S.C.A. § 7, seemingly for the proposition that an arbitrator's subpoena authority is coextensive with that of a federal ***276** court. This is decidedly not the case. The FAA provides that a federal court may "compel the *attendance* of [a subpoenaed person] *before said arbitrator* ...." 9 U.S.C.A. § 7 (emphasis added). The enforcement provision does not expand the arbitrator's subpoena authority, which remains simply the power to compel non-parties to appear before the arbitration tribunal.

[9] Furthermore, once subpoenaed by an arbitrator the recipient is under no obligation to move to quash the subpoena. By failing to do so, the recipient does not waive the right to challenge the subpoena on the merits if faced with a petition to compel.[8] The FAA imposes no requirement that a subpoenaed party file a petition to quash or otherwise challenge the subpoena; the Act's only mechanism for obtaining federal court review is the petition to compel. *See* 9 U.S.C.A. § 7 ("[U]pon petition the ... district court ... may compel the attendance of such person.").

The rationale for constraining an arbitrator's subpoena power is clear. Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes. *See Burton v. Bush,* 614 F.2d 389, 390–91 (4th Cir.1980) ("When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial."). A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process. *See id.* at 391 (concluding that limitations on discovery promote the "policy underpinnings of arbitration [which are] speed, efficiency, and reduction of litigation expenses."). Consequently, because COMSAT and AUI have elected to enter arbitration, neither may reasonably expect to obtain full-blown discovery from the other or from third parties.

Yet COMSAT argues quite persuasively that in a complex case such as this one, the much-lauded efficiency of arbitration will be degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing. For this reason, in *Burton* we contemplated that a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship. 614 F.2d at 391.

We do not now attempt to define "special need," except to observe that at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable. COMSAT did not attempt to make such a showing before the district court, and we infer from the record that no such showing would be possible. As COMSAT acknowledged, many if not all of the documents it sought were obtainable from AUI or with a FOIA request. In fact, the record indicates that prior to filing its petition to compel, COMSAT obtained hundreds of responsive documents from NSF via the FOIA process, continuing up to the point when COMSAT abandoned its FOIA request by ceasing to pay photocopying charges. Likewise, COMSAT has ***277** not attempted to show that any information it might obtain from Van Horn and Dickman, both employees of non-party NSF, is otherwise unavailable from opposing party AUI.

C.

[10] Assuming *arguendo* that COMSAT could yet make the requisite showing of special need, we examine whether the NSF's refusal to comply with the COMSAT subpoenas was an arbitrary and capricious agency action taken in violation of the APA. We apply the APA's deferential standard of review in full recognition of the fact that one of our sister circuits has decided otherwise. In *Exxon Shipping Co. v. U.S. Dept. of Interior* the Ninth Circuit held that non-party federal agencies must produce evidence in response to the subpoenas of private litigants, subject only to the court's discretionary right to limit burdensome discovery under Rules 26 and 45 of the Federal Rules of Civil Procedure. 34 F.3d 774, 778–779 (9th Cir.1994). We decline to follow this holding.

1.

[11] **[12]** COMSAT does not contest the underlying validity of NSF's *Touhy* regulations. Instead, COMSAT maintains that such housekeeping regulations do not

"immunize" an agency from the duty to comply with a federal subpoena. We agree, but only in the following respect: it is sovereign immunity, not housekeeping regulations, that gives rise to the Government's power to refuse compliance with a subpoena. As we have acknowledged, "subpoena proceedings fall within the protection of sovereign immunity even though they are technically against the federal employee and not against the sovereign," *Boron Oil Co. v. Downie,* 873 F.2d 67, 71 (4th Cir.1989); thus, in the context of an agency's response to a third-party subpoena, "the proper method for judicial review of the agency's final decision pursuant to its regulations is through the Administrative Procedure Act." *United States v. Williams,* 170 F.3d 431, 434 (4th Cir.1999). The APA waives sovereign immunity and permits a federal court to order a non-party agency to comply with a subpoena if the government has refused production in an arbitrary, capricious, or otherwise unlawful manner. *See id.* (holding that the APA is the only avenue of review for a state criminal defendant aggrieved by Justice Department's refusal, pursuant to internal housekeeping regulations, to provide the defense with FBI files).

The Ninth Circuit's *Exxon* decision abrogates the doctrine of sovereign immunity to a significant degree. Although the decision acknowledges the APA as the source of the congressional waiver of sovereign immunity permitting review of a non-party agency's refusal to comply with a subpoena, *see* 34 F.3d at 779 n. 9, *Exxon* overlooks an important limitation upon this waiver: courts may reverse an agency's decision not to comply only when the agency has acted unreasonably. *See Fishermen's Dock Coop., Inc. v. Brown,* 75 F.3d 164, 168 (4th Cir.1996) ("[C]ourt of appeals review looks to the *agency's* action to determine whether the record reveals that a rational basis existed for its decision") (citation omitted).

2.

Acting in accordance with the procedures mandated by its regulations, NSF reached an entirely reasonable decision to refuse compliance with COMSAT's document subpoenas. In an August 25, 1998, letter to COMSAT, NSF's general counsel described in detail the agency's *Touhy* analysis of the costs and benefits associated with producing the subpoenaed documents. Most if not all the documents sought were available through COMSAT's FOIA request or from AUI; therefore NSF's counsel concluded that production would be unnecessarily duplicative and costly. As an agency official must, NSF's counsel also considered whether the public ***278** interest and the agency's taxpayer-funded mission would be furthered by compliance.

NSF's counsel answered this question in the negative, and we cannot quarrel with his conclusion. Compliance with the third-party subpoenas issued in this single case, where the litigant sought a tremendous number of agency documents and demanded the presence of agency employees at depositions, would measurably strain agency resources and divert NSF personnel from their official duties. Multiply the cost of compliance by the number of NSF grantees—almost twenty thousand—who might become embroiled in similar disputes, or by the limitless number of private litigants who might seek to draw upon NSF's expertise, and the potential cumulative burden upon the agency becomes alarmingly large.

[13] When an agency is not a party to an action, its choice of whether or not to comply with a third-party subpoena is essentially a policy decision about the best use of the agency's resources. We find NSF's decision reasonable in this case, and so we defer to the agency's judgment, recognizing as we do that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do ... [because] [o]ur Constitution vests such responsibilities in the political branches." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 866, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (citation omitted).

The Ninth Circuit grounded its *Exxon* decision in a steadfast conviction that "the public ... has a right to everyman's evidence." 34 F.3d at 779 (quoting *United States v. Bryan,* 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884 (1950)). Our decision today does not call this important principle into question. Private litigants who are dissatisfied with an agency's response to a third-party subpoena or to a FOIA request may still obtain federal court review under the APA. *See Williams,* 170 F.3d at 434 (in an APA action, federal court may compel agency to produce information unlawfully withheld or unreasonably delayed).

[14] Of course, neither FOIA nor a third-party subpoena will provide the private litigant with guaranteed access,

at public expense, to the testimonial evidence of agency employees. When the government is not a party, the decision to permit employee testimony is committed to the agency's discretion. This compromise between public and private interests is necessary to conserve agency resources and to prevent the agency from becoming embroiled in private litigation. *See Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 112 n. 2 (4th Cir.1993).

III.

In summary, we hold today that a federal court may not compel a third party to comply with an arbitrator's subpoena for prehearing discovery, absent a showing of special need or hardship. Moreover, if the non-party recipient of a subpoena is a government agency, principles of sovereign immunity apply. The decision whether to provide documents or employee testimony in response to a third-party subpoena is committed to agency discretion. Accordingly, we review the government's refusal to comply with such a subpoena under the APA's "arbitrary and capricious" standard for final agency actions.

The district court erred in enforcing the arbitrator's subpoenas. The court also erred when it reviewed NSF's actions under the standards of Federal Rule of Civil Procedure 45, rather than the standard established by the APA. The order enforcing the subpoenas is, therefore,

REVERSED.

All Citations

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Footnotes

1 Section 6305 of the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C.A. §§ 6301—6308 (West 1983 & Supp.1999), explains the nature and purpose of a cooperative agreement:

> An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a ... recipient when—
> (1) the principal purpose of the relationship is to transfer a thing of value to State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and
> (2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

31 U.S.C.A. § 6305.

The statute distinguishes between "procurement contracts" and "cooperative agreements." *See* §§ 6303, 6305.

2 COMSAT's predecessor corporation, Radiation Systems, Inc., was the original party to this agreement.

3 Pursuant to 5 U.S.C.A. § 301, executive branch agencies may prescribe regulations for their own internal governance, conduct of business, record keeping, and document custody. Such regulations are commonly known as "housekeeping" regulations, and do not authorize the agency to withhold information from the public. Housekeeping regulations that create agency procedures for responding to subpoenas are often termed "*Touhy* regulations," in reference to the Supreme Court's decision in *United States ex rel. Touhy v. Ragen,* 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951). In *Touhy* the Court ruled that agency employees may not be held in contempt for refusing to answer a subpoena, if prohibited from responding by a superior. *See id.* at 468, 71 S.Ct. 416.

4 NSF states that it identified over 40 linear feet of files that might contain documents responsive to COMSAT's initial FOIA request, and that processing such a request would cost more than $20,000. When so informed, COMSAT agreed to narrow its request, and NSF continued to produce responsive documents until June of 1998.

5 In its brief COMSAT states that its subpoenas sought only a "small set" of documents not already produced by NSF or AUI. As worded, however, the subpoenas plainly seek "all documents" in NSF's possession that are in any way related to the telescope project.

6 NSF also argued that the COMSAT subpoenas, which lacked instructions on how to challenge a subpoena, were facially defective when judged by the standards of Rule 45. Because we reverse on other grounds, we do not reach the issue of alleged defects in the subpoenas.

7 COMSAT cites the minutes of the meeting of the board of AUI trustees for the company's claim that NSF is obligated to pay any arbitration award. These minutes actually state that while litigation and award expenses are an "allowable

cost" under the cooperative agreement, NSF's obligation to secure funding for these costs "is subject to the requirement that the Director [of NSF], in his or her sole discretion, shall determine the appropriateness of the reimbursement of the costs." *See* Joint Appendix at 108.

8 The district court found that NSF waived its right to object to the subpoenas because the agency did not act pursuant to 45 C.F.R. § 615.6(c), which requires NSF to notify the court "or other competent authority" that a subpoena is being reviewed and to seek a stay pending a final agency determination. *Id.* NSF argues that COMSAT requested that such notice be given to COMSAT's counsel, not the arbitrator, and the agency acted accordingly.

We need not settle this procedural squabble. NSF's compliance with its own *Touhy* regulations, which protect its employees from contempt proceedings, has no bearing on the agency's right to object to the arbitrator's subpoena. *See* § 615.1(d) (stating that these regulations "may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States"). *See also Smith,* 159 F.3d at 880 (holding that the Justice Department's *Touhy* regulations are intended for internal governance only and do not create any right to disclosure of agency records).

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348 F.Supp.2d 283
United States District Court,
S.D. New York.

ODFJELL ASA, Odfjell USA, Inc., Odfjell Seachem As, Jo Tankers As, Jo Tankers, BV, and Jo Tankers, Inc., Plaintiffs,
v.
CELANESE AG, Celanese, Ltd. and Millennium Petrochemicals, Inc., Defendants.
In the Matter of the Arbitration Between Celanese Ltd., Celanese Chemicals Europe GMBH, and Millennium Petrochemicals, Inc., Claimants,
and
Odfjell Asa, Odfjell Seachem As, Odfjell U.S.A., Inc., Jo Tankers As, Jo Tankers BV, and Jo Tankers, Inc., Respondents.

No. 04 Civ. 1758(JSR).
|
Dec. 18, 2004.

Synopsis
Background: Shippers and transporters of bulk liquid chemicals sued corporations engaged in business of producing, developing, and selling chemical products, seeking to stay arbitration arising out of shipping contract dispute. Claimants brought motion to compel compliance with non-party subpoenas, and non-party brought motion to quash subpoena which was issued to particular employee.

Holdings: The District Court, Rakoff, J., held that:

[1] subpoenas to non-party document custodian and particular employee to appear before arbitrators to testify and to produce certain documents were valid and enforceable, and

[2] objections to subpoenas, on grounds of privilege and the like, first had to be heard and determined by arbitrator before whom subpoena was returnable.

Claimants' motion granted.

West Headnotes (5)

[1] **Alternative Dispute Resolution**
Subpoenas

Subpoenas to non-party document custodian and particular employee to appear before arbitrators to testify and to produce certain documents were valid and enforceable under Federal Arbitration Act (FAA). 9 U.S.C.A. § 7.

Cases that cite this headnote

[2] **Alternative Dispute Resolution**
Discovery and depositions
Alternative Dispute Resolution
Witnesses

The Federal Arbitration Act (FAA) does not limit the point in time in the arbitration process when the power to summon a witness and information can be invoked, and that power is not limited to a trial-like final hearing. 9 U.S.C.A. § 7.

Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Concurrence of arbitrators in proceedings and decision

Under the Federal Arbitration Act (FAA), preliminary proceedings can proceed expeditiously before a single arbitrator to deal with preliminary questions of admissibility, privilege, and the like before the full panel hears the more central issues. 9 U.S.C.A. § 7.

Cases that cite this headnote

[4] **Alternative Dispute Resolution**
Matters to Be Determined by Court

Under Federal Arbitration Act (FAA), objections to subpoenas, on grounds of privilege and the like, first had to be heard and determined by arbitrator before whom subpoena was returnable. 9 U.S.C.A. § 7.

2 Cases that cite this headnote

[5] Alternative Dispute Resolution
Subpoenas

The right to bring a motion to quash goes hand in hand with the court's power to enforce or refuse to enforce an arbitration subpoena under the Federal Arbitration Act (FAA). 9 U.S.C.A. § 7.

1 Cases that cite this headnote

Attorneys and Law Firms

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Hector Torres, Harold G. Levison, Kasowitz, Benson, Torres & Friedman, New York, NY, Gary William Dunn, Kasowitz, Benson, Torres & Friedman LLP, New York, NY, for Defendants.

Karen Asner, White & Case, New York, NY, for Stolt Nielsen.

MEMORANDUM ORDER

RAKOFF, District Judge.

By Order dated December 7, 2004 (the "December 7 Order"), the Court (a) granted the motion of claimants Celanese Ltd., Celanese Chemicals Europe GmbH, Celanese Pte., Ltd., Grupo Celanese S.A., and Servicios Corporativos Celanese S. de RL de C.V. (collectively, "Celanese") and Millennium Petrochemicals, Inc. to enforce arbitration subpoenas requiring the custodians of records of non-parties Stolt–Nielsen S.A., Stolt–Nielsen Transportation Group, BV, Stolt–Nielsen Transportation Group, ***285** Inc., and Stolt–Nielsen Transportation Group, Ltd. (collectively "Stolt–Nielsen") to appear before the arbitration panel, testify, and produce certain documents, and (b) denied the motion of Stolt–Nielsen to quash or stay a similar arbitration subpoena requiring Paul E. O'Brien, the former Senior Vice President and General Counsel of Stolt–Nielsen Transportation Group Ltd., to appear before the panel, testify, and produce certain documents. This Memorandum Order explains the reasons for the December 7 Order and addresses Stolt–Nielsen's subsequent motion for a stay of that Order.

Basic familiarity with the factual background of the underlying arbitration is here assumed. *See Odfjell ASA et al. v. Celanese et al.,* 2004 WL 1574728, 2004 U.S. Dist. LEXIS 13151 (S.D.N.Y. Jul. 14, 2004). Briefly, claimants are chemical producers who had entered into a variety of shipment contracts with respondents and with Stolt–Nielsen. The arbitration claims involve assertions that respondents Odfjell ASA, Odfjell USA, Inc., Odfjell Seachem AS, Jo Tankers AS, Jo Tankers, BV, and Jo Tankers, Inc. were co-conspirators in a scheme to fix prices, rig bids, and engage more generally in anti-competitive conduct in the parcel tanker shipping market, all in violation of federal antitrust laws.

The present dispute over the Stolt and O'Brien subpoenas plays out against the backdrop of an earlier dispute previously resolved by this Court involving other subpoenas. Specifically, by Order dated May 28, 2004 and subsequent Memorandum dated August 4, 2004 (the "August 4 Memorandum"), the Court denied the claimants' motion for an order compelling non-party Hendrikus van Westenbrugge to comply with two arbitration subpoenas directing him to appear at a pre-hearing deposition. *See Odfjell ASA et al. v. Celanese AG et al.,* 328 F.Supp.2d 505 (S.D.N.Y.2004). In so ruling, the Court explained that Section 7 of the Federal Arbitration Act ("FAA") confers upon arbitrators only the power to compel non-parties to appear before the arbitrators, not the power to compel non-parties to participate in depositions or other forms of pre-hearing discovery outside the presence of the arbitrators. *Id.*

Seemingly taking its cue from this Court's May 28 Order (as elaborated by the August 4 Memorandum), the arbitration panel, on July 6, 2004, issued several subpoenas duces tecum directing Stolt–Nielsen "to appear in an arbitration proceeding" on July 28, 2004 and to produce at that time "all documents produced by

Stolt–Nielsen to the United States Department of Justice ('DOJ') or to the European Commission ('EC') in connection with any investigation conducted by the DOJ or the EC concerning the parcel-tanker industry and all documents collected by the DOJ and EC from Stolt–Nielsen in the course of such investigation." Subpoenas Duces Tecum, Jul. 6, 2004, attached as Ex. 33 to Declaration of Gary W. Dunn, Aug. 19, 2004 ("Aug. Dunn Decl."). In a separate subpoena duces tecum dated July 22, 2004, the panel directed Paul O'Brien "to appear in an arbitration proceeding" on July 28, 2004 and to produce various documents at that time. Subpoena Duces Tecum, attached as Ex. 34 to Aug. Dunn Decl. By letter dated July 19, 2004, Stolt–Nielsen requested that the arbitration panel vacate the subpoenas directed to the Stolt–Nielsen entities on the grounds that the FAA does not allow arbitrators to issue subpoenas duces tecum to non-parties and that the subpoenas seek confidential information that could undermine the ongoing investigations by the DOJ and EC. *See* Letter from Karie Jo Barwind, Jul. 19, 2004, attached as Ex. 35 to Aug. Dunn Decl. By letter dated July 22, 2004, the arbitration panel denied this request, stating that "[i]t ***286** is the Panel's position that the subpoena it issued is a valid hearing subpoena" and that the panel could take up the issue of confidentiality at the hearing itself. *See* Letter from John J. Gibbons, Jul. 22, 2004, attached as Ex. 36 to Aug. Dunn Decl. By letter dated July 23, 2004, Stolt–Nielsen again refused to appear, and the July 28th hearing was adjourned. *See* Letter from Karie Jo Barwind, Jul. 23, 2004, attached as Ex. 37 to Aug. Dunn Decl.

Although the foregoing subpoenas, unlike the "deposition" subpoenas this Court had earlier considered, facially recited that they were returnable before the arbitration panel, they did not seemingly require any hearing-like activity by the arbitrators and hence might have been argued to exceed the panel's jurisdiction under Section 7 of the FAA. On August 3, 2004, however, the panel amended the subpoenas. The new subpoenas to the various Stolt–Nielsen entities commanded their respective custodians of records "to appear *and testify* in an arbitration proceeding" on August 12, 2004, and "to bring with [them] and produce at that time and place any and all documents and things, of which [they] have custody or control, which are responsive" to the requests for documents turned over to the DOJ and the EC. Subpoenas, Aug. 3, 2004, attached as Ex. 32 to Aug. Dunn Decl. (emphasis added). By letter dated August 9, 2004, Stolt–Nielsen again refused to comply. *See* Letter from Karie Jo Barwind, Aug. 9, 2004, attached as Ex. 38 to Aug. Dunn Decl. Thereafter, claimants moved in this Court to compel compliance.

Similarly, on August 3, 2004, the panel also issued an amended subpoena to Paul O'Brien likewise commanding him to "appear *and testify* in an arbitration proceeding" on August 12, 2004 and to bring eight specified sets of documents at the same time. Subpoena, Aug. 3, 2004, attached as Exhibit A to Declaration of Karen M. Asner, Oct. 6, 2004 ("Oct. 6 Asner Decl.") (emphasis added). Unlike Stolt–Nielsen, O'Brien did not contest the subpoena. Stolt–Nielsen, however, did so, eventually moving in this Court to quash the subpoena.[1] As a result, the return date on the amended subpoenas, both to Stolt–Nielsen and to O'Brien, were adjourned pending resolution of the motions before this Court.

[1] Thereafter, the Court received extensive briefing and oral argument both on claimants' motion to compel compliance with the Stolt–Nielsen subpoenas and Stolt–Nielsen's motion to quash the O'Brien subpoena. With respect to the former, Stolt–Nielsen's primary argument is that the subpoenas are just a thinly-disguised attempt to obtain the pre-hearing discovery that the August 4 Memorandum forbade. However, as noted, the instant subpoenas to Stolt–Nielsen, unlike the deposition subpoenas addressed in the August 4 Memorandum, call for the non-party to appear before the arbitrators themselves to testify and to produce certain documents. This difference is dispositive.

[2] Section 7 of the FAA states that the arbitrators "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 ***287** material as evidence in the case." 9 U.S.C. § 7. This is precisely what the instant subpoenas require. Nothing in the language of the FAA limits the point in time in the arbitration process when this power can be invoked or says that the arbitrators may only invoke this power under section 7 at the time of the trial-like final hearing.

[3] Indeed, the above-quoted language of the FAA plainly contemplates that not every appearance before an arbitrator will consist of a full-blown trial-like hearing, for it provides that the arbitrators may summon the witness

to come "before them *or any of them.*" In practical terms, this means that, while the necessity of appearing before at least one arbitrator will prevent parties to an arbitration from engaging in the extensive and costly discovery that is the bane of civil litigation, at the same time preliminary proceedings can proceed expeditiously before a single arbitrator to deal with preliminary questions of admissibility, privilege, and the like before the full panel hears the more central issues. [2]

[4] As noted, Stolt–Nielsen objects to the instant subpoenas not only on Section 7 grounds but also on the ground that the subpoenas seek documents purportedly protected by grand jury secrecy and by confidentiality arrangements with government agencies. The Court is, frankly, skeptical that any of these arguments is likely to prevail. However, there is no reason for the Court to decide these issues, at least in the first instance, since one of the very reasons for making these subpoenas returnable before one or more members of the arbitration panel is so that the arbitrators can rule on preliminary issues of admissibility, privilege, and the like. Indeed, section 7 would make no sense if it provided the arbitrators with the power to subpoena witnesses and documents but did not provide them the power to determine related privilege issues. *See In the Matter of the Arbitration Between Laufman v. Anpol Contracting, Inc.,* 1995 WL 360015, 1995 U.S. Dist. LEXIS 8214 (S.D.N.Y. June 13, 1995), *citing Local Lodge 1746, International Association of Machinists and Aerospace Workers, AFL–CIO v. Pratt & Whitney,* 329 F.Supp. 283, 287 (D.Conn.1971) (compelling compliance with an arbitration subpoena over objection that subpoena called for privilege documents on ground that arbitrator is competent to evaluate privilege claims); *SchlumbergerSema, Inc. v. Xcel Energy,* 2004 WL 67647 (D.Minn. Jan.9, 2004) (granting in part petitioner's motion to enforce arbitration subpoena over objection that documents and information sought were confidential, noting that opposing party's "concerns about the confidentiality of the information sought can be addressed by the panel"). This approach of having the arbitration panel, rather than the Court, determine the relevant privilege ***288** issues, at least initially, is also consistent with "the 'great deference' which must be paid to arbitral panels by federal courts." *Wallace v. Buttar,* 378 F.3d 182, 193 (2d Cir.2004) (*quoting Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S,* 333 F.3d 383 (2003))

[5] If claimants had brought a motion to compel compliance with the O'Brien subpoena, then the Court would have been compelled to grant that motion for the same reasons, set out above, as requires the Court to grant claimants' motion to compel compliance with the Stolt–Nielsen subpoenas. But, as noted, Mr. O'Brien has not himself refused to comply with the subpoena directed to him. Rather, the objection comes, in the form of a purported motion to quash, from his former employer, Stolt–Nielsen. While Stolt–Nielsen undoubtedly has standing to object in a proper forum to O'Brien's giving of testimony or providing of documents as to which Stolt–Nielsen claims privilege, there is considerable doubt in this Court's mind that this is the proper forum, at least at this juncture, since the FAA nowhere explicitly gives a person subpoenaed to an arbitration the right to move in a federal district court to quash the subpoena. [3] However, the Court need not reach this issue, since, in any event, for the reasons already stated in connection with the Stolt–Nielsen subpoenas, objections on the grounds of privilege and the like should first be heard and determined by the arbitrator before whom the subpoena is returnable, and hence, even assuming *arguendo* that this Court has jurisdiction to consider the motion to quash, the motion must be dismissed at this stage as unripe. [4]

Accordingly, for the foregoing reasons, the Court reconfirms its Order of December 7, 2004, granting claimants' motion to enforce the Stolt–Nielsen subpoenas and denying Stolt–Nielsen's motion to quash or stay the O'Brien subpoena. As for Stolt–Nielsen's motion for a stay, the Court, after careful review of the parties' submissions, concludes that Stolt–Nielsen has failed to demonstrate a substantial possibility of success on appeal, and hence that motion is also denied.

SO ORDERED.

All Citations

348 F.Supp.2d 283

Footnotes

1 In this regard, it should be noted that, even though O'Brien previously worked for Stolt–Nielsen, O'Brien and Stolt–Nielsen are currently litigation adversaries in a proceeding in Connecticut state court styled *O'Brien v. Stolt–Nielsen Transportation Group, LTD et al.,* X08 CV 02 0190051 (the "Connecticut case"), and it is Stolt–Nielsen's contention that the attorney-client privilege issues that are the subject of the Connecticut case are grounds for quashing (or at least staying) the O'Brien subpoena.

2 Stolt–Nielsen also argues that, if the Court approves these subpoenas, there would be no limitation on the number of times its custodians would potentially be compelled to appear before the panel to produce documents. *Cf. In re Integrity Ins. Co.,* 885 F.Supp. 69, 73 (S.D.N.Y.1995) (noting, while holding that an arbitrator may not compel appearance of a non-party at a pre-hearing deposition, that to hold otherwise would result in a situation where "[t]he non-party may be required to appear twice-once for deposition and again at the hearing"). However, claimants have flatly represented to the Court that they do not intend to recall the custodians of records of Stolt–Nielsen at any other time than the hearing at which the subpoenas are returnable, and the Court has accepted and relied on this representation. *See* Transcript, Sept. 14, 2004, at 15. Any failure to comply with this representation may therefore give rise to the imposition of sanctions, and this Court retains jurisdiction for that limited purpose.

3 There is some authority for the idea that the right to bring a motion to quash goes hand in hand with the court's power to enforce or refuse to enforce an arbitration subpoena. *See, Integrity Insurance Co. v. American Centennial Insurance Co.,* 885 F.Supp. 69, 72 (S.D.N.Y.1995). However, neither this case nor the cases it cites analyze the issue in terms of the plain language of the FAA.

4 Before the Court had reached this conclusion, it was provided, on an *in camera* basis, with an affidavit from a third party responding to Stolt–Nielsen's contention that claimant Celenese had purloined some of the documents it was requesting from O'Brien. Since this contention is raised in the context of Stolt–Nielsen's motion to quash the O'Brien subpoena, it too should first be addressed by the arbitrators, to whom, if they so request, this Court will be happy to furnish a copy of the affidavit on an *in camera* basis.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Air Crash at Belle Harbor, New York on November 12, 2001, 2nd Cir.(N.Y.), May 8, 2007

430 F.3d 567
United States Court of Appeals,
Second Circuit.

STOLT–NIELSEN SA, Stolt–Nielsen Transportation Group Ltd. (SNTG), Stolt–Nielsen Transportation Group, BV, and Stolt–Nielsen Transportation Group, Inc., Appellants,
v.
CELANESE AG, Celanese, Ltd., and Millenium Petrochemicals, Inc., Defendants–Claimants–Appellees,
Celanese Chemicals Europe GMBH, Celanese Pte, Ltd, Grupo Celanese SA, and Corporativos Celanese S. de RL de C.V., Claimants–Appellees,
Odfjell ASA, Odfjell USA, Inc., Odfjell Seachem as, Jo Tankers as, Jo Tankers, BV, and Jo Tankers, Inc., Plaintiffs.

Docket No. 04–6373 CV.
|
Argued: July 14, 2005.
|
Decided: Nov. 21, 2005.

Synopsis

Background: Carrier that was not party to arbitrated dispute involving alleged price-fixing and bid-rigging in shipping of bulk liquid chemicals sought to quash subpoena issued by arbitration panel and directed toward carrier's former counsel. Shipper that was party to arbitration sought to compel compliance with related subpoenas directed toward carrier's records custodians. The United States District Court for the Southern District of New York, Jed S. Rakoff, J., 348 F.Supp.2d 283, denied carrier's motion to quash and granted shipper's motion to compel, and carrier appealed.

Holdings: The Court of Appeals, Kravitz, District Judge sitting by designation, held that:

[1] District Court had jurisdiction to hear motions;

[2] District Court's decisions were appealable; and

[3] subpoenas were valid and enforceable under Federal Arbitration Act, not subterfuge to improperly obtain depositions and pre-hearing discovery from non-party's employees.

Affirmed.

See also 328 F.Supp.2d 505.

West Headnotes (6)

[1] Federal Courts
Alternative dispute resolution in general

Federal Arbitration Act, standing alone, does not provide basis for federal jurisdiction. 9 U.S.C.A. § 1 et seq.

4 Cases that cite this headnote

[2] Federal Courts
Alternative dispute resolution in general

Although provision of Federal Arbitration Act explicitly permits aggrieved party to petition district court to enforce arbitration subpoena, that provision does not confer jurisdiction on federal courts; party invoking provision must establish basis for subject matter jurisdiction independent of Act. 9 U.S.C.A. § 7.

10 Cases that cite this headnote

[3] Admiralty
Rights and controversies in general
Federal Courts
Ancillary and incidental jurisdiction in general
Federal Courts
Water
Federal Courts
Alternative dispute resolution in general

District court had jurisdiction over motion to enforce arbitration panel's subpoena directed

to non-party's employees, filed by party to arbitration in antitrust dispute arising out of shipment of bulk chemicals via parcel tankers; although provision of Federal Arbitration Act under which motion was brought did not itself confer jurisdiction, court had admiralty jurisdiction when parties first came before it on motion to stay arbitration, and, after denying motion, court retained jurisdiction over any later petitions arising out of arbitration. 9 U.S.C.A. § 7; 28 U.S.C.A. § 1333(1).

15 Cases that cite this headnote

[4] Alternative Dispute Resolution
Decisions reviewable;finality

District court's order denying motion by non-party to arbitration to quash arbitration panel's subpoena directed to non-party's former counsel was immediately appealable, since former counsel could not be expected to risk contempt citation rather than comply with subpoena and in fact was willing to comply with subpoena immediately; moreover, Court of Appeals had pendent jurisdiction over non-party's accompanying appeal of district court's enforcement of panel's related subpoenas against non-party's records custodians, since it raised identical issue, i.e. panel's authority to issue non-party subpoenas under Federal Arbitration Act. 9 U.S.C.A. §§ 7, 16(a)(3).

16 Cases that cite this headnote

[5] Alternative Dispute Resolution
Subpoenas

Arbitration panel's subpoenas to non-party's former counsel and document custodians, to appear before panel to testify and produce certain documents, were valid and enforceable under Federal Arbitration Act, and were not subterfuge to improperly obtain depositions and pre-hearing discovery from non-party, regardless of fact that appearances were scheduled well before date set for hearing on the merits; subpoenaed parties were not ordered to appear for depositions, arbitrators at hearing ruled on evidentiary issues such as admissibility, and testimony provided became part of arbitration record to be used in determination of dispute. 9 U.S.C.A. § 7.

8 Cases that cite this headnote

[6] Alternative Dispute Resolution
Scope and standards of review

Court of Appeals reviewed de novo district court's interpretation of Federal Arbitration Act provision permitting arbitration panel to issue non-party subpoena. 9 U.S.C.A. § 7.

4 Cases that cite this headnote

Attorneys and Law Firms

***568** J. Mark Gidley, argued (Christopher M. Curran, Karen M. Asner and Peter J. Carney, on the brief), White & Case, LLP, Washington, DC, for Appellants.

***569** Hector Torres, Kasowitz, Benson, Torres & Friedman, LLP, New York, NY, for Appellees.

Before: STRAUB and SACK, Circuit Judges, and KRAVITZ, District Judge. *

Opinion

KRAVITZ, District Judge.

Stolt–Nielsen SA, Stolt–Nielsen Transportation Group, Ltd., Stolt–Nielsen Transportation Group, BV, and Stolt–Nielsen Transportation Group, Inc. (collectively, "Stolt") appeal from an order of the United States District Court for the Southern District of New York (Jed. S. Rakoff, District Judge) granting a motion to enforce four subpoenas served on Stolt's custodians of records and denying Stolt's request to quash a subpoena served on its former counsel. The subpoenas were issued by an arbitration panel presiding over an arbitral proceeding to which neither Stolt nor its former counsel is a party. Section 7 of the Federal Arbitration Act (FAA) provides that arbitrators "may summon in writing any person to attend before 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." 9 U.S.C. § 7. We have previously stated that "open questions remain as to whether § 7 may be invoked as authority for compelling pre-hearing depositions and pre-hearing document discovery, especially where such evidence is sought from non-parties." *Nat'l Broadcasting Co., Inc. v. Bear Stearns & Co.,* 165 F.3d 184, 188 (2d Cir.1999). In this appeal, Stolt asks us to resolve the question left open in *Bear Stearns* and hold that Section 7 does not authorize arbitrators to issue subpoenas to compel pre-hearing depositions and document discovery from non-parties.

We decline to decide whether Section 7 authorizes arbitrators to issue subpoenas to non-parties to compel pre-hearing discovery, because there is no occasion to do so in this case. Contrary to Stolt's claim, the subpoenas in question did not compel pre-hearing depositions or document discovery from non-parties. Instead, the subpoenas compelled non-parties to appear and provide testimony and documents to the arbitration panel itself at a hearing held in connection with the arbitrators' consideration of the dispute before them. The plain language of Section 7 authorizes arbitrators to issue subpoenas in such circumstances. Therefore, the District Court did not err in granting the motion to compel or in denying the motion to quash.

BACKGROUND

The present case arises out of a dispute over alleged anti-competitive behavior in the business of shipping and transporting chemicals by specialized shipping vessels known as parcel tankers. Celanese AG, Celanese Ltd., and Millenium Petrochemicals, Inc. (collectively, "Claimants") develop, produce, and sell chemical products. Between 1990 and 2002, Claimants entered into numerous contracts for the shipment of chemical products by Stolt and by two other groups of companies known in this case as "Odfjell" and "JO Tankers." [1] In 2003 and 2004, certain of the Odfjell and JO Tankers groups of companies (as well as certain individuals) pled guilty to a criminal conspiracy to rig bids and fix prices in the parcel tanker market in violation of the Sherman Act, 15 U.S.C. § 1. Stolt admitted participation in the conspiracy ***570** but was granted conditional amnesty from prosecution under the Sherman Act in connection with its parcel tanker operations.

Pursuant to an arbitration clause contained in the parties' shipping contracts, [2] Claimants instituted arbitration proceedings against Odfjell and JO Tankers for price-fixing, bid-rigging, and other wrongful behavior. Stolt is not a party to Claimants' arbitration with JO Tankers and Odfjell. Claimants' arbitration with Odfjell and JO Tankers is to be conducted in New York under the rules of the Society of Maritime Arbitrators, which provide that the powers and duties of the arbitrators will be governed by the Society's rules and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* The arbitration panel consists of three arbitrators. The parties appointed two arbitrators, who in turn chose the Honorable John J. Gibbons, former Chief Judge of the United States Court of Appeals for the Third Circuit, as chairman of the panel.

In April 2004, the arbitration panel, at Claimants' request, issued a subpoena *ad testificandum* and subpoena *duces tecum* directing non-party Hendrikus van Westenbrugge, a former executive of JO Tankers then incarcerated at a federal correctional facility in New Jersey, to appear for a pre-hearing deposition before Claimants and to produce at that time various documents sought by Claimants. After Mr. van Westenbrugge failed to comply with the subpoena, Claimants moved the District Court to compel compliance with the arbitration panel's subpoena. The District Court declined. After considering the language of Section 7 and case law interpreting that provision, the court held that Section 7 grants arbitrators the power to compel non-parties to provide testimony and documents before the arbitrators themselves, but it does not authorize arbitrators "to compel a *pre-hearing* deposition of or *pre-hearing* document production from a non-party." *Odfjell ASA v. Celanese AG,* 328 F.Supp.2d 505, 507 (S.D.N.Y.2004) (emphasis in original).

In August 2004, the arbitration panel issued five more subpoenas, four of them directed to Stolt custodians of records and one to Stolt's former general counsel, Paul O'Brien. The subpoenas directed the recipients to "appear and testify in an arbitration proceeding" and to bring certain documents with them. Stolt moved the District Court to quash the subpoena directed to Mr. O'Brien (the "O'Brien subpoena"), and after Stolt indicated its intention not to comply with the custodians of records' subpoenas (the "Stolt subpoenas"), Claimants moved the District Court to compel compliance with the Stolt subpoenas.

On December 7, 2004, the District Court issued an order granting Claimants' motion to compel compliance with the Stolt subpoenas and denying Stolt's motion to quash the O'Brien subpoena. Having been apprised of the court's order, the arbitration panel informed Stolt that the subpoenas would be returnable on December 21, 2004. Stolt then appealed the December 7 ***571** order to this Court, and after the arbitration panel rejected Stolt's request for a continuance, Stolt asked the District Court to stay the arbitration hearing pending this appeal.

On December 18, 2004, the District Court denied Stolt's motion for a stay pending appeal and provided the parties with a written explanation for its December 7 order. *Odfjell ASA v. Celanese AG,* 348 F.Supp.2d 283 (S.D.N.Y.2004). The District Court rejected Stolt's argument that the subpoenas were "thinly disguised attempt[s] to obtain the pre-hearing discovery" that the court had previously prohibited. *Id.* at 286. The District Court explained that in contrast to the van Westenbrugge subpoenas, "the instant subpoenas ... call for the non-party to appear before the arbitrators themselves." *Id.* According to the court, "[t]his difference is dispositive" because Section 7 authorizes arbitrators to summon witnesses to testify "before them" and to bring documents, and that "is precisely what the instant subpoenas require." *Id.* at 287. Finally, the court rejected Stolt's argument that the subpoenas were unenforceable on grounds of inadmissibility and privilege, concluding that the arbitration panel was the proper venue to raise such arguments in the first instance. *Id.* at 287–88.

On December 21, 2004, a panel of this Court denied Stolt's motion for an emergency stay pending the present appeal. That same day, Mr. O'Brien and Stolt's custodians of records appeared before the arbitration panel in accordance with the subpoenas. Stolt's custodians of records brought with them more than 300 boxes of documents in response to the subpoenas. Due to the logistical difficulties in having the witnesses authenticate 300 boxes of documents, the parties agreed to continue compliance with the Stolt subpoenas, pending Claimants' review of the documents Stolt had produced.

Mr. O'Brien, however, did testify before the arbitration panel and also provided documents to the panel, in accordance with the subpoena. Stolt's counsel asserted attorney-client privilege at several points during the hearing in objection to questions asked of Mr. O'Brien. [3] Based on Stolt's assertion of privilege, Mr. O'Brien refused to answer thirty-two questions that the panel directed him to answer; Stolt also objected to Mr. O'Brien's production of several documents. *See Odfjell ASA v. Celanese,* 380 F.Supp.2d 297, 300 (S.D.N.Y.2005). After the hearing was adjourned, Claimants moved the District Court to compel Mr. O'Brien to answer the thirty-two questions and to produce the requested documents. *Id.* The District Court denied the motion, ruling that Stolt first should be allowed to produce evidence establishing the validity of its claim of attorney-client privilege. The court remanded the matter to the arbitration panel for further proceedings consistent with its opinion. *Id.* at 303.

DISCUSSION

I.

[1] At the outset, we address the issues of subject matter and appellate jurisdiction, although the parties themselves do not question the existence of either. In their opening briefs, both parties presumed that the FAA provided a basis for subject-matter jurisdiction. However, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), the Supreme ***572** Court explained that the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331." *Id.* at 25 n. 32, 103 S.Ct. 927. We have similarly stated that "[i]t is well-established ... that the FAA, standing alone, does not provide a basis for federal jurisdiction." *Westmoreland Capital Corp. v. Findlay,* 100 F.3d 263, 267 (2d Cir.1996). Thus, we have held that a party invoking various provisions of the FAA in federal court must first establish a basis for subject matter jurisdiction independent of the FAA itself. *See Perpetual Sec., Inc. v. Tang,* 290 F.3d 132, 136–40 (2d Cir.2002) (considering petitions brought under Sections 9 and 10); *Westmoreland Capital Corp.,* 100 F.3d at 267–68; (Section four) *Harry Hoffman Printing, Inc. v. Graphic Commc'ns, International Union, Local 261,* 912 F.2d 608, 611 (2d Cir.1990) (Section 10).

[2] This Court has not previously considered whether Section 7 requires an independent basis for subject matter

jurisdiction. Section 7 does explicitly permit an aggrieved party to bring a petition before a district court to enforce an arbitration subpoena. *See* 9 U.S.C. § 7. But so do other provisions of the FAA that we have already determined require an independent basis of subject matter jurisdiction. *See Westmoreland Capital Corp.,* 100 F.3d at 268; *Harry Hoffman Printing,* 912 F.2d at 611. There is no reason to reach a different conclusion for a party invoking Section 7. *See Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd.,* 95 F.3d 562, 567 (7th Cir.1996) (holding that Section 7, like other provisions of the FAA, does not create subject matter jurisdiction); *see also Westmoreland Capital Corp.,* 100 F.3d at 268 ("[A]lthough a number of provisions in the FAA refer to the 'United States court' in a manner that suggests a bestowal of jurisdiction (e.g., FAA §§ 7, 9, 10, 11), these provisions have not been interpreted to confer jurisdiction on the federal courts."). Therefore, parties invoking Section 7 must establish a basis for subject matter jurisdiction independent of the FAA.

[3] We are satisfied that the parties in this case have done so, since maritime jurisdiction provides an ample basis for subject matter jurisdiction. District courts have original jurisdiction under 28 U.S.C. § 1333(1) over "[a]ny civil case of admiralty or maritime jurisdiction," including cases involving maritime contracts. *See CTI–Container Leasing Corp. v. Oceanic Operations Corp.,* 682 F.2d 377, 379 (2d Cir.1982) ("If the contract is a 'maritime contract,' it is within the federal court's admiralty jurisdiction."). "Traditional texts have defined a 'maritime' contract as one that, for example, relat[es] to a ship in its use as such, or to commerce or to navigation on navigable waters, or to transportation by sea or to maritime employment ...." *Id.* (alteration in original) (internal quotation marks). The shipping contracts at issue in the underlying arbitration—contracts between chemical producers and parcel tanker companies for the global shipment of chemical products—fit squarely within the definition of a maritime contract. *See The Gothland,* 64 U.S. (23 How.) 491, 493–94, 16 L.Ed. 516 (1859) ("[C]ontracts of affreightment are 'maritime contracts' within the true meaning and construction of the Constitution and act of Congress ....").

Those maritime contracts provided the basis for subject matter jurisdiction when this case originally arrived in the District Court. At that time, Odfjell and JO Tankers asked the District Court to stay the arbitration that Claimants had filed under ***573** the terms of their maritime contracts. *See Odfjell ASA v. Celanese AG,* No. 04 Civ. 1758, 2004 WL 1574728, at *1 (S.D.N.Y. July 14, 2004). Emphasizing the existence of "substantial reasons in favor of arbitrability," *id.* at *3, the court rejected the stay request, an order that "was essentially the equivalent of an order ... to compel arbitration." *Smiga v. Dean Witter Reynolds, Inc.,* 766 F.2d 698, 705 (2d Cir.1985). We have previously explained that "a court which orders arbitration retains jurisdiction to determine any subsequent application involving the same agreement to arbitrate." *Id.; see also Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd.,* 95 F.3d 562, 566 (7th Cir.1996) ("Once the court orders arbitration, it may, of course, also order compliance with summonses from the arbitrator."). Therefore, in this case, the District Court properly retained subject matter jurisdiction under 28 U.S.C. § 1333(1) over any later applications or petitions arising out of the parties' arbitration, including the motions to compel and quash that form the basis of this appeal. [4]

[4] Satisfied that subject matter jurisdiction exists, we next turn to this Court's jurisdiction over the present appeal. *See Arnold v. Lucks,* 392 F.3d 512, 517 (2d Cir.2004) ("[E]very federal appellate court has a special obligation to satisfy itself ... of its own jurisdiction ...." (internal quotation marks omitted)). Section 16(a)(3) of the FAA confers a right to an appeal from a "final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3). The Seventh Circuit has previously held that a district court order compelling compliance with arbitration subpoenas "is final and appealable for the purposes of § 16(a)(3)." *Amgen,* 95 F.3d at 567. According to the Seventh Circuit, the district court's order was immediately appealable because it was the "final" product of an "independent" proceeding, rather than an interlocutory order from an "embedded proceeding [that] is a constituent part of a more comprehensive litigation." *Id.* at 566. *Amgen* is the only circuit court decision directly addressing appellate jurisdiction in the context of a district court order regarding enforcement of an arbitration subpoena, though other circuits have assumed jurisdiction in that context without discussion. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 406 (3d Cir.2004); *COMSAT Corp. v. Nat'l Sci. Found.,* 190 F.3d 269, 274 (4th Cir.1999).

However, the Seventh Circuit's reliance in *Amgen* on the dichotomy between so-called "independent proceedings"

and "embedded proceedings" was cast into considerable doubt by the Supreme Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). *See Salim Oleochemicals v. M/V SHROPSHIRE,* 278 F.3d 90, 92 (2d Cir.2002) (recognizing that the "analysis prescribed in *Green Tree* displaces [an] approach which turn[s] on the independent/embedded distinction"). There, the Supreme Court rejected the notion that "Congress intended to incorporate the rather complex independent/embedded distinction, and its consequences for finality, into § 16(a)(3)." *Green Tree Fin.,* 531 U.S. at 88–89, 121 S.Ct. 513. Instead, the Supreme Court instructed lower courts that the phrase "final decision" in ***574** Section 16(a)(3) is to be construed in accordance with that term's "consistent and longstanding interpretation." *Id.* at 88, 121 S.Ct. 513.

Under traditional finality principles, a district court's decision to compel compliance with a subpoena or to deny a motion to quash a subpoena is generally not a "final decision" and therefore is not immediately appealable. Thus, in *United States v. Construction Products Research, Inc.,* 73 F.3d 464 (2d Cir.1996), we observed that "[t]he general rule is that orders enforcing subpoenas issued in connection with civil and criminal actions ... are *not* final, and therefore *not* appealable." *Id.* at 468 (emphasis in original). *See, e.g., United States v. Ryan,* 402 U.S. 530, 532–33, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971); *Cobbledick v. United States,* 309 U.S. 323, 328, 60 S.Ct. 540, 84 L.Ed. 783 (1940); *In re DG Acquisition Corp.,* 151 F.3d 75, 85 (2d Cir.1998). *See generally* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2466, at 87 (2d ed.1995). Instead, in a criminal or civil proceeding, a witness wishing to contest a subpoena must usually disobey the subpoena, be held in civil or criminal contempt, and then appeal the contempt order. *See Constr. Prods. Research,* 73 F.3d at 469 ("To obtain appellate review, the subpoenaed party must defy the district court's enforcement order, be held in contempt, and then appeal the contempt order, which is regarded as final under [28 U.S.C.] § 1291."). And this is true whether the witness attempting to quash a subpoena is a party to the litigation in which the subpoena was issued or merely a non-party witness. *See Dove v. Atl. Capital Corp.,* 963 F.2d 15, 17 (2d Cir.1992) ("A non-party witness ordinarily may not appeal directly from an order compelling discovery but must instead defy the order and be found in contempt in order to obtain review of the court's initial order."); *see also United States v. Nixon,* 418 U.S. 683, 690–92, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.,* 591 F.2d 174, 177 (2d Cir.1979). [5]

There is a different rule in administrative proceedings. "A district court order enforcing a subpoena issued by a government agency in connection with an administrative proceeding may be appealed immediately without first performing the ritual of obtaining a contempt order." *Constr. Prods. Research,* 73 F.3d at 469; *see, e.g., RNR Enter., Inc. v. S.E.C.,* 122 F.3d 93 (2d Cir.1997) (considering an appeal from a district court's enforcement of administrative subpoenas); *In re Gimbel,* 77 F.3d 593 (2d Cir.1996) (same). As this Court has explained, "The rationale is that, at least from the district court's perspective, the court's enforcement of a agency subpoena arises out of a proceeding that 'may be deemed self-contained, ***575** so far as the judiciary is concerned.... [T]here is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending [subpoenaed party] permitted to appeal.' " *Constr. Prods. Research,* 73 F.3d at 469 (alterations in original) (quoting *Cobbledick,* 309 U.S. at 330, 60 S.Ct. 540).

One could certainly argue that enforcement of an arbitration subpoena presents a situation closer to that of an administrative agency subpoena than enforcement of a subpoena in a ordinary civil or criminal proceeding. On the other hand, Section 7 itself explicitly states that if a witness neglects a summons to appear at an arbitration hearing, a district court may "punish said person ... 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. § 7. This language might suggest that the usual rules governing challenges to court subpoenas (including the rules governing appellate jurisdiction) should also apply to subpoenas issued by arbitrators. Furthermore, courts have a well-recognized interest in preventing arbitrations from being slowed down by, or burdened by the expense of, piecemeal appeals of every subpoena issued by an arbitration panel. *See Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.,* 403 F.3d 85, 90 (2d Cir.2005) (describing the "twin goals of arbitration" to be "settling disputes efficiently and avoiding long and expensive litigation" (internal quotation marks omitted)). As the Supreme Court and this Court have often observed, in enacting the FAA Congress sought to "move the parties to an arbitrable dispute out of court and into arbitration as

quickly and easily as possible." *Moses H. Cone,* 460 U.S. at 22, 103 S.Ct. 927.

Having set forth the competing interests, we find that in this case we need not choose between them. For there is another, well-recognized basis for appellate jurisdiction in this particular case that permits us to leave undecided the issue addressed by the Seventh Circuit in *Amgen.* This Court has previously recognized that where a subpoenaed third-party witness does not object to testifying, but someone else does—often on grounds of privilege—a district court's refusal to quash the subpoena is immediately appealable by the objecting party. *See In re Grand Jury Proceedings,* 219 F.3d 175, 182 n. 3 (2d Cir.2000) (permitting a company to immediately appeal a district court's enforcement of subpoenas issued to its counsel and founder). "The theory of immediate appealability ... is that the third party [witness] will not be expected to risk a contempt citation and will surrender the documents sought, thereby letting the 'cat out of the bag' and precluding effective appellate review at a later stage." *In re Katz,* 623 F.2d 122, 124 (2d Cir.1980). Here, Stolt objects to the District Court's denial of its motion to quash the O'Brien subpoena. Like the third-party witness in *In re Katz,* Mr. O'Brien cannot be expected to risk a contempt citation rather than comply with the subpoena. Indeed, he has demonstrated that he is more than willing to comply with the subpoena without any additional prompting. Therefore, under traditional finality principles, the District Court's order refusing to quash the O'Brien subpoena is immediately appealable.

Appellate jurisdiction over the order enforcing the Stolt subpoenas is less clear under traditional finality principles, for the reasons discussed above. However, because we have clear jurisdiction over Stolt's appeal involving the O'Brien subpoena, we may exercise pendent jurisdiction over the appeal involving the related ***576** Stolt subpoena. Pendent appellate jurisdiction allows an appeals court to exercise jurisdiction over a non-final claim "where [the] issue is 'inextricably intertwined' with an issue over which the court properly has appellate jurisdiction." *Lamar Adver. of Penn, LLC v. Town of Orchard Park, New York,* 356 F.3d 365, 371 (2d Cir.2004) (quoting *Swint v. Chambers County Comm'n,* 514 U.S. 35, 50–51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995)). This Court has exercised pendent appellate jurisdiction where the same specific question underlay both the appealable order and the non-appealable order, or where resolution of the non-appealable order was subsidiary to resolution of the appealable order. *See, e.g., Luna v. Pico,* 356 F.3d 481, 486–87 (2d Cir.2004) (exercising pendent jurisdiction over the denial of plaintiff's motion for summary judgment on liability because whether plaintiff's constitutional rights were violated was inextricably intertwined with the immediately appealable issue of defendants' qualified immunity); *Pathways, Inc. v. Dunne,* 329 F.3d 108, 113 (2d Cir.2003) (finding that denial of a preliminary injunction was inextricably intertwined with an otherwise-non-appealable dismissal of claims for injunctive and declaratory relief based on the *Younger* abstention doctrine); *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.,* 199 F.3d 94, 97 (2d Cir.1999) (explaining that, where a party appeals a finding of subject matter jurisdiction based on the "commercial activity exception" in the Foreign Sovereign Immunities Act ("FSIA"), pendent jurisdiction will exist over a finding of personal jurisdiction to the extent that "questions regarding minimum contacts for personal jurisdiction purposes and commercial contacts for FSIA purposes [are] inextricably intertwined.").

In this appeal, the issue is identical for both the Stolt subpoenas and the O'Brien subpoena, as Stolt asks us to quash both sets of subpoenas "as beyond the scope of Section 7 of the Federal Arbitration Act." Moreover, the District Court recognized that a motion to compel compliance with the O'Brien subpoena would have to be granted "for the same reasons ... as requires the Court to grant claimants' motion to compel compliance with the Stolt–Nielsen subpoena." *Odfjell ASA v. Celanese AG,* 348 F.Supp.2d 283, 288 (S.D.N.Y.2004); *cf. Lamar Adver.,* 356 F.3d at 372 (exercising pendent jurisdiction where the district court denied plaintiff's "request for a preliminary injunction for the very same reasons it denied [his] motion for summary judgment"). Therefore, under the circumstances of this case, we find that an exercise of our pendent jurisdiction is proper over Stolt's appeal from the District Court's order enforcing the Stolt subpoenas. [6]

II.

[5] **[6]** Turning to the merits of Stolt's appeal, we note at the outset that we review the District Court's interpretation ***577** of Section 7, as we review other questions of statutory interpretation, *de novo. See Lander v. Hartford Life & Annuity Ins. Co.,* 251 F.3d 101, 107

(2d Cir.2001); *United States v. Koh,* 199 F.3d 632, 636 (2d Cir.1999). Section 7 provides in relevant part that "[t]he arbitrators ... 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." 9 U.S.C. § 7.[7] The subpoenas at issue in this appeal directed Mr. O'Brien and the Stolt custodians to appear and testify, and also provide documents, at a hearing convened before the arbitration panel. No party to this appeal contests the materiality of the evidence sought by the subpoenas. Therefore, as the District Court rightly recognized, in issuing the O'Brien and Stolt subpoenas, the arbitration panel invoked precisely the authority that Section 7 unambiguously grants them.

Stolt does not dispute the power of arbitrators to subpoena non-parties for testimony and documents at what Stolt calls a "trial-like arbitration hearing on the merits." What fuels Stolt's objection, and what Stolt devotes its entire brief to arguing, is that Section 7 does not empower arbitrators to summon non-parties for the purpose of compelling testimonial and documentary discovery in advance of a "merits hearing," and that the subpoenas in question were "a thinly disguised effort to obtain pre-hearing discovery." Evidencing this subterfuge, according to Stolt, is a letter from Claimants to the arbitration panel explaining the need—in light of the District Court's ruling on the van Westenbrugge subpoena—to convene a hearing so that non-party evidence and documents could be obtained. Stolt also makes much of the fact that the subpoena was returnable on December 21, 2004, during the period that the arbitration panel had scheduled for fact depositions and months in advance of October 17, 2005, the date set by the panel for commencement of the "Arbitration hearing on the merits." In sum, Stolt alleges that Claimants and the arbitration panel have conspired to "circumvent Section 7's limitations through the contrivance of conducting its discovery in the presence of the arbitrators."

Like the District Court, we are not persuaded that the December 21 hearing was the ruse Stolt claims it to be. Therefore, we have no occasion to rule on the authority of arbitrators to order non-parties to participate in discovery. Any rule there may be against compelling non-parties to ***578** participate in discovery cannot apply to situations, as presented here, in which the non-party is "summon[ed] in writing ... to attend before [the arbitrators] or any of them as a witness and ... to bring with him ... [documents] which may be deemed material as evidence in the case." 9 U.S.C. § 7.

Several factors convince us that the subpoenas were well within the authority provided arbitrators under Section 7, although we hasten to add that we do not suggest that all of these factors need be present in every case in order to justify arbitration subpoenas under Section 7. First, the custodians and Mr. O'Brien were not ordered to appear for depositions. Depositions usually take place outside the presence of the decision maker, and they are designed to allow parties to prepare for the eventual presentation of evidence or examination of witnesses before the decision maker at trial or a hearing. *See Black's Law Dictionary* 451 (7th ed.1999) (defining "deposition" as "[a] witness's *out-of-court* testimony that is reduced to writing ... for later use in court or for discovery purposes" (emphasis added)). Here, by contrast, the custodians and Mr. O'Brien were directed to appear at a hearing before the arbitrators, and all three arbitrators were present at that hearing. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 407 (3d Cir.2004) (noting that while Section 7 does not permit a subpoena to compel production from a non-party in absence of a hearing, it does permit subpoenas in which "the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time").

Second, the arbitrators heard testimony directly from Mr. O'Brien, and unlike a deposition, the panel ruled at the hearing on evidentiary issues such as admissibility and privilege and reserved on other evidentiary issues. Indeed, the hearing transcript reveals that the hearing was primarily devoted to resolving evidentiary issues, especially the issue of whether and to what extent attorney-client privilege foreclosed Mr. O'Brien's testimony. While the custodians were not required to testify, that was the result of a consensual agreement between Stolt and Claimants and not a function of the arbitration subpoena or the hearing process itself.

Third, the testimony provided at the hearing became part of the arbitration record, to be used by the arbitrators in their determination of the dispute before them. Finally, we note that if Judge Rakoff had been of the view that the arbitrators and Claimants were attempting by artifice to

undermine his prior order forbidding the use of Section 7 to take discovery of non-parties, there is every reason to believe he would have so found. But, in fact, he concluded based upon the record before him and the representations of the parties that the December 21 hearing was convened by the arbitrators in good faith and that it complied with Section 7, as well as the spirit and terms of his prior ruling. Section 7 does not deny arbitrators the power to summon witnesses to a hearing under such circumstances.

Contrary to Stolt's assertions, the mere fact that the session before the arbitration panel on December 21 was preliminary to later hearings that the panel intended to hold does not transform the December 21 hearing into a discovery device. As Judge Rakoff rightly recognized, "Nothing in the language of the FAA limits the point in time in the arbitration process when [the subpoena] power can be invoked or says that the arbitrators may only invoke this power under section 7 at the time of the trial-like final hearing." *Odfjell ASA,* 348 F.Supp.2d at 287. To the contrary, the language of Section 7 is broad, limited only ***579** by the requirement that the witness be summoned to appear "before [the arbitrators] or any of them" and that any evidence requested be material to the case. *See* 9 U.S.C. § 7.

According to Stolt, that "Section 7 speaks of a 'witness' providing 'evidence' " suggests that the provision applies only to a merits hearing akin to a full-blown trial. Yet, often witnesses are called and evidence is adduced in contexts other than trials. For instance, courts hear evidence and testimony at preliminary hearings on issues such as the admissibility of evidence or on a motion for interim relief. *See, e.g., New York ex rel. Spitzer v. Operation Rescue Nat'l,* 273 F.3d 184, 199 (2d Cir.2001) (noting that a district court heard testimony at a preliminary injunction hearing); *Frank v. Plaza Constr. Corp.,* 186 F.Supp.2d 420, 425 (S.D.N.Y.2002) (noting that the court held an "evidentiary hearing" before trial to determine the authenticity and admissibility of a document).

So, too, arbitrators may need to hear testimony or receive evidence on preliminary issues—such as whether an arbitration clause is enforceable or whether a claim is barred by relevant statutes of limitations—in advance of an ultimate hearing on the substantive merits of the underlying claims in the arbitration. *See, e.g., Tellium, Inc. v. Corning Inc.,* No. 03 Civ. 8487, 2004 WL 307238, at *1 (S.D.N.Y. Feb.13, 2004) (noting that an arbitration panel "[found] disputed issues of fact regarding" plaintiff's claim that it was not a proper party to the arbitration and "grant[ed it] the right to present evidence on the matter at an early hearing in advance of the plenary hearing"); *Echeverri v. Starrett City, Inc.,* No. 96–CV–1006, 1998 WL 903482, at *2 (E.D.N.Y. Dec. 7, 1998) (noting that "consideration of [plaintiff's] claim on the merits" was to follow an "initial hearing" on the issue of arbitrability). Arbitrators may also need to hold a preliminary hearing to decide whether to preserve the status quo, as well as to decide issues of privilege, authenticity, and admissibility. *See Am. Express Fin. Advisors Inc. v. Thorley,* 147 F.3d 229, 230–31 (2d Cir.1998) (recognizing that arbitrators can grant preliminary injunctive relief); American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, at R–31(b) ("The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant."); *id.* at R–34(a) ("The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods."). In any case, we doubt that arbitrators are prohibited from making use of their powers under Section 7 to hear testimony and gather evidence as to the merits of a dispute so long as they do so by summoning witnesses and evidence before them.

Just as a subpoena can issue under Rule 45 of the *Federal Rules of Procedure* to compel witnesses "to attend and give testimony" and "produce ... books, documents or tangible things" at a "trial *or hearing,*" Section 7 authorizes arbitrators to subpoena witnesses "to attend before them ... and ... bring with him or them any [relevant] book, record, document, or paper ... *in the same manner as subpoenas to appear and testify before the court.*" 9 U.S.C. § 7 (emphasis added). Moreover, as the District Court correctly observed, Section 7's reference to hearings "before [the arbitrators] *or any of them* " suggests that the provision authorizes the use of subpoenas at preliminary proceedings even in front of a single arbitrator, before the full panel "hears the more central issues." *Odfjell,* 348 F.Supp.2d at 287. Thus, there ***580** is nothing in the language of Section 7 that requires, or even suggests, the limitation that Stolt advances.

Furthermore, the present case demonstrates the usefulness of employing subpoenas at a preliminary hearing before the arbitration panel. Because Stolt's interests and those of Mr. O'Brien were not aligned, Mr. O'Brien did not object to appearing before the arbitrators. In view of Stolt's assertion of privilege, however, issues remained as to which questions Mr. O'Brien would be permitted to answer, even if he were willing to provide answers. Rather than be forced to deal with thorny issues of privilege at the "final" hearing, the arbitrators were instead able to subpoena Mr. O'Brien for a preliminary session in which those issues could be resolved. Similarly, even though the parties dispensed with the testimony of the Stolt custodians, the hearing could also have usefully resolved issues of foundation and admissibility regarding the Stolt documents in advance of a final hearing.

Stolt objects that if non-party witnesses may be summoned to hearings other than the final "merits hearing," witnesses will face the burdensome prospect of being recalled to testify at multiple sessions. In that regard, however, it is worth noting that Claimants assured the District Court before it decided to enforce the subpoenas that Claimants would not recall Stolt's custodians of records for multiple hearings. *Id.* at 287 n. 2. Nor should we lightly assume that arbitrators will subpoena third-party witnesses gratuitously, since the arbitrators themselves must attend any hearing at which such subpoenas are returnable. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 414 (3d Cir.2004) (Chertoff, J., concurring) (noting that Section 7's "procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own" when they subpoena third-party witnesses). Arbitrators issuing subpoenas and district courts asked to enforce them can, and should, take steps to minimize the burden on non-party witnesses. Indeed, that is precisely what happened here. [8]

Finally, there is an artificiality about Stolt's argument that further confirms the wisdom of rejecting it. Arbitration hearings, even "trial-like merits hearings," are often continued, frequently with many months elapsing between hearing sessions. If the arbitrators had summoned Mr. O'Brien or the Stolt custodians for the first day of the scheduled hearings on the merits on October 17, 2005, heard their testimony, and then adjourned for ten months, before reconvening, even Stolt would concede that Section 7 would authorize the subpoenas. Yet, according to Stolt, the ten-month gap here between the December 21, 2004, hearing and the beginning of the "merits" hearing somehow rendered the subpoenas invalid. Nothing in the language of Section 7 or common sense dictates such a result. Here, as noted above, all three arbitrators participated in a hearing in which they received testimony and documents, took evidence, and considered matters of admissibility and privilege, resolving many of them. Preliminary or not, what occurred on December 21, 2004, was the sort of hearing to which Section 7 authorizes arbitrators to summon non-party witnesses.

*581 CONCLUSION

In sum, we again leave to another day the question whether Section 7 authorizes arbitrators to issue discovery-type subpoenas to those who are not parties to the arbitration. We decide only that Section 7 unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel, and that is precisely what occurred in this case. Accordingly, the O'Brien and Stolt subpoenas were authorized by Section 7, and the District Court's judgment is affirmed.

All Citations

430 F.3d 567, 2005 A.M.C. 2777, 2005-2 Trade Cases P 75,049

Footnotes

* The Honorable Mark R. Kravitz of the United States District Court for the District of Connecticut, sitting by designation.

1 "Odfjell" refers collectively to Odfjell ASA, Odfjell USA, Inc., and Odfjell Seachem AS. "JO Tankers" refers collectively to JO Tankers AS, JO Tankers BV, and JO Tankers, Inc.

2 The shipping contracts incorporated by reference a set of standardized industry charter party terms commonly known as "ASBATANKVOY." The ASBATANKVOY contains an arbitration clause, which provides, in pertinent part, as follows:

> 24. ARBITRATION. Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen.

3 After leaving Stolt but prior to being subpoenaed, Mr. O'Brien had sued Stolt "to remedy the career damages he ... suffered as a result of [Stolt's] criminal activity." Therefore, Stolt's interests and Mr. O'Brien's interests were not necessarily aligned.

4 Because we conclude that the District Court had subject matter jurisdiction under 28 U.S.C. § 1333(1), we need not consider the alternative grounds of subject matter jurisdiction proffered by the parties—namely, jurisdiction under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. § 201 *et seq.*) and diversity jurisdiction (28 U.S.C. § 1332).

5 When one district court denies a motion to compel a third-party subpoena issued by another court in the same circuit, the denial is not immediately appealable, even though it may represent the only issue pending before the court asked to compel the third-party subpoena. *See Barrick Group, Inc. v. Mosse,* 849 F.2d 70 (2d Cir.1988). In *Barrick Group,* we noted that when both the court issuing the subpoena and the court considering the motion to compel are in the same circuit, "a circuit court can consider any appeal on discovery issues at the same time as the appeal from the judgment in the underlying action. This approach avoids piecemeal proceedings, strengthens the rule of finality and provides ultimately for the effective review of all issues." *Id.* at 73. However, where the principal action and ancillary proceeding are pending in different circuits, we allow an immediate appeal of discovery decisions on the ground that "there can be no effective review of the determination under such circumstances unless the interlocutory appeal is allowed." *Id.; see Baker v. F & F Investment,* 470 F.2d 778, 780 n. 3 (2d Cir.1972); *Republic Gear Co. v. Borg–Warner Corp.,* 381 F.2d 551, 554 (2d Cir.1967).

6 One further jurisdictional issue deserves mention. Even though there has been partial compliance with the subpoenas, this dispute is not moot because the full scope of Mr. O'Brien's testimony before the arbitration panel has not yet been resolved. *See Odfjell,* 380 F.Supp.2d at 303 (remanding to the arbitration panel for reconsideration of Stolt's attorney-client privilege claims). Similarly, whether the custodians have properly complied with the Stolt subpoenas also has not yet been decided. "[S]o long as the appellant retains some interest in the case, so that a decision in its favor will inure to its benefit, its appeal is not moot." *New England Health Care Employees Union v. Mount Sinai Hosp.,* 65 F.3d 1024, 1029 (2d Cir.1995); *see Constr. Prods. Research,* 73 F.3d at 469 ("[A]lthough Respondents have largely complied with the subpoena, they have not surrendered the allegedly privileged documents. Thus, this case is not moot ....").

7 Section 7, in its entirety, provides 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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. 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. § 7.

8 Stolt also argues that affirming the District Court's order would "permit[ ] [Claimants] to call an *unlimited* number of Stolt–Nielsen employees." Yet, the risk that Claimants might subpoena a large number of Stolt employees would remain even if we were to agree with Stolt that Section 7 limits the summoning of non-party witnesses to the merits hearing. Nor is there any evidence that Claimants intend to call a litany of Stolt witnesses.

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC, N.D.Ill., August 9, 2011

360 F.3d 404
United States Court of Appeals,
Third Circuit.

HAY GROUP, INC.
v.
E.B.S. ACQUISITION CORP. et al,
PriceWaterhouseCoopers L.L.P. Appellants.

No. 03–1161, 03–1162.
|
Argued Sept. 15, 2003.
|
March 12, 2004.

Synopsis

Background: Former employer commenced an arbitration proceeding against former employee, alleging that employee violated non-solicitation clause in his separation agreement. Former employer moved to enforce subpoenas issued to non-party current employer prior to arbitration hearing. The United States District Court for the Eastern District of Pennsylvania, Mary A. McLaughlin, J., issued order enforcing subpoenas. Non-party current employer appealed.

Holdings: The Court of Appeals, Alito, Circuit Judge, held that:

[1] Federal Arbitration Act (FAA) did not confer authority on arbitrators to subpoena production of documentary evidence held by non-party without summoning non-party to appear as witness, and

[2] issuance of subpoena duces tecum to non-party was not prohibited by rule of civil procedure.

Reversed.

Chertoff, Circuit Judge, filed concurring opinion.

West Headnotes (5)

[1] Alternative Dispute Resolution
Nature and Extent of Authority

An arbitrator's authority over parties that are not contractually bound by the arbitration agreement is strictly limited to that granted by the Federal Arbitration Act (FAA). 9 U.S.C.A. § 1 et seq.

13 Cases that cite this headnote

[2] Statutes
Language

In interpreting a statute, the Court of Appeals must begin with the text.

4 Cases that cite this headnote

[3] Statutes
Absence of Ambiguity;Application of Clear or Unambiguous Statute or Language

A court's policy preferences cannot override the clear meaning of a statute's text, in construing a statute.

4 Cases that cite this headnote

[4] Alternative Dispute Resolution
Subpoenas

Provision of Federal Arbitration Act (FAA), conferring power on arbitrators to summon non-party "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" did not authorize arbitrators to subpoena production of documentary evidence held by non-party without summoning non-party to appear as witness; FAA provision did not expressly state that arbitrators had power to compel production of documentary evidence without summoning custodian to testify, literal interpretation of provision furthered FAA's goals of resolving disputes in

timely and cost efficient manner and giving effect to private arbitration agreements, and requirement was consistent with limiting FAA jurisdiction over parties which did not consent to arbitration. 9 U.S.C.A. § 7.

42 Cases that cite this headnote

[5] Alternative Dispute Resolution
Subpoenas

Federal rule of civil procedure, providing that subpoenas commanding attendance of a person issued separately from subpoenas for production or inspection were required to be issued from the court for the district in which the production or inspection was made, did not prohibit issuance of subpoena duces tecum to non-party in arbitration proceeding for documentary evidence located outside the territory within which subpoena could be served on non-party; rule applied only to subpoena duces tecum separate from subpoena commanding attendance, which could not be issued in arbitration proceeding, and term "production" in rule referred to delivery of documents and not their retrieval. 9 U.S.C.A. § 7; Fed.Rules Civ.Proc.Rule 45(a)(2), 28 U.S.C.A.

42 Cases that cite this headnote

Attorneys and Law Firms

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Before ALITO, AMBRO, and CHERTOFF, Circuit Judges.

OPINION OF THE COURT

ALITO, Circuit Judge.

PriceWaterhouseCoopers ("PwC") and E.B.S., non-parties to an arbitration, seek to avoid compliance with an arbitration panel's subpoena requiring them to turn over documents prior to the panel's hearing. The District Court enforced the subpoena. We reverse.

I.

Hay Group ("Hay") is a management consulting firm. David A. Hoffrichter left Hay's employment and joined PwC in September 1999. In early 2002, PwC sold the division employing Hoffrichter to E.B.S.

Hoffrichter's separation agreement from Hay contained a clause that forbade him from soliciting any of Hay's employees or clients for one year. The agreement further provided for arbitration to resolve any dispute arising under the agreement. In February 2000, Hay commenced such an arbitration proceeding in Philadelphia, Pennsylvania, against Hoffrichter, claiming that he had violated the non-solicitation clause.

In an attempt to obtain information for the arbitration, Hay served subpoenas for documents on E.B.S. at its Pittsburgh office and on PwC at its Philadelphia office. Hay sought to have the documents produced prior to the panel's arbitration hearing. PwC and E.B.S. objected to these subpoenas, but the arbitration panel disagreed. When PwC and E.B.S. still refused to comply with the subpoenas, Hay asked the United States District Court for the Eastern District of Pennsylvania to enforce the subpoenas. PwC and E.B.S. again objected, claiming, among other ***406** things, that the Federal Arbitration Act ("FAA") did not authorize the panel to issue subpoenas to non-parties for pre-hearing document production and that the Federal Rules of Civil Procedure prohibited the District Court from enforcing a subpoena on a non-party for documents outside the Court's territorial jurisdiction.

In November 2002, the District Court issued a decision enforcing the subpoenas and ordering the parties to

resolve any remaining differences. In doing so, the District Court accepted the view of the Eighth Circuit and several district courts that the FAA authorizes arbitration panels to issue subpoenas on non-parties for pre-hearing document production. The District Court also held that even under the view of the Fourth Circuit, which permits such production only when there is a "special need," the panel's subpoenas would be valid. In addition, the District Court held that it had the power to enforce subpoenas on non-parties for document production even if the documents were located outside the territory within which the court's subpoenas could be served.

PwC and E.B.S. then filed the present appeal. The District Court denied their motion to stay its order pending appeal, but our Court granted their emergency motion for a stay.

II.

A.

On appeal, PwC and E.B.S. first argue that, under Section 7 of the FAA, 9 U.S.C. § 7, a non-party witness may be compelled to bring documents to an arbitration proceeding but may not simply be subpoenaed to produce documents. We agree.

[1] An arbitrator's authority over parties that are not contractually bound by the arbitration agreement is strictly limited to that granted by the Federal Arbitration Act. *See, e.g., Legion Insurance Company v. John Hancock Mutual Life Ins. Co.,* No. 01–162, 2001 WL 1159852 at *1, 2001 U.S. Dist. LEXIS 15911 at *3 (E.D.Pa. Sept.5, 2001)("It is clear, and undisputed, that the cited statute is the only source of the authority for the validity and enforceability of the arbitrators' subpoena [over a nonparty]"); *Integrity Ins. Co., in Liquidation, v. Am. Centennial Ins. Co.,* 885 F.Supp. 69, 71 (S.D.N.Y.1995)("Because the parties to a contract cannot bind nonparties, they certainly cannot grant such authority to an arbitrator. Thus, an arbitrator's power over nonparties derives solely from the FAA."). Accordingly, we must look to the FAA to determine whether an arbitrator may issue a subpoena requiring pre-hearing document production by a person or entity that is not bound by the arbitration agreement (hereinafter a "non-party").

[2] **[3]** In interpreting a statute, we must, of course, begin with the text. "The Supreme Court has repeatedly explained that recourse to legislative history or underlying legislative intent is unnecessary when a statute's text is clear and does not lead to an absurd result." *United States ex rel. Mistick PBT v. Housing Authority of City of Pittsburgh,* 186 F.3d 376, 395 (3d Cir.1999). Furthermore, a court's policy preferences cannot override the clear meaning of a statute's text. *See Eaves v. County of Cape May,* 239 F.3d 527, 531–32 (3d Cir.2000)("We do not find the reasoning of the courts adopting the 'majority view' persuasive, because they ignore a textual analysis of § 1961(a) and, instead, base their result on policies they find to underlie post-judgment interest and attorney's fee awards.")

Section 7 of the FAA provides as follows:

> ***407** The arbitrators selected either as prescribed in this title [9 U.S.C. §§ 1 et seq.] 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.*** The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or 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 to 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 as 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. § 7 (emphasis added).

[4] This language speaks unambiguously to the issue before us. The only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party "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." 9 U.S.C. § 7(emphasis added). The power to require a non-party "to bring" items "with him" clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier. In addition, the use of the word "and" makes it clear that a non-party may be compelled "to bring" items "with him" only when the non-party is summoned "to attend before [the arbitrator] as a witness." Thus, Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time. [1]

This interpretation is supported by the interpretation of similar language in a previous version of Federal Rule of Civil Procedure 45. From its adoption in 1937 until its amendment in 1991, Rule 45 did not allow federal courts to issue pre-hearing document subpoenas on non-parties. This restriction was based on a reading of the first two paragraphs of the rule, which provided as follows:

> **(a) For Attendance of Witnesses; Form; Issuance.** *Every subpoena* shall be issued by the clerk under the seal of the court, shall state the name of the ***408** court and the title of the action, and *shall command each person to whom it is directed to attend and give testimony* at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.
>
> **(b) For Production of Documentary Evidence.** *A subpoena may* also *command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein;* but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

Fed. R. Civ. Proc. 45 (1990)(emphasis added).

Under this version of Rule 45(a), a subpoena was required to command the person to whom it was directed "to attend and give testimony." The court could then add a requirement that the subpoenaed witness bring documents with him. *See* Fed. R. Civ. Proc. 45(b). The accepted view was that nothing in Rule 45 gave the court the power to issue documents-only subpoenas to non-parties. *See* Fed.R.Civ.P. 45, Committee Notes, 1991 Amendment Subdivision (a)("Fourth, Paragraph (a)(1) authorizes the issuance of a subpoena to compel a nonparty to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material required to be produced."); *Turner v. Parsons,* 596 F.Supp. 185, 186 (E.D.Pa.1984)("Certainly, this rule permits a non-party to be subpoenaed for a deposition. Additionally, this non-party can be required to bring certain documents to a deposition. Nowhere in the rule is it stated that documents can be subpoenaed alone, that is, without requesting their production in conjunction with a deposition or trial"); 139 F.R.D. 197, 205–206 ("Under the new Rule 45, a subpoena duces tecum seeking the production of documents (or other materials) from a nonparty may be used independently of the regular testimonial subpoena; the two are no longer wedded, as they were under the prior version of Rule 45.").

Some courts have argued that the language of Section 7 implies the power to issue such pre-hearing subpoenas. *See In re Security Life Insurance Co. of America,* 228 F.3d 865, 870–71 (8th Cir.2000)("We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."); *Meadows Indemnity Co., Ltd. v. Nutmeg Insurance Co.,* 157 F.R.D. 42, 45 (M.D.Tenn.1994)("The power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser

power to compel such documents for arbitration purposes prior to a hearing.").

We disagree with this power-by-implication analysis. By conferring the power to compel a non-party witness to bring items to an arbitration proceeding while saying nothing about the power simply to compel the production of items without summoning the custodian to testify, the FAA implicitly withholds the latter power. If the FAA had been meant to confer the latter, broader power, we believe that the drafters would have said so, and they would have then had no need to spell out the more limited power to compel a non-party ***409** witness to bring items with him to an arbitration proceeding. As mentioned above, until its amendment in 1991, Rule 45 of the Federal Rules of Civil Procedure was framed in terms quite similar to Section 7 of the FAA, but courts did not infer that, just because they could compel a non-party witness to bring items with him, they could also require a non-party simply to produce items without being subpoenaed to testify.

Since the text of Section 7 of the FAA is straightforward, we must see if the result is absurd. *See United States ex rel. Mistick PBT,* 186 F.3d at 395. We conclude that it is not. Indeed, we believe that a reasonable argument can be made that a literal reading of Section 7 actually furthers arbitration's goal of "resolving disputes in a timely and cost efficient manner." *Painewebber Inc. v. Hofmann,* 984 F.2d 1372, 1380 (3d Cir.1993). First, as noted above, until 1991 the Federal Rules of Civil Procedure themselves did not permit a federal court to compel pre-hearing document production by non-parties. That the federal courts were left for decades to operate with this limitation of their subpoena power strongly suggests that the result produced by interpreting Section 7 of the FAA as embodying a similar limitation is not absurd. Second, it is not absurd to read the FAA as circumscribing an arbitration panel's power to affect those who did not agree to its jurisdiction. *See Legion Ins. Co.,* at *1, 2001 U.S. Dist. LEXIS 15911 at *4 ("the authority of arbitrators with respect to non-parties who have never agreed to be involved in arbitration is severely limited"). The requirement that document production be made at an actual hearing may, in the long run, discourage the issuance of large-scale subpoenas upon non-parties. This is so because parties that consider obtaining such a subpoena will be forced to consider whether the documents are important enough to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed. Under a system of pre-hearing document production, by contrast, there is less incentive to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration. *See COMSAT Corp. v. Natl. Science Foundation,* 190 F.3d at 269, 276 (4th Cir.1999)("The rationale for constraining an arbitrator's subpoena power is clear. Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their dispute. A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process."). Thus, contrary to Hay's claim, heeding the clear language of Section 7 does not lead to absurd or even unreasonable results.

Of course, one may well think that it would be preferable on policy grounds for arbitrators to be able to require non-parties to produce documents without also subpoenaing them to appear in person before the panel. But if it is desirable for arbitrators to possess that power, the way to give it to them is by amending Section 7 of the FAA, just as Rule 45 of the Federal Rules of Civil Procedure was amended in 1991 to confer such a power on district courts.

The Fourth Circuit has interpreted Section 7 in a way that is largely consistent with our reading. In *COMSAT Corp. v. Natl. Science Foundation, supra,* the court held that the plain meaning of Section 7 did not empower an arbitrator to issue pre-hearing discovery subpoenas to nonparties:

> ***410** Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during pre-hearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them;' that is, to compel testimony by non-parties at the arbitration hearing.

190 F.3d at 275. In dicta, however, the *COMSAT* court suggested that an arbitration panel might be able to subpoena a non-party for pre-hearing discovery "under

unusual circumstances" and "upon a showing of special need or hardship." *Id.* at 276. While we agree with *COMSAT*' s holding, we cannot agree with this dicta because there is simply no textual basis for allowing any "special need" exception. Again, while such a power might be desirable, we have no authority to confer it.

We have carefully considered but must respectfully disagree with the Eighth Circuit's holding in *Security Life* that Section 7 authorizes arbitrators to issue pre-hearing document-production subpoenas on non-parties. In *Security Life,* the Eighth Circuit reasoned that the "the interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing." *Security Life,* 228 F.3d at 870. In our view, however, this policy argument cannot supersede the statutory text. [2]

Even if we were to look outside the statutory text to make our decision, any argument in favor of ignoring the literal meaning of the FAA in the name of efficiency seems to cut against Supreme Court precedent regarding the role of efficiency considerations in interpreting the Act. Although efficiency is certainly an objective of parties who favor arbitration over litigation, *see, e.g., Alexander v. Gardner–Denver Co.,* 415 U.S. 36, 58, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *Painewebber Inc. v. Hofmann,* 984 F.2d 1372, 1380 (3d Cir.1993), efficiency is not the principal goal of the FAA. Rather, the central purpose of the FAA is to give effect to private agreements. *See Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 218–19, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (*"Byrd"*)("The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.").

In *Byrd,* the Supreme Court addressed the argument that considerations of efficiency should control the interpretation of the provisions of the FAA relating to the enforcement of arbitration agreements. The complaint in that case asserted a federal claim that was not going to be arbitrated, as well as pendent state claims that were covered by a mandatory arbitration agreement. The Supreme Court was presented with the argument that the District Court had the authority to refuse to compel arbitration of the pendent claims because this would have resulted in wasteful bifurcated proceedings and because the drafters of the FAA had not explicitly ***411** considered the prospect of such proceedings. *See* 470 U.S. at 219, 105 S.Ct. 1238.

Rejecting this argument, the Supreme Court noted that the terms of Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3 and 4, required the District Court to compel arbitration of the pendent claims. *See* 470 U.S. at 218, 105 S.Ct. 1238. The Court then examined the legislative history of the FAA and "reject [ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims." *Id.* Instead, the Court concluded, "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which the parties had entered." *Id.* at 221, 105 S.Ct. 1238. This concern, the Court held, required rigorous enforcement of agreements to arbitrate. *Id.* We take from *Byrd* the lesson that Congress's failure explicitly to consider an inefficient byproduct of the Arbitration Act does not render the text ambiguous.

Under *Byrd*' s reasoning, efficiency considerations clearly cannot override the terms of Section 7. Indeed, since the efficiency interest was far stronger in *Byrd* than it is in this case, the result here follows a fortiori. In a case such as the one before us, convening and adjourning an arbitration panel will hardly prove an insurmountable obstacle; the costs will be slight in comparison to amassing and transporting a huge volume of documents. Interpreting Section 7 as we do shifts the balance of power slightly from the party that seeks the documents to the non-party that is subpoenaed. Under our interpretation, the party seeking the documents cannot simply obtain a subpoena requiring the documents to be shipped from one warehouse to another; instead, the party will be forced to appear at a proceeding during which the documents are produced. This slight redistribution of bargaining power is unlikely to have any substantial effect on the efficiency of arbitration. Moreover, as we noted in the previous section, the rule we adopt in this case may in fact facilitate efficiency by reducing overall discovery in arbitration. In any event, if patent inefficiency, such as that resulting from the bifurcated proceedings at issue in *Byrd,* is insufficient to overcome a textual command, an ambiguous efficiency effect certainly cannot do so.

In sum, we hold that the FAA did not authorize the panel to issue a pre-hearing discovery subpoena to PwC and E.B.S. We further reject any "special needs exception" to

this rule. If Hay wants to access the documents, the panel must subpoena PwC and E.B.S. to appear before it and bring the documents with them.

B.

We now turn to the PwC's argument [3] that the subpoenas at issue in this case were improper for an additional reason, namely, because they sought the production of documents that were located outside the territorial jurisdiction of the District Court. Although it is not strictly necessary for us to decide this issue at this time, we believe that it is appropriate for us to do so because of the potential that Hay will obtain a new subpoena calling on a PwC representative to appear at an arbitration proceeding and to bring the documents at issue to that proceeding. If that occurs, PwC may renew the argument in question, and the likely result would then be another appeal. In order to avoid unnecessary litigation, we address PwC's argument now.

PwC contends that ***412** Fed. R. Civ. Proc. 45(a)(2) [4] prohibits subpoenas duces tecum for documents located outside the territory within which a subpoena may be served under Fed. R. Civ. Proc. 45(b)(2). PwC relies on the following language in Rule 45(a)(2):

> If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.

As applied to the situation that we have postulated (the subsequent service on PwC of a subpoena calling for both an appearance before the arbitration panel and the production of documents), PwC's argument has several flaws. We will mention two.

[5] First, the portion of Rule 45(a)(2) on which PwC's argument is based applies only to a subpoena duces tecum that is "separate from a subpoena commanding the attendance of a person." We have held, however, that the FAA does not permit such subpoenas. The portion of Rule 45(a)(2) that applies when a witness is subpoenaed to appear contains no similar language. Rather, that portion of the Rule states only that a subpoena for attendance at a trial, hearing, or deposition shall issue from the court for the district "in which the hearing or trial or hearing is to be held" or from "the court for the district designated in the notice of deposition as the district in which the deposition is to be taken." Nothing in this language suggests that a witness who is subpoenaed to testify may not also be directed to bring documents that are not located within the territorial limits set out in Rule 45(b)(2).

Second, PwC misinterprets the language in Rule 45(a)(2) on which it relies. As noted, that provision states that a subpoena calling only for the "production or inspection" of documents "shall issue from the court for the district in which the production or inspection is to be made." "Production" refers to the delivery of documents, not their retrieval, and therefore "the district in which the production ... is to be made" is not the district in which the documents are housed but the district in which the subpoenaed party is required to turn them over.

The Notes to the 1991 Amendment reflect the same understanding of this language. The Notes state: "Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person's control *whether or not the materials are located within the District or within the territory within which the subpoena can be served."* Fed. R. Civ. Proc. 45, Committee Notes, 1991 Amendment Subdivision (a) (emphasis added); *see also* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE para. 45.03 (3d ed. 2000) ("The subpoena should issue from the Court where the production of documents is to occur, regardless of where the documents are located."); 9A CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2456 at 31 (1995 & 2003 Supp.)("Even records kept beyond the territorial jurisdiction of the district court issuing the subpoena may be covered if they are controlled by someone subject to the court's jurisdiction.").

***413** PwC's belief that a subpoena cannot reach extraterritorial documents seems to arise out of a misreading of *Legion Ins. Co. v. John Hancock Mutual Life Ins. Co.,* 33 Fed. Appx. 26 (3d Cir.2002). In *Legion,* the United States District Court for the Eastern District of Pennsylvania held that it lacked personal jurisdiction over a party, CSIS, on whom an arbitrator's subpoena had been served, and the Court therefore refused to enforce the subpoena. Affirming, a panel of our Court wrote that "in light of the territorial limits imposed by Rule 45 upon the service of subpoenas, we conclude that the District

Court did not commit error in denying [the] motion to enforce the arbitration subpoena against CSIS, which, as a nonparty located in Florida, lies beyond the scope of the court's subpoena enforcement powers." *Legion,* 33 Fed. Appx. at 28. PwC cites language in the opinion that it interprets as supporting its argument, but PwC takes that language out of context. The other cases on which and PwC relies are either unpersuasive or inapposite. [5]

We have considered all of the arguments made by PwC regarding the location of the documents, but we find them unconvincing.

III.

For the reasons set out above, the order of the District Court is reversed.

CHERTOFF, Circuit Judge, concurring:

I join Judge Alito's opinion in full. But I appreciate the reason that a number of courts have been motivated to read a pre-hearing discovery power into the arbitration rules. I write separately to observe that our opinion does not leave arbitrators powerless to require advance production of documents when necessary to allow fair and efficient proceedings.

Under section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA. In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence. *See* David M. Heilbron, *The Arbitration* ***414** *Clause, the Preliminary Conference, and the Big Case,* 45 Arb. J. 38, 43–44 (1990).

To be sure, this procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own in order to mandate what is, in reality, an advance production of documents. But that is not necessarily a bad thing, since it will induce the arbitrators and parties to weigh whether advance production is really needed. And the availability of this procedure within the existing statutory language should satisfy the desire that there be some mechanism "to compel pre-arbitration discovery upon a showing of special need or hardship." *COMSAT Corp. v. Nat'l Sci. Found.,* 190 F.3d 269, 276 (4th Cir.1999).

All Citations

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Footnotes

1 Some states have recently adopted versions of the Uniform Arbitration Act, which differs from the Federal Arbitration Act. Some of these state statutes explicitly grant arbitrators the power to issue pre-hearing document production subpoenas on third parties. *See, e.g.,* 10 Del.Code § 5708(a) (2003)("The arbitrators may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts, and all other documents and evidence, and shall have the power to administer oaths."); 42 Pa.C.S.A. § 7309 ("The arbitrators may issue subpoenas in the form prescribed by general rules for the attendance of witnesses and for the production of books, records, documents and other evidence.") The language of these state statutes clearly shows how a law can give authority to an arbitrator to issue pre-hearing document-production orders on third parties.

2 We have also considered the District Court decisions that have reached similar results. *See In re Arbiration Between Douglas Brazell and America Color Graphics, Inc.,* 2000 WL 364997, 2000 U.S. Dist. Lexis 4482 (S.D.N.Y. April 6, 2000); *Meadows Indemnity Co., Ltd. v. Nutmeg Insurance Co.,* 157 F.R.D. 42, 45 (M.D.Tenn.1994); *Stanton v. Paine Webber,* 685 F.Supp. 1241, 1242 (S.D.Fla.1988). None of these cases provides an adequate justification for disregarding the plain meaning of Section 7's text.

3 E.B.S. does not join in this argument.

4 Fed. R. Civ. Proc. 54(b)(2) provides in relevant part as follows:

> [A] subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in

the subpoena or at any place without the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena.

5 PwC relies on the statement in *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.,* 2 F.3d 1397, 1406 (5th Cir.1993), that "a federal court sitting in one district cannot issue a subpoena *duces tecum* to a non-party for the production of documents located in another district." However, this statement was dictum; the basis for the statement is unclear; and it appears that both the subpoena recipient and the documents in that case may have been located beyond the reach of Fed. R. Civ. Proc. 45(b)(2)(the court was in Houston, Texas, and the non-party and the records were in Mississippi).

In *Cates v. LTV Aerospace Corp.,* 480 F.2d 620 (5th Cir.1973), Navy regulations specified that the documents in question could be obtained only from the Secretary of the Navy in Washington, but a party attempted to obtain the documents by serving a subpoena on the commanding officer of a naval facility in Texas. The court held that the regulations could not be circumvented in this way. The critical factor in *Cates* was not the location of the documents but the location of the officer from whom they had to be sought.

In *Ariel v. Jones,* 693 F.2d 1058 (11th Cir.1982), a district court in Florida quashed a subpoena duces tecum for documents stored in Colorado on the ground that the agent served in Florida did not have effective control of the documents. In affirming, the court of appeals did not endorse the principle advocated by PwC that a non-party may not be subpoenaed to produce documents located outside the district court's territorial jurisdiction. Rather, the court of appeals held that the trial court had not abused its discretion in quashing the subpoena as unreasonable and oppressive.

476 S.E.2d 149
323 S.C. 454, 476 S.E.2d 149
(Cite as: 323 S.C. 454, 476 S.E.2d 149)

H

Supreme Court of South Carolina.
SOIL REMEDIATION COMPANY and Yadkin Brick Company, Inc., Plaintiffs,
v.
NU–WAY ENVIRONMENTAL, INC., Petitioner,
v.
CAROLINA EASTMAN DIVISION, A DIVISION OF EASTMAN KODAK COMPANY and Yeargin, Inc., Third–Party Defendants,
Of whom Yeargin, Inc. is Respondent.

No. 24477.
Heard Feb. 7, 1996.
Decided Aug. 12, 1996.

In contractual dispute, third-party defendant moved to compel arbitration with third-party plaintiff. The Circuit Court, Richland County, James E. Lockemy, J., denied motion, and third-party defendant appealed. The Court of Appeals, Goolsby, J., held that arbitration notice in contract satisfied statutory requirement, and reversed, 317 S.C. 274, 453 S.E.2d 253. Petition for writ of certiorari was granted and the Supreme Court, Toal, J., held that: (1) state statute clearly required that arbitration notice be in capital letters and underlined on contract's first page; (2) finding that notice, that was capitalized on first page but not underlined, met statute was error; (3) Federal Arbitration Act (FAA) preempts state statute in agreements covered by FAA; and (4) contract at issue involved interstate commerce and FAA applied.

Affirmed in result.

West Headnotes

[1] Statutes 361 ⚿1111

361 Statutes
361III Construction
361III(C) Clarity and Ambiguity; Multiple Meanings
361k1107 Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
361k1111 k. Plain language; plain, ordinary, common, or literal meaning. Most Cited Cases
(Formerly 361k189)
Where the terms of the statute are clear, the court must apply those terms according to their literal meaning.

[2] Alternative Dispute Resolution 25T ⚿133(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk133 Formal Requisites
25Tk133(1) k. In general. Most Cited Cases
(Formerly 33k6.2 Arbitration)
Terms of statutory provision concerning arbitration clauses in contracts, that notice that contract is subject to arbitration shall be typed in underlined capital letters, or rubber-stamped, prominently on the contract's first page, are clear and court must apply those terms according to their literal meaning. Code 1976, § 15–48–10(a).

[3] Alternative Dispute Resolution 25T ⚿133(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk133 Formal Requisites
25Tk133(1) k. In general. Most Cited Cases
(Formerly 33k6.2 Arbitration)
Finding that technical requirements of contractual arbitration notice statutory provision were met was error where arbitration notice in contract was not underlined, even though it was in capital letters

at the top of the first page; statutory provision was that notice shall be typed in underlined capital letters, or rubber-stamped, prominently on the contract's first page. Code 1976, § 15–48–10.

[4] Alternative Dispute Resolution 25T ⚿113

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk113 k. Arbitration favored; public policy. Most Cited Cases
(Formerly 33k1.2 Arbitration)
Federal Arbitration Act (FAA) declares a liberal policy favoring arbitration. 9 U.S.C.A. § 1 et seq.

[5] Alternative Dispute Resolution 25T ⚿117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 ⚿18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular cases, preemption or supersession. Most Cited Cases
Federal Arbitration Act (FAA) displaces state statutory arbitration notice provision, that requires notice that contract is subject to arbitration must be typed in underlined capital letters or rubber-stamped prominently on contract's first page, if agreement at issue is covered by FAA; state statute singles out arbitration and directly conflicts with FAA. 9 U.S.C.A. § 2; Code 1976, § 15–48–10(a).

[6] Commerce 83 ⚿80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases
For the Federal Arbitration Act (FAA) to apply, the commerce involved in the contract must be interstate or foreign. 9 U.S.C.A. § 1 et seq.

[7] Commerce 83 ⚿80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases
To determine whether a contract giving rise to the transaction between the parties involves interstate commerce under Federal Arbitration Act (FAA), "commerce" is defined as commerce among the several States or with foreign nations. 9 U.S.C.A. § 1.

[8] Commerce 83 ⚿80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases

States 360 ⚿18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular cases, preemption or supersession. Most Cited Cases
Contractual agreement to remove and dispose of water and sludge materials located on property in one state, that was subcontracted for disposal and transportation to facility in another state, involved interstate commerce; thus, as there was nexus between contract and interstate commerce, Federal Arbitration Act (FAA) was applicable and preempted state statutory arbitration notice provision that conflicted with FAA. 9 U.S.C.A. § 1, et seq.; Code 1976, § 15–48–10(a).

****150 *455** Russell T. Burke and W. Leighton Lord, III, both of Nexsen, Pruet, Jacobs & Pollard, LLP, Columbia, for Petitioner.

Stephen E. Hudson, of Kilpatrick & Cody, Atlanta, GA, for Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

TOAL, Justice:

We granted Nu–Way Environmental, Inc.'s petition for a writ of certiorari to review the decision of the Court of Appeals holding that the contract between the disputing parties satisfied***456** statutory requirements as to arbitration. We affirm in result.

FACTUAL/PROCEDURAL BACKGROUND

This is a contractual dispute between Yeargin, Inc. ("Yeargin") and Nu–Way Environmental, Inc. ("Nu–Way"). Yeargin moved before the circuit court to compel Nu–Way to arbitrate the dispute. The court ruled that the contract between the parties did not require arbitration, because it failed to meet the requirements of S.C.Code Ann. § 15–48–10 (Supp.1995). Yeargin appealed the court's ruling; the Court of Appeals reversed, finding that the contract satisfied the statutory requirements. Nu–Way petitioned for a writ of certiorari, which this Court granted.

LAW/ANALYSIS

Nu–Way argues the Court of Appeals erred in concluding that the contract between the parties satisfied the requirements of S.C.Code Ann. § 15–48–10.

Section 15–48–10(a) provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. *Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract* and unless such notice is displayed thereon the contract shall not be subject to arbitration.

(emphasis added). The contract in the present case contained the following laser-printed notice provision at the top of the first page:

> THIS SUBCONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO SECTION 15–48–10, CODE OF LAWS OF SOUTH CAROLINA (1976).

The Court of Appeals held that the above provision met the statutory requirements of "typed in underlined capital letters, ***457** or rubber-stamped prominently." It reasoned that one of the definitions of "underline" is "to emphasize or cause to stand out," which was met under the present facts through the use of this capitalized notice provision. The opinion further stated that assuming the word "underlined" meant "to draw a line under" would lead to absurd results not intended by the Legislature. The Court of Appeals gave a number of examples which, although eye-catching, would fail the notice standards of section 15–48–10, because they were not underlined, typed on a typewriter, or rubber-stamped. Accordingly, it concluded that form should not be elevated over substance and that the provision in the present contract satisfied the purposes behind ****151** S.C.Code Ann. § 15–48–10. We disagree with the analysis of the Court of Appeals.

[1][2] Where the terms of the statute are clear, the court must apply those terms according to their literal meaning. *Paschal v. State of S.C. Election Comm'n,* 317 S.C. 434, 454 S.E.2d 890 (1995). The terms of section 15–48–10 are: "Notice that a contract is subject to arbitration ... shall be *typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract* and unless such notice is displayed thereon the contract shall not be subject to arbitration." (emphasis added). The terms of the statute are clear; therefore, the court must apply those terms according to their literal meaning. As Chief Justice Howell observed in

his dissent below, "By straining the imagination, even a 'bright line test' can be made to seem hopelessly irreconcilable with practical application. Legislative intent should not fall victim to such an exercise." He further wrote, while "strict construction of this statute may lead to results not intended by contracting parties, it is a matter for the legislature to act upon." We agree with this analysis.

Our conclusion is compelled not only by the unambiguous wording of section 15–48–10, but also by case law, which has strictly construed this provision. *See Osteen v. T.E. Cuttino Constr. Co.,* 315 S.C. 422, 424, 434 S.E.2d 281, 283 (1993) ("It is undisputed that the contract does not conform to the requirements of section 15–48–10(a)." [FN1]); ***458***Timms v. Greene,* 310 S.C. 469, 472, 427 S.E.2d 642, 643 (1993) (Declaring that "the State Act is clear with regard to the notice requirement," the decision affirmed circuit court's finding that section 15–48–10 had not been satisfied, because the contract did not contain on its first page any mention of arbitration.); *Circle S. Enters., Inc. v. Stanley Smith & Sons,* 288 S.C. 428, 343 S.E.2d 45 (Ct.App.1986) (Arbitration provision was held not to be enforceable, because it failed to meet the section 15–48–10 requirement that notice appear on the first page of the contract.[FN2]).

> FN1. Although not described in the opinion, the arbitration provision, as revealed by the record, was not underlined, rubber-stamped, or on the first page of the con- tract.
>
> FN2. The provision was also not underlined or rubber-stamped, as indicated by the record.

[3] Hence, the Court of Appeals erred in finding that the technical requirements of S.C.Code Ann. § 15–48–10 had been satisfied. That, however, does not end the inquiry. Inextricably linked with the question of the applicability of section 15–48–10 is the impact of the Federal Arbitration Act ("FAA") on this dispute. In its appeal of the circuit court's order, Yeargin argued that even if the arbitration agreement were unenforceable under the state statute, it would be enforceable under federal law. We agree. Because the Court of Appeals held the arbitration agreement was enforceable, it did not reach the second issue of the applicability of federal law.

[4] The FAA declares a liberal policy favoring arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Section 2 of the Act states:

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

9 U.S.C. § 2. Recently, in *Doctor's Associates, Inc. v. Casarotto,* 517U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), the United States Supreme Court interpreted this statute. In that ***459*** dispute, the Montana Supreme Court had held that an arbitration clause was unenforceable, because it did not meet the state law requirement that notice that the contract is subject to arbitration be "typed in underlined capital letters on the first page of the contract." Mont.Code Ann. § 27–5–114(4) (1995). The parties had a franchise agreement containing an arbitration clause, but the clause did not appear on the first page of the contract. On appeal, the United States Supreme Court declared, citing 9 U.S.C. § 2, that written arbitration ****152*** agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." (emphasis in original). It wrote:

> [G]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. Courts may not, however, invalidate arbitration agreements under state laws

applicable *only* to arbitration provisions. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed "upon the same footing as other contracts." Montana's § 27–5–114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act.

Casarotto, 517 U.S. at ——, 116 S.Ct. at 1653 (citations omitted) (emphasis in original).

[5] If the arbitration agreement in the instant controversy is covered by the FAA, then *Casarotto* directly controls, and the FAA preempts S.C.Code Ann. § 15–48–10(a). The South Carolina statute is nearly identical to the Montana statute. The only difference is that in addition to allowing notice through underlined capital letters, section 15–48–10(a) allows the notice to be "rubber-stamped." Because section 15–48–10(a) singles out arbitration agreements, it directly conflicts with section 2 of the FAA. The FAA therefore displaces the statute, if the agreement is covered by the Act.

[6][7] ***460** For the Federal Act to apply, the commerce involved in the contract must be interstate or foreign. *Timms,* 310 S.C. 469, 427 S.E.2d 642. Thus, we must determine whether the contract giving rise to the transaction between the parties involves interstate commerce. "Commerce" is defined as "commerce among the several States or with foreign nations...." 9 U.S.C. § 1; *Mathews v. Fluor Corp.,* 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994) ("Commerce, as defined in the Act, evidences transactions involving interstate or foreign commerce."). The court must examine the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the Act. *Mathews,* 312 S.C. at 404, 440 S.E.2d at 881.

Evidence of transactions in interstate commerce was held to be present in *Episcopal Housing Corp. v. Federal Ins. Co.,* 269 S.C. 631, 239 S.E.2d 647 (1977), wherein contract documents relating to the construction of a housing project contained clear references to equipment and materials to be furnished from outside South Carolina. Likewise in *Circle S. Enters.,* 288 S.C. 428, 343 S.E.2d 45, the Court of Appeals concluded that construction of an auto-truck stop involved interstate commerce, as indicated by the nature of the project and by the fact that numerous items specified in the contracts were purchased and shipped from outside South Caro- lina.

In contrast, *Mathews,* 312 S.C. 404, 440 S.E.2d 880, held that a contractual dispute involving the sale of real estate situated in South Carolina did not involve interstate commerce where, despite the fact the contracting parties were domiciled outside of South Carolina, there was no nexus between the contract and interstate commerce. Likewise in *Timms,* 310 S.C. 469, 427 S.E.2d 642, this Court held that a personal injury action in which plaintiff sought damages for injuries occurring while she was left unattended under a hair dryer at a health care center, did not implicate a transaction involving interstate commerce. *Timms* distinguished *Episcopal Housing Corp.* and *Circle S. Enters.* on the grounds that both concerned "construction contracts clearly predicated upon transactions involving the purchase and use of materials and supplies from outside the state." *Timms,* 310 S.C. at 469, 427 S.E.2d at 643–44.

[8] ***461** In the present case, the contractual agreement at issue involves interstate commerce. Nu–Way concedes that the object of the contract between Yeargin and itself was the removal and disposal of water and sludge materials located on property situated in ****153** South Carolina. Nu–Way subcontracted with a third party for the disposal of the materials, which were to be transported to a North Carolina facility. Thus, there is a

nexus between the contract and interstate commerce. The present case differs from *Mathews* and *Timms* in that the transaction is not confined to this state, but involves the transport of materials from South Carolina to another state.

The presence of interstate commerce makes the FAA applicable to the present arbitration agreement. Hence, under *Casarotto,* the FAA preempts S.C.Code Ann. § 15–48–10(a).

CONCLUSION

Based on the foregoing, the decision of the Court of Appeals is **AFFIRMED IN RESULT.**

FINNEY, C.J., and MOORE, WALLER and BURNETT, JJ., concur.

S.C.,1996.
Soil Remediation Co. v. Nu-Way Environmental, Inc.
323 S.C. 454, 476 S.E.2d 149

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542 S.E.2d 360
343 S.C. 531, 542 S.E.2d 360
(Cite as: 343 S.C. 531, 542 S.E.2d 360)

Supreme Court of South Carolina.
Anthony L. MUNOZ and Patricia A. Munoz, Petitioners,
v.
GREEN TREE FINANCIAL CORP. a/k/a Green Tree Acceptance Corp. and Gerald Sealey d/b/a Tri-State Builders, Defendants,
of whom Green Tree Financial Corp. is Respondent.

No. 25238.
Heard April 6, 2000.
Decided Jan. 22, 2001.
Rehearing Denied March 7, 2001.

Debtors who signed installment contract and security agreement to finance home improvements sued builder and creditor, alleging unconscionable consumer credit transaction, violations of South Carolina Consumer Protection Code, negligent misrepresentation, fraud, and unfair trade practices. Debtor moved to compel arbitration pursuant to arbitration clause in agreement. The Circuit Court, Charleston County, Howard P. King, J., denied motion. Creditor appealed. The Court of Appeals reversed. On writ of certiorari, the Supreme Court, Moore, J., held that: (1) overruling *Mathews*, 312 S.C. 404, 440 S.E.2d 880, Federal Arbitration Act (FAA) applied to agreement; (2) FAA preempted state Uniform Arbitration Act; (3) state Consumer Protection Code could not be invoked to invalidate arbitration clause; (4) arbitration clause was not unconscionable; and (5) doctrine of mutuality of remedy did not apply.

Court of Appeals' decision affirmed.

West Headnotes

[1] Alternative Dispute Resolution 25T ⚿117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

Commerce 83 ⚿80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases

States 360 ⚿18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

Federal Arbitration Act (FAA) applied to installment contract and security agreement that debtors signed to finance home improvements, and thus, FAA preempted provision of South Carolina Uniform Arbitration Act requiring that arbitration notice be "typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract"; arbitration agreement provided that it would be governed by FAA, and transaction in question involved interstate commerce. 9 U.S.C.A. § 2; Code 1976, § 15-48-10.

[2] Alternative Dispute Resolution 25T ⚿137

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 k. In General. Most Cited Cases
(Formerly 33k2.2 Arbitration)

Parties are free to enter into a contract providing for arbitration under rules established by state law rather than under rules established by the Federal Arbitration Act (FAA). 9 U.S.C.A. § 1 et seq.

[3] Commerce 83 ⚿80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases

Unless the parties have contracted to the contrary, the Federal Arbitration Act (FAA) applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction; overruling *Mathews v. Fluor Corp.*, 312 S.C. 404, 440 S.E.2d 880. 9 U.S.C.A. § 2.

[4] Alternative Dispute Resolution 25T ⚿137

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 k. In General. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 ⚿18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

General contract principles of state law apply to arbitration clauses governed by the Federal Arbitration Act (FAA). 9 U.S.C.A. § 1 et seq.

[5] Alternative Dispute Resolution 25T ⚿117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 ⚿18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

State law remains applicable to arbitration clauses governed by the Federal Arbitration Act (FAA) if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally. 9 U.S.C.A. § 1 et seq.

[6] Alternative Dispute Resolution 25T ⚿117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 ⚿18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

A state law that places arbitration clauses on an unequal footing with contracts generally is preempted if the Federal Arbitration Act (FAA) applies. 9 U.S.C.A. § 1 et seq.

[7] Alternative Dispute Resolution 25T ⚿117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 ⚿18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

Federal Arbitration Act (FAA) preempted South Carolina Uniform Arbitration Act, for purposes of determining enforceability of arbitration clause in installment contract and security agreement that parties signed as part of interstate transaction; state Arbitration Act placed arbitration clause on unequal footing with contracts generally, as that Act applied specifically and exclusively to arbitration agreements. 9 U.S.C.A. § 2; Code 1976, § 15-48-10 et seq.

[8] Alternative Dispute Resolution 25T 117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

State Consumer Protection Code could not be invoked to invalidate arbitration clause in installment contract and security agreement governed by Federal Arbitration Act (FAA), as Code did not govern contracts generally, but applied only to certain consumer transactions; thus, while requirements of Code could be raised on merits of contract's enforceability as consumer credit transaction, these requirements did not apply to determine validity of arbitration clause itself. 9 U.S.C.A. § 1 et seq.; Code 1976, § 37-1-101 et seq.

[9] Alternative Dispute Resolution 25T 140

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk140 k. Severability. Most Cited Cases
(Formerly 33k7.2 Arbitration)

Under the Federal Arbitration Act (FAA), an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. 9 U.S.C.A. § 1 et seq.

[10] Alternative Dispute Resolution 25T 117

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 k. Preemption. Most Cited Cases
(Formerly 33k2.2 Arbitration)

States 360 18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

Arbitration clause governed by the Federal Arbitration Act (FAA) may be invalidated under a state law only if that law governs the enforceability of all contracts generally. 9 U.S.C.A. § 1 et seq.

[11] Alternative Dispute Resolution 25T 134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability. Most Cited Cases
(Formerly 33k6.2 Arbitration)

Arbitration clause in installment contract and security agreement governed by Federal Arbitration Act (FAA) was not unconscionable, even if it were part of adhesion contract, and even if debtors were not advised it was included in contract. 9 U.S.C.A. § 1 et seq.

[12] Contracts 95 1

95 Contracts

95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable.

[13] Contracts 95 ⚿1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
Under state law, an adhesion contract is not per se unconscionable.

[14] Contracts 95 ⚿93(2)

95 Contracts
95I Requisites and Validity
95I(E) Validity of Assent
95k93 Mistake
95k93(2) k. Signing in Ignorance of Contents in General. Most Cited Cases
A person who can read is bound to read an agreement before signing it.

[15] Alternative Dispute Resolution 25T ⚿ 134(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(1) k. In General. Most Cited Cases
(Formerly 33k6.2 Arbitration)
Doctrine of mutuality of remedy did not apply to issue of enforceability of arbitration clause in installment contract and security agreement governed by Federal Arbitration Act (FAA), even if agreement allowed creditor to seek foreclosure on mortgage given by debtors and denied debtors right to litigate any counterclaim in foreclosure action; debtors were not deprived of remedy, but rather, they were simply required to seek their remedy through arbitration rather than through judicial system. 9 U.S.C.A. § 1 et seq.

[16] Contracts 95 ⚿10(1)

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k10 Mutuality of Obligation
95k10(1) k. In General. Most Cited Cases
Under state law, a lack of mutuality of remedy does not invalidate a contract.

[17] Alternative Dispute Resolution 25T ⚿ 134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability. Most Cited Cases
(Formerly 33k6.2 Arbitration)
It was not unconscionable to compel arbitration on debtors' claims against creditor pursuant to arbitration clause in installment contract and security agreement governed by Federal Arbitration Act (FAA), even if debtors were unaware they were giving mortgage on their home, and even though creditor was free to pursue foreclosure in courts; although arbitration clause required debtors to arbitrate any counterclaim they might have, there was nothing prohibiting them from litigating in court any defense to foreclosure which would include alleged invalidity of their mortgage. 9 U.S.C.A. § 1 et seq.

West Codenotes
PreemptedCode 1976, § 15-48-10(a)S.C.Code Ann. § 15-48-10 et seq. ****362 *535** Mary Leigh Arnold, of Mt. Pleasant; and Bradford P. Simpson, of Suggs

& Kelly Lawyers, P.A., of Columbia, for petitioners.

Herbert W. Hamilton and W. Keith Martens, both of Kennedy, Covington, Lobdell & Hickman, L.L.P., of Rock Hill, for respondent.

Helen Fennell and Danny Collins, both of Columbia, for amicus curiae South Carolina Dept. of Consumer Affairs.

John T. Moore, William C. Hubbard, and B. Rush Smith, III, all of Nelson, Mullins, Riley & Scarborough, L.L.P., of Columbia; and Alan S. Kaplinsky and Martin C. Bryce, Jr., both of Ballard, Spahr, Andrew & Ingersoll, L.L.P., of Philadelphia, for amici curiae South Carolina Bankers Assoc., American Bankers Assoc., American Financial Services Assoc., and Consumer Bankers Assoc.

Timothy Eble, of Ness, Motley, Loadholt, Richardson & Poole, of Mt. Pleasant; and Victoria Nugent and F. Paul Bland, Jr., both of Washington, D.C., for amicus curiae Trial Lawyers for Public Justice.

MOORE, Justice:

We granted a writ of certiorari to review the Court of Appeals' unpublished decision reversing the denial of a motion to compel arbitration. We affirm.

***536 FACTS**

On December 28, 1993, petitioners (the Munozes) signed an installment contract and security agreement with Gerald Sealy (Builder) to finance home improvements in the amount of $15,000 secured by a mortgage on their home. Builder assigned the agreement the same day to respondent Green Tree Financial Corporation (Creditor).

In December 1996, the Munozes commenced this action against Creditor and Builder. The Munozes claimed they had been "grossly overcharged for materials and work performed" and alleged several causes of action including an unconscionable consumer credit transaction, violations of the South Carolina Consumer Protection Code, negligent misrepresentation, fraud, and unfair trade practices.

Creditor moved to compel arbitration pursuant to the arbitration clause in the agreement which provides:

> All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and *shall be governed by the Federal Arbitration Act* at 9 U.S.C. section 1.... THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY U.S. (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this contract.... Notwithstanding anything hereunto the contrary, *we retain an option to use judicial or non judicial relief to enforce a mortgage,* deed of trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property, or to foreclose on the real property. Such judicial relief would take the form ***537** of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment or to enforce the mortgage or deed of trust *shall not constitute a waiver of the right of any party to compel arbitration* regarding any other dispute or remedy subject to arbitration in this contract, *including the filing of a counterclaim in a suit brought by us pursuant to this provision.*

(underscoring added).

The trial judge found this arbitration clause was unconscionable, essentially because**363 it was part of an adhesion contract, it lacked mutuality, and it did not comply with statutory provisions of South Carolina law specifically relating to consumer transactions and arbitration clauses. He concluded the arbitration clause was unenforceable and denied the motion to compel arbitration. Creditor appealed.

On appeal, the Court of Appeals reversed finding that a contract of adhesion is not per se unconscionable, mutuality is not required, and the Federal Arbitration Act (FAA) preempts state law because the transaction involved interstate commerce.

ISSUES

1. Does the FAA apply? If so, what is its effect?

2. Is the arbitration clause unconscionable as an adhesion contract?

3. Is the arbitration clause invalid for lack of mutuality?

DISCUSSION

1. The FAA

a. Does the FAA apply?

[1] The trial judge ruled the arbitration agreement violated the South Carolina Uniform Arbitration Act, S.C.Code Ann. § 15-48-10 (Supp.1999). [FN1] The Court of Appeals reversed *538 holding the FAA applies to this agreement and therefore preempts our state Arbitration Act. The Munozes contend this was error. We disagree.

> FN1. This section requires notice that a contract is subject to arbitration be "typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract."

[2][3] Title 9 U.S.C. § 2 of the FAA provides in pertinent part:

> [A] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any con- tract.

Unless the parties have contracted to the contrary,[FN2] the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction. *539*Allied-Bruce Terminix Companies, Inc. v. Dobson,* 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *Soil Remediation Co. v. Nu-Way Envtl., Inc.,* 323 S.C. 454, 476 S.E.2d 149 (1996).[FN3]

> FN2. As the United States Supreme Court recognized in *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.,* 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), the parties are free to enter into a contract providing for arbitration under rules established by state law rather than under rules established by the FAA. The FAA preempts state laws that invalidate the parties' agreement to arbitrate "[b]ut it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself." *Id.* at 478, 109 S.Ct. 1248. Such a result would be inimical to the FAA's primary purpose of ensuring that arbitration agreements are enforced according to their terms. *Id.; see also Ford v. NYLCare Health Plans of the Gulf Coast, Inc.,* 141 F.3d 243 (5 th Cir.1998); *Wolsey, Ltd. v. Foodmaker, Inc.,* 144 F.3d 1205 (9 th Cir.1998); *Ackerberg v. Johnson,* 892 F.2d 1328 (8 th Cir.1989).
>
> In *Soil Remediation Co. v. Nu-Way Envtl., Inc.,* 323 S.C. 454, 476 S.E.2d 149

(1996), we found an arbitration agreement that did not comply with the technical notice requirements of § 15-48-10 (a) was nonetheless valid because the FAA included no such notice requirement. We did not address the impact of the parties' agreement that the state Arbitration Act would apply. We now clarify that the result in *Soil Remediation* hinged on the fact that application of state law would have rendered the arbitration agreement completely unenforceable under § 15-48-10(a) which provides that a contract failing to comply with statutory notice requirements shall not be subject to arbitration. State law was therefore preempted *to the extent it would have invalidated the arbitration agreement.* The parties to a contract are otherwise free to agree that our state Arbitration Act will apply and this agreement shall be enforceable even if interstate commerce is involved.

FN3. We overrule *Mathews v. Fluor Corp.,* 312 S.C. 404, 440 S.E.2d 880 (1994), to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied.

Here, the arbitration agreement, which applies to "this contract and the relationships which result from this contract," provides it ****364** shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.,* 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

Further, the transaction in this case in fact involves interstate commerce. Both the Munozes and Builder are domiciled in South Carolina. Builder, however, assigned all its rights under the agreement to Creditor, a Delaware corporation with its principal place of business in Minnesota. Creditor actually prepared the agreement in Minnesota and forwarded it to Builder in South Carolina. The proceeds of the loan were disbursed from a bank in Minnesota. Although the Munozes may not have contemplated an interstate transaction, their contractual relationship with Creditor in fact involves interstate commerce and therefore the FAA applies.

b. Effect of the FAA

[4][5][6][7] General contract principles of state law apply to arbitration clauses governed by the FAA. *Doctor's Assoc., Inc. v. Casarotto,* 517 U.S. 681, 685, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); *Allied-Bruce,* 513 U.S. at 281, 115 S.Ct. 834; *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *see also Keystone, Inc. v. Triad Systems Corp.,* 292 Mont. 229, 971 P.2d 1240 (1998) (applying general state law to arbitration clause governed by FAA). State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally. *Perry v. Thomas,* 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). A state law that places arbitration clauses on an unequal footing with contracts generally, however, is preempted if the FAA applies. ***540***Allied-Bruce,* 513 U.S. at 281, 115 S.Ct. 834. Accordingly, our state Arbitration Act, which applies specifically and exclusively to arbitration agreements, is preempted in this case. *Soil Remediation Co. v. Nu-Way Envtl., Inc., supra.*

[8] In addition to our state Arbitration Act, the Munozes assert various statutory provisions of our state Consumer Protection Code [FN4] invalidate the arbitration clause. We find this argument without merit.

FN4. S.C.Code Ann. § 37-1-101 et seq. (1989 & Supp.1999).

[9][10] Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S.

395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). An arbitration clause may be invalidated under a state law only if that law governs the enforceability of all contracts generally. *Perry v. Thomas, supra.* The Consumer Protection Code does not govern contracts generally but applies only to certain consumer transactions. While the requirements of the Consumer Protection Code may be raised on the merits of the contract's enforceability as a consumer credit transaction, these requirements do not apply to determine the validity of the arbitration clause itself.

Further, we quote from the United States Supreme Court's most recent decision regarding application of the FAA:

> We have ... rejected generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.... [E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions.

Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, ----, 121 S.Ct. 513, 521, 148 L.Ed.2d 373 (2000) (internal quotations and citations omitted). Although the Supreme Court's decision involved a federal statutory claim and is not directly applicable here, we are guided by the same liberal policy favoring ***541** arbitration. Accordingly, we find the arbitration clause in this case is not invalid under our state Consumer Protection Code.

****365** *2. Adhesion contract*

[11] The Munozes contend the arbitration clause is unconscionable because it is part of an adhesion contract and they were not advised it was included in the contract.

[12][13][14] Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable. *Lackey v. Green Tree Fin. Corp.,* 330 S.C. 388, 498 S.E.2d 898 (Ct.App.1998). Under state law, an adhesion contract is not per se unconscionable. *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.,* 322 S.C. 399, 472 S.E.2d 242 (1996) (unconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions *together with* terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them); *Lackey v. Green Tree Fin. Corp.,* 330 S.C. 388, 498 S.E.2d 898 (Ct.App.1998) (fact that a contract is one of adhesion does not render it unconscionable).[FN5] Further, a person who can read is bound to read an agreement before signing it. *Hood v. Life & Cas. Ins. Co. of Tennessee,* 173 S.C. 139, 175 S.E. 76 (1934).[FN6] We find the arbitration clause is not unconscionable as an adhesion contract.

> FN5. Similarly, federal substantive law under the FAA holds an arbitration clause is not invalid simply because it is part of an adhesion contract. *Cohen v. Wedbush, Noble, Cooke, Inc.,* 841 F.2d 282 (9th Cir.1988). Inequality of bargaining power alone will not invalidate an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); *Harris v. Green Tree Fin. Corp.,* 183 F.3d 173 (3d Cir.1999).

> FN6. This rule is consistent with federal cases holding that arbitration agreements governed by the FAA will not be set aside on the ground the arbitration clause was not noticed or explained since the party signing the agreement is presumed to have read it. *Adams v. Merrill Lynch, Pierce, Fenner & Smith,* 888 F.2d 696 (10th Cir.1989); *Cohen v. Wedbush, Noble, Cooke, Inc.,* 841 F.2d 282 (9th Cir.1988).

3. Mutuality

[15] The Munozes contend the arbitration

clause lacks mutuality and is therefore invalid because it allows Creditor to ***542** seek foreclosure on the mortgage given by the Munozes and denies the Munozes the right to litigate any counterclaim in the foreclosure action.

[16] We find the doctrine of mutuality of remedy does not apply here. An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined. *Ex parte McNaughton,* 728 So.2d 592, 598 (Ala.1998). The Munozes have not been deprived of a remedy-they simply must seek their remedy through arbitration rather than through the judicial system. Moreover, under state law, a lack of mutuality of remedy does not invalidate a contract. *Lackey v. Green Tree, supra.*[FN7]

> FN7. This rule has been adopted by the majority of courts. *See, e.g., Sablosky v. Edward S. Gordon Co.,* 73 N.Y.2d 133, 538 N.Y.S.2d 513, 535 N.E.2d 643 (1989) (collecting cases); Restatement Second of Contracts, § 363 comment c (no requirement of mutuality of remedy). Our conclusion is also consistent with federal cases holding an arbitration agreement governed by the FAA need not equally bind each party to arbitration if consideration has been given beyond the agreement to arbitrate. *Harris v. Green Tree,* 183 F.3d at 180 (holding valid exact arbitration agreement in question here); *Doctor's Assocs., Inc. v. Distajo,* 66 F.3d 438 (2d Cir.1995).

[17] The Munozes further complain that in light of the allegation they were unaware they were giving a mortgage on their home, it is unconscionable to compel arbitration on their claims while Creditor may pursue foreclosure in the courts. We note, however, that although the arbitration clause requires the Munozes to arbitrate any *counterclaim* they may have, there is nothing prohibiting them from litigating in court any *defense* to foreclosure which would include the alleged invalidity of their mortgage. *See, e.g., Livingston Holding Co. v. Avinger,* 183 S.C. 1, 189 S.E. 806 (1937) (defense that mortgage obtained by duress or fraud raised as defense in foreclosure action); *Whittle v. Jones,* 79 S.C. 205, 60 S.E. 522 (1908) (defense that mortgage void on ground of fraud and misrepresentation raised as defense in foreclosure action). Accordingly, we find no reason to invalidate the arbitration clause on this ground.

****366 *543 CONCLUSION**

The decision of the Court of Appeals reversing the denial of the motion to compel arbitration is

AFFIRMED.

TOAL, C.J., WALLER, BURNETT, JJ., and Acting Justice EDWARD B. COTTINGHAM, concur.

S.C.,2001.
Munoz v. Green Tree Financial Corp.
343 S.C. 531, 542 S.E.2d 360

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130 S.Ct. 1758, 2010 A.M.C. 913, 93 Empl. Prac. Dec. P 43,878, 176 L.Ed.2d 605, 78 USLW 4328, 2010-1 Trade Cases P 76,982, 10 Cal. Daily Op. Serv. 5144, 2010 Daily Journal D.A.R. 6107, 22 Fla. L. Weekly Fed. S 269
(Cite as: 130 S.Ct. 1758)

Supreme Court of the United States
STOLT-NIELSEN S.A. et al., Petitioners,
v.
ANIMALFEEDS INTERNATIONAL CORP.
No. 08-1198.

Argued Dec. 9, 2009.
Decided April 27, 2010.

Background: In consolidated actions, owners of parcel tankers moved to vacate arbitration award imposing class arbitration on charterers' class antitrust claims. The United States District Court for the Southern District of New York, Jed S. Rakoff, J., 435 F.Supp.2d 382, vacated the arbitration award, and charterer appealed. The United States Court of Appeals for the Second Circuit, Sack, Circuit Judge, 548 F.3d 85, reversed and remanded with instructions to deny the petition to vacate. Certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:
(1) challenge to arbitration award was ripe for judicial review;
(2) arbitration panel exceeded its powers under the Federal Arbitration Act (FAA) by imposing its policy choice;
(3) vessel owners did not waive challenge to arbitration panel's award; and
(4) the parties could not be compelled to submit antitrust claims to class arbitration.

Reversed and remanded.

Justice Ginsburg filed a dissenting opinion in which Justice Stevens and Justice Breyer joined.

Justice Sotomayor took no part in the consideration or decision of the case.

West Headnotes

[1] Shipping 354 ⚿39(7)

354 Shipping
354III Charters
354k39 Construction and Operation in General
354k39(7) k. Arbitration of controversies. Most Cited Cases
Question of whether arbitration panel's award imposing class arbitration on charterers and vessel owners, whose arbitration clauses were "silent" on that issue, was consistent with the Federal Arbitration Act (FAA) was ripe for judicial review; the panel's award meant that owners had to submit to class determination proceedings before arbitrators who, if owners were correct, had no authority to require class arbitration absent the parties' agreement to resolve their disputes on that basis, and should owners refuse to proceed with what they maintained was essentially an ultra vires proceeding, they would almost certainly be subject to a petition to compel arbitration under the FAA. 9 U.S.C.A. § 1 et seq.

[2] Federal Courts 170B ⚿461

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk460 Review on Certiorari
170Bk461 k. Questions not presented below or in petition for certiorari. Most Cited Cases
Argument that the question on which certiorari was granted, namely whether arbitration panel's award imposing class arbitration on charterers and vessel owners, whose arbitration clauses were "silent" on that issue, was consistent with the Federal Arbitration Act (FAA), was prudentially unripe was waived before the Supreme Court, where argument was not pressed in, or considered by, the courts below. 9 U.S.C.A. § 1 et seq.

[3] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In general. Most Cited Cases
"Ripeness" reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction.

[4] Administrative Law and Procedure 15A ⚿704

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(B) Decisions and Acts Reviewable
15Ak704 k. Finality; ripeness. Most Cited Cases
In evaluating a claim to determine whether it is ripe for judicial review, Supreme Court considers both the fitness of the issues for judicial decision and the hardship of withholding court consideration.

[5] Alternative Dispute Resolution 25T ⚿328

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk327 Mistake or Error
25Tk328 k. In general. Most Cited Cases

Alternative Dispute Resolution 25T ⚿362(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk360 Impeachment or Vacation
25Tk362 Grounds for Impeachment or Vacation
25Tk362(1) k. In general. Most Cited Cases
In order to obtain relief vacating decision of arbitration panel, a party must clear a high hurdle, and it is not enough for the party to show that the panel committed an error, or even a serious error. 9 U.S.C.A. § 1 et seq.

[6] Alternative Dispute Resolution 25T ⚿324

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk324 k. Consistency and reasonableness; lack of evidence. Most Cited Cases
It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable under the Federal Arbitration Act (FAA). 9 U.S.C.A. § 10(a)(4).

[7] Alternative Dispute Resolution 25T ⚿229

25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk228 Nature and Extent of Authority
25Tk229 k. In general. Most Cited Cases
The task of an arbitrator is to interpret and enforce a contract, not to make public policy. 9 U.S.C.A. § 1 et seq.

[8] Shipping 354 ⚿39(7)

354 Shipping
354III Charters
354k39 Construction and Operation in General
354k39(7) k. Arbitration of controversies. Most Cited Cases
Arbitration panel exceeded its powers under the Federal Arbitration Act (FAA) by imposing its own policy choice in concluding that arbitration clauses in charter party agreements between charterers and vessel owners allowed for class arbitration of char-

terers' antitrust claims, despite the fact that the clauses were silent as to class arbitration; rather than inquiring whether the FAA, maritime law, or New York law contained a default rule under which an arbitration clause would be construed as allowing class arbitration in the absence of express consent, the panel perceived an emerging consensus among arbitrators that class arbitration was beneficial in a wide variety of settings, and the panel then considered only whether there was any good reason not to follow that consensus in this dispute. 9 U.S.C.A. § 10(a)(4).

[9] Customs and Usages 113 ⚿15(1)

113 Customs and Usages
113k9 Application and Operation
113k15 Explanation of Contract
113k15(1) k. In general. Most Cited Cases
Under both New York law and general maritime law, evidence of custom and usage is relevant to determining the parties' intent when an express agreement is ambiguous.

[10] Shipping 354 ⚿39(7)

354 Shipping
354III Charters
354k39 Construction and Operation in General
354k39(7) k. Arbitration of controversies. Most Cited Cases
Vessel owners, who sought to overturn arbitration panel's award imposing class arbitration on antitrust claims brought against them by charterers, did not waive, in the parties' supplemental agreement, any claim that the arbitrators could not construe the arbitration agreement to permit class arbitration, where the supplemental agreement expressly provided that it did not alter the scope of the parties' arbitration agreements in any charter party agreement, and it provided that neither the supplemental agreement itself, nor any of its terms, could be used to support or oppose any argument in favor of a class action arbitration, and nothing in the supplemental agreement conferred authority on the arbitrators to exceed the terms of the charter party agreements. 9 U.S.C.A. § 1 et seq.

[11] Alternative Dispute Resolution 25T ⚿137

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 k. In general. Most Cited Cases
Courts are obliged to enforce the parties' agreement to arbitrate according to its terms. 9 U.S.C.A. § 1 et seq.

[12] Federal Courts 170B ⚿403

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk403 k. Arbitration. Most Cited Cases
While the interpretation of an arbitration agreement is generally a matter of state law, the Federal Arbitration Act (FAA) imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion. 9 U.S.C.A. § 1 et seq.

[13] Alternative Dispute Resolution 25T ⚿114

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 k. Constitutional and statutory provisions and rules of court. Most Cited Cases
The central or primary purpose of the Federal Arbitration Act (FAA) is to ensure that private agreements to arbitrate are enforced according to their terms. 9 U.S.C.A. § 1 et seq.

[14] Alternative Dispute Resolution 25T ⚿137

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction

25Tk137 k. In general. Most Cited Cases

Contracts 95 ⇐147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) k. In general. Most Cited Cases
Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties, and in this endeavor, as with any other contract, the parties' intentions control. 9 U.S.C.A. § 1 et seq.

[15] Alternative Dispute Resolution 25T ⇐230

25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk228 Nature and Extent of Authority
25Tk230 k. Agreement or submission as determinative. Most Cited Cases
An arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution. 9 U.S.C.A. § 1 et seq.

[16] Alternative Dispute Resolution 25T ⇐112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or consensual basis. Most Cited Cases
Parties may specify with whom they choose to arbitrate their disputes. 9 U.S.C.A. § 1 et seq.

[17] Alternative Dispute Resolution 25T ⇐137

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 k. In general. Most Cited Cases

Alternative Dispute Resolution 25T ⇐143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases
It falls to courts and arbitrators to give effect to the parties' contractual limitations on arbitration, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties. 9 U.S.C.A. § 1 et seq.

[18] Shipping 354 ⇐39(7)

354 Shipping
354III Charters
354k39 Construction and Operation in General
354k39(7) k. Arbitration of controversies. Most Cited Cases
Charterer and vessel owners could not be compelled to submit charterer's class action antitrust claims to class arbitration, where the charterers and owners had not reached an agreement on class arbitration, and the arbitration clauses in their charter party agreements were silent on the question of class arbitration. 9 U.S.C.A. § 1 et seq.

[19] Alternative Dispute Resolution 25T ⇐112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or consensual basis. Most Cited Cases
A party may not be compelled under the Federal Arbitration Act (FAA) to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. 9 U.S.C.A. § 1 et seq.

[20] Alternative Dispute Resolution 25T ⇐112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or consensual basis. Most Cited Cases
The foundational Federal Arbitration Act (FAA) principle is that arbitration is a matter of consent. 9 U.S.C.A. § 1 et seq.

[21] Alternative Dispute Resolution 25T ⇐137

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 k. In general. Most Cited Cases
In certain contexts, it is appropriate under the Federal Arbitration Act (FAA) to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement; this recognition is grounded in the background principle that when the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court. 9 U.S.C.A. § 1 et seq.; Restatement (Second) of Contracts § 204.

[22] Alternative Dispute Resolution 25T ⇐137

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 k. In general. Most Cited Cases
Under the Federal Arbitration Act (FAA), an implicit agreement to authorize class-action arbitration is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate, because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator, and the relative benefits of class-action arbitration are much less assured than the benefits of bilateral arbitration, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration. 9 U.S.C.A. § 1 et seq.

[23] Alternative Dispute Resolution 25T ⇐111

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk111 k. Nature, purpose, and right to arbitration in general. Most Cited Cases
In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed; and the ability to choose expert adjudicators to resolve specialized disputes. 9 U.S.C.A. § 1 et seq.

[24] Alternative Dispute Resolution 25T ⇐137

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 k. In general. Most Cited Cases
The differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the Federal Arbitration Act (FAA), that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings. 9 U.S.C.A. § 1 et seq.

**1761 Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Petitioner shipping companies serve much of the

world market for parcel tankers-seagoing vessels with compartments that are separately chartered to customers, such as respondent (AnimalFeeds), who wish to ship liquids in small quantities. AnimalFeeds ships its goods pursuant to a standard contract known in the maritime trade as a charter party. The charter party that AnimalFeeds uses contains an arbitration clause. AnimalFeeds brought a class action antitrust suit against petitioners for price fixing, and that suit was consolidated with similar suits brought by other charterers, including one in which the Second Circuit subsequently reversed a lower court ruling that the charterers' claims were not subject to arbitration. As a consequence, the parties in this case agree that they must arbitrate their antitrust dispute. AnimalFeeds sought arbitration on behalf of a class of purchasers of parcel tanker transportation services. The parties agreed to submit the question whether their arbitration agreement allowed for class arbitration to a panel of arbitrators, who would be bound by rules (Class Rules) developed by the American Arbitration Association following *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414. One Class Rule requires an arbitrator to determine whether an arbitration clause permits class arbitration. The parties selected an arbitration panel, designated New York City as the arbitration site, and stipulated that their arbitration clause was "silent" on the class arbitration issue. The panel determined that the arbitration clause allowed for class arbitration, but the District Court vacated the award. It concluded that the arbitrators' award was made in "manifest disregard" of the law, for had the arbitrators conducted a choice-of-law analysis, they would have applied the rule of federal maritime law requiring contracts to be interpreted in light of custom and usage. The Second Circuit reversed, holding that because petitioners had cited no authority applying a maritime rule of custom and usage *against* class arbitration, the arbitrators' decision was not in manifest disregard of maritime law; and that the arbitrators had not manifestly ***1762** disregarded New York law, which had not established a rule against class arbitration.

Held: Imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* Pp. ---- - ----.

(a) The arbitration panel exceeded its powers by imposing its own policy choice instead of identifying and applying a rule of decision derived from the FAA or from maritime or New York law. Pp. ---- - ----.

(1) An arbitration decision may be vacated under FAA § 10(a)(4) on the ground that the arbitrator exceeded his powers, "only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice,' " *Major League Baseball Players Assn. v. Garvey,* 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 *(per curiam),* for an arbitrator's task is to interpret and enforce a contract, not to make public policy. P. ----.

(2) The arbitration panel appears to have rested its decision on AnimalFeeds' public policy argument for permitting class arbitration under the charter party's arbitration clause. However, because the parties agreed that their agreement was "silent" on the class arbitration issue, the arbitrators' proper task was to identify the rule of law governing in that situation. Instead, the panel based its decision on post- *Bazzle* arbitral decisions without mentioning whether they were based on a rule derived from the FAA or on maritime or New York law. Rather than inquiring whether those bodies of law contained a "default rule" permitting an arbitration clause to allow class arbitration absent express consent, the panel proceeded as if it had a common-law court's authority to develop what it viewed as the best rule for such a situation. Finding no reason to depart from its perception of a post- *Bazzle* consensus among arbitrators that class arbitration was beneficial in numerous settings, the panel simply imposed its own conception of sound policy and permitted class arbitration. The panel's few references to intent do not show that the panel did anything other than impose its own policy preference.

Thus, under FAA § 10(b), this Court must either "direct a rehearing by the arbitrators" or decide the question originally referred to the panel. Because there can be only one possible outcome on the facts here, there is no need to direct a rehearing by the arbitrators. Pp. ---- - ----.

(b) *Bazzle* did not control resolution of the question whether the instant charter party permits arbitration to proceed on behalf of this class. Pp. ---- - ----.

(1) No single rationale commanded a majority in *Bazzle,* which concerned contracts between a commercial lender and its customers that had an arbitration clause that did not expressly mention class arbitration. The plurality decided only the question whether the court or arbitrator should decide whether the contracts were "silent" on the class arbitration issue, concluding that it was the arbitrator. Justice STEVENS' opinion bypassed that question, resting instead on his resolution of the questions of what standard the appropriate decisionmaker should apply in determining whether a contract allows class arbitration, and whether, under whatever standard is appropriate, class arbitration had been properly ordered in the case at hand. Pp. ---- - ----.

(2) The *Bazzle* opinions appear to have baffled these parties at their arbitration proceeding. For one thing, the parties appear to have believed that *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration,*1763 a question addressed only by the plurality. That question need not be revisited here because the parties expressly assigned that issue to the arbitration panel, and no party argues that this assignment was impermissible. Both the parties and the arbitration panel also seem to have misunderstood *Bazzle* as establishing the standard to be applied in deciding whether class arbitration is permitted. However, *Bazzle* left that question open. Pp. ---- - ----.

(c) Imposing class arbitration here is inconsistent with the FAA. Pp. ---- - ----.

(1) The FAA imposes rules of fundamental importance, including the basic precept that arbitration "is a matter of consent, not coercion." *Volt v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488. The FAA requires that a "written provision in any maritime transaction" calling for the arbitration of a controversy arising out of such transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and permits a party to an arbitration agreement to petition a federal district court for an order directing that arbitration proceed "in the manner provided for in such agreement," § 4. Thus, this Court has said that the FAA's central purpose is to ensure that "private agreements to arbitrate are enforced according to their terms." *Volt,* 489 U.S., at 479, 109 S.Ct. 1248. Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must "give effect to the [parties'] contractual rights and expectations." *Ibid.* The parties' "intentions control," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444, and the parties are "generally free to structure their arbitration agreements as they see fit," *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57, 115 S.Ct. 1212, 131 L.Ed.2d 76. They may agree to limit the issues arbitrated and may agree on rules under which an arbitration will proceed. They may also specify *with whom* they choose to arbitrate their disputes. See *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 289, 122 S.Ct. 754, 151 L.Ed.2d 755. Pp. ---- - ----.

(2) It follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. Here, the arbitration panel imposed class arbitration despite the parties' stipulation that they had reached "no agreement" on that issue. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent. It may be appropriate to presume that parties to an arbitration agreement

implicitly authorize the arbitrator to adopt those procedures necessary to give effect to the parties' agreement. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491. But an implicit agreement to authorize class action arbitration is not a term that the arbitrator may infer solely from the fact of an agreement to arbitrate. The differences between simple bilateral and complex class action arbitration are too great for such a presumption. Pp. ---- - ----.

548 F.3d 85, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS and BREYER, JJ., joined. SOTOMAYOR, J., took no part in the consideration or decision of the case.
***1764** Seth P. Waxman, Washington, DC, for petitioners.

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For U.S. Supreme Court briefs, see:2009 WL 4030381 (Pet.Brief)2009 WL 2809359 (Pet.Brief)2009 WL 3404244 (Resp.Brief)

Justice ALITO delivered the opinion of the Court.

We granted certiorari in this case to decide whether imposing class arbitration on parties whose arbitration clauses are "silent" on that issue is consistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*

I

A

Petitioners are shipping companies that serve a large share of the world market for parcel tankers—seagoing vessels with compartments that are separately chartered to customers wishing to ship liquids in small quantities. One of those customers is AnimalFeeds International Corp. (hereinafter AnimalFeeds), which supplies raw ingredients, such as fish oil, to animal-feed producers around the world. AnimalFeeds ships its goods pursuant to a standard contract known in the maritime trade as a charter party.[FN1] Numerous charter parties are in regular

use, and the charter party that AnimalFeeds uses is known as the "Vegoilvoy" charter party. Petitioners assert, without contradiction, that charterers like AnimalFeeds, or their agents-not the shipowners-typically select the particular*1765 charter party that governs their shipments. Accord, Trowbridge, Admiralty Law Institute: Symposium on Charter Parties: The History, Development, and Characteristics of the Charter Concept, 49 Tulane L.Rev. 743, 753 (1975) ("Voyage charter parties are highly standardized, with many commodities and charterers having their own specialized forms").

> FN1. "[C]harter parties are commonly drafted using highly standardized forms specific to the particular trades and business needs of the parties." Comment, A Comparative Analysis of Charter Party Agreements " *Subject to* " Respective American and British Laws and Decisions ... It's All in the Details, 26 Tulane Mar. L.J. 291, 294 (2001-2002); see also 2 T. Schoenbaum, Admiralty and Maritime Law § 11-1, p. 200 (3d ed.2001).

Adopted in 1950, the Vegoilvoy charter party contains the following arbitration clause:

> "Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [*i.e.,* the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator." App. to Pet. for Cert. 69a.

In 2003, a Department of Justice criminal investigation revealed that petitioners were engaging in an illegal price-fixing conspiracy. When AnimalFeeds learned of this, it brought a putative class action against petitioners in the District Court for the Eastern District of Pennsylvania, asserting antitrust claims for supracompetitive prices that petitioners allegedly charged their customers over a period of several years.

Other charterers brought similar suits. In one of these, the District Court for the District of Connecticut held that the charterers' claims were not subject to arbitration under the applicable arbitration clause, but the Second Circuit reversed. See *JLM Industries, Inc. v. Stolt-Nielsen S.A.,* 387 F.3d 163, 183 (2004). While that appeal was pending, the Judicial Panel on Multidistrict Litigation ordered the consolidation of then-pending actions against petitioners, including AnimalFeeds' action, in the District of Connecticut. See *In re Parcel Tanker Shipping Services Antitrust Litigation,* 296 F.Supp.2d 1370, 1371, and n. 1 (JPML 2003). The parties agree that as a consequence of these judgments and orders, AnimalFeeds and petitioners must arbitrate their antitrust dispute.

B

In 2005, AnimalFeeds served petitioners with a demand for class arbitration, designating New York City as the place of arbitration and seeking to represent a class of "[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [petitioners] at any time during the period from August 1, 1998, to November 30, 2002." 548 F.3d 85, 87 (C.A.2 2008) (internal quotation marks omitted). The parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators who were to "follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as effective Oct. 8, 2003)." App. to Pet. for Cert. 59a. These rules (hereinafter Class Rules) were developed by the American Arbitration Association (AAA) after our decision in *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 123 S.Ct.

2402, 156 L.Ed.2d 414 (2003), and Class Rule 3, in accordance with the plurality opinion in that case, requires an arbitrator, as a threshold matter, to determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." App. 56a.

*1766 The parties selected a panel of arbitrators and stipulated that the arbitration clause was "silent" with respect to class arbitration. Counsel for AnimalFeeds explained to the arbitration panel that the term "silent" did not simply mean that the clause made no express reference to class arbitration. Rather, he said, "[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue." *Id.,* at 77a.

After hearing argument and evidence, including testimony from petitioners' experts regarding arbitration customs and usage in the maritime trade, the arbitrators concluded that the arbitration clause allowed for class arbitration. They found persuasive the fact that other arbitrators ruling after *Bazzle* had construed "a wide variety of clauses in a wide variety of settings as allowing for class arbitration," but the panel acknowledged that none of these decisions was "exactly comparable" to the present dispute. See App. to Pet. for Cert. 49a-50a. Petitioners' expert evidence did not show an "inten[t] to preclude class arbitration," the arbitrators reasoned, and petitioners' argument would leave "no basis for a class action absent express agreement among all parties and the putative class members." *Id.,* at 51a.

The arbitrators stayed the proceeding to allow the parties to seek judicial review, and petitioners filed an application to vacate the arbitrators' award in the District Court for the Southern District of New York. See 9 U.S.C. § 10(a)(4) (authorizing a district court to "make an order vacating the award upon the application of any party to the arbitration ... where the arbitrators exceeded their powers"); Petition to Vacate Arbitration Award, No. 1:06-CV-00420-JSR (SDNY) in App. in No. 06-3474-cv (CA2), p. A-17, ¶ 16 (citing § 10(a)(4) as a ground for vacatur of the award); see also *id.,* at A-15 to A-16, ¶ 9 (invoking the District Court's jurisdiction under 9 U.S.C. § 203 and 28 U.S.C. §§ 1331 and 1333). The District Court vacated the award, concluding that the arbitrators' decision was made in "manifest disregard" of the law insofar as the arbitrators failed to conduct a choice-of-law analysis. 435 F.Supp.2d 382, 384-385 (S.D.N.Y.2006). See *Wilko v. Swan,* 346 U.S. 427, 436-437, 74 S.Ct. 182, 98 L.Ed. 168 (1953) ("[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation"); see also Petition to Vacate Arbitration Award, *supra,* at A-17, ¶ 17 (alleging that the arbitration panel "manifestly disregarded the law"). Had such an analysis been conducted, the District Court held, the arbitrators would have applied the rule of federal maritime law requiring that contracts be interpreted in light of custom and usage. 435 F.Supp.2d, at 385-386.

AnimalFeeds appealed to the Court of Appeals, which reversed. See 9 U.S.C. § 16(a)(1)(E) ("An appeal may be taken from ... an order ... vacating an award"). As an initial matter, the Court of Appeals held that the "manifest disregard" standard survived our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), as a "judicial gloss" on the enumerated grounds for vacatur of arbitration awards under 9 U.S.C. § 10. 548 F.3d, at 94. Nonetheless, the Court of Appeals concluded that, because petitioners had cited no authority applying a federal maritime rule of custom and usage *against* class arbitration, the arbitrators' decision was not in manifest disregard of federal maritime law. *Id.,* at 97-98. Nor had the arbitrators manifestly disregarded New York law, the Court of Appeals continued, since nothing in New York case law *1767 established a rule against class arbitration. *Id.,* at 98-99.

[1][2][3][4] We granted certiorari. 557 U.S. ----, 129 S.Ct. 2793, 174 L.Ed.2d 289 (2009).[FN2]

FN2. Invoking an argument not pressed in or considered by the courts below, the dissent concludes that the question presented is not ripe for our review. See *post,* at ----, ---- - ---- (opinion of GINSBURG, J.). In so doing, the dissent offers no clear justification for now embracing an argument "we necessarily considered and rejected" in granting certiorari. *United States v. Williams,* 504 U.S. 36, 40, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992). Ripeness reflects constitutional considerations that implicate "Article III limitations on judicial power," as well as "prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.,* 509 U.S. 43, 57, n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). In evaluating a claim to determine whether it is ripe for judicial review, we consider both "the fitness of the issues for judicial decision" and "the hardship of withholding court consideration." *National Park Hospitality Assn. v. Department of Interior,* 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003). To the extent the dissent believes that the question on which we granted certiorari is constitutionally unripe for review, we disagree. The arbitration panel's award means that petitioners must now submit to class determination proceedings before arbitrators who, if petitioners are correct, have no authority to require class arbitration absent the parties' agreement to resolve their disputes on that basis. See Class Rule 4(a) (cited in App. 57a); Brief for American Arbitration Association as *Amicus Curiae* 17. Should petitioners refuse to proceed with what they maintain is essentially an ultra vires proceeding, they would almost certainly be subject to a petition to compel arbitration under 9 U.S.C. § 4. Cf. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect"). We think it is clear on these facts that petitioners have demonstrated sufficient hardship, and that their question is fit for our review at this time. To the extent the dissent believes that the question is prudentially unripe, we reject that argument as waived, *Sprietsma v. Mercury Marine,* 537 U.S. 51, 56, n. 4, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002), and we see no reason to disregard the waiver. We express no view as to whether, in a similar case, a federal court may consider a question of prudential ripeness on its own motion. See *National Park Hospitality Assn., supra,* at 808, 123 S.Ct. 2026 ("[E]ven in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion").

II

A

[5][6][7] Petitioners contend that the decision of the arbitration panel must be vacated, but in order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error-or even a serious error. See *Eastern Associated Coal Corp. v. Mine Workers,* 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000); *Paperworkers v. Misco, Inc.,* 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." *Major League Baseball Players Assn. v. Garvey,* 532 U.S. 504, 509, 1015, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) *(per curiam)* (quoting *Steelworkers v. Enterprise*

Wheel & Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator "exceeded [his] powers," for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must conclude that what the arbitration panel did was simply to impose its own view of sound ***1768** policy regarding class arbitration.[FN3]

> FN3. We do not decide whether " 'manifest disregard' " survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 585, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 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." Brief for Respondent 25 (internal quotation marks omitted). Assuming, *arguendo,* that such a standard applies, we find it satisfied for the reasons that follow.

B

1

[8] In its memorandum of law filed in the arbitration proceedings, AnimalFeeds made three arguments in support of construing the arbitration clause to permit class arbitration:

> "The parties' arbitration clause should be construed to allow class arbitration because (a) the clause is silent on the issue of class treatment and, without express prohibition, class arbitration is permitted under *Bazzle*; *(b) the clause should be construed to permit class arbitration as a matter of public policy*; and (c) the clause would be unconscionable and unenforceable if it forbade class arbitration." App. in No. 06-3474-cv (CA2), at A-308 to A-309 (emphasis added).

The arbitrators expressly rejected AnimalFeeds' first argument, see App. to Pet. for Cert. 49a, and said nothing about the third. Instead, the panel appears to have rested its decision on AnimalFeeds' public policy argument. Because the parties agreed their agreement was "silent" in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation. Had they engaged in that undertaking, they presumably would have looked either to the FAA itself or to one of the two bodies of law that the parties claimed were governing, *i.e.,* either federal maritime law or New York law. But the panel did not consider whether the FAA provides the rule of decision in such a situation; nor did the panel attempt to determine what rule would govern under either maritime or New York law in the case of a "silent" contract. Instead, the panel based its decision on post- *Bazzle* arbitral decisions that "construed a wide variety of clauses in a wide variety of settings as allowing for class arbitration." App. to Pet. for Cert. 49a-50a. The panel did not mention whether any of these decisions were based on a rule derived from the FAA or on maritime or New York law.[FN4]

> FN4. The panel's reliance on these arbitral awards confirms that the panel's decision was not based on a determination regarding the parties' intent. All of the arbitral awards were made under the AAA's Class Rules, which were adopted in 2003, and thus none was available when the parties here entered into the Vegoilvoy charter party during the class period ranging from 1998 to 2002. See 548 F.3d 85, 87 (C.A.2 2008) (defining the class period). Indeed,

> at the hearing before the panel, counsel for AnimalFeeds conceded that "[w]hen you talk about expectations, virtually every one of the arbitration clauses that were the subject of the 25 AAA decisions were drafted before *[Bazzle]*. So therefore, if you are going to talk about the parties' intentions, pre- *[Bazzle]* class arbitrations were not common, post *[Bazzle]* they are common." App. 87a. Moreover, in its award, the panel appeared to acknowledge that none of the cited arbitration awards involved a contract between sophisticated business entities. See App. to Pet. for Cert. 50a.

[9] Rather than inquiring whether the FAA, maritime law, or New York law contains*1769 a "default rule" under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation. Perceiving a post- *Bazzle* consensus among arbitrators that class arbitration is beneficial in "a wide variety of settings," the panel considered only whether there was any good reason not to follow that consensus in this case. App. to Pet. for Cert. 49a-50a. The panel was not persuaded by "court cases denying consolidation of arbitrations," [FN5] by undisputed evidence that the Vegoilvoy charter party had "never been the basis of a class action," or by expert opinion that "sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration." [FN6] *Id.,* at 50a-51a. Accordingly, finding no convincing ground for departing from the post- *Bazzle* arbitral consensus, the panel held that class arbitration was permitted in this case. App. to Pet. for Cert. 52a. The conclusion is inescapable that the panel simply imposed its own conception of sound policy. [FN7]

> FN5. See *Government of United Kingdom v. Boeing Co.,* 998 F.2d 68, 71, 74 (C.A.2 1993); see also *Glencore, Ltd. v. Schnitzer Steel Prods. Co.,* 189 F.3d 264, 268 (C.A.2 1999); *Champ v. Siegel Trading Co.,* 55 F.3d 269, 275 (C.A.7 1995). Unlike the subsequent arbitration awards that the arbitrators cited, these decisions were available to the parties when they entered into their contracts.
>
> FN6. Petitioners produced expert evidence from experienced maritime arbitrators demonstrating that it is customary in the shipping business for parties to resolve their disputes through bilateral arbitration. See, *e.g.,* App. 126a (expert declaration of John Kimball) ("In the 30 years I have been practicing as a maritime lawyer, I have never encountered an arbitration clause in a charter party that could be construed as allowing class action arbitration"); *id.,* at 139a (expert declaration of Bruce Harris) ("I have been working as a maritime arbitrator for thirty years and this matter is the first I have ever encountered where the issue of a class action arbitration has even been raised"). These experts amplified their written statements in their live testimony, as well. See, *e.g.,* App. 112a, 113a (Mr. Kimball) (opining that the prospect of a class action in a maritime arbitration would be "quite foreign" to overseas shipping executives and charterers); *id.,* at 111a-112a (Mr. Harris) (opining that in the view of the London Corps of International Arbitration, class arbitration is "inconceivable").
>
> Under both New York law and general maritime law, evidence of "custom and usage" is relevant to determining the parties' intent when an express agreement is ambiguous. See *Excess Ins. Co. v. Factory Mut. Ins. Co.,* 3 N.Y.3d 577, 590-591, 789 N.Y.S.2d 461, 822 N.E.2d 768, 777 (2004) ("Our precedent estab-

lishes that where there is ambiguity in a reinsurance certificate, the surrounding circumstances, including industry custom and practice, should be taken into consideration"); *Lopez v. Consolidated Edison Co. of N. Y.,* 40 N.Y.2d 605, 609, 389 N.Y.S.2d 295, 357 N.E.2d 951, 954-955 (1976) (where contract terms were ambiguous, parol evidence of custom and practice was properly admitted to show parties' intent); *407 East 61st Garage, Inc. v. Savoy Fifth Avenue Corp.,* 23 N.Y.2d 275, 281, 296 N.Y.S.2d 338, 244 N.E.2d 37, 41 (1968) (contract was "not so free from ambiguity to preclude extrinsic evidence" of industry "custom and usage" that would "establish the correct interpretation or understanding of the agreement as to its term"). See also *Great Circle Lines, Ltd. v. Matheson & Co.,* 681 F.2d 121, 125 (C.A.2 1982) ("Certain long-standing customs of the shipping industry are crucial factors to be considered when deciding whether there has been a meeting of the minds on a maritime contract"); *Samsun Corp. v. Khozestan Mashine Kar Co.,* 926 F.Supp. 436, 439 (S.D.N.Y.1996) ("[W]here as here the contract is one of charter party, established practices and customs of the shipping industry inform the court's analysis of what the parties agreed to"); Hough, Admiralty Jurisdiction-Of Late Years, 37 Harv. L.Rev. 529, 536 (1924) (noting that "maritime law is a body of sea customs" and the "custom of the sea ... includes a customary interpretation of contract language").

FN7. The dissent calls this conclusion "hardly fair," noting that the word " 'policy' is not so much as mentioned in the arbitrators' award." *Post,* at 1780. But just as merely saying something is so does not make it so, cf. *United States v. Morrison,* 529 U.S. 598, 614, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), the arbitrators need not have said they were relying on policy to make it so. At the hearing before the arbitration panel, one of the arbitrators recognized that the body of post- *Bazzle* arbitration awards on which AnimalFeeds relied involved "essentially consumer non-value cases." App. 82a. In response, counsel for AnimalFeeds defended the applicability of those awards by asserting that the "vast majority" of the claimants against petitioners "have negative value claims ... meaning it costs more to litigate than you would get if you won." *Id.,* at 82a-83a. The panel credited this body of awards in concluding that petitioners had not demonstrated the parties' intent to preclude class arbitration, and further observed that if petitioners' anticonsolidation precedents controlled, then "there would appear to be no basis for a class action absent express agreement among all parties and the putative class members." App. to Pet. for Cert. 50a, 51a.

***1770** 2

It is true that the panel opinion makes a few references to intent, but none of these shows that the panel did anything other than impose its own policy preference. The opinion states that, under *Bazzle,* "arbitrators must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action," and the panel added that "[t]his is also consistent with New York law." App. to Pet. for Cert. 49a. But the panel had no occasion to "ascertain the parties' intention" in the present case because the parties were in complete agreement regarding their intent. In the very next sentence after the one quoted above, the panel acknowledged that the parties in this case agreed that the Vegoilvoy charter party was "silent on whether [it] permit[ted]

or preclude[d] class arbitration," but that the charter party was "not ambiguous so as to call for parol evidence." *Ibid.* This stipulation left no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task.

The panel also commented on the breadth of the language in the Vegoilvoy charter party, see *id.,* at 50a, but since the only task that was left for the panel, in light of the parties' stipulation, was to identify the governing rule applicable in a case in which neither the language of the contract nor any other evidence established that the parties had reached any agreement on the question of class arbitration, the particular wording of the charter party was quite beside the point.

In sum, instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers. As a result, under § 10(b) of the FAA, we must either "direct a rehearing by the arbitrators" or decide the question that was originally referred to the panel. Because we conclude that there can be only one possible outcome on the facts before us, we see no need to direct a rehearing by the arbitrators.

III

A

The arbitration panel thought that *Bazzle* "controlled" the "resolution" of the question whether the Vegoilvoy charter party "permit[s] this arbitration to proceed on behalf of a class," App. to Pet. for Cert. 48a-49a, but that understanding was incorrect.

*1771 *Bazzle* concerned contracts between a commercial lender (Green Tree) and its customers. These contracts contained an arbitration clause but did not expressly mention class arbitration. Nevertheless, an arbitrator conducted class arbitration proceedings and entered awards for the customers.

The South Carolina Supreme Court affirmed the awards. *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 569 S.E.2d 349 (2002). After discussing both Seventh Circuit precedent holding that a court lacks authority to order classwide arbitration under § 4 of the FAA, see *Champ v. Siegel Trading Co.,* 55 F.3d 269 (1995), and conflicting California precedent, see *Keating v. Superior Court of Alameda Cty.,* 31 Cal.3d 584, 183 Cal.Rptr. 360, 645 P.2d 1192 (1982), the State Supreme Court elected to follow the California approach, which it characterized as permitting a trial court to "order class-wide arbitration under adhesive but enforceable franchise contracts," 351 S.C., at 259, 266, 569 S.E.2d, at 357, 360. Under this approach, the South Carolina court observed, a trial judge must "[b]alanc[e] the potential inequities and inefficiencies" of requiring each aggrieved party to proceed on an individual basis against "resulting prejudice to the drafting party" and should take into account factors such as "efficiency" and "equity." *Id.,* at 260, and n. 15, 569 S.E.2d, at 357, and n. 15.

Applying these standards to the case before it, the South Carolina Supreme Court found that the arbitration clause in the Green Tree contracts was "silent regarding class-wide arbitration." *Id.,* at 263, 569 S.E.2d, at 359 (emphasis deleted). The Court described its holding as follows:

> "[W]e ... hold that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice. If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement." *Id.,* at 266, 569 S.E.2d, at 360 (footnote omitted).

When *Bazzle* reached this Court, no single rationale commanded a majority. The opinions of the Justices

who joined the judgment-that is, the plurality opinion and Justice STEVENS' opinion-collectively addressed three separate questions. The first was which decision maker (court or arbitrator) should decide whether the contracts in question were "silent" on the issue of class arbitration. The second was what standard the appropriate decision maker should apply in determining whether a contract allows class arbitration. (For example, does the FAA entirely preclude class arbitration? Does the FAA permit class arbitration only under limited circumstances, such as when the contract expressly so provides? Or is this question left entirely to state law?) The final question was whether, under whatever standard is appropriate, class arbitration had been properly ordered in the case at hand.

The plurality opinion decided only the first question, concluding that the arbitrator and not a court should decide whether the contracts were indeed "silent" on the issue of class arbitration. The plurality noted that, "[i]n certain limited circumstances," involving "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," it is assumed "that the parties intended courts, not arbitrators," to make the decision. 539 U.S., at 452, 123 S.Ct. 2402. But the plurality opined that the question whether *1772 a contract with an arbitration clause forbids class arbitration "does not fall into this narrow exception." *Ibid.* The plurality therefore concluded that the decision of the State Supreme Court should be vacated and that the case should be remanded for a decision by the arbitrator on the question whether the contracts were indeed "silent." The plurality did not decide either the second or the third question noted above.

Justice STEVENS concurred in the judgment vacating and remanding because otherwise there would have been "no controlling judgment of the Court," but he did not endorse the plurality's rationale. *Id.,* at 455, 123 S.Ct. 2402 (opinion concurring in judgment and dissenting in part). He did not take a definitive position on the first question, stating only that *"[a]rguably* the interpretation of the parties' agreement should have been made in the first instance by the arbitrator." *Ibid.* (emphasis added). But because he did not believe that Green Tree had raised the question of the appropriate decision maker, he preferred not to reach that question and, instead, would have affirmed the decision of the State Supreme Court on the ground that "the decision to conduct a class-action arbitration was correct as a matter of law." *Ibid.* Accordingly, his analysis bypassed the first question noted above and rested instead on his resolution of the second and third questions. Thus, *Bazzle* did not yield a majority decision on any of the three questions.

B

Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case at the time of the arbitration proceeding. For one thing, the parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration. See App. 89a (transcript of argument before arbitration panel) (counsel for Stolt-Nielsen states: "What *[Bazzle]* says is that the contract interpretation issue is left up to the arbitrator, that's the rule in *[Bazzle]* "). In fact, however, only the plurality decided that question. But we need not revisit that question here because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible.

[10][11] Unfortunately, however, both the parties and the arbitration panel seem to have misunderstood *Bazzle* in another respect, namely, that it established the standard to be applied by a decision maker in determining whether a contract may permissibly be interpreted to allow class arbitration. The arbitration panel began its discussion by stating that the parties "differ regarding *the rule of interpretation* to be gleaned from [the *Bazzle*] decision." App. to Pet. for Cert. 49a (emphasis ad-

ded). The panel continued:

> "Claimants argue that *Bazzle* requires clear language that forbids class arbitration in order to bar a class action. The Panel, however, agrees with Respondents that the test is a more general one-arbitrators must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action." *Ibid.*

As we have explained, however, *Bazzle* did not establish the rule to be applied in deciding whether class arbitration is permitted.[FN8] The decision in *Bazzle* left that question open, and we turn to it now.

> FN8. AnimalFeeds invokes the parties' supplemental agreement as evidence that petitioners "waived" any claim that the arbitrators could not construe the arbitration agreement to permit class arbitration. Brief for Respondent 15. The dissent concludes, likewise, that the existence of the parties' supplemental agreement renders petitioners' argument under § 10(a)(4) "scarcely debatable." *Post,* at 1780. These arguments are easily answered by the clear terms of the supplemental agreement itself. The parties expressly provided that their supplemental agreement " *does not alter* the scope of the Parties' arbitration agreements in any Charter Party Agreement," and that "[n]either the fact of this Agreement nor any of its terms may be used to support or oppose *any argument in favor of a class action arbitration* ... and may not be relied upon by the Parties, any arbitration panel, *any court,* or any other tribunal for such purposes." App. to Pet. for Cert. 62a-63a (emphasis added). As with any agreement to arbitrate, we are obliged to enforce the parties' supplemental agreement "according to its terms." *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 58, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995). The question that the arbitration panel was charged with deciding was whether the arbitration clause in the Vegoilvoy charter party allowed for class arbitration, and nothing in the supplemental agreement conferred authority on the arbitrators to exceed the terms of the charter party itself. Thus, contrary to AnimalFeeds' argument, these statements show that petitioners did *not* waive their argument that *Bazzle* did not establish the standard for the decision maker to apply when construing an arbitration clause.

*1773 IV

[12] While the interpretation of an arbitration agreement is generally a matter of state law, see *Arthur Andersen LLP v. Carlisle,* 556 U.S. ----, ----, 129 S.Ct. 1896, 1901-02, 173 L.Ed.2d 832 (2009); *Perry v. Thomas,* 482 U.S. 483, 493, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration "is a matter of consent, not coercion," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

A

[13] In 1925, Congress enacted the United States Arbitration Act, as the FAA was formerly known, for the express purpose of making "valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations." 43 Stat. 883. Reenacted and codified in 1947, see 61 Stat. 669, [FN9] the FAA provides, in pertinent part, that a "written provision in any maritime transaction" calling for the arbitration of a controversy arising out of such transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at

law or in equity for the revocation of any contract," 9 U.S.C. § 2. Under the FAA, a party to an arbitration agreement may petition a United States district court for an order directing that "arbitration proceed in the manner provided for in such agreement." § 4. Consistent with these provisions, we have said on numerous occasions that the central or "primary" purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms." *Volt, supra,* at 479, 109 S.Ct. 1248; *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57, 58, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); see also *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 688, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996). See generally 9 U.S.C. § 4.

> FN9. See generally Sturges & Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act, 17 Law & Contemp. Prob. 580, 580-581, n. 1 (1952) (recounting the history of the United States Arbitration Act and its 1947 reenactment and codification).

[14][15] Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must *1774 "give effect to the contractual rights and expectations of the parties." *Volt, supra,* at 479, 109 S.Ct. 1248. In this endeavor, "as with any other contract, the parties' intentions control." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution. See *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 648-649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Mitsubishi Motors, supra,* at 628, 105 S.Ct. 3346 ("By agreeing to arbitrate ..., [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"); see also *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 581, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) (an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties" (internal quotation marks omitted)).

Underscoring the consensual nature of private dispute resolution, we have held that parties are " 'generally free to structure their arbitration agreements as they see fit.' " *Mastrobuono, supra,* at 57, 115 S.Ct. 1212; see also *AT & T Technologies, supra,* at 648-649, 106 S.Ct. 1415. For example, we have held that parties may agree to limit the issues they choose to arbitrate, see *Mitsubishi Motors, supra,* at 628, 105 S.Ct. 3346, and may agree on rules under which any arbitration will proceed, *Volt, supra,* at 479, 109 S.Ct. 1248. They may choose who will resolve specific disputes. *E.g.,* App. 30a; *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 57, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *Burchell v. Marsh,* 58 U.S. 344, 17 How. 344, 349, 15 L.Ed. 96 (1855); see also *International Produce, Inc. v. A/S Rosshavet,* 638 F.2d 548, 552(CA2) ("The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose"), cert. denied, 451 U.S. 1017, 101 S.Ct. 3006, 69 L.Ed.2d 389 (1981).

[16][17] We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes. See *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 289, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties,* that are not already covered in the agreement" (emphasis added)); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.,* 460 U.S. 1, 20, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("[A]n arbitration agreement must be enforced notwithstanding

the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement"); *Steelworkers, supra,* at 581, 80 S.Ct. 1358 (an arbitrator "has no general charter to administer justice for a community which transcends the parties" (internal quotation marks omitted)); accord, *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ("[A]rbitration is simply a matter of contract *between the parties*; it is a way to resolve those disputes-but only those disputes-that the *parties* have agreed to submit to arbitration" (emphasis added)). It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the *1775 exercise: to give effect to the intent of the parties. *Volt,* 489 U.S., at 479, 109 S.Ct. 1248.

B

[18][19][20] From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached "no agreement" on that issue, see App. 77a. The critical point, in the view of the arbitration panel, was that petitioners did not "establish that the parties to the charter agreements intended to *preclude* class arbitration." App. to Pet. for Cert. 51a. Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment, the panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

[21] In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement. Thus, we have said that " ' "procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (quoting *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 557, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964)). This recognition is grounded in the background principle that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." Restatement (Second) of Contracts § 204 (1979).

[22][23] An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. See *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); *Mitsubishi Motors,* 473 U.S., at 628, 105 S.Ct. 3346; see also *14 Penn Plaza LLC v. Pyett,* 556 U.S. ----, ----, 129 S.Ct. 1456, 1463-65, 173 L.Ed.2d 398 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution") (citing *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 123, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001)); *Gardner-Denver, supra,* at 57, 94 S.Ct. 1011 ("Parties usually choose an arbitrator because they trust his knowledge and judg-

ment concerning the demands and norms of industrial relations"). But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-*1776 wide arbitration. Cf. *First Options, supra,* at 945, 115 S.Ct. 1920 (noting that "one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate" contrary to their expectations).

[24] Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure, see, *e.g., supra,* at ----, no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. See App. 86a ("[W]e believe domestic class members could be in the hundreds" and that "[t]here could be class members that ship to and from the U.S. who are not domestic who we think would be covered"); see also, *e.g., Bazzle,* 351 S.C., at 251, 569 S.E.2d, at 352-353 (involving a class of 1,899 individuals that was awarded damages, fees, and costs of more than $14 million by a single arbitrator). Under the Class Rules, "the presumption of privacy and confidentiality" that applies in many bilateral arbitrations "shall not apply in class arbitrations," see Addendum to Brief for American Arbitration Association as *Amicus Curiae* 10a (Class Rule 9(a)), thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. Cf. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) (noting that "the burden of justification rests on the exception" to the general rule that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process" (internal quotation marks omitted)). And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, cf. App. in No. 06-3474-cv (CA2), at A-77, A-79, ¶¶ 30, 31, 40, even though the scope of judicial review is much more limited, see *Hall Street,* 552 U.S., at 588, 128 S.Ct. 1396. We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.[FN10]

> FN10. We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was "no agreement" on the issue of class-action arbitration. App. 77a.

The dissent minimizes these crucial differences by characterizing the question before the arbitrators as being merely what "procedural mode" was available to present AnimalFeeds' claims. *Post,* at 1781. If the question were that simple, there would be no need to consider the parties' intent with respect to class arbitration. See *Howsam, supra,* at 84, 123 S.Ct. 588 (committing "procedural questions" presumptively to the arbitrator's discretion (internal quotation marks omitted)). But the FAA requires more. Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration. Here, where the parties stipulated that there was "no agreement" on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.

*1777 V

For these reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for fur-

ther proceedings consistent with this opinion.

It is so ordered.

Justice GINSBURG, with whom Justice STEVENS and Justice BREYER join, dissenting.

When an arbitration clause is silent on the question, may arbitration proceed on behalf of a class? The Court prematurely takes up that important question and, indulging in *de novo* review, overturns the ruling of experienced arbitrators.[FN1]

> FN1. All three panelists are leaders in the international-dispute-resolution bar. See Brief for Respondent 8-9.

The Court errs in addressing an issue not ripe for judicial review. Compounding that error, the Court substitutes its judgment for that of the decision-makers chosen by the parties. I would dismiss the petition as improvidently granted.[FN2] Were I to reach the merits, I would adhere to the strict limitations the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.,* places on judicial review of arbitral awards. § 10. Accordingly, I would affirm the judgment of the Second Circuit, which rejected petitioners' plea for vacation of the arbitrators' decision.

> FN2. Alternatively, I would vacate with instructions to dismiss for lack of present jurisdiction. See Reply to Brief in Opposition 12, n. 6.

I

As the Court recounts, *ante,* at ---- - ----, this case was launched as a class action in federal court charging named ocean carriers (collectively, Stolt-Nielsen) with a conspiracy to extract supracompetitive prices from their customers (buyers of ocean-transportation services). That court action terminated when the Second Circuit held, first, that the parties' transactions were governed by contracts (charter parties) with enforceable arbitration clauses, and second, that the antitrust claims were arbitrable. *JLM Industries, Inc. v. Stolt-Nielsen S.A.,* 387 F.3d 163, 175, 181 (2004).

Cargo-shipper AnimalFeeds International Corp. (AnimalFeeds) thereupon filed a demand for class arbitration of the antitrust-conspiracy claims.[FN3] Stolt-Nielsen contested AnimalFeeds' right to proceed on behalf of a class, but agreed to submission of that threshold dispute to a panel of arbitrators. Thus, the parties entered into a supplemental agreement to choose arbitrators and instruct them to "follow ... Rul[e] 3 ... of the American Arbitration Association's Supplementary Rules for Class Arbitrations." App. to Pet. for Cert. 59a. Rule 3, in turn, directed the panel to "determine ... whether the applicable arbitration clause permits the arbitration to proceed on behalf of ... a class." App. 56a.

> FN3. Counsel for AnimalFeeds submitted in arbitration that "[i]t would cost ... the vast majority of absent class members, and indeed the current claimants, ... more to litigate the matter on an individual basis than they could recover. An antitrust case, particularly involving an international cartel[,] ... is extraordinarily difficult and expensive to litigate." App. 82a (paragraph break omitted).

After receiving written submissions and hearing arguments, the arbitration panel rendered a clause-construction award. It decided unanimously-and only-that the "arbitration claus[e] [used in the parties' standard-form shipping contracts] permit[s] this ... arbitration to proceed as a class arbitration." App. to Pet. for Cert. 52a. Stolt-Nielsen petitioned for court review urging vacatur of the clause-construction*1778 award on the ground that "the arbitrators [had] exceeded their powers." § 10(a)(4) . The Court of Appeals upheld the award: "Because the parties specifically agreed that the arbitration panel would decide whether the arbitration claus[e] permitted class arbitration," the Second Circuit reasoned, "the arbitration panel did not exceed its authority in deciding that issue-irrespective of whether it decided the issue correctly." 548 F.3d 85, 101 (2008).

II

I consider, first, the fitness of the arbitrators' clause-construction award for judicial review. The arbitrators decided the issue, in accord with the parties' supplemental agreement, "as a threshold matter." App. 56a. Their decision that the charter-party arbitration clause permitted class arbitration was abstract and highly interlocutory. The panel did not decide whether the particular claims AnimalFeeds advanced were suitable for class resolution, see App. to Pet. for Cert. 48a-49a; much less did it delineate any class or consider whether, "if a class is certified, ... members of the putative class should be required to 'opt in' to th[e] proceeding," *id.,* at 52a.

The Court, *ante,* at ----, n. 2, does not persuasively justify judicial intervention so early in the game or convincingly reconcile its adjudication with the firm final-judgment rule prevailing in the federal court system. See, *e.g.,* 28 U.S.C. § 1257 (providing for petitions for certiorari from "[f]inal judgments or decrees" of state courts); § 1291 (providing for Court of Appeals review of district court "final decisions"); *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945) (describing "final decision" generally as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment").

We have equated to "final decisions" a slim set of "collateral orders" that share these characteristics: They "are conclusive, [they] resolve important questions separate from the merits, and [they] are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Industries, Inc. v. Carpenter,* 558 U.S. ----, ----, 130 S.Ct. 599, 601, ---L.Ed.2d ---- (2009) (quoting *Swint v. Chambers County Comm'n,* 514 U.S. 35, 42, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995)). "[O]rders relating to class certification" in federal court, it is settled, do not fit that bill. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 470, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).[FN4]

FN4. Federal Rule of Civil Procedure 23(f), adopted in response to *Coopers & Lybrand,* gives Courts of Appeals discretion to permit an appeal from an order granting or denying class-action certification. But the rule would not permit review of a preliminary order of the kind at issue here, *i.e.,* one that defers decision whether to grant or deny certification.

Congress, of course, can provide exceptions to the "final-decision" rule. Prescriptions in point include § 1292 (immediately appealable "[i]nterlocutory decisions"); § 2072(c) (authorizing promulgation of rules defining when a district court ruling is final for purposes of appeal under § 1291); Fed. Rule Civ. Proc. 23(f) (pursuant to § 1292(e), accords Courts of Appeals discretion to permit appeals from district court orders granting or denying class-action certification); Fed. Rule Civ. Proc. 54(b) (providing for "entry of a final judgment as to one or more, but fewer than all, of the claims or parties"). Did Congress provide for immediate review of the preliminary ruling in question here?

*1779 Section 16 of the FAA, governing appellate review of district court arbitration orders, lists as an appealable disposition a district court decision "confirming or denying confirmation of an award or partial award." 9 U.S.C. § 16(a)(1)(D). Notably, the arbitrators in the matter at hand labeled their decision "Partial Final Clause Construction Award." App. to Pet. for Cert. 45a. It cannot be true, however, that parties or arbitrators can gain instant review by slicing off a preliminary decision or a procedural order and declaring its resolution a "partial award." Cf. *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 588, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008) (FAA §§ 9-11, which provide for expedited review to confirm, vacate, or modify arbitration awards, "substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.").

Lacking this Court's definitive guidance, some

Courts of Appeals have reviewed arbitration awards "finally and definitely dispos[ing] of a separate independent claim." *E.g., Metallgesellschaft A.G. v. M/V Capitan Constante,* 790 F.2d 280, 283 (C.A.2 1986).[FN5] Others have considered "partial award [s]" that finally "determin[e] liability, but ... not ... damages." *E.g., Hart Surgical, Inc. v. Ultracision, Inc.,* 244 F.3d 231, 234 (C.A.1 2001). [FN6] Another confirmed an interim ruling on a "separate, discrete, independent, severable issue." *Island Creek Coal Sales Co. v. Gainesville,* 729 F.2d 1046, 1049 (C.A.6 1984) (internal quotation marks omitted), abrogated on other grounds by *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.,* 529 U.S. 193, 120 S.Ct. 1331, 146 L.Ed.2d 171 (2000).

> FN5. See *Metallgesellschaft A.G.,* 790 F.2d, at 283, 284 (Feinberg, C.J., dissenting) (describing exception for separate and independent claims as "creat[ing], in effect, an arbitration analogue to [Fed. Rule Civ. Proc.] 54(b)").
>
> FN6. But see *Liberty Mut. Ins. Co. v. Wetzel,* 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976) (district court order determining liability but reserving decision on damages held not immediately appealable).

Receptivity to review of preliminary rulings rendered by arbitrators, however, is hardly universal. See *Dealer Computer Servs., Inc. v. Dub Herring Ford,* 547 F.3d 558 (C.A.6 2008) (arbitration panel's preliminary ruling that contract did not bar class proceedings held not ripe for review; arbitrators had not yet determined that arbitration *should* proceed on behalf of a class); *Metallgesellschaft A.G.,* 790 F.2d, at 283, 285 (Feinberg, C.J., dissenting) ("[Piecemeal review] will make arbitration more like litigation, a result not to be desired. It would be better to minimize the number of occasions the parties to arbitration can come to court; on the whole, this benefits the parties, the arbitration process and the courts.").

While lower court opinions are thus divided, this much is plain: No decision of this Court, until today, has ever approved immediate judicial review of an arbitrator's decision as preliminary as the "partial award" made in this case. [FN7]

> FN7. The parties agreed that the arbitrators would issue a "partial final award," and then "stay all proceedings ... to permit any party to move a court of competent jurisdiction to confirm or to vacate" the award. App. 56a. But an arbitration agreement, we have held, cannot "expand judicial review" available under the FAA. *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 587, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).

III

Even if Stolt-Nielsen had a plea ripe for judicial review, the Court should reject it on the merits. Recall that the parties ***1780** jointly asked the arbitrators to decide, initially, whether the arbitration clause in their shipping contracts permitted class proceedings. See *supra,* at ----. The panel did just what it was commissioned to do. It construed the broad arbitration clause (covering "[a]ny dispute arising from the making, performance or termination of this Charter Party," App. to Pet. for Cert. 47a) and ruled, expressly and only, that the clause permitted class arbitration. The Court acts without warrant in allowing Stolt-Nielsen essentially to repudiate its submission of the contract-construction issue to the arbitration panel, and to gain, in place of the arbitrators' judgment, this Court's *de novo* determination.

A

The controlling FAA prescription, § 10(a),[FN8] authorizes a court to vacate an arbitration panel's decision "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). The

four grounds for vacatur codified in § 10(a) restate the longstanding rule that, "[i]f [an arbitration] award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court ... will not set [the award] aside for error, either in law or fact." *Burchell v. Marsh,* 58 U.S. 344, 349, 17 How. 344, 349, 15 L.Ed. 96 (1855).

FN8. Title 9 U.S.C. § 10(a) provides:

> "In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-
>
> "(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."

The sole § 10 ground Stolt-Nielsen invokes for vacating the arbitrators' decision is § 10(a)(4). The question under that provision is "whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *DiRussa v. Dean Witter Reynolds Inc.,* 121 F.3d 818, 824 (C.A.2 1997); *Comprehensive Accounting Corp. v. Rudell,* 760 F.2d 138, 140 (C.A.7 1985). The parties' supplemental agreement, referring the class-arbitration issue to an arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision. That scarcely debatable point should resolve this case.

B

The Court's characterization of the arbitration panel's decision as resting on "policy," not law, is hardly fair comment, for "policy" is not so much as mentioned in the arbitrators' award. Instead, the panel tied its conclusion that the arbitration clause permitted class arbitration, App. to Pet. for Cert. 52a, to New York law, federal maritime law, and decisions made by other panels pursuant to Rule 3 of the American Arbitration Association's Supplementary Rules for Class Arbitrations. *Id.,* at 49a-50a.

At the outset of its explanation, the panel rejected the argument, proffered by AnimalFeeds, that this Court's decision in ***1781** *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), settled the matter by "requir[ing] clear language that *forbids* class arbitration in order to bar a class action." App. to Pet. for Cert. 49a (emphasis added). Agreeing with Stolt-Nielsen in this regard, the panel said that the test it employed looked to the language of the particular agreement to gauge whether the parties "intended to permit or to preclude class action[s]." *Ibid.* Concentrating on the wording of the arbitration clause, the panel observed, is "consistent with New York law as articulated by the [New York] Court of Appeals ... and with federal maritime law." *Ibid.*[FN9]

FN9. On New York law, the panel referred to *Evans v. Famous Music Corp.,* 1 N.Y.3d 452, 775 N.Y.S.2d 757, 807 N.E.2d 869 (2004).

Emphasizing the breadth of the clause in question-"

'any dispute arising from the making, performance or termination of this Charter Party' shall be put to arbitration," *id.,* at 50a-the panel noted that numerous other partial awards had relied on language similarly comprehensive to permit class proceedings "in a wide variety of settings." *Id.,* at 49a-50a. The panel further noted "that many of the other panels [had] rejected arguments similar to those advanced by [Stolt-Nielsen]." *Id.,* at 50a.

The Court features a statement counsel for AnimalFeeds made at the hearing before the arbitration panel, and maintains that it belies any argument that the clause in question permits class arbitration: "All the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue." *Ante,* at 1766 (quoting App. 77a); see *ante,* at ----, ---- - ----, ----, ----, and n. 10. The sentence quoted from the hearing transcript concluded: "therefore there has been *no agreement to bar class arbitrations*." App. 77a (emphasis added). Counsel quickly clarified his position: "It's also undisputed that the arbitration clause here contains broad language and this language should be interpreted to permit class arbitrations." *Id.,* at 79a. See also *id.,* at 80a (noting consistent recognition by arbitration panels that "a silent broadly worded arbitration clause, just like the one at issue here, should be construed to permit class arbitration"); *id.,* at 88a ("[B]road ... language ... silent as to class proceedings should be interpreted to permit a class proceeding.").

Stolt-Nielsen, the panel acknowledged, had vigorously argued, with the support of expert testimony, that "the bulk of international shippers would never intend to have their disputes decided in a class arbitration." App. to Pet. for Cert. 52a. That concern, the panel suggested, might be met at a later stage; "if a class is certified," the panel noted, class membership could be confined to those who affirmatively " 'opt in' " to the proceeding. *Ibid.*

The question properly before the Court is not whether the arbitrators' ruling was erroneous, but whether the arbitrators "exceeded their powers." § 10(a)(4). The arbitrators decided a threshold issue, explicitly committed to them, see *supra,* at ----, about the procedural mode available for presentation of AnimalFeeds' antitrust claims. Cf. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.,* 559 U.S. ----, ----, 130 S.Ct. 1431, 1443, 176 L.Ed.2d 311 (2010) (plurality opinion) ("[R]ules allowing multiple claims (and claims by or against multiple parties) to be litigated together ... neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter *1782 only how the claims are processed."). That the arbitrators endeavored to perform their assigned task honestly is not contested. "Courts ... do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Paperworkers v. Misco, Inc.,* 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). The arbitrators here not merely "arguably," but certainly, "construe[d] ... the contract" with fidelity to their commission. *Ibid.* This Court, therefore, may not disturb the arbitrators' judgment, even if convinced that "serious error" infected the panel's award. *Ibid.*

C

The Court not only intrudes on a decision the parties referred to arbitrators. It compounds the intrusion by according the arbitrators no opportunity to clarify their decision and thereby to cure the error the Court perceives. Section 10(b), the Court asserts, invests in this tribunal authority to "decide the question that was originally referred to the panel." *Ante,* at 1770. The controlling provision, however, says nothing of the kind. Section 10(b) reads, in full: "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, *direct a rehearing by the arbitrators*." (Emphasis added.) Just as § 10(a)(4) provides no justification for the Court's disposition, see *supra,* at ---- - ---- and this page, so, too, § 10(b) provides no grounding for the Court's peremptory action.

IV

A

For arbitrators to consider whether a claim should proceed on a class basis, the Court apparently demands contractual language one can read as affirmatively authorizing class arbitration. See *ante,* at ---- ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."); *ante,* at ----. The breadth of the arbitration clause, and the absence of any provision waiving or banning class proceedings,[FN10] will not do. *Ante,* at ---- - ----.

> FN10. Several courts have invalidated contractual bans on, or waivers of, class arbitration because proceeding on an individual basis was not feasible in view of the high costs entailed and the slim benefits achievable. See, *e.g., In re American Express Merchants' Litigation,* 554 F.3d 300, 315-316, 320 (C.A.2 2009); *Kristian v. Comcast Corp.,* 446 F.3d 25, 55, 59 (C.A.1 2006); *Discover Bank v. Superior Court,* 36 Cal.4th 148, 162-163, 30 Cal.Rptr.3d 76, 113 P.3d 1100, 1110 (2005); *Leonard v. Terminix Int'l Co., LP,* 854 So.2d 529, 539 (Ala.2002). Were there no right to proceed on behalf of a class in the first place, however, a provision banning or waiving recourse to this aggregation device would be superfluous.

The Court ties the requirement of affirmative authorization to "the basic precept that arbitration 'is a matter of consent, not coercion.' " *Ante,* at ---- (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). Parties may "specify *with whom* they choose to arbitrate," the Court observes, just as they may "limit the issues they choose to arbitrate." *Ante,* at 1774. But arbitrators, in delineating an appropriate class, need not, and should not, disregard such contractual constraints. In this case, for example, AnimalFeeds proposes to pursue, on behalf of a class, only "claims ... arising out of any [charter party agreement] ... *that provides for arbitration.*" App. to Pet. for Cert. 56a (emphasis added). Should the arbitrators certify the proposed class, they would adjudicate only the rights of persons "with whom" *1783 Stolt-Nielsen agreed to arbitrate, and only "issues" subject to arbitration. *Ante,* at ---- (emphasis omitted).

The Court also links its affirmative-authorization requirement to the parties' right to stipulate rules under which arbitration may proceed. See *ibid.* The question, however, is the proper default rule when there is no stipulation. Arbitration provisions, this Court has noted, are a species of forum-selection clauses. See *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). Suppose the parties had chosen a New York *judicial forum* for resolution of "any dispute" involving a contract for ocean carriage of goods. There is little question that the designated court, state or federal, would have authority to conduct claims like AnimalFeeds' on a class basis. Why should the class-action prospect vanish when the "any dispute" clause is contained in an arbitration agreement? Cf. *Connecticut General Life Ins. Co. v. Sun Life Assurance Co. of Canada,* 210 F.3d 771, 774-776 (C.A.7 2000) (reading contract's authorization to arbitrate "[a]ny dispute" to permit consolidation of arbitrations). If the Court is right that arbitrators ordinarily are not equipped to manage class proceedings, see *ante,* at ---- - ----, then the claimant should retain its right to proceed in that format in court.

B

When adjudication is costly and individual claims are no more than modest in size, class proceedings may be "the thing," *i.e.,* without them, potential claimants will have little, if any, incentive to seek vindication of their rights. *Amchem Products, Inc.*

v. Windsor, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (C.A.7 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."). Mindful that disallowance of class proceedings severely shrinks the dimensions of the case or controversy a claimant can mount, I note some stopping points in the Court's decision.

First, the Court does not insist on express consent to class arbitration. Class arbitration may be ordered if "there is a contractual basis for concluding that the part[ies] *agreed* " "to submit to class arbitration". *Ante,* at ----; see *ante,* at ----, n. 10 ("We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."). Second, by observing that "the parties [here] are sophisticated business entities," and "that it is customary for the shipper to choose the charter party that is used for a particular shipment," the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis. *Ante,* at ----. While these qualifications limit the scope of the Court's decision, I remain persuaded that the arbitrators' judgment should not have been disturbed.

* * *

For the foregoing reasons, I would dismiss the petition for want of a controversy ripe for judicial review. Were I to reach the merits, I would affirm the Second Circuit's judgment confirming the arbitrators' clause-construction decision.

U.S.,2010.
Stolt-Nielsen S.A. v. AnimalFeeds International Corp.
130 S.Ct. 1758, 2010 A.M.C. 913, 93 Empl. Prac. Dec. P 43,878, 176 L.Ed.2d 605, 78 USLW 4328, 2010-1 Trade Cases P 76,982, 10 Cal. Daily Op. Serv. 5144, 2010 Daily Journal D.A.R. 6107, 22 Fla. L. Weekly Fed. S 269

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KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Wallace v. Red Bull Distributing Co., N.D.Ohio, July 23, 2013

131 S.Ct. 1740
Supreme Court of the United States

AT&T MOBILITY LLC, Petitioner,
v.
Vincent CONCEPCION et ux.

No. 09–893.
|
Argued Nov. 9, 2010.
|
Decided April 27, 2011.

Synopsis

Background: Customers brought putative class action against telephone company, alleging that company's offer of a free phone to anyone who signed up for its cellphone service was fraudulent to the extent that the company charged the customer sales tax on the retail value of the free phone. The United States District Court for the Southern District of California, Dana M. Sabraw, J., 2008 WL 5216255, denied company's motion to compel arbitration. Company appealed. The United States Court of Appeals for the Ninth Circuit, Carlos T. Bea, Circuit Judge, 584 F.3d 849, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Scalia, held that the Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts, abrogating *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100.

Reversed and remanded.

Justice Thomas filed a concurring opinion.

Justice Breyer filed a dissenting opinion, in which Justices Ginsburg, Sotomayor, and Kagan, joined.

West Headnotes (13)

[1] Alternative Dispute Resolution
Constitutional and statutory provisions and rules of court

The provision of the Federal Arbitration Act (FAA) stating that arbitration agreements in maritime transactions or contracts evidencing transactions involving commerce are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, reflects both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract. 9 U.S.C.A. § 2.

746 Cases that cite this headnote

[2] Alternative Dispute Resolution
Constitutional and statutory provisions and rules of court

In light of the liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract, which are reflected in the provision of the Federal Arbitration Act (FAA) stating that arbitration agreements in maritime transactions or contracts evidencing transactions involving commerce are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms. 9 U.S.C.A. § 2.

983 Cases that cite this headnote

[3] Alternative Dispute Resolution
Preemption

States
Particular cases, preemption or supersession

The Federal Arbitration Act (FAA) preempts California's judicial rule stating that a class arbitration waiver is unconscionable

under California law if it is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and if it is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, because that rule stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the FAA, which include ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings; abrogating *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100. 9 U.S.C.A. § 2; West's Ann.Cal.Civ.Code §§ 1668, 1670.5(a).

153 Cases that cite this headnote

[4] **Alternative Dispute Resolution**
Validity
Alternative Dispute Resolution
Validity of assent
Alternative Dispute Resolution
Unconscionability

Under the saving clause in the provision of the Federal Arbitration Act (FAA) stating that arbitration agreements in maritime transactions or contracts evidencing transactions involving commerce are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. 9 U.S.C.A. § 2.

957 Cases that cite this headnote

[5] **Contracts**
Procedural unconscionability
Contracts
Substantive unconscionability

Under California law, a finding that a contract is unconscionable requires a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. West's Ann.Cal.Civ.Code §§ 1668, 1670.5(a).

52 Cases that cite this headnote

[6] **Alternative Dispute Resolution**
Preemption
States
Particular cases, preemption or supersession

When state law prohibits outright the arbitration of a particular type of claim, the conflicting state rule is displaced by the Federal Arbitration Act (FAA). 9 U.S.C.A. § 2.

140 Cases that cite this headnote

[7] **Alternative Dispute Resolution**
Preemption
States
Particular cases, preemption or supersession

In light of the preemptive effect of the Federal Arbitration Act (FAA), a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what the state legislature cannot. 9 U.S.C.A. § 2.

180 Cases that cite this headnote

[8] **Alternative Dispute Resolution**
Constitutional and statutory provisions and rules of court

While the saving clause, in the provision of the Federal Arbitration Act (FAA) stating that arbitration agreements in maritime transactions or contracts evidencing transactions involving commerce are valid,

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. 9 U.S.C.A. § 2.

288 Cases that cite this headnote

[9] States

Congressional intent

A federal statute's preemption saving clause cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act; in other words, the act cannot be held to destroy itself.

5 Cases that cite this headnote

[10] Alternative Dispute Resolution

Constitutional and statutory provisions and rules of court

The principal purpose of the Federal Arbitration Act (FAA) is to ensure that private arbitration agreements are enforced according to their terms. 9 U.S.C.A. §§ 2–4.

266 Cases that cite this headnote

[11] Alternative Dispute Resolution

Nature, purpose, and right to arbitration in general

In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.

8 Cases that cite this headnote

[12] Judgment

Persons represented by parties

For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.

16 Cases that cite this headnote

[13] Alternative Dispute Resolution

Contractual or consensual basis

Alternative Dispute Resolution

Constitutional and statutory provisions and rules of court

Arbitration is a matter of contract, and the Federal Arbitration Act (FAA) requires courts to honor parties' expectations. 9 U.S.C.A. § 1 et seq.

140 Cases that cite this headnote

West Codenotes

Limited on Preemption Grounds

West's Ann.Cal.Civ.Code §§ 1668, 1670.5(a).

****1742 *333** *Syllabus* [*]

The cellular telephone contract between respondents (Concepcions) and petitioner (AT & T) provided for arbitration of all disputes, but did not permit classwide arbitration. After the Concepcions were charged sales tax on the retail value of phones provided free under their service contract, they sued AT & T in a California Federal District Court. Their suit was consolidated with a class action alleging, *inter alia,* that AT & T had engaged in false advertising and fraud by charging sales tax on "free" phones. The District Court denied AT & T's motion to compel arbitration under the Concepcions' contract. Relying on the California Supreme Court's *Discover Bank* decision, it found the arbitration provision unconscionable because it disallowed classwide proceedings. The Ninth Circuit agreed that the provision was unconscionable under California law and held that the Federal Arbitration Act (FAA), which makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds

as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, did not preempt its ruling.

Held: Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581, California's *Discover Bank* rule is pre-empted by the FAA. Pp. 1745 – 1753.

(a) Section 2 reflects a "liberal federal policy favoring arbitration," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765, and the "fundamental principle that arbitration is a matter of contract," *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. ——, ——, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). Thus, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038, and enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488. Section 2's saving clause permits agreements to be invalidated by "generally applicable contract defenses," but not by defenses that apply ****1743** only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902. Pp. 1745 – 1746.

(b) In *Discover Bank,* the California Supreme Court held that class waivers in consumer arbitration agreements are unconscionable if the ***334** agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud. Pp. 1745 – 1747.

(c) The Concepcions claim that the *Discover Bank* rule is a ground that "exist[s] at law or in equity for the revocation of any contract" under FAA § 2. When state law prohibits outright the arbitration of a particular type of claim, the FAA displaces the conflicting rule. But the inquiry is more complex when a generally applicable doctrine is alleged to have been applied in a fashion that disfavors or interferes with arbitration. Although § 2's saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. Cf. *Geier v. American Honda Motor Co.,* 529 U.S. 861, 872, 120 S.Ct. 1913, 146 L.Ed.2d 914. The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings. Parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444, to arbitrate according to specific rules, *Volt, supra,* at 479, 109 S.Ct. 1248, and to limit with whom they will arbitrate, *Stolt–Nielsen, supra,* at ——. Pp. 1746 – 1750.

(d) Class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, interferes with fundamental attributes of arbitration. The switch from bilateral to class arbitration sacrifices arbitration's informality and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. And class arbitration greatly increases risks to defendants. The absence of multilayered review makes it more likely that errors will go uncorrected. That risk of error may become unacceptable when damages allegedly owed to thousands of claimants are aggregated and decided at once. Arbitration is poorly suited to these higher stakes. In litigation, a defendant may appeal a certification decision and a final judgment, but 9 U.S.C. § 10 limits the grounds on which courts can vacate arbitral awards. Pp. 1750 – 1753.

584 F.3d 849, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

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Opinion

****1744** Justice SCALIA delivered the opinion of the Court.

***336** Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.

I

In February 2002, Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT & T Mobility LCC (AT & T). [1] The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." App. to Pet. for Cert. 61a. [2] The agreement authorized AT & T to make unilateral amendments, which it did to the arbitration provision on several occasions. The version at issue in this case reflects revisions made in December 2006, which the parties agree are controlling.

The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT & T's Web site. AT & T may ***337** then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT & T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT & T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT & T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT & T's last written settlement offer, requires AT & T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees. [3]

The Concepcions purchased AT & T service, which was advertised as including the provision of free phones; they were not charged for the phones, but they were charged $30.22 in sales tax based on the phones' retail value. In March 2006, the Concepcions filed a complaint against AT & T in the United States District Court for the Southern District of California. The complaint was later consolidated with a putative class action alleging, among other things, that AT & T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

In March 2008, AT & T moved to compel arbitration under the terms of its contract ****1745** with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory ***338** under California law because it disallowed classwide procedures. The District Court denied AT & T's motion. It described AT & T's arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was "quick, easy to use" and likely to "promp[t] full or ... even excess payment to the customer *without* the need to arbitrate or litigate"; that the $7,500 premium functioned as "a substantial inducement for the consumer to pursue the claim in arbitration" if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. *Laster v. T–Mobile USA, Inc.,* 2008 WL 5216255, *11–*12 (S.D.Cal., Aug.11, 2008). Nevertheless, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court,* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT & T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. *Laster,* 2008 WL 5216255, *14.

The Ninth Circuit affirmed, also finding the provision unconscionable under California law as announced in *Discover Bank*. *Laster v. AT & T Mobility LLC,* 584 F.3d 849, 855 (2009). It also held that the *Discover Bank* rule was not preempted by the FAA because that rule was simply "a refinement of the unconscionability

analysis applicable to contracts generally in California." 584 F.3d, at 857. In response to AT & T's argument that the Concepcions' interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that " 'class proceedings will reduce the efficiency and expeditiousness of arbitration' " and noted that " '*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.' " *Id.*, at 858 (quoting *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 990 (C.A.9 2007)).

We granted certiorari, 560 U.S. 923, 130 S.Ct. 3322, 176 L.Ed.2d 1218 (2010).

***339** II

[1] **[2]** The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. See *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008). Section 2, the "primary substantive provision of the Act," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), provides, in relevant part, as follows:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

We have described this provision as reflecting both a "liberal federal policy favoring arbitration," *Moses H. Cone, supra,* at 24, 103 S.Ct. 927, and the "fundamental principle that arbitration is a matter of contract," *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. ——, ——, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010). In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), and enforce them according to their terms, *Volt Information Sciences, Inc. v.* ****1746** *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

[3] **[4]** The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); see also *Perry v. Thomas,* 482 U.S. 483, 492–493, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987).

***340** The question in this case is whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule.

[5] Under California law, courts may refuse to enforce any contract found "to have been unconscionable at the time it was made," or may "limit the application of any unconscionable clause." Cal. Civ.Code Ann. § 1670.5(a) (West 1985). A finding of unconscionability requires "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Armendariz v. Foundation Health Pyschcare Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669, 690 (2000); accord, *Discover Bank,* 36 Cal.4th, at 159–161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108.

In *Discover Bank,* the California Supreme Court applied this framework to class-action waivers in arbitration agreements and held as follows:

> "[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *Id.,* at 162, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110 (quoting Cal. Civ.Code Ann. § 1668).

California courts have frequently applied this rule to find arbitration agreements unconscionable. See, *e.g., Cohen v. DirecTV, Inc.*, 142 Cal.App.4th 1442, 1451–1453, 48 Cal.Rptr.3d 813, 819–821 (2006); *Klussman v. Cross Country* ***341** *Bank,* 134 Cal.App.4th 1283, 1297, 36 Cal.Rptr.3d 728, 738–739 (2005); *Aral v. EarthLink, Inc.*, 134 Cal.App.4th 544, 556–557, 36 Cal.Rptr.3d 229, 237–239 (2005).

III

A

The Concepcions argue that the *Discover Bank* rule, given its origins in California's unconscionability doctrine and California's policy against exculpation, is a ground that "exist[s] at law or in equity for the revocation of any contract" under FAA § 2. Moreover, they argue that even if we construe the *Discover Bank* rule as a prohibition on collective-action waivers rather than simply an application of unconscionability, the rule would still be applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well. See *America Online, Inc. v. Superior* ****1747** *Ct.,* 90 Cal.App.4th 1, 17–18, 108 Cal.Rptr.2d 699, 711–713 (2001).

[6] **[7]** When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer,* 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In *Perry v. Thomas,* 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), for example, we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist " 'at law or in equity for the revocation of any contract.' " *Id.,* at 492, n. 9, 107 S.Ct. 2520 (emphasis deleted). We said that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot." *Id.,* at 493, n. 9, 107 S.Ct. 2520.

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy ***342** consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank.* A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. See *Discover Bank, supra,* at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1109 (arguing that class waivers are similarly one-sided). And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to "any" contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.

Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed "a panel of twelve lay arbitrators" to help avoid preemption). Such examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in "a great variety" of "devices and formulas" declaring arbitration against public policy. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F.2d 402, 406 (C.A.2 1959). And although these statistics are not definitive, it is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts. Broome, An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L.J. 39, 54, 66 (2006); Randall, ***343** Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 Buffalo L.Rev. 185, 186–187 (2004).

The Concepcions suggest that all this is just a parade of horribles, and no genuine worry. "Rules aimed at destroying arbitration" or "demanding procedures

incompatible with arbitration," they concede, **1748 "would be preempted by the FAA because they cannot sensibly be reconciled with Section 2." Brief for Respondents 32. The "grounds" available under § 2's saving clause, they admit, "should not be construed to include a State's mere preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.' " *Id.,* at 33 (quoting *Carter v. SSC Odin Operating Co., LLC,* 237 Ill.2d 30, 50, 340 Ill.Dec. 196, 927 N.E.2d 1207, 1220 (2010)). [4]

[8] **[9]** We largely agree. Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. Cf. *Geier v. American Honda Motor Co.,* 529 U.S. 861, 872, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000); *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 372–373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). As we have said, a federal statute's saving clause " 'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.' " *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.,* 524 U.S. 214, 227–228, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) (quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 446, 27 S.Ct. 350, 51 L.Ed. 553 (1907)).

*344 We differ with the Concepcions only in the application of this analysis to the matter before us. We do not agree that rules requiring judicially monitored discovery or adherence to the Federal Rules of Evidence are "a far cry from this case." Brief for Respondents 32. The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

B

[10] The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt,* 489 U.S., at 478, 109 S.Ct. 1248; see also *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. ——, ——, 130 S.Ct. 1758, 1763, 176 L.Ed.2d 605 (2010). This purpose is readily apparent from the FAA's text. Section 2 makes arbitration agreements "valid, irrevocable, and enforceable" as written (subject, of course, to the saving clause); § 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims "in accordance with the terms of the agreement"; and § 4 requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement (assuming that the "making of the arbitration agreement or the failure ... to perform the same" is not at issue). In light of these provisions, we have held that parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), **1749 to arbitrate according to specific rules, *Volt, supra,* at 479, 109 S.Ct. 1248, and to limit *with whom* a party will arbitrate its disputes, *Stolt–Nielsen, supra,* at ——, 130 S.Ct. at 1773.

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, *345 for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, ——, 129 S.Ct. 1456, 1460, 173 L.Ed.2d 398 (2009); *Mitsubishi Motors Corp., supra,* at 628, 105 S.Ct. 3346.

The dissent quotes *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 219, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985), as " 'reject[ing] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.' " *Post,* at 4 (opinion of BREYER, J.). That is greatly misleading. After saying (accurately enough) that "the overriding goal of the Arbitration Act was [not] to promote the expeditious resolution of claims," but to "ensure judicial enforcement of privately made agreements to arbitrate," 470 U.S., at 219, 105 S.Ct. 1238, *Dean Witter* went on to explain: "This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it ...." *Id.,* at 220, 105 S.Ct. 1238. It then quotes a House Report saying that "the costliness and delays of litigation ... can be largely eliminated by agreements for

arbitration." *Ibid.* (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 2 (1924)). The concluding paragraph of this part of its discussion begins as follows:

> "We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the drafters." 470 U.S., at 221, 105 S.Ct. 1238.

In the present case, of course, those "two goals" do not conflict—and it is the dissent's view that would frustrate *both* of them.

Contrary to the dissent's view, our cases place it beyond dispute that the FAA was designed to promote arbitration. ***346** They have repeatedly described the Act as "embod[ying] [a] national policy favoring arbitration," *Buckeye Check Cashing,* 546 U.S., at 443, 126 S.Ct. 1204, and "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone,* 460 U.S., at 24, 103 S.Ct. 927; see also *Hall Street Assocs.,* 552 U.S., at 581, 128 S.Ct. 1396. Thus, in *Preston v. Ferrer,* holding preempted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,' " which objective would be "frustrated" by requiring a dispute to be heard by an agency first. 552 U.S., at 357–358, 128 S.Ct. 978. That rule, we said, would "at the least, hinder speedy resolution of the controversy." *Id.,* at 358, 128 S.Ct. 978. [5]

****1750** California's *Discover Bank* rule similarly interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.* The rule is limited to adhesion contracts, *Discover Bank,* 36 Cal.4th, at 162–163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110, but the times in which consumer contracts were anything ***347** other than adhesive are long past. [6] *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir.2004); see also *Hill v. Gateway 2000, Inc.,* 105 F.3d 1147, 1149 (C.A.7 1997). The rule also requires that damages be predictably small, and that the consumer allege a scheme to cheat consumers. *Discover Bank, supra,* at 162–163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. The former requirement, however, is toothless and malleable (the Ninth Circuit has held that damages of $4,000 are sufficiently small, see *Oestreicher v. Alienware Corp.,* 322 Fed.Appx. 489, 492 (2009) (unpublished)), and the latter has no limiting effect, as all that is required is an allegation. Consumers remain free to bring and resolve their disputes on a bilateral basis under *Discover Bank,* and some may well do so; but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.

Although we have had little occasion to examine classwide arbitration, our decision in *Stolt–Nielsen* is instructive. In that case we held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation. 559 U.S., at ——, 130 S.Ct. at 1773–1776. We then held that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Id.,* at ——, 130 S.Ct. at 1776. This is obvious as a ***348** structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that ****1751** class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

[11] First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." 559 U.S., at ——, 130 S.Ct. at 1775. But

before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted. A cursory comparison of bilateral and class arbitration illustrates the difference. According to the American Arbitration Association (AAA), the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only. AAA, Analysis of the AAA's Consumer Arbitration Caseload, online at http://www.adr.org/ si.asp?id=5027 (all Internet materials as visited Apr. 25, 2011, and available in Clerk of Court's case file). As of September 2009, the AAA had opened 283 class arbitrations. Of those, 121 remained active, and 162 had been settled, withdrawn, or dismissed. Not a single one, however, had ***349** resulted in a final award on the merits. Brief for AAA as *Amicus Curiae* in *Stolt–Nielsen,* O.T.2009, No. 08–1198, pp. 22–24. For those cases that were no longer active, the median time from filing to settlement, withdrawal, or dismissal—not judgment on the merits—was 583 days, and the mean was 630 days. *Id.,* at 24. [7]

[12] Second, class arbitration *requires* procedural formality. The AAA's rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. Compare AAA, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), online at http://www.adr.org/ sp.asp? id=21936, with Fed. Rule Civ. Proc. 23. And while parties can alter those procedures by contract, an alternative is not obvious. If procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811–812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration.

We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in *Discover Bank,* class arbitration is a "relatively recent development." 36 Cal.4th, at 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. And it ****1752** is at the very ***350** least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied.

Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, see, *e.g., Kohen v. Pacific Inv. Management Co. LLC,* 571 F.3d 672, 677–678 (C.A.7 2009), and class arbitration would be no different.

Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing ... 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 if the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award ... was not made." The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct ***351** rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. *Hall Street Assocs.,* 552 U.S., at 578, 128 S.Ct. 1396. We find it hard to believe that defendants would bet the company with no effective means of review, and even

harder to believe that Congress would have intended to allow state courts to force such a decision. [8]

[13] The Concepcions contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the Concepcions admit States may not superimpose on arbitration: Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. *Rent–A–* ****1753** *Center, West,* 561 U.S., at ——, 130 S.Ct. 2772, 2774. But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.

The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. See *post,* at 9. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT & T will ***352** pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT & T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be "essentially guarantee[d]" to be made whole, 584 F.3d, at 856, n. 9. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT & T than they would have been as participants in a class action, which " could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Laster,* 2008 WL 5216255, at *12.

* * *

Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941), California's *Discover Bank* rule is preempted by the FAA. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

Section 2 of the Federal Arbitration Act (FAA) provides that an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The question here is whether California's *Discover Bank* rule, see *Discover Bank v. Superior Ct.,* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), is a "groun[d] ... for the revocation of any contract."

It would be absurd to suggest that § 2 requires only that a defense apply to "any contract." If § 2 means anything, it ***353** is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to "any contract." There must be some additional limit on the contract defenses permitted by § 2. Cf. *ante,* at 17 (opinion of the Court) (state law may not require procedures that are "not arbitration as envisioned by the FAA" and "lac[k] its benefits"); *post,* at 5 (BREYER, J., dissenting) (state law may require only procedures that are "consistent with the use of arbitration").

I write separately to explain how I would find that limit in the FAA's text. As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress. 9 U.S.C. §§ 2, 4. Under this reading, I would reverse the Court of Appeals because a district court cannot follow both the FAA and the *Discover Bank* rule, which does not relate to defects in the making of an agreement.

****1754** This reading of the text, however, has not been fully developed by any party, cf. Brief for Petitioner 41, n. 12, and could benefit from briefing and argument in an appropriate case. Moreover, I think that the Court's test will often lead to the same outcome as my textual interpretation and that, when possible, it is important in interpreting statutes to give lower courts guidance from a majority of the Court. See *US Airways, Inc. v. Barnett,* 535 U.S. 391, 411, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002) (O'Connor, J., concurring). Therefore, although I adhere

to my views on purposes-and-objectives pre-emption, see *Wyeth v. Levine,* 555 U.S. 555, ——, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (opinion concurring in judgment), I reluctantly join the Court's opinion.

I

The FAA generally requires courts to enforce arbitration agreements as written. Section 2 provides that "[a] written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... shall ***354** be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Significantly, the statute does not parallel the words "valid, irrevocable, and enforceable" by referencing the grounds as exist for the " invalidation, revocation, or nonenforcement" of any contract. Nor does the statute use a different word or phrase entirely that might arguably encompass validity, revocability, and enforce-ability. The use of only "revocation" and the conspicuous omission of "invalidation" and "nonenforcement" suggest that the exception does not include all defenses applicable to any contract but rather some subset of those defenses. See *Duncan v. Walker,* 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute" (internal quotation marks omitted)).

Concededly, the difference between revocability, on the one hand, and validity and enforceability, on the other, is not obvious. The statute does not define the terms, and their ordinary meanings arguably overlap. Indeed, this Court and others have referred to the concepts of revocability, validity, and enforceability interchangeably. But this ambiguity alone cannot justify ignoring Congress' clear decision in § 2 to repeat only one of the three concepts.

To clarify the meaning of § 2, it would be natural to look to other portions of the FAA. Statutory interpretation focuses on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

Examining the broader statutory scheme, § 4 can be read to clarify the scope of § 2's exception to the enforcement of ***355** arbitration agreements. When a party seeks to enforce an arbitration agreement in federal court, § 4 requires that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," the court must order arbitration "in accordance with the terms of the agreement."

Reading §§ 2 and 4 harmoniously, the "grounds ... for the revocation" preserved in § 2 would mean grounds related to the ****1755** making of the agreement. This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403–404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (interpreting § 4 to permit federal courts to adjudicate claims of "fraud in the inducement of the arbitration clause itself" because such claims "g[o] to the 'making' of the agreement to arbitrate"). Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause. [*]

***356** II

Under this reading, the question here would be whether California's *Discover Bank* rule relates to the making of an agreement. I think it does not.

In *Discover Bank,* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100, the California Supreme Court held that "class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory." *Id.,* at 65, 30 Cal.Rptr.3d 76, 113 P.3d, at 1112; see also *id.,* at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108 ("[C]lass action waivers [may be] substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy"). The court concluded that where a class-action waiver is found in an arbitration agreement in certain consumer contracts of adhesion, such waivers "should not be enforced." *Id.,*

at 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. In practice, the court explained, such agreements "operate to insulate a party from liability that otherwise would be imposed under California law." *Id.,* at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108, 1109. The court did not conclude that a customer would sign such an agreement only if under **1756 the influence of fraud, duress, or delusion.

The court's analysis and conclusion that the arbitration agreement was exculpatory reveals that the *Discover Bank* rule does not concern the making of the arbitration agreement. Exculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy. *357 15 G. Giesel, Corbin on Contracts §§ 85.1, 85.17, 85.18 (rev. ed.2003). Indeed, the court explained that it would not enforce the agreements because they are " 'against the policy of the law.' " 36 Cal.4th, at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108 (quoting Cal. Civ.Code Ann. § 1668); see also 36 Cal.4th, at 166, 30 Cal.Rptr.3d 76, 113 P.3d, at 1112 ("Agreements to arbitrate may not be used to harbor terms, conditions and practices that undermine public policy" (internal quotation marks omitted)). Refusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made.

Accordingly, the *Discover Bank* rule is not a "groun[d] ... for the revocation of any contract" as I would read § 2 of the FAA in light of § 4. Under this reading, the FAA dictates that the arbitration agreement here be enforced and the *Discover Bank* rule is pre-empted.

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The Federal Arbitration Act says that an arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added). California law sets forth certain circumstances in which "class action waivers" in *any* contract are unenforceable. In my view, this rule of state law is consistent with the federal Act's language and primary objective. It does not "stan[d] as an obstacle" to the Act's "accomplishment and execution." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). And the Court is wrong to hold that the federal Act pre-empts the rule of state law.

I

The California law in question consists of an authoritative state-court interpretation of two provisions of the California Civil Code. The first provision makes unlawful all contracts "which have for their object, directly or indirectly, to exempt anyone from responsibility for his own ... violation of law." *358 Cal. Civ.Code Ann. § 1668 (West 1985). The second provision authorizes courts to "limit the application of any unconscionable clause" in a contract so "as to avoid any unconscionable result." § 1670.5(a).

The specific rule of state law in question consists of the California Supreme Court's application of these principles to hold that "some" (but not "all") "class action waivers" in consumer contracts are exculpatory and unconscionable under California "law." *Discover Bank v. Superior Ct.*, 36 Cal.4th 148, 160, 162, 30 Cal.Rptr.3d 76, 113 P.3d 1100, 1108, 1110 (2005). In particular, in *Discover Bank* the California Supreme Court stated that, when a class-action waiver

> "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury **1757 to the person or property of another.' " *Id.,* at 162–163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110.

In such a circumstance, the "waivers are unconscionable under California law and should not be enforced." *Id.,* at 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110.

The *Discover Bank* rule does not create a "blanket policy in California against class action waivers in the consumer context." *Provencher v. Dell, Inc.,* 409 F.Supp.2d 1196, 1201 (C.D.Cal.2006). Instead, it represents the "application of a more general [unconscionability] principle." *Gentry v. Superior Ct.*, 42 Cal.4th 443, 457, 64 Cal.Rptr.3d 773, 165 P.3d 556, 564 (2007). Courts applying California law have enforced class-action waivers where they satisfy general unconscionability standards. See, *e.g.,* *359 *Walnut Producers of Cal.*

v. Diamond Foods, Inc., 187 Cal.App.4th 634, 647–650, 114 Cal.Rptr.3d 449, 459–462 (2010); *Arguelles–Romero v. Superior Ct.*, 184 Cal.App.4th 825, 843–845, 109 Cal.Rptr.3d 289, 305–307 (2010); *Smith v. Americredit Financial Servs., Inc.,* No. 09cv1076, 2009 WL 4895280 (S.D.Cal., Dec.11, 2009); cf. *Provencher, supra,* at 1201 (considering *Discover Bank* in choice-of-law inquiry). And even when they fail, the parties remain free to devise other dispute mechanisms, including informal mechanisms, that, in context, will not prove unconscionable. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

II

A

The *Discover Bank* rule is consistent with the federal Act's language. It "applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements." 36 Cal.4th, at 165–166, 30 Cal.Rptr.3d 76, 113 P.3d, at 1112. Linguistically speaking, it falls directly within the scope of the Act's exception permitting courts to refuse to enforce arbitration agreements on grounds that exist "for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). The majority agrees. *Ante,* at 9.

B

The *Discover Bank* rule is also consistent with the basic "purpose behind" the Act. *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 219, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). We have described that purpose as one of "ensur[ing] judicial enforcement" of arbitration agreements. *Ibid.;* see also *Marine Transit Corp. v. Dreyfus,* 284 U.S. 263, 274, n. 2, 52 S.Ct. 166, 76 L.Ed. 282 (1932) (" 'The purpose of this bill is to make *valid and enforceable* agreements for arbitration' " (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924); emphasis added)); 65 Cong. Rec.1931 (1924) ("It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in ***360** admiralty contracts"). As is well known, prior to the federal Act, many courts expressed hostility to arbitration, for example by refusing to order specific performance of agreements to arbitrate. See S.Rep. No. 536, 68th Cong., 1st Sess., 2 (1924). The Act sought to eliminate that hostility by placing agreements to arbitrate " '*upon the same footing as other contracts.*' " *Scherk v. Alberto–Culver Co.,* 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) (quoting H.R.Rep. No. 96, at 2; emphasis added).

Congress was fully aware that arbitration could provide procedural and cost advantages. The House Report emphasized the "appropriate[ness]" of making arbitration ****1758** agreements enforceable "at this time when there is so much agitation against the costliness and delays of litigation." *Id.,* at 2. And this Court has acknowledged that parties may enter into arbitration agreements in order to expedite the resolution of disputes. See *Preston v. Ferrer,* 552 U.S. 346, 357, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (discussing "prime objective of an agreement to arbitrate"). See also *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

But we have also cautioned against thinking that Congress' primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the "enforcement" of agreements to arbitrate. *Dean Witter,* 470 U.S., at 221, 105 S.Ct. 1238. See also *id.,* at 219, 105 S.Ct. 1238 (we "reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims"); *id.,* at 219, 217–218, 105 S.Ct. 1238 ("[T]he intent of Congress" requires us to apply the terms of the Act without regard to whether the result would be "possibly inefficient"); cf. *id.,* at 220, 105 S.Ct. 1238 (acknowledging that "expedited resolution of disputes" might lead parties to prefer arbitration). The relevant Senate Report points to the Act's basic purpose when it says that "[t]he purpose of the [Act] is *clearly set forth in section 2,*" S.Rep. No. 536, at 2 (emphasis added), namely, the section that says that an arbitration agreement "shall be valid, irrevocable, ***362** and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2.

Thus, insofar as we seek to implement Congress' intent, we should think more than twice before invalidating a state law that does just what § 2 requires, namely, puts

agreements to arbitrate and agreements to litigate "upon the same footing."

III

The majority's contrary view (that *Discover Bank* stands as an "obstacle" to the accomplishment of the federal law's objective, *ante,* at 9–18) rests primarily upon its claims that the *Discover Bank* rule increases the complexity of arbitration procedures, thereby discouraging parties from entering into arbitration agreements, and to that extent discriminating in practice against arbitration. These claims are not well founded.

For one thing, a state rule of law that would sometimes set aside as unconscionable a contract term that forbids class arbitration is not (as the majority claims) like a rule that would require "ultimate disposition by a jury" or "judicially monitored discovery" or use of "the Federal Rules of Evidence." *Ante,* at 8, 9. Unlike the majority's examples, class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere. See, *e.g., Keating v. Superior Ct.*, 109 Cal.App.3d 784, 167 Cal.Rptr. 481, 492 (1980) (officially depublished); American Arbitration Association (AAA), Supplementary Rules for Class Arbitrations (2003), http://www.adr.org/sp.asp?id=21936 (as visited Apr. 25, 2011, and available in Clerk of Court's case file); JAMS, The Resolution Experts, Class Action Procedures (2009). Indeed, the AAA has told us that it has found class arbitration to be "a fair, balanced, and efficient means of resolving class disputes." Brief for AAA as *Amicus Curiae* in *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,* O.T.2009, No. 08–1198, p. 25 (hereinafter AAA *Amicus* Brief). And unlike the majority's examples, the *Discover Bank* rule imposes equivalent limitations on litigation; hence it cannot ****1759** fairly be characterized as a targeted attack on arbitration.

Where does the majority get its contrary idea—that individual, rather than class, arbitration is a "fundamental attribut[e]" of arbitration? *Ante,* at 9. The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.

When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power. See *Mitsubishi Motors, supra,* at 646, 105 S.Ct. 3346 (Stevens, J., dissenting); Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 15 (1924); Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9–10 (1923); Dept. of Commerce, Secretary Hoover Favors Arbitration—Press Release (Dec. 28, 1925), Herbert Hoover Papers—Articles, Addresses, and Public Statements File—No. 536, p. 2 (Herbert Hoover Presidential Library); Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L.Rev. 265, 281 (1926); AAA, Year Book on Commercial Arbitration in the United States (1927). This last mentioned feature of the history —roughly equivalent bargaining power—suggests, if anything, that California's statute is consistent with, and indeed may help to further, the objectives that Congress had in mind.

Regardless, if neither the history nor present practice suggests that class arbitration is fundamentally incompatible with arbitration itself, then on what basis can the majority hold California's law pre-empted?

***363** For another thing, the majority's argument that the *Discover Bank* rule will discourage arbitration rests critically upon the wrong comparison. The majority compares the complexity of class arbitration with that of bilateral arbitration. See *ante,* at 14. And it finds the former more complex. See *ibid.* But, if incentives are at issue, the *relevant* comparison is not "arbitration with arbitration" but a comparison between class arbitration and judicial class actions. After all, in respect to the relevant set of contracts, the *Discover Bank* rule similarly and equally sets aside clauses that forbid class procedures —whether arbitration procedures or ordinary judicial procedures are at issue.

Why would a typical defendant (say, a business) prefer a judicial class action to class arbitration? AAA statistics "suggest that class arbitration proceedings take more time than the average commercial arbitration, but may take *less time* than the average class action in court." AAA *Amicus* Brief 24 (emphasis added). Data from California courts confirm that class arbitrations can take considerably less

time than in-court proceedings in which class certification is sought. Compare *ante,* at 14 (providing statistics for class arbitration), with Judicial Council of California, Administrative Office of the Courts, Class Certification in California: Second Interim Report from the Study of California Class Action Litigation 18 (2010) (providing statistics for class-action litigation in California courts). And a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution of disputes were all that mattered, then the *Discover Bank* rule would reinforce, ****1760** not obstruct, that objective of the Act.

The majority's related claim that the *Discover Bank* rule will discourage the use of arbitration because "[a]rbitration is poorly suited to ... higher stakes" lacks empirical support. *Ante,* at 16. Indeed, the majority provides no convincing reason to believe that parties are unwilling to submit High-Stake disputes to Arbitration. and There are numerous counterexamples. Loftus, Rivals Resolve Dispute Over Drug, Wall Street Journal, Apr. 16, 2011, p. B2 (discussing $500 million settlement in dispute submitted to arbitration); Ziobro, Kraft Seeks Arbitration In Fight With Starbucks Over Distribution, Wall Street Journal, Nov. 30, 2010, p. B10 (describing initiation of an arbitration in which the payout "could be higher" than $1.5 billion); Markoff, Software Arbitration Ruling Gives I.B.M. $833 Million From Fujitsu, N.Y. Times, Nov. 30, 1988, p. A1 (describing both companies as "pleased with the ruling" resolving a licensing dispute).

Further, even though contract defenses, *e.g.,* duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States. *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. ——, ——, 130 S.Ct. 2772, 2775 (2010) (arbitration agreements "may be invalidated by 'generally applicable contract defenses' " (quoting *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996))). A provision in a contract of adhesion (for example, requiring a consumer to decide very quickly whether to pursue a claim) might increase the speed and efficiency of arbitrating a dispute, but the State can forbid it. See, *e.g., Hayes v. Oakridge Home,* 122 Ohio St.3d 63, 67, 2009–Ohio–2054, ¶ 19, 908 N.E.2d 408, 412 ("Unconscionability is a ground for revocation of an arbitration agreement"); *In re Poly–America, L. P.,* 262 S.W.3d 337, 348 (Tex.2008) ("Unconscionable contracts, however—whether relating to arbitration or not—are unenforceable under Texas law"). The *Discover Bank* rule amounts to a variation on this theme. California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration. Cf. *Doctor's Associates, supra,* at 687. See also *ante,* at 4, n. (THOMAS, J., concurring) (suggesting that, under certain circumstances, California might remain free to apply its unconscionability doctrine).

***365** Because California applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision. If California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?

Regardless, the majority highlights the disadvantages of class arbitrations, as it sees them. See *ante,* at 15–16 (referring to the "greatly increase[d] risks to defendants"; the "chance of a devastating loss" pressuring defendants "into settling questionable claims"). But class proceedings have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. I suspect that it is true even here, for as the Court of Appeals recognized, AT & T can avoid the $7,500 payout (the payout that supposedly makes the Concepcions' arbitration worthwhile) simply by paying the claim's face value, such that "the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22." *Laster v. AT & T Mobility* ****1761** *LLC,* 584 F.3d 849, 855, 856 (C.A.9 2009).

What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim? See, *e.g., Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (C.A.7 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30"). In California's perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the $30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold). *Discover Bank* sets

forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to ***366** insulate an agreement's author from liability for its own frauds by "deliberately cheat[ing] large numbers of consumers out of individually small sums of money." 36 Cal.4th, at 162–163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. Why is this kind of decision—weighing the pros and cons of all class proceedings alike—not California's to make?

Finally, the majority can find no meaningful support for its views in this Court's precedent. The federal Act has been in force for nearly a century. We have decided dozens of cases about its requirements. We have reached results that authorize complex arbitration procedures. *E.g., Mitsubishi Motors,* 473 U.S., at 629, 105 S.Ct. 3346 (antitrust claims arising in international transaction are arbitrable). We have upheld nondiscriminatory state laws that slow down arbitration proceedings. *E.g., Volt Information Sciences,* 489 U.S., at 477–479, 109 S.Ct. 1248 (California law staying arbitration proceedings until completion of related litigation is not pre-empted). But we have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings. Cf. *Preston,* 552 U.S., at 355–356, 128 S.Ct. 978 (Act pre-empts state law that vests primary jurisdiction in state administrative board).

At the same time, we have repeatedly referred to the Act's basic objective as assuring that courts treat arbitration agreements "like all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 447, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). See also, *e.g., Vaden v. Discover Bank,* 556 U.S. 49, ——, 129 S.Ct. 1262, 1273–1274, 173 L.Ed.2d 206 (2009);; *Doctor's Associates, supra,* at 687, 116 S.Ct. 1652; *Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 281, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 483–484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *Perry v. Thomas,* 482 U.S. 483, 492–493, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987); *Mitsubishi Motors, supra,* at 627, 105 S.Ct. 3346. And we have recognized that "[t]o immunize an arbitration agreement from judicial challenge" on grounds applicable to all other contracts "would be to elevate it over other forms of contract." ***367** *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); see also *Marchant v. Mead–Morrison Mfg. Co.,* 252 N.Y. 284, 299, 169 N.E. 386, 391 (1929) (Cardozo, C.J.) ("Courts are not at liberty to shirk the process of [contractual] construction under the empire of a belief that arbitration is beneficent any more than they may shirk it if their belief happens to be the contrary"); Cohen & Dayton, 12 Va. L.Rev., at 276 (the Act "is no infringement upon the right of each State to decide for itself what ****1762** contracts shall or shall not exist under its laws").

These cases do not concern the merits and demerits of class actions; they concern equal treatment of arbitration contracts and other contracts. Since it is the latter question that is at issue here, I am not surprised that the majority can find no meaningful precedent supporting its decision.

IV

By using the words "save upon such grounds as exist at law or in equity for the revocation of any contract," Congress retained for the States an important role incident to agreements to arbitrate. 9 U.S.C. § 2. Through those words Congress reiterated a basic federal idea that has long informed the nature of this Nation's laws. We have often expressed this idea in opinions that set forth presumptions. See, *e.g., Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action"). But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State's action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California's law, not to strike it down. We do not honor federalist principles in their breach.

With respect, I dissent.

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All Citations

563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742, 79 USLW 4279, 161 Lab.Cas. P 10,368, 11 Cal. Daily Op. Serv. 4842, 2011 Daily Journal D.A.R. 5846, 52 Communications Reg. (P&F) 1179, 22 Fla. L. Weekly Fed. S 957

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The Conceptions' original contract was with Cingular Wireless. AT & T acquired Cingular in 2005 and renamed the company AT & T Mobility in 2007. *Laster v. AT & T Mobility LLC,* 584 F.3d 849, 852, n. 1 (C.A.9 2009).

2 That provision further states that "the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." App. to Pet. for Cert. 61a.

3 The guaranteed minimum recovery was increased in 2009 to $10,000. Brief for Petitioner 7.

4 The dissent seeks to fight off even this eminently reasonable concession. It says that to its knowledge "we have not ... applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings," *post,* at 10 (opinion of BREYER, J.), and that "we should think more than twice before invalidating a state law that ... puts agreements to arbitrate and agreements to litigate 'upon the same footing' " *post,* at 4–5.

5 Relying upon nothing more indicative of congressional understanding than statements of witnesses in committee hearings and a press release of Secretary of Commerce Herbert Hoover, the dissent suggests that Congress "thought that arbitration would be used primarily where merchants sought to resolve disputes of fact ... [and] possessed roughly equivalent bargaining power." *Post,* at 6. Such a limitation appears nowhere in the text of the FAA and has been explicitly rejected by our cases. "Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we [have] nevertheless held ... that agreements to arbitrate in that context are enforceable." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 33, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); see also *id.,* at 32–33, 111 S.Ct. 1647 (allowing arbitration of claims arising under the Age Discrimination in Employment Act of 1967 despite allegations of unequal bargaining power between employers and employees). Of course the dissent's disquisition on legislative history fails to note that it contains nothing—not even the testimony of a stray witness in committee hearings—that contemplates the existence of class arbitration.

6 Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.

7 The dissent claims that class arbitration should be compared to class litigation, not bilateral arbitration. *Post,* at 6–7. Whether arbitrating a class is more desirable than litigating one, however, is not relevant. A State cannot defend a rule requiring arbitration-by-jury by saying that parties will still prefer it to trial-by-jury.

8 The dissent cites three large arbitration awards (none of which stems from classwide arbitration) as evidence that parties are willing to submit large claims before an arbitrator. *Post,* at 7–8. Those examples might be in point if it could be established that the size of the arbitral dispute was predictable when the arbitration agreement was entered. Otherwise, all the cases prove is that arbitrators can give huge awards—which we have never doubted. The point is that in class-action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive. It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate.

* The interpretation I suggest would be consistent with our precedent. Contract formation is based on the consent of the parties, and we have emphasized that "[a]rbitration under the Act is a matter of consent." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

The statement in *Perry v. Thomas,* 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), suggesting that § 2 preserves all state-law defenses that "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," *id.,* at 493, n. 9, 107 S.Ct. 2520, is dicta. This statement is found in a footnote concerning a claim that the Court "decline[d] to address." *Id.,* at 493, n. 9, 107 S.Ct. 2520. Similarly, to the extent that statements in *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. ——, —— n. 1, 130 S.Ct. 2772, 2778 n. 1 (2010), can be read to suggest anything about the scope of state-law defenses under § 2, those statements are dicta, as well. This Court has never addressed the question whether the state-law "grounds" referred to in § 2 are narrower than those applicable to any contract.

Moreover, every specific contract defense that the Court has acknowledged is applicable under § 2 relates to contract formation. In *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), this Court said that fraud, duress, and unconscionability "may be applied to invalidate arbitration agreements without contravening § 2." All three defenses historically concern the making of an agreement. See *Morgan Stanley Capital*

Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 547, 128 S.Ct. 2733, 171 L.Ed.2d 607 (2008) (describing fraud and duress as "traditional grounds for the abrogation of [a] contract" that speak to "unfair dealing at the contract formation stage"); *Hume v. United States,* 132 U.S. 406, 411, 414, 10 S.Ct. 134, 33 L.Ed. 393 (1889) (describing an unconscionable contract as one "such as no man in his senses and not under delusion would make" and suggesting that there may be "contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception" (internal quotation marks omitted)).

End of Document

South Carolina Arbitration Certification Training

Cases, continued

Interstate Commerce

New Hope v. Paragon Builders – August 2008
Fred Bradley v. Brentwood Homes, Inc. - July 2012

Enforcement of Arbitration as a Consideration Separate from the Arbitration Clause and Arbitrability

South Carolina Public Service Authority v. Great Western Coal 437 S.E. 2d 22 - July 1993

Arbitrator loses jurisdiction after final award

McClatchy Newspapers v. Central Valley Typographical Union – Sept. 1982
Colonial Penn Insurance Co. v. the Omaha indemnity Company - Sept. 1991

Confirmation of Award

Hall Street Syllabus
Hall Street v. Mattel
Hall Street Breyer Dissent
Hall Street Stevens Dissent

Westlaw

667 S.E.2d 1
379 S.C. 620, 667 S.E.2d 1
(Cite as: 379 S.C. 620, 667 S.E.2d 1)

C

Court of Appeals of South Carolina.
NEW HOPE MISSIONARY BAPTIST CHURCH, Respondent,
v.
PARAGON BUILDERS, and Kenneth W. Rose, Defendants,
of whom Paragon Builders is the Appellant.

No. 4433.
Submitted May 1, 2008.
Decided Aug. 27, 2008.

Background: Church brought declaratory judgment action asking court to invalidate contract entered into on its behalf with builder. Builder filed motion to compel arbitration. The Circuit Court, Lancaster County, Brooks P. Goldsmith, J., denied builder's motion. Builder appealed.

Holdings: The Court of Appeals, Thomas, J., held that:
(1) the Federal Arbitration Act (FAA) applied to the arbitration agreement, and
(2) challenge to contract in its entirety did not preclude trial court from compelling arbitration.

Reversed.

Pieper, J., filed a dissenting opinion.

West Headnotes

[1] Alternative Dispute Resolution 25T ⚿200

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 k. Arbitrability of Dispute. Most Cited Cases

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination.

[2] Alternative Dispute Resolution 25T ⚿213(5)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) k. Scope and Standards of Review. Most Cited Cases

Appeal from the denial of a motion to compel arbitration is subject to de novo review.

[3] Alternative Dispute Resolution 25T ⚿213(5)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) k. Scope and Standards of Review. Most Cited Cases

A circuit court's factual findings on the issue of arbitrability will not be reversed on appeal if any evidence reasonably supports the findings.

[4] Alternative Dispute Resolution 25T ⚿114

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases

Commerce 83 ⚿80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases
Federal Arbitration Act (FAA) applied to the arbitration agreement in a construction management agreement for the construction of a new church facility, since the parties did not contract to the contrary, and the arbitration agreement pertained to a transaction involving interstate commerce due to the nature of the construction project, the builder's position as chief construction advisor, and builder's affidavit swearing the project would involve businesses and supplies from outside South Carolina, including working with out-of-state architect. 9 U.S.C.A. § 1 et seq.

[5] Alternative Dispute Resolution 25T ⚿205

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk205 k. In General. Most Cited Cases
Trial court was required to compel church to arbitrate its dispute with builder regarding existence, validity, and enforceability of their construction management contract, though arbitration agreement was part of the parties' contract, and church contended there was no valid enforceable contract between the parties due to a lack of meeting of the minds, ambiguity with regard to builder's obligations and the lack of authority of signatory parties to enter into contract on behalf of church, where church failed to make independent challenge to validity of the arbitration clause. 9 U.S.C.A. § 1 et seq.

[6] Alternative Dispute Resolution 25T ⚿112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or Consensual Basis. Most Cited Cases
Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.

[7] Alternative Dispute Resolution 25T ⚿199

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 k. Existence and Validity of Agreement. Most Cited Cases
When a party argues fraud in the inducement of an entire contract, but not the arbitration clause within the contract, arbitration cannot be avoided.

[8] Alternative Dispute Resolution 25T ⚿199

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 k. Existence and Validity of Agreement. Most Cited Cases

Alternative Dispute Resolution 25T ⚿211

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk211 k. Trial or Hearing. Most Cited Cases
A party may allege an arbitration agreement was never entered into and under such circumstances, a challenge to the existence of the arbitration agreement itself becomes a matter to be forth-

with and summarily tried by the court.

[9] Alternative Dispute Resolution 25T ⚿199

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 k. Existence and Validity of Agreement. Most Cited Cases

Alternative Dispute Resolution 25T ⚿200

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 k. Arbitrability of Dispute. Most Cited Cases
Gateway matters to be decided by courts, not arbitrators, include whether the parties have a valid arbitration agreement or whether a binding arbitration clause applies to a certain type of controversy.

[10] Alternative Dispute Resolution 25T ⚿200

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 k. Arbitrability of Dispute. Most Cited Cases
Determining whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract.

[11] Alternative Dispute Resolution 25T ⚿140

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk140 k. Severability. Most Cited Cases
Arbitration clauses are separable from the contracts in which they are imbedded.

[12] Alternative Dispute Resolution 25T ⚿140

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk140 k. Severability. Most Cited Cases
An arbitration clause's validity is distinct from the substantive validity of the contract as a whole.

[13] Alternative Dispute Resolution 25T ⚿140

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk140 k. Severability. Most Cited Cases
Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision.

[14] Alternative Dispute Resolution 25T ⚿113

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk113 k. Arbitration Favored; Public Policy. Most Cited Cases
The policies of the United States and the State favor arbitration of disputes.

[15] Alternative Dispute Resolution 25T ⚿114

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases
The Federal Arbitration Act (FAA) was designed to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate. 9 U.S.C.A.

§ 1 et seq.

[16] Alternative Dispute Resolution 25T 112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or Consensual Basis. Most Cited Cases
Where there has been no agreement to arbitrate, a party cannot be forced into compulsory arbitration.

**2 James Mixon Griffin, of Columbia, for Appellant.

Philip E. Wright, of Lancaster, for Respondent.

THOMAS, J.

*623 Paragon Builders appeals the trial court's denial of its motion to compel arbitration or dismiss the complaint of New Hope Missionary Baptist Church. We reverse.[FN1]

FN1. We decide this case without oral argument pursuant to Rule 215, SCACR.

FACTS

Paragon Builders, L.L.C. of Orangeburg, South Carolina, signed a contract with New Hope Missionary Baptist Church (Church) on or between September 30 and October 3, 2004. The two-page Contract was entitled a "Construction Management Agreement" wherein Paragon Builders avowed to help bring the construction of a new church facility "online" by working as "the chief construction advisor." Under the Contract, Paragon Builders pledged to work with the Church's architect in North Carolina, appointed church leaders, state and local building inspectors, local city and county governments,*624 utilities, bankers and others associated with the project.

Article 2 of the Contract, entitled "Time of Completion," contained an arbitration clause stating, "[a]ll disputes hereunder shall be resolved by binding arbitration in accordance with the rules of the American Arbitration Association." The Contract also provided that the Church would pay Paragon Builders twenty-five thousand dollars ($25,000) but that "if for any reason this project is not constructed by Paragon Builders all money will remain with the contractor" and the Church "will not receive any funds back." Payment of the entire $25,000 amount was due at the signing of the Contract.

The Contract was signed by Kenny W. Rose and Emoray R. Waiters, allegedly on behalf of the Church.[FN2] At some point, a payment of twenty-five thousand dollars was made from Church funds to Paragon Builders. Thereafter, the Church filed a declaratory judgment action asking the court to **3 determine the existence, validity, and enforceability of the Contract.

FN2. In the Record on Appeal, a single page bearing twenty-eight signatures has been attached to the Contract. The page bears no identifying marks or explanation regarding the identity of the twenty-eight signatories or why twenty-eight individuals signed the blank sheet of paper.

The Church's complaint raised numerous issues regarding the validity of the Contract, including the absence of any meeting of the minds, Paragon Builders' lack of consideration, and the ambiguity of the Contract with regard to Paragon Builders' obligations. The Church asserted the $25,000 payment and ensuing deposit were not authorized by the Church but was "the misguided action of the church financial secretary acting *ex officio.* " The complaint prayed for a refund of the $25,000 payment.

The complaint contended neither Rose [FN3] nor Waiters was a "trustee [ ] of the church nor were they authorized by the church to enter into any such contract." Waiters' signature was also claimed to be a forgery. The Church contended the *625 signatures on a blank page attached to the Contract were "simply a list of people who attended a meeting re-

garding the contract" and did not constitute a signature page which was part of the Contract. The Church asserted the Contract "was not approved by any vote of the church or any authorized committee or organization of the church" and as such does not bind the Church.

> FN3. The Church further explained that although Rose was the pastor when the Contract was signed, there was an ongoing dispute with Rose at that time, and "ninety-nine percent of the activity that related to this Contract took place directly between the pastor and the contractor," without any information being relayed to the Church.

Paragon Builders timely answered denying the Church was entitled to a declaratory judgment or a refund. The Answer also pled an affirmative defense pursuant to Rule 12(b)(6), SCRCP, that the Church failed to state a claim upon which relief can be granted, and that the Church's claims were subject to arbitration under the Contract.

On July 3, 2006, Paragon Builders filed a Motion to Compel Arbitration and Dismiss or Stay the Complaint. The motion was heard on October 9, 2006, and subsequently denied. The trial court held, "[u]nder the Federal Arbitration Act and S.C.Code Ann. § 15–48–10, before arbitration may be compelled, there must be a determination that there was an agreement between the parties," and this was the very issue the Church contested. The trial court further held, "until there is a determination by the Court as to whether or not the parties had an agreement, arbitration cannot be compelled." Paragon Builders now appeals.

STANDARD OF REVIEW

[1][2][3] Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Appeal from the denial of a motion to compel arbitration is subject to de novo review. *Chassereau v. Global Sun Pools, Inc.,* 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.,* 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct.App.2003).

LAW/ANALYSIS

Paragon Builders claims the trial court erred in denying its Motion to Compel Arbitration brought pursuant to ***626**Section 15– 48–20(a) of the South Carolina Code (2005). Specifically, Paragon Builders asserts the Contract's arbitration clause requires disputes arising out of the Contract be resolved through arbitration. Pursuant to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), and *The Housing Authority of City of Columbia v. Cornerstone Housing, L.L.C.,* 356 S.C. 328, 588 S.E.2d 617 (Ct.App.2003), we find the trial court erred in denying Paragon Builders' Motion to Compel Arbitration since the Church failed to specifically challenge the arbitration agreement.

Section 15–48–10(a) of the South Carolina Code (2005) states, "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the ***4** revocation of any contract." The Legislature also provided that:

> On application of a party showing an [arbitration] agreement described in § 15–48–10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

S.C.Code Ann. § 15–48–20(a) (2005). An order denying a motion to compel arbitration [FN4] made under Section 15–48–20 is immediately appealable. S.C.Code Ann. § 15–48–200(a)(1) (2005); *Towles v. United HealthCare Corp.,* 338 S.C. 29, 35, 524 S.E.2d 839, 842–43 (Ct.App.1999).

> FN4. This court also recently dealt with a motion to compel arbitration in *Partain v. Upstate Automotive Group,* 378 S.C. 152, 662 S.E.2d 426 (2008) (Shearouse Adv. Sh. No. 16 at 69).

[4] As a preliminary note, we find the trial court properly determined the Federal Arbitration Act ("FAA") applies to the arbitration agreement in this matter since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project, Paragon Builders' ***627** position as chief construction advisor, and Paragon Builders' affidavit swearing the project will involve businesses and supplies from outside South Carolina. *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 538–39, 542 S.E.2d 360, 363 (2001) ("Unless the parties have contracted to the contrary, the FAA applies in federal or state courts to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction."); *Episcopal Hous. Corp. v. Federal Ins. Co.,* 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) ("It would be virtually impossible to construct an eighteen (18) story apartment building between 1971 and 1973 with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina."); *Blanton v. Stathos,* 351 S.C. 534, 540–41, 570 S.E.2d 565, 568–69 (Ct.App.2002) (holding Blanton's affidavit asserting the contract affected interstate commerce, Stathos's failure to dispute the affidavit, and the nature of the construction project were sufficient to uphold the decision of the circuit court that the contract evinces a transaction involving interstate commerce); *Towles,* 338 S.C. at 36, 524 S.E.2d at 843 ("Because interstate commerce is involved, the FAA applies and displaces South Carolina's Uniform Arbitration Act.") (citing *Soil Remediation Co. v. Nu–Way Envtl., Inc.,* 323 S.C. 454, 459–60, 476 S.E.2d 149, 152 (1996)).

[5][6][7] Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); *Aiken v. World Fin. Corp. of S. C.,* 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *Chassereau v. Global Sun Pools, Inc.,* 373 S.C. 168, 171–72, 644 S.E.2d 718, 720 (2007). Since the Church contends a valid, enforceable contract does not exist, this is no doubt one reason why the trial court denied Paragon Builders' Motion to Compel Arbitration until the court could determine whether or not the parties had an agreement. However, further examination of case law from the United States Supreme Court and the South Carolina Supreme Court yields the surprising result that when a party argues fraud in the inducement of an entire contract, but not the arbitration agreement itself, arbitration cannot be avoided. ***628***Prima Paint,* 388 U.S. 395, 87 S.Ct. 1801; *S.C. Pub. Serv. Auth. v. Great Western Coal, Inc.,* 312 S.C. 559, 437 S.E.2d 22 (1993); *Jackson Mills, Inc. v. BT Capital Corp.,* 312 S.C. 400, 440 S.E.2d 877 (1994); *Cornerstone Hous.,* 356 S.C. 328, 588 S.E.2d 617 (Ct.App.2003).

[8] In *Prima Paint,* 388 U.S. at 403–04, 87 S.Ct. 1801, the United States Supreme Court held that general allegations of fraud in the inducement of a contract are insufficient to prevent the invocation of a contract's arbitration clause. The court referenced Section 4 [FN5] of the FAA and concluded that ****5** with respect to cases evidencing transactions in commerce:

> FN5. Section 4 provides in part, "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an

> order directing the parties to proceed to arbitration in accordance with the terms of the agreement ... [i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C.A. § 4 (2008).

if the claim is fraud in the inducement [FN6] of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it ... [b]ut the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

> FN6. The Church's complaint and brief to this court set forth arguments such as, an absence of any meeting of the minds, a lack of the signatories' ability to bind the Church, forgery, and failure of the Church to approve the Contract, all of which deal with fraud in factum, i.e., ineffective assent to the Contract. *Great Western Coal,* 312 S.C. at 562, 437 S.E.2d at 24.

388 U.S. at 403–04, 87 S.Ct. 1801. In *Great Western Coal, Inc.,* 312 S.C. at 562–63, 437 S.E.2d at 24 (emphasis added), the South Carolina Supreme Court explained how the rule of *Prima Paint* should be applied by our courts:

> We join the jurisdictions which have rejected limiting the holding in *Prima Paint.* We hold a party cannot avoid arbitration through rescission of the entire contract when there is no independent *challenge to the arbitration clause.* Fraud as a defense to an arbitration clause must be fraud ***629** specifically as to the arbitration clause and not the contract generally.

A party may allege the arbitration agreement was never entered into and "under such circumstances, a challenge to the existence of the arbitration agreement itself becomes a matter to be 'forthwith and summarily tried' by the Court." *Jackson Mills,* 312 S.C. at 404, 440 S.E.2d at 879 (citations omitted).

In its complaint, at the hearing, and in its brief to this court, the Church does not specifically allege the arbitration clause in the Contract is invalid, unenforceable, or does not exist. Instead, the Church argues it has numerous grounds on which *the Contract* is invalid and that "the Contract simply does not exist as a Contract" in part because of Rose's inability to bind the Church.

[9][10] We acknowledge the United States Supreme Court has identified certain limited circumstances in which "courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of 'clear and unmistakable' evidence to the contrary)." *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). These "gateway matters" include whether the parties have a valid arbitration agreement or whether a binding arbitration clause applies to a certain type of controversy. *Id.* However, in the present case we are not confronted with the question of whether an arbitration agreement encompasses a certain dispute [FN7] or whether the arbitration agreement is invalid. Instead, we have been presented with the question of whether arbitration should be compelled when a contract's validity has been challenged.

> FN7. "Determining whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract." *Towles,* 338 S.C. at 41, 524 S.E.2d at 846. Whether a particular claim is subject to arbitration has been examined in many cases, including, *Aiken,* 373 S.C. 144, 644 S.E.2d 705; *Chassereau,* 373 S.C. 168, 644 S.E.2d 718; *Zabinski,* 346 S.C. 580, 553 S.E.2d 110; *Timms v. Greene,* 310 S.C. 469, 427 S.E.2d 642 (1993); *Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co.,* 356 S.C. 202, 588 S.E.2d 136 (Ct.App.2003). This issue is not presently

before the court.

[11][12][13] Common sense implies that if a party challenged the validity of a contract which contained an arbitration clause, *630 the validity of the arbitration clause is also challenged. The courts have found otherwise. " Arbitration clauses are separable [FN8] from the **6 contracts in which they are imbedded." *Jackson Mills,* 312 S.C. at 403, 440 S.E.2d at 879 (citing *Prima Paint,* 388 U.S. at 402, 87 S.Ct. 1801). An arbitration clause's validity is distinct from the substantive validity of the contract as a whole. *Cornerstone Hous.,* 356 S.C. at 338, 588 S.E.2d at 622 (citing *Munoz,* 343 S.C. at 540, 542 S.E.2d at 364). "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." *Cornerstone Hous.,* 356 S.C. at 340, 588 S.E.2d at 623.

FN8. In *Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14, 644 S.E.2d 663 (2007), the South Carolina Supreme Court recently noted that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause especially in situations where " 'illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts.' " 373 S.C. at 34, 644 S.E.2d at 673. This situation is not presently before us since the Church has made no claims regarding the unconscionability of its Contract with Paragon Builders. The supreme court emphasized the importance of a case-by-case analysis to address unique circumstances surrounding the evaluation of an arbitration clause for unconscionability and further distinguished *Simpson* from cases such as the one *sub judice* by holding the arbitration clause in *Simpson* is unconscionable due to a multitude of one-sided terms. *Id.* at 36, 644 S.E.2d at 674.

[14][15] The policies of the United States and this State favor arbitration of disputes. *Stokes v. Metropolitan Life Ins. Co.,* 351 S.C. 606, 610–11, 571 S.E.2d 711, 713–14 (Ct.App.2002); *Tritech Elec., Inc. v. Frank M. Hall & Co.,* 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct.App.2000) (citation omitted); *Towles,* 338 S.C. at 37, 524 S.E.2d at 844. "The FAA was designed 'to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate.' " *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (citation omitted). The Church's argument that the entire Contract is invalid can be considered at the arbitration itself. *Cornerstone Hous.,* 356 S.C. at 340, 588 S.E.2d at 623; *see Bazzle,* 539 U.S. 444, 453, 123 S.Ct. 2402 (noting arbitrators are well *631 suited to address issues such as contract interpretation and arbitration procedures).

[16] We further acknowledge that "where there has been no agreement to arbitrate, a party cannot be forced into compulsory arbitration." *Hilton Head Resort Four Seasons Ctr. Horizontal Prop. Regime Council v. Resort Inv. Corp.,* 311 S.C. 394, 397–98, 429 S.E.2d 459, 462 (Ct.App.1993) (citation omitted). Again, precedent forces a distinction to be drawn between disputes in which a party challenges the arbitration agreement itself and disputes in which only the overall contract is challenged. *See Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (holding the trial court was the proper forum for determining the enforceability of the arbitration clause in the contract because "[a]lthough the clause specifically stated that arbitration applied to issues involving 'the validity and scope of this contract,' Simpson challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place"); *Cornerstone Hous.,* 356 S.C. at 338–42, 588 S.E.2d at 622–24 (holding because a party did not directly challenge the arbitration agreement in either of the two contracts, the legality and enforceability of the contracts is an is-

sue for the arbitrator to decide). Indeed, even Section 15–48–20(a) of the South Carolina Code (2005) notes when a party presents a court with an arbitration agreement and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration unless "the opposing party denies the existence of the *agreement to arbitrate.* " S.C.Code Ann. § 15–48–20(a) (2005) (emphasis added). Unlike the cases argued by the Church, the matter presently before us does not raise the issue of whether the arbitration clause in Article 2 of the Contract is invalid. Accordingly, the order of the trial court is

REVERSED.

WILLIAMS, J., concurs.
PIEPER, J., dissents in a separate opinion.

***632** PIEPER, J., dissenting.

I respectfully dissent. In my opinion, this case involves more than a situation where a party alleges fraud in the inducement of just the contract itself, as opposed to challenging the arbitration provision of the contract. I believe the Church has raised a colorable claim that there was no arbitration agreement****7** by alleging the signer of the agreement had neither the authority to agree to the contract itself, nor the authority to agree to the arbitration provision.

I fully support the policy in favor of arbitration and will not resort to citation of the law in this regard. I believe the majority opinion fully recounts the applicable law. However, the majority notes that where there has been no agreement to arbitrate, a party cannot be forced to do so. I believe further clarification of the law in this area is necessary. Based on the facts of this case, I find it very problematic that a person, without authority, may set out to not only bind another to a contract, but also to arbitration without the right to do so, and without a preliminary court determination on the issue of the authority to bind (i.e. the existence of the agreement to arbitrate). Under the facts herein, I respectfully believe this case falls within that type of "gateway matter" ripe for a judicial determination as to the existence of the agreement to arbitrate. *See Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (stating where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place); *see also* 9 U.S.C.A. § 4 (2008) (wherein the Federal Arbitration Act directs the court to summarily determine the existence of the arbitration agreement if it is at issue); *accord* S.C.Code Ann. § 15–48–20(a) (2005).

Moreover, the circuit court did not rule that arbitration may not eventually result; instead, the court concluded that a preliminary and threshold determination must be made about the existence of an agreement to arbitrate. Once that threshold determination is made, I do not read the court's order as precluding arbitration if the issue as to the authority to enter the agreement to arbitrate is determined adversely to the ***633** Church. Therefore, I agree with the assertion by the Church in its brief that the appeal is premature.

Accordingly, I would affirm.

S.C.App.,2008.
New Hope Missionary Baptist Church v. Paragon Builders
379 S.C. 620, 667 S.E.2d 1

END OF DOCUMENT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Fred Bradley, Respondent,

v.

Brentwood Homes, Inc., Brentwood Homes-Limehouse, LLC, Brentwood Homes-The Retreat at Johns Island, LLC, Brentwood Homes of South Carolina, Inc., Brentwood Homes of North Carolina, Inc., Brentwood Homes of Myrtle Beach, Inc., Brentwood Homes of Low Country, Inc., Brentwood Homes of Fort Mill, Inc., Brentwood Homes of Beaufort-Bluffton, Inc., Harris Street, LLC, Crescent Homes of SC, Inc., Brentwood Homes Incorporated, a Georgia Corporation, Appellants.

Appellate Case No. 2010-163350

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27143
Heard May 22, 2012 – Filed July 11, 2012

AFFIRMED

Robert T. Lyles, Jr. of Charleston, for Appellants.

W. W. DesChamps, Jr. and William Wayne DesChamps, III, both of Myrtle Beach, SC, for Respondent.

JUSTICE BEATTY: Brentwood Homes, Inc. and the other appellants (collectively "Brentwood Homes") appeal the circuit court's order denying a

motion to stay the proceedings and compel arbitration in a lawsuit filed by Fred Bradley that arose out of his purchase of a home in South Carolina. Although Brentwood Homes concedes the Home Purchase Agreement does not meet the technical requirements of the South Carolina Uniform Arbitration Act (the "UAA"),[1] it claims the court erred in denying the motion because the transaction involved interstate commerce and, thus, was subject to the Federal Arbitration Act ("FAA").[2] We affirm.

I. Factual/Procedural History

On January 31, 2007, Bradley and Brentwood Homes entered into a Home Purchase Agreement (the "Agreement") for the purchase of a home located in North Myrtle Beach, South Carolina. In the Agreement, Bradley and his wife were designated as the purchasers and Brentwood Homes was designated as the seller. Pursuant to the Agreement, Bradley agreed to purchase a completed dwelling wherein Brentwood Homes acted as a seller of the completed dwelling rather than as a contractor for the construction of the dwelling.[3] The closing of the home took place on March 2, 2007.

On July 31, 2009, Bradley initiated a lawsuit against Brentwood Homes in which he alleged numerous construction defects in the dwelling. In his Complaint, Bradley identified causes of action for fraud, negligence, and breach of implied warranty.

After six months of discovery requests by Bradley, Brentwood Homes filed an Amended Answer and Counterclaim on February 5, 2010. In this responsive

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[1] S.C. Code Ann. §§ 15-48-10 to -240 (2005 & Supp. 2011).

[2] 9 U.S.C.A. §§ 1-16 (2009 & Supp. 2012).

[3] Section 22H states:

> It is understood that Purchaser is buying a completed dwelling and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling. Purchaser will acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Agreement upon the completion of the dwelling.

pleading, Brentwood Homes claimed the circuit court did not have jurisdiction to rule on Bradley's lawsuit as the Agreement provided for arbitration. Brentwood Homes concurrently filed a motion to stay the proceedings and compel arbitration.

In support of this motion, Brentwood Homes referenced subsection 14G in the Agreement, which provides in relevant part:

> **Mandatory Binding Arbitration.**[4] Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home, (2) Seller's performance under any Punch List or Inspection Agreement, (3) Seller's performance under any warranty contained in this Agreement or otherwise, and (4) any matters as to which Purchaser and Seller agree to arbitrate.

Alternatively, Brentwood Homes claimed that even if the arbitration provision in the Agreement did not comply with the requirements of the UAA,[5] it was subject to the FAA as the transaction involved interstate commerce. Specifically, Brentwood Homes claimed the Agreement "on its face involves interstate commerce" as it provides that the Seller will purchase a warranty from 2-10 HBW Warranty,[6] or such other national warranty, and that claims would be submitted to the East Region of 2-10 HBW, which is located in Tucker, Georgia. Additionally, Brentwood Homes supplemented its motion with affidavits from

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[4] The second page of the Agreement also contained the following statement: "THIS CONTRACT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA or NORTH CAROLINA UNIFORM ARBITRATION ACT, WHICHEVER IS APPLICABLE."

[5] See S.C. Code Ann. § 15-48-10(a) (2005) ("Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.").

[6] Section 14C of the Agreement provides that the "2-10 HBW Warranty includes a provision requiring all disputes that arise under the 2-10 HBW Warranty to be submitted to binding arbitration."

Bradley and Edward M. Terry, who was the Vice-President of Brentwood Homes on January 31, 2007.[7] Bradley's affidavit established that the home purchase was financed by a North Carolina branch of JPMorgan Chase Bank & Co. In his affidavit, Terry attested that Brentwood Homes "used subcontractors, materials and suppliers from outside of the State of South Carolina" in the construction of Bradley's home.

At the hearing before the circuit court, Bradley initially opposed the motion to compel arbitration on the ground Brentwood Homes waived the right to assert the affirmative defense due to its delay in responding to discovery requests. Regarding the merits, Bradley claimed the arbitration clause in the Agreement did not satisfy the statutory requirements of the UAA as it was not on the first page of the Agreement and was not identified by capital letters and underlining. Alternatively, Bradley asserted the Agreement was not subject to the FAA because it was "just a general contract to purchase and sell the home" and, thus, did not involve interstate commerce. Bradley objected to Brentwood Homes' reliance on Terry's affidavit to support its claim that the transaction involved interstate commerce as Terry had no direct involvement with the home purchase. At the conclusion of the hearing, the court orally denied the motion to stay the proceedings and compel arbitration.

By written order, the court found the Agreement did not comply with the statutory requirements of the UAA. In turn, the court assessed whether the Agreement was subject to the FAA. In making this determination, the court considered the terms of the Agreement, the pleadings and motions, the affidavits and accompanying documents, and the arguments of counsel. The court found the Agreement "does not refer to equipment and materials to be furnished from outside the state of South Carolina, nor does it list any subcontractors which were outside the confines of this state." The court also discounted Terry's affidavit based on discovery responses, which indicated that Terry did not deal directly with Bradley. Ultimately, the court held the Agreement was not subject to the FAA as Brentwood Homes had "not submitted sufficient evidence to demonstrate that the transaction between [Bradley and Brentwood Homes] involved interstate commerce."

Brentwood Homes appealed the order to the Court of Appeals. This Court certified the appeal from the Court of Appeals pursuant to Rule 204(b), SCACR.

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[7] Terry later became President of Brentwood Homes, but resigned from this position in May 2009.

II. Discussion

A.

We begin our analysis with a general discussion of our appellate courts' interpretation and application of the FAA.

"Arbitrability determinations are subject to *de novo* review." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id.

Brentwood Homes concedes the Agreement does not meet the technical requirements of section 15-48-10(a) of the UAA as the arbitration provision is not underlined and does not appear on the first page of the contract. This concession, however, is not dispositive. Because an application of the South Carolina law would have rendered the parties' arbitration agreement completely unenforceable, consideration of the applicability of the FAA is required. The FAA is intended to ensure that arbitration will proceed in the event a state law would have preclusive effect on an otherwise valid arbitration agreement. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012) ("[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (quoting AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011))); Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) (stating that "the federal policy [of the FAA] is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate").

Thus, although the parties were free to agree that our state arbitration act would apply, the FAA would preempt an application of our state law to the extent it invalidated the arbitration agreement, if interstate commerce is involved. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001) ("While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate."); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539 n. 2, 542 S.E.2d 360, 363 n. 2 (2001) ("State law was therefore preempted *to the extent it would have invalidated the arbitration agreement.* The parties to a contract are otherwise free to agree that our state Arbitration Act will

apply and this agreement shall be enforceable even if interstate commerce is involved." (second emphasis added)); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (holding that FAA displaced South Carolina notice-requirement statute, which would have precluded arbitration, where parties agreed to arbitration and the transaction involved interstate commerce).

The FAA provides: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2. Therefore, in order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign. 2 S.C. Jur. Arbitration § 6 (Supp. 2012) ("Interstate commerce is a necessary basis for application of the federal act, and a contract or agreement not so predicated must be governed by state law. To activate application of the federal act, the commerce involved in the contract must be interstate or foreign.").

"The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)). "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57 (2003) (quoting Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948)). "Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration." Zabinski, 346 S.C. at 591, 553 S.E.2d at 115-16 (citing Volt, 489 U.S. at 478).

"To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Id. at 594, 553 S.E.2d at 117. "Our courts consistently look to the essential character of the contract when applying the FAA." Thornton v. Trident Med. Ctr., LLC, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct. App. 2003) (finding it was proper to "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was]

involved"). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999).

B.

As an initial matter, Brentwood Homes takes issue with the circuit court's decision regarding Terry's affidavit. Specifically, Brentwood Homes contends that the court did not consider Terry's affidavit. We find this contention to be without merit as the court did in fact consider Terry's affidavit as it noted in the order that it reviewed "the affidavits submitted at [the] hearing and attachments thereto."

C.

Turning to our assessment of whether the transaction involved interstate commerce, we must examine the terms of the Agreement, the Complaint, and the surrounding facts, which includes the affidavits of Terry and Bradley as well as accompanying financial documentation.

Based on this evidence, Brentwood Homes claims it established that the arbitration provision in the Agreement is enforceable under the FAA as the transaction involved interstate commerce. In support of this claim, Brentwood Homes relies on the following: (1) the terms of the Agreement, which specify that a national warranty company will be used to provide a structural warranty for Bradley's home and that any claims under the warranty will be submitted to an office in Georgia; (2) Terry's affidavit, which establishes that Bradley's residence was constructed using materials, subcontractors, and suppliers from outside of South Carolina; and (3) Bradley's affidavit, which indicates that he received financing for the home purchase from a North Carolina lender.

The analysis of this issue necessarily involves a discussion of the historical intrastate character of real estate transactions. Beginning in 1994, this Court recognized the unique nature of real estate transactions when it issued its decision in Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994), overruled on other grounds by Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539 n.3, 542 S.E.2d 360, 363 n.3 (2001) (overruling Mathews "to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied"). In Mathews, this Court held that interstate commerce was not involved in a contract for the sale of a commercial building located in South Carolina to out-of-state parties even though, incidental to the sale, the parties

utilized the services of a North Carolina engineer and procured financing from a Pennsylvania lender. Id. at 407, 440 S.E.2d at 881. In so ruling, the Court found the transaction was outside the scope of the FAA because it was "unable to discern from the evidence presented whether the contract *required* respondent to administer anything related to interstate commerce." Id. at 407, 440 S.E.2d at 882.

This Court has continued to adhere to the view that the development of real estate is an inherently intrastate transaction. See Zabinski, 346 S.C. at 595, 553 S.E.2d at 117-18 ("The development of land within South Carolina borders is the quintessential example of a purely intrastate activity.").

Because the precise question presented in the instant case has not yet been addressed by our appellate courts, we have looked to other jurisdictions for guidance. We find the case of Saneii v. Robards, 289 F. Supp. 2d 855 (W.D. Ky. 2003) to be instructive. In Saneii, the purchasers of a home in Kentucky brought a claim alleging the home vendors fraudulently induced them into the contract to purchase the home by misrepresenting and concealing defects. Id. at 857. The sales and purchase agreement contained a binding arbitration clause generally used by the Kentucky Real Estate Commission. Id. The purchasers argued that the arbitration clause was not enforceable under Kentucky law, which excludes from arbitration issues involving a determination of whether the making of the agreement itself involved fraud. Id. at 858. The district court was left to determine whether the FAA preempted this state law. Id. Specifically, the court considered whether the contract for the sale of residential real estate is "'a transaction involving interstate commerce' within the meaning of § 2 of the FAA." Id.

Ultimately, the court concluded that "a residential real estate sales contract does not evidence or involve interstate commerce." Id. at 860. In reaching this conclusion, the court explained:

> Notwithstanding its congenial effects on interstate commerce, the sale of residential real estate is inherently intrastate. Contracts strictly for the sale of residential real estate focus entirely on a commodity--the land--which is firmly planted in one particular state. The citizenship of immediate parties (the buyer and the seller) or their movements to or from that state are incidental to the real estate transaction. Those movements are not part of the transaction itself. All of the legal relationships concerning the land are bound by state law principles. Single residential real estate transactions of this type have no substantial or direct connection to interstate commerce. For

all these reasons, logic suggests that such transactions are not among those considered as involving interstate commerce.

> To characterize a residential real estate [transaction] as involving interstate commerce under these circumstances would actually promote a lack of uniformity in the law, which is exactly contrary to one of the FAA's stated purpose. If the FAA applied to out-of-state purchasers of Kentucky real estate, different rules would apply in that considerable volume of transactions concerning property here. Applying Kentucky law to all Kentucky real estate transactions creates a more uniform and, therefore, a more equitable body of law.

Id. at 858-59 (footnote omitted); see also Garrison v. Palmas Del Mar Homeowners Ass'n, 538 F. Supp. 2d 468, 473 (D. P.R. 2008) (discussing Mathews and Saneii and stating, "The FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce, regardless of whether said transactions involve out-of-state purchasers.").

Applying the above-outlined principles to the facts of the instant case, we find the circuit court correctly determined that the Agreement was not subject to the FAA. We agree with the circuit court's conclusion that Brentwood Homes failed to satisfy its burden of proof as none of the factors relied upon to establish the involvement of interstate commerce negate the intrastate nature of the sale and purchase of residential real estate.

Initially, as its title reflects, the Home Purchase Agreement specifically provides that Bradley agreed to purchase a completed dwelling rather than contract for the construction of a dwelling. Notably, the provisions of the Agreement providing for "New Construction," "House Plan," "Options," and "Color Selection," are eliminated as "N/A" and were not signed by Bradley. Therefore, we find Terry's affidavit is inapposite as his attestation that out-of-state materials, suppliers, and subcontractors were used for the construction of the residence has no bearing on the purchase of the completed dwelling.[8]

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[8] We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA. See, e.g., Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (holding that performance required under a contract for the construction of an eighteen-story building involved interstate commerce because

Furthermore, neither the inclusion of the national warranty nor Bradley's use of out-of-state financing converted the intrastate transaction into one involving interstate commerce. Significantly, Bradley did not name the national warranty company as a defendant in his lawsuit as his claims involved fraud, negligence, and breach of an implied warranty and not a claim under the 2-10 HBW Warranty. Bradley's use of a North Carolina branch of JPMorgan Chase Bank & Co., a national financial institution, also did not bring the sale of the home within interstate commerce as the use of this lender was tangential to the performance of the Agreement. See Saneii, 289 F. Supp. 2d at 859 n.3 (noting that the "tangential effect" of a home buyer obtaining financing from a bank, which happened to participate interstate commerce, was not enough to bring the sale of a home within interstate commerce and the FAA).

Finally, if the utilization of out-of-state financing or a national warranty was sufficient to constitute interstate commerce, then every transaction that involved these ancillary factors would be subject to the FAA. We believe a decision to this effect would eviscerate the well-established real estate exception to the FAA.

Based on the foregoing, we conclude that Brentwood Homes failed to offer sufficient evidence that the transaction involved interstate commerce to subject the Agreement to the FAA.[9]

III. Conclusion

Because the essential character of the Agreement was strictly for the purchase of a completed residential dwelling and not the construction, we find the FAA does not apply as these types of transactions have historically been deemed to

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"[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina"); New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 626-27, 667 S.E.2d 1, 4 (Ct. App. 2008) (finding contract for construction of a church pertained to a transaction "involving interstate commerce due to the nature of the construction project" and the builders' affidavit swearing the project would involve businesses and supplies from outside of South Carolina).

[9] In light of our holding, we need not address Bradley's argument that Brentwood Homes waived its right to assert its claim for arbitration. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) (providing that an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

involve intrastate commerce. Furthermore, the existence of the national warranty and Bradley's use of out-of-state financing did not negate the intrastate nature of the transaction. Accordingly, we affirm the circuit court's order denying Brentwood Homes' motion to stay the proceedings and compel arbitration as Brentwood Homes failed to offer sufficient evidence that the transaction involved interstate commerce to subject the Agreement to the FAA.

AFFIRMED.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Shaffer v. Jeffery, Okla., March 26, 1996

312 S.C. 559
Supreme Court of South Carolina.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, Respondent,
v.
GREAT WESTERN COAL (KENTUCKY), INC., Great Western Coal, Inc., Clyde E. Goins and Joe C. Norman, Defendants,
of whom Clyde E. Goins is the Appellant.

No. 23907.
|
Heard April 20, 1993.
|
Decided July 19, 1993.

Public service authority sued coal supplier and its president, individually, as well as former authority employee for civil conspiracy, fraud, fraudulent interference with employee contract, and breach of fiduciary duty alleging that president and former employee had increased price of coal while lowering its quality. The Circuit Court, Charleston County, William T. Howell, J., denied president's motion to compel arbitration of dispute. President appealed. The Supreme Court held that: (1) party seeking to avoid arbitration was required to plead that arbitration clause was fraudulently induced; (2) fact that president did not individually sign contract did not bar him from seeking to compel arbitration; (3) remand was required for trial court to determine what causes of action were arbitrable under criterion; and (4) public service authority was specifically authorized by statute to enter into arbitration agreements.

Reversed and remanded.

West Headnotes (10)

[1] Alternative Dispute Resolution
Validity

To avoid arbitration of contract itself, party seeking to avoid arbitration had to make allegation of fraud in inducement of arbitration clause; fraud as defense to arbitration clause had to be fraud specifically as to arbitration clause and not contract generally.

10 Cases that cite this headnote

[2] Alternative Dispute Resolution
Severability

Party cannot avoid arbitration through rescission of entire contract when there is no independent challenge to arbitration clause.

8 Cases that cite this headnote

[3] Alternative Dispute Resolution
Severability

Arbitration clause is separable from contract.

4 Cases that cite this headnote

[4] Alternative Dispute Resolution
Persons Entitled to Enforce

President of company which contracted to provide coal to utility was entitled to compel arbitration in suit by public service authority alleging conspiracy and fraud pursuant to arbitration clause in contract, even though president did not sign contract in his individual capacity.

2 Cases that cite this headnote

[5] Alternative Dispute Resolution
Sales Contracts Disputes

Only actions for which public service authority sought damages based upon coal contracts were arbitrable under arbitration clause in coal contracts.

2 Cases that cite this headnote

[6] Alternative Dispute Resolution
Contractual or Consensual Basis

Arbitration is matter of contract and controlled by contract law.

4 Cases that cite this headnote

[7] **Alternative Dispute Resolution**
Disputes and Matters Arbitrable Under Agreement

To decide whether arbitration agreement encompasses dispute court must determine whether factual allegations underlying claim are within scope of broad arbitration clause, regardless of label assigned to claim.

6 Cases that cite this headnote

[8] **Alternative Dispute Resolution**
Construction in Favor of Arbitration

Any doubts concerning scope of arbitration should be resolved in favor of arbitration.

1 Cases that cite this headnote

[9] **Alternative Dispute Resolution**
Construction in Favor of Arbitration

Unless court can say with positive assurance that arbitration clause is not susceptible of interpretation that covers dispute, arbitration should be ordered.

4 Cases that cite this headnote

[10] **Alternative Dispute Resolution**
Statutory Rights and Obligations

Public service authority was not barred from entering arbitration agreements pursuant to contract on ground that it was governmental agency or quasi-**public** entity; statute specifically authorized **public service authority** to enter into arbitration agreements. Code 1976, § 58-31-30(17).

1 Cases that cite this headnote

Attorneys and Law Firms

****23** ***560** T. Alexander Beard, of Cooper Beard & Dibble, and V. Thomas Lankford, of Sharp & Lankford, Charleston, for appellant.

Gedney Main Howe, III, and John Hamilton Smith, of Young, Clement, Rivers & Tisdale, Charleston, and Bristow Marchant, of Adams, Quackenbush, Herring & Stuart, Columbia, for respondent.

Opinion

***561** PER CURIAM:

This is an appeal from an order denying Appellant Clyde E. Goins's motion to compel arbitration. We reverse.

FACTS

In 1978 and 1980 **South Carolina Public Service Authority** (Santee Cooper), contracted with **Great Western** (Kentucky), Inc., and **Great Western** Coal, Inc., to purchase coal for ten and twenty years, respectively. **Great Western** Coal and **Great Western** Coal (Kentucky) are collectively referred to herein as **Great Western**. Both contracts contained an arbitration clause.

On November 21, 1990, Santee filed a complaint against **Great Western**; **Great Western's** President, individually (Goins); and a former Santee employee, Joe C. Norman, alleging civil conspiracy, fraud, fraudulent interference with an employee contract, and breach of fiduciary duty by Norman.[1] Santee alleged Norman and Goins had increased the price of the coal while lowering its quality. On December 11, 1990, Goins demanded arbitration.

****24** On February 11, 1991, Goins made a motion to dismiss and compel arbitration. Judge McInnis held the motion for arbitration in abeyance pending discovery and denied the motion to dismiss. Goins appealed. This Court dismissed the appeal without prejudice to any party's right to appeal the final order regarding arbitration. Further, this Court granted exclusive jurisdiction to hear all pretrial matters to Judge Howell.

In August 1991, Goins renewed his motion to compel arbitration. After a hearing on the motion, Judge Howell denied the motion.

ISSUES

(1) Did the trial judge err in holding the arbitration provision was unenforceable?

(2) Did Judge Howell err in concluding Santee, a quasi-public entity, cannot enter into binding arbitration agreements?

***562** *DISCUSSION*

(1) Enforceability

[1] Goins contends the trial judge erred in holding the arbitration clause was unenforceable because of fraud in factum. The trial judge held there was no allegation of fraud in inducement but found fraud in factum. The only evidence of any type of fraud in the complaint is Santee's allegation that Goins made false representations which caused it to undertake transactions.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), the United States Supreme Court addressed the issue whether a claim of fraud in the inducement of the entire contract is to be resolved by the court or may be arbitrated. The Court held arbitration clauses are separable from the contracts in which they are included. Therefore, there must be an allegation of fraud in inducement of the arbitration agreement to avoid arbitration of the contract itself. *Id.*

A few courts have distinguished fraud in the inducement from fraud in factum. In *Cancanon v. Smith Barney, Harris, Upham & Co.,* 805 F.2d 998, 1000 (11th Cir.1986), the court held "where the allegation is one of fraud in factum, i.e., ineffective assent to the contract, the issue is not subject to resolution pursuant to an arbitration clause contained in the contract." *See Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.,* 925 F.2d 1136 (9th Cir.1991) (interpreted *Prima Paint* to be limited to challenges based upon fraud in inducement); *Republic of Philippines v. Westinghouse Elect. Corp.,* 714 F.Supp. 1362 (D.N.J.1989). However, several courts have rejected this analysis and held the *Prima Paint* doctrine is not limited to rescission based on fraudulent inducement but extends to all challenges to a contract. *See e.g. R.M. Perez & Assoc., Inc. v. Welch,* 960 F.2d 534 (5th Cir.1992); *C.B.S. Employees Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 912 F.2d 1563 (6th Cir.1990) (citing *Rhoades v. Powell,* 644 F.Supp. 645, 653 (E.D.Cal.1986)); *Unionmutual Stock Life Co. v. Beneficial Life Ins. Co.,* 774 F.2d 524 (1st Cir.1985).

[2] **[3]** We join the jurisdictions which have rejected limiting the holding in *Prima Paint.* We hold a party cannot avoid arbitration through rescission of the entire contract ***563** when there is no independent challenge to the arbitration clause. Fraud as a defense to an arbitration clause must be fraud specifically as to the arbitration clause and not the contract generally. The arbitration clause is separable from the contract. *Prima Paint, supra.* Therefore, the trial judge erred in holding the arbitration clause is unenforceable because Santee did not plead the arbitration clause was fraudulently induced.

[4] Goins also argues the trial judge erred in ruling Goins is not entitled to demand arbitration because he did not sign the contract in his individual capacity. We agree. In *Arnold v. Arnold Corp.,* 920 F.2d 1269 (6th Cir.1990), the court held that a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint, or *signatory parties in their individual capacity* because this would nullify the rule requiring arbitration. The court further held when the nonsignatory parties are willing to submit to arbitration, the case should be arbitrated. *Id.* Goins is the party seeking arbitration. Therefore, we hold the trial judge erred in ****25** denying Goins's motion to compel arbitration because he did not sign the contract.

[5] Goins argues the trial judge erred in ruling the causes of action set forth in Santee's complaint are not covered by the arbitration clause. The arbitration clause in this case reads: "Any controversy between the parties hereto arising out of *or related to this contract,* or the breach thereof, shall be settled by arbitration." (emphasis added).

[6] Arbitration is a matter of contract and controlled by contract law. 5 Am.Jur.2d *Arbitration and Award* § 11 (1962). Santee in its amended complaint alleges, among other things, tortious interference with its employee contract with Joe Norman. Although the complaint does

not allege a breach of the coal contract, Goins contends the actual cause of action is based upon the coal contracts.

[7] **[8]** **[9]** To decide whether an arbitration agreement encompasses a dispute a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc* ***564** *Textile, S.A.,* 863 F.2d 315 (4th Cir. 1988). Any doubts concerning the scope of arbitration should be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 103 S.Ct. 927, 74 L.E.2d 765 (1983). Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute, arbitration should be ordered. *Mitsubishi, supra.*

Here, we find only the actions for which Santee seeks damages based upon the coal contracts are arbitrable and not the remaining causes of action. Therefore, we reverse the order denying arbitration and remand this case for the trial court to determine which causes of action are arbitrable under this criterion.

(2) Quasi-**public** Entity

[10] Goins also argues the trial judge erred in holding Santee was barred from entering arbitration agreements because it is a governmental agency or a quasi-**public** entity. We agree. S.C.Code Ann. § 58-31-30(17) (Supp.1992) authorizes the **Public Service Authority** (Santee) "to enter into agreements providing for binding arbitration...." Thus, Santee is specifically authorized by statute to enter arbitration agreements.

REVERSED AND REMANDED.

MOORE, J., not participating.

All Citations

312 S.C. 559, 437 S.E.2d 22

Footnotes

1 Santee and **Great Western** have reached a settlement in this action. Joe Norman died and his estate has not been substituted. Thus, the only defendant remaining in this action is Goins.

KeyCite Yellow Flag - Negative Treatment
Amended by McCLATCHY NEWSPAPER v. LOCAL 46, 9th Cir. (Cal.), September 22, 1982

686 F.2d 731
United States Court of Appeals,
Ninth Circuit.

McCLATCHY NEWSPAPERS, d/b/
a The Sacramento Bee, a California
corporation, Plaintiff-Appellant,
v.
CENTRAL VALLEY TYPOGRAPHICAL
UNION NO. 46, INTERNATIONAL
TYPOGRAPHICAL UNION, Defendant-Appellee.

Nos. 80-4597, 81-4117.
|
Argued and Submitted Feb. 9, 1982.
|
July 14, 1982.
|
As Amended on Denial of Rehearing
and Rehearing En Banc Sept. 22, 1982.

Following entry of arbitration award in favor of union, the United States District Court for the Eastern District of California, Raul A. Ramirez, J., confirmed award and, while appeal was pending, entered amended judgment which reaffirmed original decision and made original directives, and appeals were taken. The Court of Appeals, Wallace, Circuit Judge, held that: (1) arbitrator did not exceed his authority in interpreting the term "strike" to encompass only primary strikes, and not sympathy strike; (2) arbitrator acted properly in refusing to reopen proceedings to consider allegedly newly available evidence eight months after award issued; and (3) district court was without jurisdiction to enter its amended judgment, for when judgment was appealed jurisdiction over case passed to Court of Appeals.

Affirmed in part and vacated in part.

West Headnotes (8)

[1] Labor and Employment
Merits of award

Review of an arbitration award is limited; plenary review of merits of arbitration award would undermine federal policy of settling labor disputes by arbitration.

12 Cases that cite this headnote

[2] Alternative Dispute Resolution
Scope and Standards of Review

On judicial review of arbitration award, Court of Appeals may determine whether parties agreed to give arbitrator power to make the award he made and whether award drew its essence from agreement submitted for arbitration.

17 Cases that cite this headnote

[3] Labor and Employment
Concerted activities

Arbitrator did not exceed his powers when he interpreted the term "strike" to encompass only primary strikes and not sympathy strike, where arbitrator's award represented plausible interpretation of contract and where, by empowering arbitrator to decide whether job guarantees ceased by reason of strike employer had implicitly agreed to have arbitrator interpret scope of the words "strike or lockout" in the agreement.

4 Cases that cite this headnote

[4] Labor and Employment
Hearing

Arbitrator acted properly in refusing to reopen proceedings to consider allegedly newly available evidence eight months after award issued, even assuming the availability of new evidence.

6 Cases that cite this headnote

[5] Labor and Employment
Remand

Remand to an arbitrator for clarification and interpretation does not effectuate an appeal to the arbitrator, a new trial, or an

opportunity to relitigate the issue contrary to policy forbidding arbitrator to redetermine issue which he has already decided.

17 Cases that cite this headnote

[6] Federal Courts
Amendment of, vacation of, or relief from judgment

District court was without jurisdiction to enter amended judgment reaffirming original decision and making additional directives since jurisdiction over case passed to Court of Appeals when original judgment confirming arbitration award was appealed, where amended judgment was not addressed to maintenance of status quo during pendency of appeal but required change from the status quo and where amended order was not limited to period of appeal from initial judgment but materially affected substantial rights of the parties not decided in original decision.

42 Cases that cite this headnote

[7] Federal Courts
Effect of Transfer of Cause or Proceedings Therefor

Rule governing power of district court during pendency of appeal from interlocutory or final judgment granting, dissolving, or denying injunction codifies long-established and narrowly limited right of trial court to make orders appropriate to preserve status quo while case is pending in an appellate court, but does not restore jurisdiction to the district court to adjudicate anew the merits of the case after either party has invoked its right of appeal and jurisdiction has passed to an appellate court. Fed.Rules Civ.Proc. Rule 62(c), 28 U.S.C.A.

62 Cases that cite this headnote

[8] Federal Courts
Amendment of, vacation of, or relief from judgment

Just as an appeal from an order granting an injunction does not deprive the district court of jurisdiction to alter the injunction for purposes of maintaining the status quo, an appeal of a contempt order issued to force compliance with an injunction should not divest the court of jurisdiction to modify that order to achieve the same enforcement purpose. Fed.Rules Civ.Proc. Rule 62(c), 28 U.S.C.A.

50 Cases that cite this headnote

Attorneys and Law Firms

***732** Allen W. Teagle, Littler, Mendelson, Fastiff & Tichy, San Francisco, Cal., for plaintiff-appellant.

Duane B. Beeson, Beeson, Tayer, Kovach & Silbert, San Francisco, Cal., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before WALLACE, KENNEDY and CANBY, Circuit Judges.

Opinion

WALLACE, Circuit Judge:

This case presents consolidated appeals brought by McClatchy Newspapers (the publisher). The first appeal is from a judgment of the district court confirming an arbitration award in favor of Central Valley Typographical Union No. 46 (the union), a local of the International Typographical Union. While that appeal was pending, the district court entered an amended judgment which reaffirmed the original decision and made additional directives. The second appeal is from the amended judgment. We affirm the original judgment of the district court and vacate the amended judgment.

I

On November 20, 1973, the parties executed an agreement (the Scanner Agreement), a principal feature of which was the guarantee of lifetime jobs to named composing room

employees. The guarantee was subject to the following qualifications:

> (Named) composing room employees will be retained in the employment of the Publisher( ) ... for the remainder of their working lives unless forced to vacate ... through retirement, resignation, death, permanent disability, or discharge for cause; provided, however, in the event of permanent suspension of (the) Publisher's composing room operation, such employment guarantee will thereupon cease. In case of a strike or lockout, such employment guarantee shall immediately cease and continuance of this Agreement will be contingent upon the terms of a negotiated strike or lockout settlement ....

On April 17, 1978, the Sacramento Mailers Union Local 31 (the mailers), another local of the International Typographical Union, struck the publisher. Some of the composing room employees named in the Scanner Agreement, observing the mailers' picket line, left their work stations prior to quitting time and subsequently refused to cross the picket line. Some also joined the mailers' picketing activities.

The publisher asserted that these activities terminated the job guarantees of those employees who participated in the sympathy strike. The union disagreed. The parties submitted the question to arbitration. The stipulated issue submitted to the arbitrator was

> (w)hether the job guarantees provided in paragraph 1 of the 1973 Memorandum Agreement between the Sacramento Bee and Central Valley Typographical Union # 46 ceased for any or all of the employees covered by that Agreement by reason of the strike which began April 17, 1978.

On August 10, 1979, the arbitrator issued his decision. He concluded that the word ***733** "strike" in the Scanner Agreement referred only to a primary strike and that the sympathy strike did not terminate the job guarantees. Eight months later the publisher requested that the arbitrator reopen the proceedings to receive new evidence. The arbitrator denied the request. The district court confirmed the arbitration award, and the publisher appealed.

Following the district court's decision, the union renewed its demand that the composing room employees be allowed to return to work. According to the union, the district court's order enforcing the arbitrator's decision compelled immediate reinstatement. The publisher disagreed. On February 6, 1981, the union filed a motion for an order adjudicating the publisher's civil contempt. The publisher opposed this motion contending that neither the arbitration award itself nor the district court's confirmation of the award compelled immediate reinstatement. The district court denied the motion, but, pursuant to Fed.R.Civ.P. 62(c), entered an amended order confirming the original award and requiring the publisher to return the composing room employees to their original or equivalent positions.

This appeal presents the following issues: whether the arbitrator acted within the authority conferred upon him by the parties, whether the arbitrator properly refused to reopen the record, whether the district court had jurisdiction to enter an amended judgment while the appeal of its original judgment was pending, and whether the district court properly ordered reinstatement of the composing room employees.

II

[1] **[2]** Review of an arbitration award is limited. Plenary review of the merits of an arbitration award would undermine the federal policy of settling labor disputes by arbitration. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596, 80 S.Ct. 1358, 1360, 4 L.Ed.2d 1424 (1960). Nevertheless, we may determine whether the parties "agree(d) to give the arbitrator the power to make the award he made," United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409 (1960), and whether the award drew its essence from the agreement submitted for arbitration. United Steelworkers of America v. Enterprise Wheel & Car Corp., supra, 363

U.S. at 597, 80 S.Ct. at 1361. See Syufy Enterprises v. Northern California State Ass'n of I.A.T.S.E. Locals, 631 F.2d 124 (9th Cir. 1980), cert. denied, 451 U.S. 983, 101 S.Ct. 2314, 68 L.Ed.2d 839 (1981).

[3] The publisher argues that the arbitrator exceeded his powers when he interpreted the term "strike" to encompass only primary strikes. We disagree. The arbitrator's interpretation of the term was essential to his resolution of the issue submitted to him. By empowering the arbitrator to decide whether the job guarantees ceased by reason of the April 17, 1978, strike, the publisher implicitly agreed to have the arbitrator interpret the scope of the words "strike or lockout" in the Scanner Agreement. The publisher also argues that the award does not draw its essence from the Scanner Agreement. We again disagree. The arbitrator's award "represents a plausible interpretation of the contract." Riverboat Casino, Inc. v. Local Joint Executive Board, 578 F.2d 250, 251 (9th Cir. 1978), quoting Holly Sugar Corp. v. Distillery Union, 412 F.2d 899, 903 (9th Cir. 1969).

III

[4] **[5]** The publisher also argues that the award should not be confirmed because the arbitrator improperly refused to reopen the proceedings to consider newly available evidence eight months after the award issued. We conclude that the arbitrator acted properly. "Arbitrators are not and never were intended to be amenable to the 'remand' of a case for 'retrial' in the same way as a trial judge." Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1238 (D.C.Cir.1971). Even assuming the availability of new evidence, it would not be appropriate for the arbitrator to consider such evidence and then redetermine the issues originally submitted to him.

> ***734** It is (a) fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is functus officio and can do nothing more in regard to the subject matter of the arbitration. The policy which lies behind this is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion. The continuity of judicial office and the tradition which surrounds judicial conduct is lacking in the isolated activity of an arbitrator, although even here the vast increase in the arbitration of labor disputes has created the office of the specialized professional arbitrator.

La Vale Plaza, Inc. v. R. S. Noonan, Inc., 378 F.2d 569, 572 (3d Cir. 1967). See Mercury Oil Refining Co. v. Oil Workers Int'l Union, 187 F.2d 980, 983 (10th Cir. 1951). [1]

IV

[6] **[7]** The publisher further argues that the district court was without jurisdiction to enter its amended judgment. We agree. When a judgment is appealed, jurisdiction over the case passes to the appellate court. The filing of a notice of appeal generally divests the district court of jurisdiction over the matters appealed. Davis v. United States, 667 F.2d 822, 824 (9th Cir. 1982); Taylor v. Wood, 458 F.2d 15, 16 (9th Cir. 1972); Sumida v. Yumen, 409 F.2d 654, 656-57 (9th Cir. 1969), cert. denied, 405 U.S. 964, 92 S.Ct. 1168, 31 L.Ed.2d 240 (1972). Certain exceptions to the rule have been recognized. [2] Only one of those exceptions, which is codified in Fed.R.Civ.P. 62(c), is arguably applicable in this case. That rule provides in part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Rule 62(c) is "merely expressive of a power inherent in the court to preserve the status quo where, in its sound discretion, the court deems the circumstances

so justify." 7 J. Moore, Moore's Federal Practice P 62.05, at 62-19 to 20 (2d ed. 1979). It does not restore jurisdiction to the district court to adjudicate anew the merits of the case after either party has invoked its right of appeal and jurisdiction has passed to an appellate court. Rule 62(c) codifies the "long established" and narrowly limited right of a trial court "to make orders appropriate to preserve the status quo while the case is pending in (an) appellate court." United States v. El-O-Pathic Pharmacy, 192 F.2d 62, 79 (9th Cir. 1951). "(A)fter appeal a trial court may, if the purposes of justice ***735** require, preserve the status quo until decision by the appellate court.... But it may not finally adjudicate substantial rights directly involved in the appeal." Newton v. Consolidated Gas Co., 258 U.S. 165, 177, 42 S.Ct. 264, 267, 66 L.Ed. 538 (1922) (citations omitted) (statement of the rule prior to its codification), citing Hovey v. McDonald, 109 U.S. 150, 157, 3 S.Ct. 136, 140, 27 L.Ed. 888 (1883), and Merrimack River Savings Bank v. Clay Center, 219 U.S. 527, 534, 31 S.Ct. 295, 296, 55 L.Ed. 320 (1911).

In the present case, the district court's amended judgment was not addressed to maintenance of the status quo during pendency of the appeal; in fact, by ordering the publisher to reinstate employees who were not working when the appeal was filed, the amended judgment required a change from the status quo. Furthermore, the district court's order was not limited to the period of the appeal from the initial judgment. If we were to affirm the district court's amended judgment, the order would affect substantial rights of the parties after appeal. The arbitrator's ruling was limited to a finding that the job guarantees survive the sympathy strike; it was not necessarily a determination that the remedy of reinstatement is appropriate. The district court's original judgment, confirming the arbitrator's award, therefore was an adjudication only of the survival of job guarantees. In its amended judgment, however, the district court adjudicated the reinstatement issue, thus materially affecting substantial rights of the parties not decided in its original disposition of the case. This matter must abide further inquiry, either by arbitration or by appropriate judicial proceedings, in which each party has the opportunity for a full and fair presentation of its case. We therefore conclude that the district court's amended judgment does not fall within the authority of Rule 62(c).

[8] The union argues that the general rule governing jurisdiction is inapplicable because the district court's amended judgment falls within the exception articulated in Hoffman ex rel. NLRB v. Beer Drivers & Salesmen's Local Union No. 888, 536 F.2d 1268, 1276 (9th Cir. 1976). There we held that an appeal from a contempt order does not divest the district court of jurisdiction to issue further contempt orders based on subsequent violations of a basic injunctive order, even though later orders may effectively modify the original contempt order. We observed that the general rule that an appeal to the circuit court deprives a district court of jurisdiction should not be applied in those cases where the district court has a continuing duty to maintain the status quo. Id. "(W)here the court supervises a continuing course of conduct and where as new facts develop additional supervisory action by the court is required, an appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision, even though in the course of that supervision the court acts upon or modifies the order from which the appeal is taken." Id.

Hoffman is only an extension of the result achieved by Fed.R.Civ.P. 62(c): just as an appeal from an order granting an injunction does not deprive the district court of jurisdiction to alter the injunction for purposes of maintaining the status quo, an appeal of a contempt order issued to force compliance with an injunction should not divest the court of jurisdiction to modify that order to achieve the same enforcement purpose. Here the appeal came from the district court's confirmation of the arbitration award, and not from a contempt order (or other supervisory action) that was issued to force compliance with that earlier confirmation. The union is incorrect in arguing that this case falls within the limited exception articulated in Hoffman.

We therefore conclude that the amended judgment was rendered without jurisdiction and must be vacated. Our disposition of the amended judgment on jurisdictional grounds obviates any need for review of the merits. We therefore decline to decide whether, had there been jurisdiction, the district court could properly have ordered reinstatement.

AFFIRMED IN PART; VACATED IN PART.

All Citations

686 F.2d 731, 111 L.R.R.M. (BNA) 2254, 34 Fed.R.Serv.2d 672, 95 Lab.Cas. P 13,730

Footnotes

1 The principle that an arbitration award once rendered is final has been held to contain some limitations. It has been recognized in common law arbitration that an arbitrator can correct a mistake which is apparent on the face of his award, complete an arbitration if the award is not complete, and clarify an ambiguity in the award. E.g., La Vale Plaza, Inc. v. R. S. Noonan, Inc., 378 F.2d 569, 573 (3d Cir. 1967). Remand to an arbitrator for clarification and interpretation is not unusual in judicial enforcement proceedings. E.g., Hanford Atomic Metal Trades Council v. General Electric Co., 353 F.2d 302, 308 (9th Cir. 1965). Recommitting an issue to an arbitrator for clarification and interpretation does not effectuate an appeal to the arbitrator, a new trial, or an opportunity to relitigate the issue. Id. See Randall v. Lodge No. 1076, Int'l Ass'n of Machinists and Aerospace Workers, 648 F.2d 462, 468 (7th Cir. 1981). None of these situations are "within the policy which forbids an arbitrator to redetermine an issue which he has already decided." La Vale Plaza, Inc. v. R. S. Noonan, Inc., supra, 378 F.2d at 573. These cases do not apply here because the publisher wishes to introduce new evidence for the specific purpose of convincing the arbitrator that his decision was erroneous.

2 For example, a district court may retain jurisdiction under specific statutory authority, Davis v. United States, 667 F.2d 822, 824 (9th Cir. 1982); a district court may also act to assist the court of appeals in the exercise of its jurisdiction. Id.; see Securities & Exchange Comm'n v. Investors Security Corp., 560 F.2d 561, 568 (3d Cir. 1977).

943 F.2d 327
United States Court of Appeals,
Third Circuit.

COLONIAL PENN INSURANCE COMPANY
v.
The OMAHA INDEMNITY COMPANY, Mutual of Omaha Insurance Company, and Royal American Managers, Inc., The Omaha Indemnity Company, Appellant,
v.
NATIONAL RISK UNDERWRITERS, INC.

No. 90–1872.
|
Argued April 9, 1991.
|
Decided Sept. 5, 1991.

The United States District Court for the Eastern District of Pennsylvania, Herbert J. Hutton, J., approved a second arbitration award in a dispute over a reinsurance contract, which purported to be a clarification of first award. Appeal was taken. The Court of Appeals, 919 F.2d 133, and 919 F.2d 136, dismissed appeals as premature. Thereafter the District Court entered Rule 54(b) determination of no just reason to delay entry of judgment and appeals were again taken. The Court of Appeals, Sloviter, Chief Judge, held that: (1) reinsurer, which was required to pay less under first arbitration order than second, had not waived its right to object to second order by having participated in a conference call seeking to clarify first order, and by having provided documents regarding clarification; (2) "functus officio" doctrine precluded arbitrator from attempting to clarify first order through issuance of a second; and (3) trial court had authority to remand case to arbitrators, to seek from them intended meaning of arbitration award which was ambiguous.

Reversed and remanded.

West Headnotes (6)

[1] Insurance
Alternative dispute resolution

Reinsurer had not waived right to contest second order of arbitration panel in favor of reinsured, by virtue of participating in conference calls between an arbitrator and counsel for reinsured seeking clarification of aspect of first order, and participating in subsequent document exchanges; reinsurer had throughout taken position that first order needed no clarification, and might well have believed, with some basis, that failure to participate would have constituted waiver of right to challenge change in arbitration award.

Cases that cite this headnote

[2] Alternative Dispute Resolution
Reconsideration by arbitrators

As general rule, once an arbitration panel renders decisions regarding issues submitted, it becomes functus officio and lacks any power to reexamine that decision.

26 Cases that cite this headnote

[3] Insurance
Alternative dispute resolution

"Functus officio" doctrine precluded arbitration panel from issuing second order purportedly clarifying first order which had required reinsurer to release its claim to reinsured's reserves even though reinsured was in fact holding no reserves to which reinsurer had any claim; problem was not obvious clerical error appearing on face of first order, to which "functus officio" doctrine did not apply.

26 Cases that cite this headnote

[4] Alternative Dispute Resolution
Recommittal to arbitrators by court

Because an arbitration award must be upheld even when there have been errors in factual issues, remand that allows arbitrators to reexamine their decision on merits is not permissible.

15 Cases that cite this headnote

[5] Alternative Dispute Resolution
Recommittal to arbitrators by court

When remedy awarded by arbitrators is ambiguous, remand for clarification of intended meaning of an arbitration award is appropriate.

30 Cases that cite this headnote

[6] Alternative Dispute Resolution
Recommittal to arbitrators by court

Unlike exception to "functus officio" doctrine, which confines arbitrators to correcting mistakes apparent on face of award, ambiguity in award for which court may remand to arbitrators may be shown not only from face of award but from an extraneous but objectively ascertainable fact.

60 Cases that cite this headnote

Attorneys and Law Firms

***328** John W. Bonds, Jr. (argued), Francis M. Gregory, Jr., Frank J. Martin, Jr., Sutherland, Asbill & Brennan, Washington, D.C., William T. Hangley, Hangley Connolly Epstein Chicco Foxman & Ewing, Philadelphia, Pa., for appellant, The Omaha Indem. Co.

Patrick J. O'Connor (argued), Susan M. Danielski, Cozen and O'Connor, Philadelphia, Pa., for appellee.

Before SLOVITER, Chief Judge, and GREENBERG and WISDOM [*], Circuit Judges.

OPINION OF THE COURT

SLOVITER, Chief Judge.

After an arbitration panel issued a final award in favor of one of the parties, a majority of the panel issued a new award "clarifying" the original award and increasing the amount awarded. The district court granted the successful party's motion to confirm the second award, and denied the other party's motion to confirm the first award. This appeal presents the question whether the arbitrators exceeded their powers when they issued a second award, and, if so, the circumstances under which an arbitral award may be corrected because of an erroneous assumption of fact.

I.

Background Facts and Procedural History

In October 1984, Colonial Penn Insurance Company entered into a reinsurance agreement, signed by Royal American Managers, Inc. (RAM) on behalf of Omaha Indemnity Company, pursuant to which Omaha (the reinsurer) was to indemnify Colonial Penn (the reinsured) against ninety percent ***329** of the losses Colonial Penn might experience on a book of short-term auto rental policies. Omaha apparently honored the agreement by accepting Colonial Penn's premiums and paying the agreed upon share of claims and expenses until September 1986 when it ceased funding the claims and asserted that RAM lacked authority to bind Omaha to the contract.

Colonial Penn filed this diversity action for breach of contract in the United States District Court for the Eastern District of Pennsylvania against Omaha, its parent Mutual of Omaha Insurance Company, and RAM. Omaha and Mutual of Omaha thereafter joined National Risk Underwriters, Inc. (NRU), Colonial Penn's underwriting manager, as a third-party defendant. Colonial Penn also asserted a claim against NRU for indemnification. In December 1987, the district court dismissed Omaha's claim against NRU, granted Omaha's motion to compel binding arbitration of its dispute with Colonial Penn as provided in the reinsurance agreement, and stayed the proceedings as to the parties other than Omaha and Colonial Penn.

A panel of three arbitrators was formed, whereby each party appointed an arbitrator and the two arbitrators together selected an umpire. Colonial Penn claimed that it had incurred losses and expenses of approximately $29 million as a result of Omaha's repudiation. In defense, Omaha contended, *inter alia,* that the parties had previously agreed to a rescission of the agreement pursuant to which Omaha had paid to Colonial Penn $9.6 million representing premiums that RAM had collected from Colonial Penn but failed to remit to Omaha. After the parties engaged in extensive discovery and briefing of legal and factual issues, they participated in an eight-day arbitration hearing.

The panel issued a unanimous "Final Award" on January 18, 1990, which provided in pertinent part:

FINAL AWARD

After due consideration of the extensive evidence introduced by the parties in this proceeding and careful examination of the briefs and arguments in support of their respective positions on each of the pertinent issues, the Panel unanimously finds, concludes and ORDERS that:

1. Omaha Indemnity shall pay the sum of $10 million to Colonial Penn without further delay in satisfaction of Omaha Indemnity's obligations to Colonial Penn under the Reinsurance Agreement between the parties dated October 1, 1984.

2. Omaha Indemnity Company *shall further release any and all claims to the reserves* (including IBNR)[1] *currently held by Colonial Penn to pay losses and loss adjustment expenses* arising out of the business which was the subject of the Reinsurance Agreement between the parties.

3. Upon payment of the sum of $10 million to Colonial Penn and release of all claims to such reserves, Omaha indemnity shall be relieved of any further liability for the payment of losses and loss adjustment expenses under the Reinsurance Agreement between the parties and also released from any other claims arising out of or related to the performance or nonperformance of its duties under that Agreement.

App. at 89–90 (emphasis added).

After reading the final award, Colonial Penn's counsel initiated a conference call to the umpire and Omaha's counsel. Colonial Penn's counsel stated that he was puzzled by the award because Colonial Penn was not holding any reserves on this program and that Omaha was not claiming any Colonial Penn reserves. During that conversation, the umpire stated that he thought, based on one of the exhibits presented at the arbitration, that Colonial Penn was holding reserves, including IBNR, of more than $8 million "and that it was the panel's ***330** intention that Colonial Penn keep that amount and run off the business." Affidavit of Frank J. Martin, Jr., Omaha's counsel, App. at 117. The umpire stated that perhaps the matter should be clarified and, in response to the umpire's inquiry, counsel for Omaha responded that he thought the Final Award was clear and unambiguous. Omaha's counsel sent a letter to the arbitrators later that day stating, *inter alia,*

> I understand the Final Order ... to mean that, upon payment of the $10 million referred to in para. 1, Omaha Indemnity will have no further liability to Colonial Penn, and no claim against moneys held by Colonial Penn to fund the $8.9 million in reserves, whether by reason of the $9.6 million in "unused premium" previously paid by Omaha Indemnity to Colonial Penn, or otherwise.

App. at 120. Colonial Penn's counsel responded by letter requesting "an amended award which reflects the panel's understanding as to the amount it awarded Colonial Penn." App. at 123.

On January 29, 1990, Colonial Penn's arbitrator and the umpire, constituting a majority of the panel, issued a second (and substitute) order "[i]n response to a request from the parties for clarification ... and after review of the submissions of the parties in support of their joint request for clarification." App. at 64. The second order deleted the reference to any release by Omaha of a claim to Colonial Penn's reserves. Instead, it provided that in addition to the $10 million previously awarded to Colonial Penn, Omaha would also be required to pay to Colonial Penn "the sum of $8,988,783 which represents Omaha Indemnity's share of the reserves (including IBNR) which will be necessary to pay losses and loss adjustment expenses arising out

of the business which was the subject of the Reinsurance Agreement between the parties." [2]

In a letter accompanying this second award, the umpire explained that "at least a majority of the Panel was under the mistaken assumption that Colonial Penn was holding Omaha's 90% share of the reserves on the book of business in question and, therefore, that portion of the Award directing Omaha ... to release any and all claims to those reserves was designed to make that sum ($8,988,783) available to Colonial Penn for the purpose of paying claims in the run-off of the business." App. at 138. The third arbitrator dissented from this order.

On February 1, 1990, as directed in the first award, Omaha forwarded $10 million to Colonial Penn and stated in the covering letter that Omaha "hereby releases any and all claims to the reserves (including IBNR) currently held by Colonial Penn to pay losses and loss adjustment expenses arising out of the business which was the subject of the reinsurance agreement." App. at 141. On February 2, 1990, Colonial Penn filed a motion in the district court for an order confirming the second arbitration award and directing entry of judgment against Omaha. On February 16, 1990, Omaha moved to confirm the first arbitration award. The district court denied Omaha's motion, granted Colonial Penn's motion confirming the second arbitration award in the amount of $18,988,783, and ordered Omaha to pay the unpaid balance and post-judgment interest.

Omaha appealed but this court dismissed the appeal as premature because Colonial ***331** Penn's claims against the other defendants were still pending. Thereafter, the district court entered a Rule 54(b) determination that there was no just reason to delay the entry of final judgment and a direction to enter his judgment as final. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1988) to hear this appeal from the final order confirming the arbitration award. We apply a plenary standard of review. *Cf. Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.,* 868 F.2d 52, 56 (3d Cir.1989) ("In reviewing the district court's denial of appellants['] motion to vacate the arbitration award, this Court will stand in the shoes of the district court and determine whether appellants were entitled to vacate the arbitration award pursuant to 9 U.S.C. § 10(d).").

II.

Discussion

A.

Waiver

[1] Omaha contends on appeal that the district court erred in confirming the second arbitration award because the arbitration panel lacked the power to reexamine the merits of an announced final decision. However, we must consider initially Colonial Penn's contention that Omaha has waived its right to challenge the second award because it consented to the arbitration panel's reconsideration of its award by virtue of its participation in the clarification process by submitting correspondence to the panel and allegedly failing to challenge the panel's jurisdiction until the panel's second order was issued. The district court did not reach the waiver issue.

We reject Colonial Penn's claim that Omaha consented to be bound by any subsequent order of the panel. Although Omaha did participate in the conference call with the umpire as well as the various letters exchanged among the parties and the arbitrators, Omaha at all times took the position that the first award needed no clarification and that Colonial Penn's request would, if granted, constitute more than the limited clarification that arbitrators are permitted to make on their own. Omaha may very well have believed, with some basis, that its failure to participate in these communications with the umpire and the panel would constitute a waiver of its subsequent right to challenge any possible change in the arbitration award. Omaha's behavior thus falls far short of constituting a consent to reconsideration of the award or a waiver of its jurisdictional challenge. We therefore consider the merits of Omaha's contentions.

B.

The Functus Officio *Doctrine*

[2] As a general rule, once an arbitration panel renders a decision regarding the issues submitted, it becomes

functus officio[3] and lacks any power to reexamine that decision. *See La Vale Plaza, Inc. v. R.S. Noonan, Inc.,* 378 F.2d 569, 572 (3d Cir.1967); *United Mine Workers, Dist. 28 v. Island Creek Coal Co.,* 630 F.Supp. 1278, 1279 (W.D.Va.1986); *Salt Lake Pressmen, Local Union No. 28 v. Newspaper Agency Corp.,* 485 F.Supp. 511, 515 (D.Utah 1980); *Hartley v. Henderson,* 189 Pa. 277, 42 A. 198, 199 (1899). Despite certain distinctions between common law and statutory arbitrations, *see La Vale,* 378 F.2d at 571, the *functus officio* doctrine has been routinely applied in federal cases brought pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1988), *see Ottley v. Schwartzberg,* 819 F.2d 373, 376 (2d Cir.1987); *American Centennial Ins. Co. v. Arion Ins. Co.,* No. 88 Civ. 1665, 1990 WL 52295 (S.D.N.Y. April 13, 1990) (LEXIS, Genfed library, Dist file).

[3] The policy underlying this general rule is an "unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final ***332** decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion." *La Vale,* 378 F.2d at 572; *McClatchy Newspapers v. Central Valley Typographical Union No. 46,* 686 F.2d 731, 734 (9th Cir.), *cert. denied,* 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982); *Washington–Baltimore Newspaper Guild, Local 35 v. Washington Post Co.,* 442 F.2d 1234, 1238–39 (D.C.Cir.1971); *see American Centennial Ins. Co. v. Arion Ins. Co.,* No. 88 Civ. 1665, 1990 WL 52295 (S.D.N.Y. April 18, 1990) (LEXIS, Genfed library, Dist file). Further, notwithstanding the fact that an increased utilization of arbitration in recent years has to some extent created the office of the specialized professional arbitrator, "[t]he continuity of judicial office and the tradition which surrounds judicial conduct is lacking in the isolated activity of an arbitrator." *La Vale,* 378 F.2d at 572; *McClatchy,* 686 F.2d at 734; *Washington–Baltimore Newspaper Guild,* 442 F.2d at 1239.

As we noted in *La Vale* and as recognized by the district court, the common law *functus officio* doctrine contains its own limitations. We described these as follows in *La Vale:* (1) an arbitrator "can correct a mistake which is apparent on the face of his award," 378 F.2d at 573; *see McClatchy,* 686 F.2d at 734 n. 1; (2) "where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination," 378 F.2d at 573; and (3) "[w]here the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify." *Id.*

Colonial Penn does not argue that either the second or third exception is applicable here. The award did not fail to adjudicate an issue submitted. The "ambiguity," if any, does not arise from doubt as to the full execution of the submission. However, Colonial Penn argued and the district court agreed that there was a mistake evident on the face of the first arbitration award because the panel ordered Omaha to release its claim to Colonial Penn's reserves when Colonial Penn was holding no reserves to which Omaha had any claim.[4] In a related vein, the district court also concluded that it was impossible to comply with the award because Omaha could not release any claims to reserves it was not holding.

We agree with Omaha that the district court's interpretation and application of the "mistake on the face of the award" standard cannot be sustained. The exception for mistakes apparent on the face of the award is applied to clerical mistakes or obvious errors in arithmetic computation. *See Local P–9, United Food & Commercial Workers v. George A. Hormel & Co.,* 776 F.2d 1393, 1394 (8th Cir.1985). Possibly, it could also be applied in a situation where the award on its face is contrary to a fact so well known as to be subject to judicial notice, but we take no position on that here.

In this case, it was not possible to tell from the face of the award either that Colonial Penn held no reserves to which Omaha might have a claim or that Omaha had not submitted a claim for any reserves allegedly held by Colonial Penn. The fact that there was a provision for release from claims does not on its face and without more suggest any mistake. In extending the limited exception for mistakes apparent on the face of the award to a situation where extraneous facts must be considered, the district court opened a Pandora's box which could subvert the policies on which the application of *functus officio* to arbitral decisions are predicated. Parties could, under the guise of a mistake in fact, seek recourse directly from the arbitrators in an attempt to overturn an adverse award. The need to regard arbitral awards ***333** as final and

protect the arbitrators from outside influence is too strong to permit diminution of the *functus officio* doctrine.

Furthermore, in reaching its conclusion the district court considered the arbitrators' letter which repudiated part of the first arbitration award. It is generally improper for an arbitration panel to impeach its final award absent consent of the parties. *See Local P–9, United Food & Commercial Workers,* 776 F.2d at 1395; *McClatchy,* 686 F.2d at 733–34 & n. 1.[5] It would be equally improper for a court to base an exception to the *functus officio* doctrine on such an impeachment. It follows that the district court erred in concluding that the panel's second award was permissible under the "mistake on the face of the award" exception to the *functus officio* doctrine. It was therefore legal error for the court to confirm the second arbitration award, which was entered in derogation of the *functus officio* doctrine. *See Salt Lake Pressmen,* 485 F.Supp. at 515 ("When the arbitrator renders his final award, his power under the agreement is exhausted, and, unless his subsequent attempts to act under the agreement and submission fall within a few very narrow categories ..., they are null and void.").

C.

Remand for Mistake

It should be apparent that the policy reasons for the *functus officio* doctrine precluding an arbitration panel from reconsidering its award are not applicable with the same force to action by the district court. In the first place, the court is not subject to the concerns about the arbitrator's lack of continuity and "isolated activity." *La Vale,* 378 F.2d at 572. Second, the court is not likely to be subject to the "evil of outside communication and unilateral influence." *Id.* Third, and most important, the court must necessarily exercise some review of the arbitral award when a motion to confirm is before it.

Of course, the scope of review of an arbitration award is very limited both at common law and under the Federal Arbitration Act.[6] That Act, however, does authorize the district court itself to modify or correct an award in certain limited situations which appear to some extent to be analogous to the exceptions to the *functus officio* doctrine.[7]

Because our reversal of the district court's order confirming the second arbitration award necessarily requires that it reconsider the motion to confirm the first arbitration award, the district court will need to know the parameters of its authority. It is generally recognized that there are circumstances, albeit limited, under which a district court can remand a case to the arbitrators for clarification. Although there is no explicit provision in the Act for ***334** such a remand, courts have uniformly stated that a remand to the arbitration panel is appropriate in cases where the award is ambiguous. *See, e.g., Mutual Fire, Marine & Inland Ins. Co.,* 868 F.2d at 58; *La Vale,* 378 F.2d at 573; *Americas Ins. Co. v. Seagull Compania Naviera, S.A.,* 774 F.2d 64, 67 (2d Cir.1985); *Island Creek Coal Sales Co. v. City of Gainesville,* 764 F.2d 437, 440 (6th Cir.), *cert. denied,* 474 U.S. 948, 106 S.Ct. 346, 88 L.Ed.2d 293 (1985).

Because of the limited purpose of such a remand, which serves the practical need for the district court to ascertain the intention of the arbitrators so that the award can be enforced, there is not even a theoretical inconsistency with the *functus officio* doctrine. *See Industrial Mut. Ass'n v. Amalgamated Workers, Local Union No. 383,* 725 F.2d 406, 412 n. 3 (6th Cir.1984) (despite *functus officio* rule, remand proper to clarify ambiguous award or to require arbitrator to address submitted but unresolved issue).

Moreover, we note that the Act itself provides for a remand to the arbitrators for purposes of rehearing in certain circumstances. *See* 9 U.S.C. § 10(e) (1988) ("Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.").

Of course, remand is to be used sparingly. Arbitrators are not as amenable to remand of a case for retrial in the same manner as are trial judges. *See Washington–Baltimore Newspaper Guild,* 442 F.2d at 1238–39; *see also Fischer v. CGA Computer Assocs.,* 612 F.Supp. 1038, 1041 (S.D.N.Y.1985) (danger that remand can frustrate basic purposes of arbitration because it delays execution of final judgment); *Ethyl Corp. v. United Steelworkers,* 768 F.2d 180, 188 (7th Cir.1985) (remand for clarification is disfavored procedure), *cert. denied,* 475 U.S. 1010, 106 S.Ct. 1184, 89 L.Ed.2d 300 (1986).

[4] **[5]** Because an arbitration award must be upheld even when there have been "errors ... in the determination of factual issues," *NF & M Corp. v. United Steelworkers,* 524 F.2d 756, 759 (3d Cir.1975), a remand that allows the arbitrators to reexamine their decision on the merits is not permissible. On the other hand, when the remedy awarded by the arbitrators is ambiguous, a remand for clarification of the intended meaning of an arbitration award is appropriate. As we said in *Mutual Fire,* "[a] district court itself should not clarify an ambiguous arbitration award but should remand it to the arbitration panel for clarification." 868 F.2d at 58. Such a remand avoids the court's misinterpretation of the award and is therefore more likely to give the parties the award for which they bargained. *See Galt v. Libbey–Owens–Ford Glass Co.,* 397 F.2d 439, 442 (7th Cir.) (remand sometimes appropriate to avoid judicial guessing of meaning of arbitral award; such remand does not constitute judicial invasion of arbitrators' province but rather gives parties clear decision from arbitrators that they bargained for), *cert. denied,* 393 U.S. 925, 89 S.Ct. 258, 21 L.Ed.2d 262 (1968); *Siegel v. Titan Indus. Corp.,* 779 F.2d 891, 894 (2d Cir.1985) (per curiam) (in order to ensure meaningful judicial review, courts on occasion may remand awards to arbitrators for clarification).

[6] Unlike the exception to the *functus officio* doctrine which confines the arbitrators to correcting mistakes apparent on the face of the award, an ambiguity in the award for which the court may remand to the arbitrators may be shown not only from the face of the award but from an extraneous but objectively ascertainable fact. Thus, for example, if an arbitration award directed the transfer of real property, and the district court could ascertain that such property was no longer in the possession of the party directed to transfer it, the remedy would be unenforceable and hence ambiguous. This case may fall within the same category.

When Omaha moved to confirm the first arbitration award, Colonial Penn opposed that motion arguing, *inter alia,* that the panel's remedy reflected a mistaken belief as to the existence of reserves and IBNR which were the funds of Omaha. Colonial ***335** Penn argued that the misdescription of the form of payment created an ambiguity or confusion because the method of payment described in the January 18, 1990 award was impossible of performance. The district court, which was under the mistaken impression of law that it could confirm the second arbitration award, never considered whether there was a sufficient ambiguity with respect to the remedy awarded in the first arbitration award to bring this situation within the limited circumstances warranting remand to the arbitrators.

The first arbitration award entered January 18, 1990 not only provides in paragraph 2 that Omaha "shall release any and all claims to the reserves (including IBNR) currently held by Colonial Penn arising out of the business between the parties," but provides in paragraph 3 that Omaha should provide "$10 million to Colonial Penn *and* release of all claims to such reserves" (emphasis added). This suggests that the award may have contemplated that Colonial Penn's compensation for the breach of contract by Omaha would be paid in two components, cash and release of a valuable monetary claim against it. If the district court can ascertain by clear and convincing evidence that Colonial Penn had no reserves to which Omaha made a claim, then the intent of the arbitrators as to the remedy would be ambiguous.

Under such circumstances, the district court would be authorized to remand so that the arbitrators themselves could clarify their intent as to the remedy awarded. Put differently, the arbitral award would be deemed unenforceable if part of the consideration awarded did not, in fact, exist. We are not persuaded by Omaha's argument that because it provided a release the award was enforceable. A release of a claim which never existed is worthless, just as a deed to property the signer does not own would be worthless. We do not discount the possibility that the arbitrators merely intended that Omaha pay $10 million and provide a form release, even if Omaha had no claim to the reserve. That is, however, the essence of the ambiguity.

We caution that we are not suggesting that the district court should order a remand in this case but merely instruct that such a remand is within its power upon a finding of ambiguity. If the same arbitrators are unavailable, then the district court would be authorized to convene a new arbitration panel for the limited purpose of clarifying the ambiguity in the remedy provided in the first arbitration award.

III.

Conclusion

For the reasons set forth above, we will reverse the district court's order granting Colonial Penn's motion to confirm the second arbitration award. We will vacate the district court's order denying Omaha's motion to confirm the first arbitration award and will remand to the district court for further proceedings consistent with this opinion. Each party to bear its own costs.

All Citations

943 F.2d 327

Footnotes

* Hon. John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

1 When an insurer sets up a reserve, it designates part of its capital to fund policyholders' claims and makes these funds unavailable for other purposes. In addition to reserves set up for reported claims, actuaries estimate the amounts that will be necessary to pay claims for losses that have been incurred but not yet reported. The reserves based on these actuarial estimates are characterized as Incurred But Not Reported (IBNR) reserves.

2 The second arbitration order provided, in relevant part,

> 1. Omaha Indemnity shall pay the sum of $10 million to Colonial Penn without further delay in satisfaction of Omaha Indemnity's obligations to Colonial Penn under the Reinsurance Agreement between the parties dated October 1, 1984.
>
> 2. Omaha Indemnity Company shall also pay to Colonial Penn the sum of $8,988,783 which represents Omaha Indemnity's share of the reserves (including IBNR) which will be necessary to pay losses and loss adjustment expenses arising out of the business which was the subject of the Reinsurance Agreement between the parties.
>
> 3. Upon payment of the sum of $18,988,783 to Colonial Penn, Omaha Indemnity shall be relieved of any further liability for the payment of losses and loss adjustment expenses under the Reinsurance Agreement between the parties and also released from any other claims arising out of or related to the performance or nonperformance of its duties under that Agreement.

App. at 64–65.

3 *Functus officio* derives from the Latin meaning “[a] task performed” and is defined by Black's as, “[h]aving fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority.” Black's Law Dictionary 606 (5th ed. 1979).

4 The district court opinion suggests that Colonial Penn was not holding any reserves. It stated, “how could Omaha Indemnity possibly release all claims it had to reserves held by Colonial Penn if Colonial Penn held no reserves?” Typescript Mem. Op. at 9, 1990 WL 61228. As Colonial Penn concedes, it did in fact hold reserves, but it had funded these reserves and there was no claim to them that Omaha could release.

5 Although the second award states that there was a “joint request for clarification,” App. at 64, there is no support in the record for that statement. Inasmuch as we have rejected Colonial Penn's waiver argument, we also reject its claim that this case falls within the additional exception for clarification of an award by the arbitrators upon the mutual assent of the parties. *See* Salt Lake Pressmen, 485 F.Supp. at 515–16.

6 Under the Federal Arbitration Act, a court may vacate the arbitrator's award:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) 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.
>
> (d) 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. § 10 (1988).

7 The district court may modify or correct an award:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
9 U.S.C. § 11 (1988).

End of Document

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HALL STREET ASSOCIATES, L. L. C. *v.* MATTEL, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–989. Argued November 7, 2007—Decided March 25, 2008

The Federal Arbitration Act (FAA), 9 U. S. C. §§9–11, provides expedited judicial review to confirm, vacate, or modify arbitration awards. Under §9, a court "must" confirm an award "unless" it is vacated, modified, or corrected "as prescribed" in §§10 and 11. Section 10 lists grounds for vacating an award, including where the award was procured by "corruption," "fraud," or "undue means," and where the arbitrators were "guilty of misconduct," or "exceeded their powers." Under §11, the grounds for modifying or correcting an award include "evident material miscalculation," "evident material mistake," and "imperfect[ions] in [a] matter of form not affecting the merits."

After a bench trial sustained respondent tenant's (Mattel) right to terminate its lease with petitioner landlord (Hall Street), the parties proposed to arbitrate Hall Street's claim for indemnification of the costs of cleaning up the lease site. The District Court approved, and entered as an order, the parties' arbitration agreement, which, *inter alia,* required the court to vacate, modify, or correct any award if the arbitrator's conclusions of law were erroneous. The arbitrator decided for Mattel, but the District Court vacated the award for legal error, expressly invoking the agreement's legal-error review standard and citing the Ninth Circuit's *LaPine* decision for the proposition that the FAA allows parties to draft a contract dictating an alternative review standard. On remand, the arbitrator ruled for Hall Street, and the District Court largely upheld the award, again applying the parties' stipulated review standard. The Ninth Circuit reversed, holding the case controlled by its *Kyocera* decision, which had overruled *LaPine* on the ground that arbitration-agreement terms fixing the mode of judicial review are unenforceable, given the exclusive grounds for vacatur and modification provided by FAA §§10 and 11.

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Held:

1. The FAA's grounds for prompt vacatur and modification of awards are exclusive for parties seeking expedited review under the FAA. The Court rejects Hall Street's two arguments to the contrary. First, Hall Street submits that expandable judicial review has been accepted as the law since *Wilko* v. *Swan*, 346 U. S. 427. Although a *Wilko* statement—"the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation," *id.,* at 436–437 (emphasis added)—arguably favors Hall Street's position, arguable is as far as it goes. Quite apart from the leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the *Wilko* statement expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. Moreover, *Wilko*'s phrasing is too vague to support Hall Street's interpretation, since "manifest disregard" can be read as merely referring to the §10 grounds collectively, rather than adding to them, see, *e.g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 656, or as shorthand for the §10 subsections authorizing vacatur when arbitrators were "guilty of misconduct" or "exceeded their powers." Second, Hall Street says that the agreement to review for legal error ought to prevail simply because arbitration is a creature of contract, and the FAA is motivated by a congressional desire to enforce such agreements. *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 220. This argument comes up short because, although there may be a general policy favoring arbitration, the FAA has textual features at odds with enforcing a contract to expand judicial review once the arbitration is over. Even assuming §§10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand their uniformly narrow stated grounds to the point of legal review generally. But §9 makes evident that expanding §10's and §11's detailed categories at all would rub too much against the grain: §9 carries no hint of flexibility in unequivocally telling courts that they "must" confirm an arbitral award, "unless" it is vacated or modified "as prescribed" by §§10 and 11. Instead of fighting the text, it makes more sense to see §§9–11 as the substance of a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. *Dean Witter, supra,* at 217, 219, distinguished. Pp. 7–12.

2. In holding the §10 and §11 grounds exclusive with regard to enforcement under the FAA's expedited judicial review mechanisms, this Court decides nothing about other possible avenues for judicial enforcement of awards. Accordingly, this case must be remanded for

Syllabus

consideration of independent issues. Because the arbitration agreement was entered into during litigation, was submitted to the District Court as a request to deviate from the standard sequence of litigation procedure, and was adopted by the court as an order, there is some question whether it should be treated as an exercise of the District Court's authority to manage its cases under Federal Rule of Civil Procedure 16. This Court ordered supplemental briefing on the issue, but the parties' supplemental arguments implicate issues that have not been considered previously in this litigation and could not be well addressed for the first time here. Thus, the Court expresses no opinion on these matters beyond leaving them open for Hall Street to press on remand. Pp. 13–15.

196 Fed. Appx. 476, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, and ALITO, JJ., joined, and in which SCALIA, J., joined as to all but footnote 7. STEVENS, J., filed a dissenting opinion, in which KENNEDY, J., joined. BREYER, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 06–989

HALL STREET ASSOCIATES, L.L.C., PETITIONER *v.* MATTEL, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 25, 2008]

JUSTICE SOUTER delivered the opinion of the Court.*

The Federal Arbitration Act (FAA or Act), 9 U. S. C. §1 *et seq.*, provides for expedited judicial review to confirm, vacate, or modify arbitration awards. §§9–11 (2000 ed. and Supp. V). The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are exclusive.

I

This case began as a lease dispute between landlord, petitioner Hall Street Associates, L. L. C., and tenant, respondent Mattel, Inc. The property was used for many years as a manufacturing site, and the leases provided that the tenant would indemnify the landlord for any costs resulting from the failure of the tenant or its predecessor lessees to follow environmental laws while using the premises. App. 88–89.

Tests of the property's well water in 1998 showed high levels of trichloroethylene (TCE), the apparent residue of

*JUSTICE SCALIA joins all but footnote 7 of this opinion.

manufacturing discharges by Mattel's predecessors between 1951 and 1980. After the Oregon Department of Environmental Quality (DEQ) discovered even more pollutants, Mattel stopped drawing from the well and, along with one of its predecessors, signed a consent order with the DEQ providing for cleanup of the site.

After Mattel gave notice of intent to terminate the lease in 2001, Hall Street filed this suit, contesting Mattel's right to vacate on the date it gave, and claiming that the lease obliged Mattel to indemnify Hall Street for costs of cleaning up the TCE, among other things. Following a bench trial before the United States District Court for the District of Oregon, Mattel won on the termination issue, and after an unsuccessful try at mediating the indemnification claim, the parties proposed to submit to arbitration. The District Court was amenable, and the parties drew up an arbitration agreement, which the court approved and entered as an order. One paragraph of the agreement provided that

> "[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." App. to Pet. for Cert. 16a.

Arbitration took place, and the arbitrator decided for Mattel. In particular, he held that no indemnification was due, because the lease obligation to follow all applicable federal, state, and local environmental laws did not require compliance with the testing requirements of the Oregon Drinking Water Quality Act (Oregon Act); that Act the arbitrator characterized as dealing with human health as distinct from environmental contamination.

Hall Street then filed a District Court Motion for Order Vacating, Modifying And/Or Correcting the arbitration decision, App. 4, on the ground that failing to treat the Oregon Act as an applicable environmental law under the terms of the lease was legal error. The District Court agreed, vacated the award, and remanded for further consideration by the arbitrator. The court expressly invoked the standard of review chosen by the parties in the arbitration agreement, which included review for legal error, and cited *LaPine Technology Corp.* v. *Kyocera Corp.*, 130 F. 3d 884, 889 (CA9 1997), for the proposition that the FAA leaves the parties "free . . . to draft a contract that sets rules for arbitration and dictates an alternative standard of review." App. to Pet. for Cert. 46a.

On remand, the arbitrator followed the District Court's ruling that the Oregon Act was an applicable environmental law and amended the decision to favor Hall Street. This time, each party sought modification, and again the District Court applied the parties' stipulated standard of review for legal error, correcting the arbitrator's calculation of interest but otherwise upholding the award. Each party then appealed to the Court of Appeals for the Ninth Circuit, where Mattel switched horses and contended that the Ninth Circuit's recent en banc action overruling *LaPine* in *Kyocera Corp.* v. *Prudential-Bache Trade Servs., Inc.*, 341 F. 3d 987, 1000 (2003), left the arbitration agreement's provision for judicial review of legal error unenforceable. Hall Street countered that *Kyocera* (the later one) was distinguishable, and that the agreement's judicial review provision was not severable from the submission to arbitration.

The Ninth Circuit reversed in favor of Mattel in holding that, "[u]nder *Kyocera* the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable." 113 Fed. Appx. 272, 272–273 (2004). The Circuit instructed the District Court on re-

mand to

> "return to the application to confirm the original arbitration award (not the subsequent award revised after reversal), and . . . confirm that award, unless . . . the award should be vacated on the grounds allowable under 9 U. S. C. §10, or modified or corrected under the grounds allowable under 9 U. S. C. §11." *Id.*, at 273.

After the District Court again held for Hall Street and the Ninth Circuit again reversed,[1] we granted certiorari to decide whether the grounds for vacatur and modification provided by §§10 and 11 of the FAA are exclusive. 550 U. S. __ (2007). We agree with the Ninth Circuit that they are, but vacate and remand for consideration of independent issues.

II

Congress enacted the FAA to replace judicial indisposition to arbitration with a "national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 443 (2006). As for jurisdiction over controversies touching arbitration, the Act does nothing, being "something of an anomaly in the field of federal-court jurisdiction" in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis. *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 25, n. 32 (1983); see, *e.g.*, 9 U. S. C. §4 (providing for action by a federal district court "which,

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[1] On remand, the District Court vacated the arbitration award, because it supposedly rested on an implausible interpretation of the lease and thus exceeded the arbitrator's powers, in violation of 9 U. S. C. §10. Mattel appealed, and the Ninth Circuit reversed, holding that implausibility is not a valid ground for vacating or correcting an award under §10 or §11. 196 Fed. Appx. 476, 477–478 (2006).

save for such [arbitration] agreement, would have jurisdiction under title 28").[2] But in cases falling within a court's jurisdiction, the Act makes contracts to arbitrate "valid, irrevocable, and enforceable," so long as their subject involves "commerce." §2. And this is so whether an agreement has a broad reach or goes just to one dispute, and whether enforcement be sought in state court or federal. See *ibid.; Southland Corp.* v. *Keating*, 465 U. S. 1, 15–16 (1984).

The Act also supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it. §§9–11. An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court.[3] §6. Under the terms of §9, a court "must" confirm an arbitration award "unless" it is vacated, modified, or corrected "as prescribed" in §§10 and 11. Section 10 lists grounds for vacating an award, while §11 names those for modifying or correcting one.[4]

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[2] Because the FAA is not jurisdictional, there is no merit in the argument that enforcing the arbitration agreement's judicial review provision would create federal jurisdiction by private contract. The issue is entirely about the scope of judicial review permissible under the FAA.

[3] Unlike JUSTICE STEVENS, see *post*, at 2 (dissenting opinion), we understand this expedited review to be what each of the parties understood it was seeking from time to time; neither party's pleadings were amended to raise an independent state-law contract claim or defense specific to the arbitration agreement.

[4] Title 9 U. S. C. §10(a) (2000 ed., Supp. V) provides:

"(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

"(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;

The Courts of Appeals have split over the exclusiveness of these statutory grounds when parties take the FAA shortcut to confirm, vacate, or modify an award, with some saying the recitations are exclusive, and others regarding them as mere threshold provisions open to expansion by agreement.[5] As mentioned already, when this litigation

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"(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."

Title 9 U. S. C. §11 (2000 ed.) provides:

"In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

"(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

"(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

"(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

"The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

[5] The Ninth and Tenth Circuits have held that parties may not contract for expanded judicial review. See *Kyocera Corp.* v. *Prudential-Bache Trade Servs., Inc.*, 341 F. 3d 987, 1000 (CA9 2003); *Bowen* v. *Amoco Pipeline Co.*, 254 F. 3d 925, 936 (CA10 2001). The First, Third, Fifth, and Sixth Circuits, meanwhile, have held that parties may so contract. See *Puerto Rico Tel. Co.* v. *U. S. Phone Mfg. Corp.*, 427 F. 3d 21, 31 (CA1 2005); *Jacada (Europe), Ltd.* v. *International Marketing Strategies, Inc.*, 401 F. 3d 701, 710 (CA6 2005); *Roadway Package System, Inc.* v. *Kayser*, 257 F. 3d 287, 288 (CA3 2001); *Gateway Technologies, Inc.* v. *MCI Telecommunications Corp.*, 64 F. 3d 993, 997 (CA5 1995). The Fourth Circuit has taken the latter side of the split in an unpublished opinion, see *Syncor Int'l Corp.* v. *McLeland*, 120 F. 3d 262 (1997), while the Eighth Circuit has expressed agreement with the former side in dicta, see *UHC Management Co.* v. *Computer Sciences*

started, the Ninth Circuit was on the threshold side of the split, see *LaPine*, 130 F. 3d, at 889, from which it later departed en banc in favor of the exclusivity view, see *Kyocera,* 341 F. 3d, at 1000, which it followed in this case, see 113 Fed. Appx., at 273. We now hold that §§10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification.

III

Hall Street makes two main efforts to show that the grounds set out for vacating or modifying an award are not exclusive, taking the position, first, that expandable judicial review authority has been accepted as the law since *Wilko* v. *Swan*, 346 U. S. 427 (1953). This, however, was not what *Wilko* decided, which was that §14 of the Securities Act of 1933 voided any agreement to arbitrate claims of violations of that Act, see *id.*, at 437–438, a holding since overruled by *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). Although it is true that the Court's discussion includes some language arguably favoring Hall Street's position, arguable is as far as it goes.

The *Wilko* Court was explaining that arbitration would undercut the Securities Act's buyer protections when it remarked (citing FAA §10) that "[p]ower to vacate an [arbitration] award is limited," 346 U. S., at 436, and went on to say that "the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation," *id.*, at 436–437. Hall Street reads this statement as recognizing "manifest disregard of the law" as a further ground for vacatur on top of those listed in §10, and some Circuits have read it the same way. See, *e.g.*, *McCarthy* v. *Citigroup Global Markets, Inc.*, 463 F. 3d

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Corp., 148 F. 3d 992, 997–998 (1998).

87, 91 (CA1 2006); *Hoeft* v. *MVL Group, Inc.*, 343 F. 3d 57, 64 (CA2 2003); *Prestige Ford* v. *Ford Dealer Computer Servs., Inc.,* 324 F. 3d 391, 395–396 (CA5 2003); *Scott* v. *Prudential Securities, Inc.*, 141 F. 3d 1007, 1017 (CA11 1998). Hall Street sees this supposed addition to §10 as the camel's nose: if judges can add grounds to vacate (or modify), so can contracting parties.

But this is too much for *Wilko* to bear. Quite apart from its leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the statement it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. Then there is the vagueness of *Wilko*'s phrasing. Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the §10 grounds collectively, rather than adding to them. See, *e.g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 656 (1985) (STEVENS, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law, 9 U. S. C. §§10, 207"); *I/S Stavborg* v. *National Metal Converters, Inc.*, 500 F. 2d 424, 431 (CA2 1974). Or, as some courts have thought, "manifest disregard" may have been shorthand for §10(a)(3) or §10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." See, *e.g.*, *Kyocera*, *supra*, at 997. We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, see *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 942 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.

Second, Hall Street says that the agreement to review for legal error ought to prevail simply because arbitration is a creature of contract, and the FAA is "motivated, first and foremost, by a congressional desire to enforce agree-

ments into which parties ha[ve] entered." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 220 (1985). But, again, we think the argument comes up short. Hall Street is certainly right that the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law. But to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.

To that particular question we think the answer is yes, that the text compels a reading of the §§10 and 11 categories as exclusive. To begin with, even if we assumed §§10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally. Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing]. . . powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted;" the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits." Given this emphasis on extreme arbitral conduct, the old rule of *ejusdem generis* has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows. Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error.

"Fraud" and a mistake of law are not cut from the same cloth.

That aside, expanding the detailed categories would rub too much against the grain of the §9 language, where provision for judicial confirmation carries no hint of flexibility. On application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.[6]

In fact, anyone who thinks Congress might have understood §9 as a default provision should turn back to §5 for an example of what Congress thought a default provision

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[6] Hall Street claims that §9 supports its position, because it allows a court to confirm an award only "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." Hall Street argues that this language "expresses Congress's intent that a court must enforce the agreement of the parties as to whether, and under what circumstances, a judgment shall be entered." Reply Brief for Petitioner 5; see also Brief for Petitioner 22–24. It is a peculiar argument, converting agreement as a necessary condition for judicial enforcement into a sufficient condition for a court to bar enforcement. And the text is otherwise problematical for Hall Street: §9 says that if the parties have agreed to judicial enforcement, the court "must grant" confirmation unless grounds for vacatur or modification exist under §10 or §11. The sentence nowhere predicates the court's judicial action on the parties' having agreed to specific standards; if anything, it suggests that, so long as the parties contemplated judicial enforcement, the court must undertake such enforcement under the statutory criteria. In any case, the arbitration agreement here did not specifically predicate entry of judgment on adherence to its judicial-review standard. See App. to Pet. for Cert. 15a. To the extent Hall Street argues otherwise, it contests not the meaning of the FAA but the Ninth Circuit's severability analysis, upon which it did not seek certiorari.

would look like:

> "[i]f in the agreement provision be made for a method of naming or appointing an arbitrator. . . such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, . . . then upon the application of either party to the controversy the court shall designate and appoint an arbitrator. . . ."

"[I]f no method be provided" is a far cry from "must grant . . . unless" in §9.

Instead of fighting the text, it makes more sense to see the three provisions, §§9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process," *Kyocera*, 341 F. 3d, at 998; cf. *Ethyl Corp.* v. *United Steelworkers of America*, 768 F. 2d 180, 184 (CA7 1985), and bring arbitration theory to grief in post-arbitration process.

Nor is *Dean Witter,* 470 U. S. 213, to the contrary, as Hall Street claims it to be. *Dean Witter* held that state-law claims subject to an agreement to arbitrate could not be remitted to a district court considering a related, non-arbitrable federal claim; the state-law claims were to go to arbitration immediately. *Id.*, at 217. Despite the opinion's language "reject[ing] the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims," *id.*, at 219, the holding mandated immediate enforcement of an arbitration agreement; the Court was merely trying to explain that the inefficiency and difficulty of conducting simultaneous arbitration and

federal-court litigation was not a good enough reason to defer the arbitration, see *id.*, at 217.

When all these arguments based on prior legal authority are done with, Hall Street and Mattel remain at odds over what happens next. Hall Street and its *amici* say parties will flee from arbitration if expanded review is not open to them. See, *e.g.*, Brief for Petitioner 39; Brief for New England Legal Foundation et al. as *Amici Curiae* 15. One of Mattel's *amici* foresees flight from the courts if it is. See Brief for U. S. Council for Int'l Business as *Amicus Curiae* 29–30. We do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds.[7]

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[7] The history of the FAA is consistent with our conclusion. The text of the FAA was based upon that of New York's arbitration statute. See S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) ("The bill . . . follows the lines of the New York arbitration law enacted in 1920 . . ."). The New York Arbitration Law incorporated pre-existing provisions of the New York Code of Civil Procedure. See 1920 N. Y. Laws p. 806. Section 2373 of the code said that, upon application by a party for a confirmation order, "the court must grant such an order, unless the award is vacated, modified, or corrected, as prescribed by the next two sections." 2 N. Y. Ann. Code Civ. Proc. (Stover 6th ed. 1902) (hereinafter Stover). The subsequent sections gave grounds for vacatur and modification or correction virtually identical to the 9 U. S. C. §§10 and 11 grounds. See 2 Stover §§2374, 2375.

In a brief submitted to the House and Senate Subcommittees of the Committees on the Judiciary, Julius Henry Cohen, one of the primary drafters of both the 1920 New York Act and the proposed FAA, said, "The grounds for vacating, modifying, or correcting an award are limited. If the award [meets a condition of §10], then and then only the award may be vacated. . . . If there was [an error under §11], then and then only it may be modified or corrected . . . ." Arbitration of Interstate Commercial Disputes, Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H. R. 646, 68th Cong., 1st Sess., 34 (1924). The House Report similarly recognized that

IV

In holding that §§10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.

Although one such avenue is now claimed to be revealed in the procedural history of this case, no claim to it was presented when the case arrived on our doorstep, and no reason then appeared to us for treating this as anything but an FAA case. There was never any question about meeting the FAA §2 requirement that the leases from which the dispute arose be contracts "involving commerce." 9 U. S. C. §2; see *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 277 (1995) (§2 "exercise[s] Congress' commerce power to the full"). Nor is there any doubt now that the parties at least had the FAA in mind at the outset; the arbitration agreement even incorporates FAA §7, empowering arbitrators to compel attendance of

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an "award may . . . be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form." H. R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924).

In a contemporaneous campaign for the promulgation of a uniform state arbitration law, Cohen contrasted the New York Act with the Illinois Arbitration and Awards Act of 1917, which required an arbitrator, at the request of either party, to submit any question of law arising during arbitration to judicial determination. See Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 97–98 (1924); 1917 Ill. Laws p. 203.

witnesses. App. to Pet. for Cert. 13a.

While it is true that the agreement does not expressly invoke FAA §9, §10, or §11, and none of the various motions to vacate or modify the award expressly said that the parties were relying on the FAA, the District Court apparently thought it was applying the FAA when it alluded to the Act in quoting *LaPine*, 130 F. 3d, at 889, for the then-unexceptional proposition that "'[f]ederal courts can expand their review of an arbitration award beyond the FAA's grounds, when . . . the parties have so agreed.'" App. to Pet. for Cert. 46a. And the Ninth Circuit, for its part, seemed to take it as a given that the District Court's direct and prompt examination of the award depended on the FAA; it found the expanded-review provision unenforceable under *Kyocera* and remanded for confirmation of the original award "unless the district court determines that the award should be vacated on the grounds allowable under 9 U. S. C. §10, or modified or corrected under the grounds allowable under 9 U. S. C. §11." 113 Fed. Appx., at 273. In the petition for certiorari and the principal briefing before us, the parties acted on the same premise. See, *e.g.*, Pet. for Cert. 27 ("This Court should accept review to resolve this important issue of statutory construction under the FAA"); Brief for Petitioner 16 ("Because arbitration provisions providing for judicial review of arbitration awards for legal error are consistent with the goals and policies of the FAA and employ a standard of review which district courts regularly apply in a variety of contexts, those provisions are entitled to enforcement under the FAA").

One unusual feature, however, prompted some of us to question whether the case should be approached another way. The arbitration agreement was entered into in the course of district-court litigation, was submitted to the District Court as a request to deviate from the standard sequence of trial procedure, and was adopted by the Dis-

trict Court as an order. See App. 46–47; App. to Pet. for Cert. 4a–8a. Hence a question raised by this Court at oral argument: should the agreement be treated as an exercise of the District Court's authority to manage its cases under Federal Rules of Civil Procedure 16? See, *e.g.*, Tr. of Oral Arg. 11–12. Supplemental briefing at the Court's behest joined issue on the question, and it appears that Hall Street suggested something along these lines in the Court of Appeals, which did not address the suggestion.

We are, however, in no position to address the question now, beyond noting the claim of relevant case management authority independent of the FAA. The parties' supplemental arguments on the subject in this Court implicate issues of waiver and the relation of the FAA both to Rule 16 and the Alternative Dispute Resolution Act of 1998, 28 U. S. C. §651 *et seq*., none of which has been considered previously in this litigation, or could be well addressed for the first time here. We express no opinion on these matters beyond leaving them open for Hall Street to press on remand. If the Court of Appeals finds they are open, the court may consider whether the District Court's authority to manage litigation independently warranted that court's order on the mode of resolving the indemnification issues remaining in this case.

* * *

Although we agree with the Ninth Circuit that the FAA confines its expedited judicial review to the grounds listed in 9 U. S. C. §§10 and 11, we vacate the judgment and remand the case for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 06–989

HALL STREET ASSOCIATES, L.L.C., PETITIONER *v.* MATTEL, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 25, 2008]

JUSTICE BREYER, dissenting.

The question presented in this case is whether "the Federal Arbitration Act . . . *precludes* a federal court from enforcing" an arbitration agreement that gives the court the power to set aside an arbitration award that embodies an arbitrator's mistake about the law. Pet. for Cert. i. Like the majority and JUSTICE STEVENS, and primarily for the reasons they set forth, I believe that the Act does not *preclude* enforcement of such an agreement. See *ante*, at 13 (opinion of the Court) (The Act "is not the only way into court for parties wanting review of arbitration awards"); *ante*, at 3–4 (STEVENS, J., dissenting) (The Act is a "shield meant to protect parties from hostile courts, not a sword with which to cut down parties' 'valid, irrevocable and enforceable' agreements to arbitrate their disputes subject to judicial review for errors of law").

At the same time, I see no need to send the case back for further judicial decisionmaking. The agreement here was entered into with the consent of the parties and the approval of the District Court. Aside from the Federal Arbitration Act itself, 9 U. S. C. §1 *et seq.*, respondent below pointed to no statute, rule, or other relevant public policy that the agreement might violate. The Court has now rejected its argument that the agreement violates the Act, and I would simply remand the case with instructions that

the Court of Appeals affirm the District Court's judgment enforcing the arbitrator's final award.

SUPREME COURT OF THE UNITED STATES

No. 06–989

HALL STREET ASSOCIATES, L.L.C., PETITIONER *v.* MATTEL, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 25, 2008]

JUSTICE STEVENS, with whom JUSTICE KENNEDY joins, dissenting.

May parties to an ongoing lawsuit agree to submit their dispute to arbitration subject to the caveat that the trial judge should refuse to enforce an award that rests on an erroneous conclusion of law? Prior to Congress' enactment of the Federal Arbitration Act (FAA or Act) in 1925, the answer to that question would surely have been "Yes."[1] Today, however, the Court holds that the FAA does not merely authorize the vacation or enforcement of awards on specified grounds, but also forbids enforcement of perfectly reasonable judicial review provisions in arbitration agreements fairly negotiated by the parties and approved by the district court. Because this result conflicts with the primary purpose of the FAA and ignores the historical context in which the Act was passed, I respectfully dissent.

Prior to the passage of the FAA, American courts were generally hostile to arbitration. They refused, with rare exceptions, to order specific enforcement of executory

[1] See *Klein* v. *Catara*, 14 F. Cas. 732, 735 (C. C.D. Mass. 1814) ("If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in the submission; they may restrain or enlarge its operation as they please") (Story, J.).

agreements to arbitrate.[2] Section 2 of the FAA responded to this hostility by making written arbitration agreements "valid, irrevocable, and enforceable." 9 U. S. C. §2. This section, which is the centerpiece of the FAA, reflects Congress' main goal in passing the legislation: "to abrogate the general common-law rule against specific enforcement of arbitration agreements," *Southland Corp.* v. *Keating*, 465 U. S. 1, 18 (1984) (STEVENS, J., concurring in part and dissenting in part), and to "ensur[e] that private arbitration agreements are enforced according to their terms," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478 (1989). Given this settled understanding of the core purpose of the FAA, the interests favoring enforceability of parties' arbitration agreements are stronger today than before the FAA was enacted. As such, there is more—and certainly not less—reason to give effect to parties' fairly negotiated decisions to provide for judicial review of arbitration awards for errors of law.

Petitioner filed this rather complex action in an Oregon state court. Based on the diverse citizenship of the parties, respondent removed the case to federal court. More than three years later, and after some issues had been resolved, the parties sought and obtained the District Court's approval of their agreement to arbitrate the remaining issues subject to *de novo* judicial review. They neither requested, nor suggested that the FAA authorized, any "expedited" disposition of their case. Because the arbitrator made a rather glaring error of law, the judge refused to affirm his award until after that error was corrected. The Ninth Circuit reversed.

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[2] See *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120–122 (1924); *The Atlanten*, 252 U. S. 313, 315–316 (1920). Although agreements to arbitrate were not specifically enforceable, courts did award nominal damages for the breach of such contracts.

This Court now agrees with the Ninth Circuit's (most recent) interpretation of the FAA as setting forth the exclusive grounds for modification or vacation of an arbitration award under the statute. As I read the Court's opinion, it identifies two possible reasons for reaching this result: (1) a supposed *quid pro quo* bargain between Congress and litigants that conditions expedited federal enforcement of arbitration awards on acceptance of a statutory limit on the scope of judicial review of such awards; and (2) an assumption that Congress intended to include the words "and no other" in the grounds specified in §§10 and 11 for the vacatur and modification of awards. Neither reason is persuasive.

While §9 of the FAA imposes a 1-year limit on the time in which any party to an arbitration may apply for confirmation of an award, the statute does not require that the application be given expedited treatment. Of course, the premise of the entire statute is an assumption that the arbitration process may be more expeditious and less costly than ordinary litigation, but that is a reason for interpreting the statute liberally to favor the parties' use of arbitration. An unnecessary refusal to enforce a perfectly reasonable category of arbitration agreements defeats the primary purpose of the statute.

That purpose also provides a sufficient response to the Court's reliance on statutory text. It is true that a wooden application of "the old rule of *ejusdem generis*," *ante,* at 9, might support an inference that the categories listed in §§10 and 11 are exclusive, but the literal text does not compel that reading—a reading that is flatly inconsistent with the overriding interest in effectuating the clearly expressed intent of the contracting parties. A listing of grounds that must always be available to contracting parties simply does not speak to the question whether they may agree to additional grounds for judicial review.

Moreover, in light of the historical context and the

broader purpose of the FAA, §§10 and 11 are best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties' "valid, irrevocable and enforceable" agreements to arbitrate their disputes subject to judicial review for errors of law.[3] §2.

Even if I thought the narrow issue presented in this case were as debatable as the conflict among the courts of appeals suggests, I would rely on a presumption of overriding importance to resolve the debate and rule in favor of petitioner's position that the FAA permits the statutory grounds for vacatur and modification of an award to be supplemented by contract. A decision "*not to regulate*" the terms of an agreement that does not even arguably offend any public policy whatsoever, "is adequately justified by a presumption in favor of freedom." *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 320 (1993) (STEVENS, J., concurring in judgment).

Accordingly, while I agree that the judgment of the Court of Appeals must be set aside, and that there may be additional avenues available for judicial enforcement of parties' fairly negotiated review provisions, see, *ante,* at 13–15, I respectfully dissent from the Court's interpretation of the FAA, and would direct the Court of Appeals to affirm the judgment of the District Court enforcing the arbitrator's final award.

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[3] In the years before the passage of the FAA, arbitration awards were subject to thorough and broad judicial review. See Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 270-271 (1926); Cullinan, Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements, 51 Vand. L. Rev. 395, 409 (1998). In §§10 and 11 of the FAA, Congress significantly limited the grounds for judicial vacatur or modification of such awards in order to protect arbitration awards from hostile and meddlesome courts.

South Carolina Arbitration Certification Training

Ethical Considerations for Arbitrators

South Carolina Ethical Canons

JAMS Ethical Guidelines

AAA Code of Ethics

APPENDIX A
Code of Ethics for Arbitrators[1]

CANON I
An Arbitrator Should Uphold the Integrity and Fairness of the Arbitration Process.

A. Fair and just processes for resolving disputes are indispensable in our society. Commercial arbitration is an important method for deciding many types of disputes. In order for commercial arbitration to be effective, there must be broad public confidence in the integrity and fairness of the process. Therefore, an arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. The provisions of this code should be construed and applied to further these objectives.

B. It is inconsistent with the integrity of the arbitration process for persons to solicit appointment for themselves. However, a person may indicate a general willingness to serve as an arbitrator.

C. Persons should accept appointment as arbitrators only if they believe that they can be available to conduct the arbitration promptly.

D. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest.

E. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, by public clamor, by fear of criticism or by self-interest.

F. When an arbitrator's authority is derived from an agreement of the parties, the arbitrator should neither exceed that authority nor do less than is required

to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules.

G. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

H. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, wherever specifically set forth in this code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue even after the decision in the case has been given to the parties.

CANON II
An Arbitrator Should Disclose Any Interest or Relationship Likely to Affect Impartiality or Which Might Create an Appearance of Partiality or Bias.

Introductory Note

This code reflects the prevailing principle that arbitrators should disclose the existence of interests or relationships that are likely to affect their impartiality or that might reasonably create an appearance that they are biased against one party or favorable to another. These provisions of the code are intended to be applied realistically so that the burden of detailed disclosure does not become so great that it is impractical for persons in the business world to be arbitrators, thereby depriving parties of the services of those who might be best informed and qualified to decide particular types of cases.[2]

This code does not limit the freedom of parties to agree on whomever they choose as an arbitrator. When parties, with knowledge of a person's interests and relationships, nevertheless desire that individual to serve as an arbitrator, that person may properly serve.

Disclosure

A. Persons who are requested to serve as arbitrators should, before accepting, disclose

(1) any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving members of their families or their current employers, partners or business associates.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in the preceding paragraph A.

C. The obligation to disclose interests or relationships described in the preceding paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Disclosure should be made to all parties unless other procedures for disclosure are provided in the rules or practices of an institution which is administering the arbitration. Where more than one arbitrator has been appointed, each should inform the others of the interests and relationships which have been disclosed.

E. In the event that an arbitrator is requested by all parties to withdraw, the arbitrator should do so. In the event that an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality or bias, the arbitrator should withdraw unless either of the following circumstances exists.

(1) If an agreement of parties, or arbitration rules agreed to by the parties, establishes procedures for determining challenges to arbitrators, then those procedures should be followed; or,

(2) if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can

nevertheless act and decide the case impartially and fairly, and that withdrawal would cause unfair delay or expense to another party or would be contrary to the ends of justice.

CANON III
An Arbitrator in Communicating with the Parties Should Avoid Impropriety or the Appearance of Impropriety.

A. If an agreement of the parties or applicable arbitration rules referred to in that agreement establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of the following paragraphs B and C.

B. Unless otherwise provided in applicable arbitration rules or in an agreement of the parties, arbitrators should not discuss a case with any party in the absence of each other party, except in any of the following circumstances.

(1) Discussions may be had with a party concerning such matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express its views.

(2) If a party fails to be present at a hearing after having been given due notice, the arbitrator may discuss the case with any party who is present.

(3) If all parties request or consent to it, such discussion may take place.

C. Unless otherwise provided in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to each other party. Whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to each other party, the arbitrator should do so.

CANON IV
An Arbitrator Should Conduct the Proceedings Fairly and Diligently.

A. An arbitrator should conduct the proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.

B. An arbitrator should perform duties diligently and conclude the case as promptly as the circumstances reasonably permit.

C. An arbitrator should be patient and courteous to the parties, to their lawyers and to the witnesses and should encourage similar conduct by all participants in the proceedings.

D. Unless otherwise agreed by the parties or provided in arbitration rules agreed to by the parties, an arbitrator should accord to all parties the right to appear in person and to be heard after due notice of the time and place of hearing.

E. An arbitrator should not deny any party the opportunity to be represented by counsel.

F. If a party fails to appear after due notice, an arbitrator should proceed with the arbitration when authorized to do so by the agreement of the parties, the rules agreed to by the parties or by law. However, an arbitrator should do so only after receiving assurance that notice has been given to the absent party.

G. When an arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence.

H. It is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement of the case. However, an arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all parties. An arbitrator should not exert pressure on any party to settle.

I. Nothing in this code is intended to prevent a person from acting as a mediator or conciliator of a dispute in which he or she has been appointed as arbitrator, if requested to do so by all parties or where authorized or required to do so by applicable laws or rules.

J. When there is more than one arbitrator, the arbitrators should afford each other the full opportunity to participate in all aspects of the proceedings.

CANON V
An Arbitrator Should Make Decisions in a Just, Independent and Deliberate Manner.

A. An arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request an arbitrator to embody that agreement in an award, an arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI
An Arbitrator Should Be Faithful to the Relationship of Trust and Confidentiality Inherent in That Office.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. Unless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.

C. It is not proper at any time for an arbitrator to inform anyone of the decision in advance of the time it is given to all parties. In a case in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone concerning the deliberations of the arbitrators. After an arbitration

award has been made, it is not proper for an arbitrator to assist in postarbitral proceedings, except as is required by law.

D. In many types of arbitration it is customary practice for the arbitrators to serve without pay. However, in some types of cases it is customary for arbitrators to receive compensation for their services and reimbursement for their expenses. In cases in which any such payments are to made, all persons who are requested to serve, or who are serving as arbitrators, should be governed by the same high standards of integrity and fairness as apply to their other activities in the case. Accordingly, such persons should scrupulously avoid bargaining with parties over the amount of payments or engaging in any communications concerning payments which would create an appearance of coercion or other impropriety. In the absence of governing provisions in the agreement of the parties or in rules agreed to by the parties or in applicable law, certain practices, relating to payments are generally recognized as being preferable in order to preserve the integrity and fairness of the arbitration process. These practices include the following.

(1) It is preferable that before the arbitrator finally accepts appointment the basis of payment be established and that all parties be informed thereof in writing.

(2) In cases conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, the payments should be arranged by the institution to avoid the necessity for communication by the arbitrators directly with the parties concerning the subject.

(3) In cases where no institution is available to assist in making arrangement for payments, it is preferable that any discussions with arbitrators concerning payments should take place in the presence of all parties.

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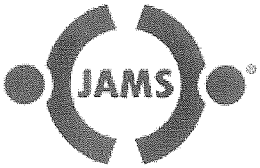
[1] This code is based on the Code of Ethics for Arbitrators promulgated by the American Bar Association and the American Arbitration Association.

[2] In applying the provisions of this code relating to disclosure, it might be helpful to recall the words of the concurring opinion, in a case decided by the US Supreme Court, that arbitrators "should err on the side of disclosure" because "it is better that the relationship be disclosed at the outset when the

parties are free to reject the arbitrator or accept him with knowledge of the relationship." At the same time, it must be recognized that "an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people." Accordingly, an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography," nor is an arbitrator called on to disclose interest or relationships that are merely "trivial" (a concurring opinion in Commonwealth Coatings Corp. v. Continental Casualty Co., 393 US 145,131-152,1968).



Arbitrators Ethics Guidelines

Arbitrators Ethics Guidelines

Introduction

A. The purpose of these Ethics Guidelines is to provide basic guidance to JAMS Arbitrators regarding ethical issues that may arise during or related to the Arbitration process. Arbitration is an adjudicative dispute resolution procedure in which a neutral decision maker issues an Award. Parties are often represented by counsel who argue the case before a single Arbitrator or a panel of three Arbitrators, who adjudicate, or judge, the matter based on the evidence presented.

B. Arbitration - either entered into voluntarily after a dispute has occurred, or as agreed to in a pre-dispute contract clause - is generally binding. By entering into the Arbitration process, the Parties have agreed to accept an Arbitrator's decision as final. There are instances when an Arbitrator's decision may be modified or vacated, but they are extremely rare. The Parties in an Arbitration trade the right to full review for a speedier, less expensive and private process in which it is certain there will be an appropriately expeditious resolution.

C. Other sets of ethics guidelines for Arbitrators exist, such as those promulgated by the National Academy of Arbitrators and jointly by the American Arbitration Association and the American Bar Association. An Arbitrator may wish to review these for informational purposes.

D. These Guidelines are national in scope and are necessarily general. They are not intended to supplant applicable state or local law or rules. An Arbitrator should be aware of applicable state statutes or court rules, such as laws concerning disclosure that may apply to the Arbitrations being conducted. In the event that these Guidelines are inconsistent with such statutes or rules, an Arbitrator must comply with the applicable law.

E. In addition, most states have promulgated codes of ethics for judges and other public judicial officers. In some instances, these codes apply to certain activities of private judges, such as court-ordered Arbitrations. Arbitrators should comply with codes that are specifically applicable to them or to their activities. Where the codes do not specifically apply, an Arbitrator may choose to comply voluntarily with the requirements of such codes.

F. The ethical obligations of an Arbitrator begin as soon as the Arbitrator becomes aware of potential selection by the Parties and continue even after the decision in the case has been rendered. JAMS strongly encourages Arbitrators to address ethical issues that may arise in their cases as soon as an issue becomes apparent, and where appropriate to seek advice on how to resolve such issues from the National Arbitration Committee.

G. The Guidelines in Articles I through IX apply to neutral Arbitrators regardless of the method by which they may have been selected. Article X is intended to apply to Party-appointed Arbitrators who are non-neutral.

Many Arbitration agreements provide for the appointment of an Arbitrator by each Party and the appointment of the third Arbitrator by the two Party-appointed Arbitrators. Party-appointed Arbitrators should be presumed to be neutral, unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise.

1. Where the Party-appointed Arbitrator is expected to be non-neutral, some of the Guidelines applicable to neutral Arbitrators do not apply or are altered to suit this process. For example, while non-neutral Arbitrators must disclose any matters that might affect their independence, the opposing Party ordinarily may not disqualify such person from service as an Arbitrator.
2. It is appropriate for the party appointed arbitrators to address the status of their service with the party that appointed them, with each other and with the neutral arbitrator and to determine whether the Parties would prefer that they act in a neutral capacity.
3. *Note regarding international Arbitrations.* Tripartite Arbitrations in which the Parties each appoint one Arbitrator are common in international disputes; however, all Arbitrators, by whomever appointed, are expected to be independent of the Parties and to be neutral. They are sometimes expected to communicate *ex parte* with the Party that appointed them solely for purposes of the selection of the chairman and not otherwise.

H. These Guidelines do not establish new or additional grounds for judicial review of Arbitration Awards.

GUIDELINES

I. AN ARBITRATOR SHOULD UPHOLD THE DIGNITY AND INTEGRITY OF THE OFFICE OF THE ARBITRATION PROCESS.

An Arbitrator has a responsibility to the Parties, to other participants in the proceeding, and to the profession. An Arbitrator should seek to discern and refuse to lend approval or consent to any attempt by a

Party of its representative to use Arbitration for a purpose other than the fair and efficient resolution of a dispute.

II. AN ARBITRATOR SHOULD BE COMPETENT TO ARBITRATE THE PARTICULAR MATTER.

An Arbitrator should accept an appointment only if the Arbitrator meets the Parties' stated requirements in the agreement to arbitrate regarding professional qualifications. An Arbitrator should prepare before the Arbitration by reviewing any statements or documents submitted by the Parties. An Arbitrator should refuse to serve or should withdraw from the Arbitration if the Arbitrator becomes physically or mentally unable to meet the reasonable expectations of the Parties.

III. AN ARBITRATOR SHOULD INFORM ALL PARTIES OF THE ROLE OF THE ARBITRATOR AND THE RULES OF THE ARBITRATION PROCESS.

A. An Arbitrator should ensure that all Parties understand the Arbitration process, the Arbitrator's role in that process, and the relationship of the Parties to the Arbitrator.

B. An Arbitrator may encourage the Parties to mediate their dispute but should not suggest that the Arbitrator serve as the mediator. In the event that, prior to or during the Arbitration, all Parties request an Arbitrator to participate in discussions of settlement or to combine the Arbitration with another dispute resolution process, the Arbitrator should explain how the Arbitrator's role and relationship to the Parties may be altered, including the impact such a shift may have on the willingness of the Parties to disclose certain information to the Arbitrator serving in the settlement-related role. Nothing in these Guidelines is intended to prevent an Arbitrator from acting as a neutral in another dispute resolution process in the same case, if requested to do so by all Parties and if an appropriate written waiver is obtained. The Parties should, however, be given the opportunity to select another neutral to conduct any such process.

IV. AN ARBITRATOR SHOULD MAINTAIN CONFIDENTIALITY APPROPRIATE TO THE PROCESS.

A. Unless otherwise agreed by the Parties, or required by applicable rules or law, an Arbitrator should keep confidential all matters relating to the Arbitration proceedings and decisions.

B. An Arbitrator should not discuss a case with persons not involved directly in the Arbitration unless the identity of the Parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification.

C. An Arbitrator may discuss a case with another member of the Arbitration panel hearing that case, whether or not all panel members are present.

D. An Arbitrator should not use confidential information acquired during the Arbitration proceeding to gain personal advantage or advantage of others, or to affect adversely the interest of another. An Arbitrator should not inform anyone of the decision in advance of giving it to all Parties. Where there is more than one Arbitrator, an Arbitrator should not disclose to anyone the deliberations of the Arbitrators.

E. An Arbitrator should not participate in post-Award proceedings, except (1) if requested to make a correction to or clarification of an Award, (2) if required by law or (3) if requested by all Parties to participate in a subsequent dispute resolution procedure in the same case.

V. AN ARBITRATOR SHOULD ENSURE THAT HE OR SHE HAS NO KNOWN CONFLICT OF INTEREST REGARDING THE CASE, AND SHOULD ENDEAVOR TO AVOID ANY APPEARANCE OF A CONFLICT OF INTEREST.

A. An Arbitrator should promptly disclose, or cause to be disclosed all matters required by applicable law and any actual or potential conflict of interest or relationship or other information, of which the Arbitrator is aware, that reasonably could lead a Party to question the Arbitrator's impartiality.

B. An Arbitrator may establish social or professional relationships with lawyers and members of other professions. There should be no attempt to be secretive about such relationships but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

C. An Arbitrator should not proceed with the process unless all Parties have acknowledged and waived any actual or potential conflict of interest. If the conflict of interest casts serious doubt on the integrity of the process, an Arbitrator should withdraw, notwithstanding receipt of a full waiver.

D. An Arbitrator's disclosure obligations continue throughout the course of the Arbitration and require the Arbitrator to disclose, at any stage of the Arbitration, any such interest or relationship that may arise, or that is recalled or discovered. Disclosure should be made to all Parties, and the Arbitrator should accept such work only where the Arbitrator believes it can be undertaken without an actual or apparent conflict of interest and after a written waiver of conflict has been obtained from the other Parties to the pending Arbitration. Where more than one Arbitrator is appointed, each should inform the others of the interests and relationships that have been disclosed.

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E. An Arbitrator should avoid conflicts of interest in recommending the services of other professionals. If an Arbitrator is unable to make a personal recommendation without creating a potential or actual conflict of interest, the Arbitrator should so advise the Parties and refer them to a professional service, provider or association.

F. After an Award or decision is rendered in an Arbitration, an Arbitrator should refrain from any conduct involving a Party, insurer or counsel to a Party to the Arbitration that would cast reasonable doubt on the integrity of the Arbitration process, absent disclosure to and consent by all the Parties to the Arbitration. This does not preclude an Arbitrator from serving as an Arbitrator or in another neutral capacity with a Party, insurer or counsel involved in the prior Arbitration, provided that appropriate disclosures are made about the prior Arbitration to the Parties to the new matter.

G. Other than agreed fee and expense reimbursement, an Arbitrator should not accept a gift or item of value from a Party, insurer or counsel to a pending Arbitration. Unless a period of time has elapsed sufficient to negate any appearance of a conflict of interest, an Arbitrator should not accept a gift or item of value from a Party to a completed Arbitration, except that this provision does not preclude an Arbitrator from engaging in normal, social interaction with a Party, insurer or counsel to an Arbitration once the Arbitration is completed.

H. Where relevant state or local rule or statute is more specific than these Guidelines as to Arbitrator disclosure, it should be followed.

VI. AN ARBITRATOR SHOULD ENDEAVOR TO PROVIDE AN EVENHANDED AND UNBIASED PROCESS AND TO TREAT ALL PARTIES WITH RESPECT AT ALL STAGES OF THE PROCEEDINGS.

A. An Arbitrator should remain impartial throughout the course of the Arbitration. Impartiality means freedom from favoritism either by word or action. The Arbitrator should be aware of and avoid the potential for bias based on the Parties' backgrounds, personal attributes or conduct during the Arbitration, or based on the Arbitrator's pre-existing knowledge of or opinion about the merits of the dispute being arbitrated. An Arbitrator should not permit any social or professional relationship with a Party, insurer or counsel to a Party to an Arbitration to affect his or her decision-making. If an Arbitrator becomes incapable of maintaining impartiality, the Arbitrator should withdraw.

B. An Arbitrator should perform duties diligently and conclude the case as promptly as the circumstances reasonably permit. An Arbitrator should be courteous to the Parties, to their representatives and to the witnesses, and should encourage similar conduct by all participants in the proceedings. An Arbitrator should make all reasonable efforts to prevent the Parties, their representatives, or other participants from engaging in delaying tactics, harassment of Parties or other participants, or other abuse or disruption of the Arbitration process.

C. Unless otherwise provided in an agreement of the Parties, (1) an Arbitrator should not discuss a case with any Party in the absence of every other Party, except that if a Party fails to appear at a hearing after having been given due notice, the Arbitrator may discuss the case with any Party who is present; and (2) whenever an Arbitrator communicates in writing with one Party, the Arbitrator should, at the same time, send a copy of the communication to every other Party. Whenever an Arbitrator receives a written communication concerning the case from one Party that has not already been sent to each Party, the Arbitrator should do so.

D. When there is more than one Arbitrator, the Arbitrators should afford each other full opportunity to participate in all aspects of the Arbitration proceedings.

VII. AN ARBITRATOR SHOULD WITHDRAW UNDER CERTAIN CIRCUMSTANCES.

A. An Arbitrator should withdraw from the process if the Arbitration is being used to further criminal conduct, or for any of the reasons set forth above - insufficient knowledge of relevant procedural or substantive issues, a conflict of interest that has not been or cannot be waived, the Arbitrator's inability to maintain impartiality, or the Arbitrator's physical or mental disability. In addition, an Arbitrator should be aware of the potential need to withdraw from the case if procedural or substantive unfairness appears to have irrevocably undermined the integrity of the Arbitration process.

B. Except where an Arbitrator is obligated to withdraw or where all Parties request withdrawal, an Arbitrator should continue to serve in the matter.

VIII. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

A. An Arbitrator should, after careful deliberation and exercising independent judgment, promptly or otherwise within the time period agreed to by the Parties or by JAMS Rules, decide all issues submitted for determination and issue an Award. An Arbitrator's Award should not be influenced by fear or criticism or by any interest in potential future case referrals by any of the Parties or counsel, nor should an Arbitrator issue an Award that reflects a compromise position in order to achieve such acceptability. An Arbitrator should not delegate the duty to decide to any other person.

B. If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the

Arbitrator should comply with such request unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she may inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

IX. AN ARBITRATOR SHOULD UPHOLD THE DIGNITY AND INTEGRITY OF THE ARBITRATION PROCESS IN MATTERS RELATING TO MARKETING AND COMPENSATION.

An Arbitrator should avoid marketing that is misleading or that compromises impartiality. An Arbitrator should ensure that any advertising or other marketing to the public conducted on the Arbitrator's behalf is truthful. An Arbitrator may discuss issues relating to compensation with the Parties but should not engage in such discussions if they create an appearance of coercion or other impropriety and should not engage in *ex parte* communications regarding compensation.

X. ETHICAL GUIDELINES APPLICABLE TO NON-NEUTRAL ARBITRATORS.

These Guidelines are applicable to non-neutral Arbitrators, except as follows:

Guideline III: A non-neutral Arbitrator should ensure that all Parties and other Arbitrators are aware of his or her non-neutral status.

Guideline V: A non-neutral Arbitrator is obligated to make disclosures of any actual or potential conflicts of interest, although a non-neutral Arbitrator is not obligated to withdraw if requested to do so only by the party who did not appoint him or her.

Guideline VI:

1. A non-neutral Arbitrator may be predisposed toward the Party who appointed him or her but in all other respects is obligated to act in good faith and with integrity and fairness.
2. A non-neutral Arbitrator may engage in *ex parte* communication with the Party that appointed him or her, but should disclose to the Parties and the other Arbitrators the fact that such communications are occurring and should honor any agreement reached with the Parties and the other Arbitrators regarding the timing and nature of such communications.

Guideline IX: The compensation arrangements between a non-neutral Arbitrator and the Party that appointed him or her usually is treated as confidential but may be disclosed in connection with any fee application in the Arbitration proceeding.

For more information, please call your local JAMS office at 1-800-352-5267.

The Code of Ethics for Arbitrators in Commercial Disputes

Effective March 1, 2004

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association® and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA®.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the **Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.**

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

CANON I: An arbitrator should uphold the integrity and fairness of the arbitration process.

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;

(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;

(3) that he or she is competent to serve; and

(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.

F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

CANON II: An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) any known direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

(3) the nature and extent of any prior knowledge they may have of the dispute; and

(4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

CANON III: An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:

(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and

(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV: An arbitrator should conduct the proceedings fairly and diligently.

A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.

C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to Paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude *ex parte* requests for interim relief.

CANON V: An arbitrator should make decisions in a just, independent and deliberate manner.

A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.

C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII: An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;

(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII: An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX: Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this code, except as exempted by Canon X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;

(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and

(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

CANON X: Exemptions for arbitrators appointed by one party who are not subject to rules of neutrality.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations Under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and

(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations Under Canon II*

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and

(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations Under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

(1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;

(2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);

(3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;

(4) Canon X arbitrators may not at any time during the arbitration:

(a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;

(b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or

(c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.

(5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;

(6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and

(7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations Under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations Under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations Under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.