

## **Special Feature Article**

# **The Arbitration Process**

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## **Introduction**

Arbitration has become an increasingly popular method to resolve legal disputes. Arbitration is where a neutral person, known as the arbitrator, considers evidence presented from all of the parties and makes a decision as to how the issues in dispute will be resolved. Parties must agree to resolve disputes by arbitration. This article examines various aspects of the arbitration process, including (1) the advantages and disadvantages of arbitration, (2) drafting arbitration provisions, (3) enforcement of arbitration provisions, (4) jurisdiction and selection of the arbitration panel, (5) appealability of arbitration awards, and (6) international arbitrations.

## **Advantages and Disadvantages of Arbitration**

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Arbitration provisions are found in many commercial, professional and consumer contracts. In addition, the parties may by a separate contract agree to arbitrate an existing dispute.

Arbitration is not a new method of resolving disputes. Arbitration has been used since ancient times.<sup>1</sup> Today, arbitration is used throughout the globe. For many international transactions, it is the preferred method for resolving controversies.

The proponents of arbitration emphasize these advantages to its use:

1. It is quicker than litigation because (a) detailed pleadings are not required, (b) there are no battles over pleadings, (c) there is no or limited discovery, (d) there are no crowded dockets, and (e) the hearing of evidence can be streamlined.
2. It is less expensive than litigation.
3. The parties select the arbitration forum.
4. The parties can dictate arbitration procedure.
5. The parties select the arbitrator(s).
6. The arbitrators need not follow the rules of evidence.
7. The arbitrators do not necessarily have to follow the law, although there are limits to this perceived advantage.
8. The parties can select arbitrators who are knowledgeable about the trades, industries or professions that are the subject of the arbitration.

9. Arbitration can be private.
10. Arbitration is better suited for handling disputes involving relatively small monetary amounts of damages.
11. Arbitration may be more flexible regarding scheduling of hearings and discovery, the scope of discovery and the presentation of evidence.

The critics of arbitration cite the following disadvantages:

1. It may not be quicker than litigation, especially (a) if the arbitrators allow the parties to present pre-trial motions, such as motions to dismiss claims or motions for summary awards, (b) one of the parties contests in court the right of the party to force arbitration, often arguing that there is no agreement to arbitrate, (c) the arbitrators allow the parties to engage in discovery, especially with no limits, and (d) selection of arbitrators can be delayed if an arbitration service is used.
2. Arbitration may be less expensive. Arbitrators must be paid and they are frequently paid handsomely. One or more of the arbitrators may incur travel, meal and lodging expenses, which must be paid by the parties. If the parties employ an arbitration service, they must pay the administrative fees, which can be relatively high, depending upon the amount of claimed damages. Delay, discovery, and extensive hearings can greatly increase the cost of arbitration.
3. The parties have no right to discovery, unless it is provided for in the arbitration agreement or the arbitrators allow it.
4. The arbitrators need not follow the rules of evidence. They can allow hearsay evidence and the use of affidavits.
5. The arbitrators do not necessarily have to follow the law.
6. The arbitrators ordinarily do not have to render a reasoned opinion. Therefore, they may not undertake a reasonable analysis of the matter before rendering the award.
7. Arbitrators are more likely to reach a compromise award than a judge or jury in a trial.
8. The parties do not have the right to a jury trial.
9. The parties only have a limited right to appeal the award.

There are no empirical studies justifying any of the perceived advantages or disadvantages of arbitration. However, in one limited study, a construction lawyer compared two complex matters, one of which was an arbitration matter and the other was a suit.<sup>2</sup> Although both cases ultimately settled, the author stated, "Arbitration led to a resolution in much less time overall and allowed the parties to customize the process to a complex construction case."<sup>3</sup> In the litigated matter, he noted, at trial "the parties became embroiled in a procedural morass that consumed two years of motions on attachment, attorney disqualification and venue issues and related appeals."<sup>4</sup>

To maximize the advantages of arbitration, practitioners should anticipate the conflicts that could arise and draft an arbitration clause that seeks to avoid the disadvantages listed above to the extent possible or educate his or her clients on the means to do so.

## Drafting the “Right” Arbitration Provision

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In his first State of the Union Address in 1962, President John F. Kennedy said, “The time to repair the roof is when the sun is shining.”<sup>5</sup> When negotiating and drafting a contract, “while the sun is shining,” the parties should consider how to prepare for the “rain” by giving consideration to the best mechanism for dispute resolution. As with any clause within a contract, careful attention to the specific language of an arbitration clause is necessary to ensure the intended application upon a later dispute.

Deciding to implement arbitration as a means to resolve disputes is just the first step in drafting an arbitration clause. While the intent of the parties at the time of contract drafting may clearly indicate a desire to arbitrate, rather than litigate a dispute, once a dispute arises, the particular language of the subject arbitration clause will be closely scrutinized.<sup>6</sup> It would be sufficient to demonstrate an intent to arbitrate disputes by simply stating within an agreement that “all disputes between the parties to this agreement shall be submitted to arbitration.” The lack of detail, however, would inevitably invite judicial intervention to piece together all of the missing elements regarding how the arbitration shall proceed, what rules will apply, who will be the arbitrator or arbitrators, and where the arbitration will take place.<sup>7</sup>

Once the parties have agreed to include an arbitration clause within their contract, all involved are best served by spending time considering exactly what disputes they desire to be arbitrated and how the arbitration process will ultimately play out. There are standard and/or suggested arbitration clauses offered by many alternative dispute resolution services; however, all parties are free to specifically craft an arbitration clause to a particular contract. Therefore, it may be useful to start with the suggested language, and then tailor the arbitration clause to your particular contract. It is incumbent upon the parties to a contract to fully understand the advantages to arbitration, as well as the disadvantages. A carefully drafted arbitration clause may allow a party to enjoy the benefits of arbitration, while avoiding its pitfalls.

The parties must consider what law will apply to the arbitration clause. Without any specific delineation within the arbitration clause, itself, the arbitration clause will likely be subject to the law upon which the entire contract will be governed.<sup>8</sup> However, it is advisable to specifically note within the arbitration clause what law will govern if a dispute arises and the matter is subject to arbitration. Generally, the Federal Arbitration Act (“FAA”) will apply to all arbitration clauses that affect interstate commerce;<sup>9</sup> however, in Illinois, the Illinois Uniform Arbitration Act (“UAA”) will apply to those arbitration clauses that do not affect interstate commerce or specifically state that Illinois law will apply.<sup>10</sup> Most states have some version of an arbitration act. Therefore, it will be important to ascertain the applicable state law to apply to every contract to fully evaluate the best arbitration clause given each state’s own statutes.

This is an important issue because the varying state arbitration statutes, as well as the FAA, all approach the issue of determining which issues are subject to arbitration differently. Under the UAA in Illinois, such a decision is more likely to be made by the court where it is clearly evident from the clause, itself, which matters are subject to arbitration, and which are not.<sup>11</sup> When it is not clear, Illinois law provides that the arbitrator is first to decide whether a matter is subject to arbitration.<sup>12</sup> Therefore, if a party desires to apply a specific state statute to the interpretation of an arbitration clause, like the UAA in Illinois, the clause should specifically state so and explicitly note that the FAA will not apply. The parties may also specifically note within the arbitration clause that all decisions regarding which issues are subject to arbitration must be determined by the court or the arbitrator.<sup>13</sup>

Consideration must also be given to what matters will be subject to arbitration. The parties may certainly submit “all disputes” under the contract to arbitration; however, the parties may wish to submit some issues to

arbitration, and other matters to the civil court system. For example, matters that a party believes will likely require appellate review are better suited for the civil court system. On the other hand, matters involving highly technical factual issues may be better suited for arbitration with an arbitrator trained or proficient in the area under dispute.

Because arbitration is supposed to be a streamlined and efficient resolution of disputes, most arbitrations are binding. However, many arbitration clauses include initial non-binding mechanisms, like mediation. Because of its non-binding nature, and informal process, mediation can be a cost-efficient way to get before a neutral (mediator) to discuss the issues in dispute in an attempt to resolve the matter before engaging in the more formal arbitration process. Of course, the added step will delay resolution if the parties are not able to settle their dispute during mediation.

Aside from any public policy concerns, parties are free to draft an arbitration clause with as much or as little detail as desired. It is recommended to include some level of detail within an arbitration clause to avoid, or limit, disputes about the clause, itself, at a later date.<sup>14</sup> An arbitration clause should provide the number of arbitrators and how they will be selected. Depending on the particular contract, the parties may want to consider requiring that the arbitrator(s) possess expertise useful to the resolution of the dispute. Of course, with more detail comes less flexibility and more room for dispute. Therefore, it is important not to over complicate the process with too much detail.<sup>15</sup>

It is also advisable to include a specific venue for the arbitration, and outline what procedural rules will govern the arbitration process. For every party to an agreement, the preferred venue will likely be the location that provides the easiest access to witnesses and counsel. This will limit the arbitration costs by limiting travel expenses. The applicable procedural rules are also important to the expense of arbitration. A greater amount of discovery will increase the cost of arbitration and the time necessary to ultimately resolve the dispute. Therefore, the parties can decide to broadly apply the rules of procedure applicable to a civil court matter, or specifically limit discovery to certain issues and/or volume of requests or depositions.<sup>16</sup> Again, consideration must be given at the outset as to the likely types of disputes and the necessary information held by the other party to the dispute which may be required if a dispute arises. It is not necessary to apply a set of rules broadly. While it might take some work, it may be advisable to pick and choose particular rules of procedure to apply from a given set of rules.<sup>17</sup>

The arbitration clause should address the issues of enforceability and, potentially, the right to review. To be effective, an arbitration clause needs to provide that the award may be enforced through the civil judicial process. On the other hand, providing for the review of an arbitration award is debatable. However, there may be instances in which a party may desire judicial review of an arbitration award.

The parties may also wish to consider measures within the arbitration clause limiting or specifying recoverable damages. Such damages may include consequential and/or incidental damages. Moreover, while there may be applicable state or federal laws that prohibit the award of punitive damages, if the parties do not wish to provide this option to the arbitrators, it certainly does not hurt to include such a prohibition in the arbitration clause. In Illinois, punitive damages may only be awarded if specifically allowed by the parties within the arbitration clause.<sup>18</sup> Moreover, the parties will want to consider an attorney fee and cost-shifting element to the clause. Again, it is not necessary, but if a party has a preference, one way or the other, it is advisable to clearly identify the types of remedies available within the arbitration clause.

When drafting an arbitration clause, start with a general, boilerplate, clause that includes the basic elements of an arbitration clause: agreement to arbitrate; scope of matters subject to the clause; selection and number of arbitrators; governing law; forum; procedural rules; and enforceability in court. Thereafter, tailor the clause to suit your needs under the very specific set of circumstances presented by the transaction involved.

## **Enforcement of Arbitration Provisions**

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The Seventh Amendment to the United States Constitution guarantees a right to jury trial for all claims for money damages in excess of \$20. Consequently, without an enforceable agreement, no court can order a party to participate in binding arbitration. This section considers the enforcement of arbitration clauses including the interplay between the Federal Arbitration Act, the Illinois Uniform Arbitration Act, the initiation of the arbitration process, and defenses to a claim for arbitration.

Increasingly, many agreements include arbitration clauses. These can be found in cable television subscriptions, residential mortgage loans, construction subcontracts, employment manuals, and attorney retainer letters, to name a few. There are two major statutory guides for arbitrations in Illinois – the FAA and the Illinois UAA. Despite its name, the FAA does not apply only to claims under federal law or to those brought in federal court. It applies in both state and federal courts.<sup>19</sup> The UAA was based on the FAA and Illinois courts will often look to federal court decisions interpreting similar provisions of the FAA for guidance when interpreting provisions of the Illinois UAA.<sup>20</sup> However, not all provisions of the FAA and the Illinois UAA are exactly the same.<sup>21</sup>

### **Federal Public Policy Favors Arbitration**

The FAA<sup>22</sup> was enacted to ease the case load of the courts and to allow an alternative avenue of dispute resolution in a faster and less costly manner. The FAA was intended “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”<sup>23</sup> As stated in Section 2 of the FAA, arbitration agreements were to “be valid, irrevocable, and enforceable, save upon grounds that exist at law or in equity for the revocation of any contract.”<sup>24</sup> The FAA does not apply “to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>25</sup> Consequently, there was some confusion in the courts as to employment cases. However, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the U.S. Supreme Court “clarified” the reach of the law and dictated that the FAA shall apply to all arbitration agreements involving interstate commerce, including employment contracts not involving transportation workers. Federal courts now regularly enforce arbitration of statutory employment claims under the FAA. Federal law now clearly favors arbitration.

### **Illinois Public Policy Follows the Federal Lead in Favoring Arbitration**

Similarly, the 1961 enactment of the UAA,<sup>26</sup> reiterated a policy favoring arbitration enforcement. The Illinois “legislature intended to place arbitration agreements upon the same footing as other contracts and to override the judiciary’s longstanding refusal to enforce agreements to arbitrate.”<sup>27</sup> Arbitration is favored as a means to achieve the final disposition of differences in an easier, more expeditious and less expensive manner than litigation.<sup>28</sup>

## **Arbitrability – Scope of Agreement**

Disputes may arise as to the scope of an arbitration agreement, *i.e.* what claims are arbitrable. The court, not the arbitrator, determines the initial issue of the arbitrability of individual claims in FAA cases.<sup>29</sup> However, the arbitrability question is decided by the arbitrator and not the court in Illinois UAA cases.<sup>30</sup> Even so, when parties agree to submit the question of arbitrability itself to arbitration, whether under the FAA or the Illinois UAA, courts will review the question of arbitrability deferentially.<sup>31</sup>

### **Standards – “Knowing And Voluntary” Versus Fundamental Contract Law**

Arbitration clauses are found in many different types of contracts—employment, construction, professional services, automobile purchase, *etc.* A particularly fertile area of arbitration law precedent is found in the employment context as employees have many statutory protections such as freedom from unlawful discrimination on the basis of race, color, sex, national origin, religion, age, and disability.<sup>32</sup> Further, the Illinois Human Rights Act,<sup>33</sup> provides these same protections to employees as well as protection against discrimination based on ancestry, marital status, sexual orientation, or military service.

In the employment area, there have been questions whether these statutory protections deserve some special treatment when determining the enforceability of arbitration provisions. Some federal claimants have suggested that arbitration agreements are not enforceable when applied to employment discrimination claims.<sup>34</sup> This argument was based on the U.S. Supreme Court’s earlier indication that an employee cannot forfeit substantive statutory rights absent a “voluntary and knowing waiver.”<sup>35</sup> Despite the reference in *Gardner-Denver* about the need for a “voluntary and knowing waiver,” the U.S. Supreme Court has not squarely addressed whether an employee’s agreement to arbitrate a substantive statutory claim (such as Title VII) must meet this heightened standard for consent to waive the right to arbitrate. Instead, the U.S. Supreme Court has recognized that federal statutory claims may be subject to arbitration pursuant to the Federal Arbitration Act and that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>36</sup> The “voluntary and knowing” standard has been the subject of much debate in the federal courts. However, Illinois courts have chosen an easier and clearer path by applying typical contract law principles instead of a higher waiver standard.

### **Illinois Rejects the Knowing and Voluntary Standard**

Instead of the “voluntary and knowing” standard, Illinois courts apply fundamental contract law principles for enforceability issues. In *Melena v. Anheuser-Busch, Inc.*,<sup>37</sup> (*Melena II*), the Illinois Supreme Court rejected the “knowing and voluntary” consent standard. Instead, the court adopted the approach followed by a growing majority of the federal courts—that the principles of fundamental contract law control whether an employee has agreed to arbitrate a statutory employment claim.<sup>38</sup> Consequently, in determining whether a binding agreement to arbitrate exists between an employer and employee, the courts generally hold that an agreement to arbitrate statutory employment claims will be enforceable except upon a showing of fraud, duress, mistake, or some other ground recognized by the law applicable to contracts generally.<sup>39</sup>

### **Arbitration Agreements are to be Treated as a Matter of Contract**

A court will not strain to find an agreement to arbitrate when none exists.<sup>40</sup> Indeed, a party is only bound to arbitrate those issues it has agreed to arbitrate pursuant to the clear and expressed language of the parties’

agreement.<sup>41</sup> Just like any other contract, an agreement to arbitrate only becomes enforceable when both parties mutually consent to submit their claims to arbitration rather than to a judicial forum.<sup>42</sup>

Both the FAA and the Illinois UAA require that an agreement to arbitrate must be in writing.<sup>43</sup> It is well-recognized that arbitration is a “matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”<sup>44</sup> While both the FAA and the Illinois UAA each require that the arbitration agreement be in writing, neither statute requires that the agreement be signed by all parties. In fact, courts applying the FAA have regularly found that no signature is required to satisfy the FAA’s written requirement.<sup>45</sup>

Contract basics such as offer and acceptance have often been litigated in these cases, particularly in the employment context. As noted by the Illinois Supreme Court, continued employment can be considered acceptance of a unilateral contract offered by an employer.<sup>46</sup> However, courts have required that the length of employment be significant to constitute “consideration.”<sup>47</sup>

### **Defenses to Enforcement — Generally**

Whether parties actually agree to arbitrate is determined pursuant to state-law contract principles.<sup>48</sup> Consequently, general contract defenses, such as fraud, duress, or unconscionability, can be applied to invalidate arbitration agreements.<sup>49</sup>

#### **Defense to Enforcement — Fraud**

Fraud in the inducement occurs when a party is induced to enter into an agreement due to the other party’s false representation. A claim of fraud in the inducement made against an arbitration clause is not arbitrable. Rather, it is an issue for the court to decide under § 4 of the FAA.<sup>50</sup> However, where the entire contract (and therefore the arbitration provision too) is purportedly fraudulently undertaken, that issue is arbitrable and is not permitted to be considered by the court.<sup>51</sup> Essentially, “a court may consider a claim that a contracting party was fraudulently induced to include an arbitration provision in the agreement but not claims that the entire contract was the product of fraud.”<sup>52</sup>

#### **Defense to Enforcement — Duress**

To apply the defense of “duress,” there must be evidence of inducement by a wrongful act to make a contract without free will. A contract executed under duress is voidable.<sup>53</sup> Duress can encompass personal injury or imprisonment as well as conduct that puts the victim in such fear as to act against his will.<sup>54</sup> Another form of duress is economic duress, also known as “business compulsion.” This occurs where one is induced by a wrongful act of another to enter into a contract under circumstances that deprive him of the exercise of free will.<sup>55</sup> But, a demand that is lawful or merely a threat to follow through on a legal right is not duress. Likewise, the duress defense is not available when consent to an agreement is obtained after hard bargaining or the pressure of financial circumstances.<sup>56</sup>

#### **Defense to Enforcement — Unconscionability**

Unconscionable essentially refers to unfairly harsh circumstances. Unconscionability can render an arbitration provision unenforceable.<sup>57</sup> Enforceability of an arbitration agreement can be attacked based on either procedural or substantive unconscionability, or even a combination of the two.<sup>58</sup> “Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff

cannot fairly be said to have been aware he was agreeing to it.”<sup>59</sup> Alternatively, “substantive unconscionability refers to those terms which are inordinately one-sided in one party’s favor.”<sup>60</sup>

Unconscionability arguments range wide and are varied. Examples are incomprehensible fine print in contracts, bait and switching of terms, binding a purchaser to additional terms after signature, pressuring a consumer in a vulnerable situation, excessive price terms, and difficult notice requirements, to name just a few.<sup>61</sup> Courts have rejected the suggestion that an agreement to arbitrate should be held unenforceable because of inequality of bargaining power between an employer and employee.<sup>62</sup>

### **Defense to Enforcement — Inadequate Consideration**

Like all other contracts, an agreement to arbitrate requires adequate consideration to be enforceable. When an arbitration agreement is a separate contract, it must have separate consideration to be valid.<sup>63</sup> Illinois courts require both parties to arbitrate their respective claims under the agreement as the total exclusion of one side’s obligation to arbitrate will be held to be illusory and therefore inadequate consideration and will not be enforceable.<sup>64</sup>

However, when the agreement to arbitrate is simply a provision contained within a broader agreement, Illinois courts have not required both parties to be mutually obligated to arbitrate.<sup>65</sup> When arbitration clauses are found within a broader agreement, an arbitration clause will be held to be enforceable as long as the contract as a whole is supported by consideration on both sides, whether or not both parties are obligated to arbitrate their respective claims under the agreement.<sup>66</sup>

### **Defense to Enforcement — Fee and Cost Shifting**

Costs and fees can act as a barrier to arbitration. When a party seeks to avoid arbitration by arguing that arbitration expenses are prohibitive, it must prove the likelihood of such costs. Unsupported statements or speculation regarding the costs are simply insufficient to sustain the burden.<sup>67</sup>

Different federal circuits have different approaches, particularly in the employment context. The First, Fifth, and Seventh Circuits all hold that a cost-shifting provision does not automatically render an arbitration agreement unenforceable.<sup>68</sup> However, the Tenth Circuit and the District of Columbia Circuit do not enforce such agreements as they essentially deny a party seeking relief under Title VII to vindicate a claim.<sup>69</sup> The Eleventh Circuit does not enforce arbitration agreements that potentially impose “high costs” on the claimant arguing that such an agreement undermines the policies that support Title VII.<sup>70</sup>

Rather than deny arbitration, some courts have been more willing to sever unenforceable clauses from agreements in favor of arbitration.<sup>71</sup> This clever sidestep promotes the pro-arbitration policy. Otherwise, courts would have to hold entire arbitration agreements unenforceable every time a particular term is held invalid.<sup>72</sup>

As an alternative to severing clauses, some courts require specific protective measures within arbitration agreements to safeguard employees’ statutory rights relative to federal civil rights claims. According to *Cole v. Burns International Security Services*,<sup>73</sup> an arbitration agreement should not require employees to pay either unreasonable costs or any arbitrator’s fees or expenses as a condition of access to the arbitration forum.<sup>74</sup> Other federal circuits review the enforceability of fee-splitting clauses in an arbitration clause on a case-by-case basis and usually have compelled arbitration.<sup>75</sup>

### **Procedural Defense to Enforcement — Consolidation of Claims**

Attempts to enforce arbitration may trigger questions regarding joining parties and consolidating claims in a single forum. For instance, a defendant may want to maintain a third-party claim for indemnification in the same forum in which the defendant is being sued. This occurs often in the construction context.



A plaintiff may have an arbitration clause with one defendant but not a second defendant. However, courts have no discretion to deny a motion to compel arbitration even if joinder of claims and parties would be frustrated.<sup>76</sup>

Another area of difficulty is the veto provision present in some standard contract forms, such as AIA Documents. The arbitration paragraph may include a requirement allowing either party to veto joinder of additional non-signatory parties to the arbitration.<sup>77</sup>

### **Enforceability When There is No Pending Court Action**

Presuming that all contract clauses setting forth conditions precedent to arbitration have been fulfilled and time limits met, a demand for arbitration must be made pursuant to the means prescribed in the contract. Alternatively, Federal Mediation and Conciliation Services (FMCS) and American Arbitration Association (AAA) have specific rules for the form and service of the demand.

If a party simply refuses to participate, despite proper notice, the other party may proceed to arbitrate “*ex parte*.” Some contracts specifically address and allow *ex parte* arbitration, in which case the prosecuting party may obtain and enforce an *ex parte* award against the party refusing to participate in the proceeding.<sup>78</sup> However, where there is no specific contractual provision for *ex parte* arbitration, the courts have not been entirely consistent regarding whether a court order compelling arbitration is required before *ex parte* arbitration may begin. As previously noted, both the Illinois UAA and the FAA authorize a party to seek an order compelling arbitration.<sup>79</sup>

### **Enforceability When There is a Pending Court Action**

A signatory to an arbitration agreement who has been joined in a civil action may demand arbitration in the same manner as if no litigation were pending and move for a stay of the court action.<sup>80</sup> Courts sometimes have difficulties when arbitrable and non-arbitrable issues are present in a litigation case. The Supreme Court recently provided guidance in *KPMG LLP v. Robert Cocchi*.<sup>81</sup> In *KPMG*, the court noted that a trial court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration. The court has discretion to stay the entire proceeding or to order a stay only on those issues subject to the arbitration clause.<sup>82</sup>

A party who prefers to avoid arbitration may try to seek a court order staying the arbitration.<sup>83</sup> The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, does not contain a comparable provision, but federal courts have authority to stay arbitration proceedings.

### **Procedural Defense to Enforcement —Waiver and Participation**

Attorneys have sought to employ the technical defense of waiver by participation. If a stay of the arbitration is not sought, a party may preserve an objection to arbitrability by raising it before the arbitration hearing starts. Subsequent participation in the arbitration is permitted if the objection is not sustained.<sup>84</sup> Providing that the objection was made, an adverse arbitration result may be challenged by vacatur of the award.<sup>85</sup> But, failure to raise the objection before participation in an arbitration waives that claim.<sup>86</sup>

Conversely, even where there is an arbitration agreement, one may be able to avoid arbitration by arguing that the right to arbitrate has been waived. The right to arbitrate, like any other contract right, can be waived.<sup>87</sup> Waiver occurs when a party’s conduct has been inconsistent with the arbitration clause thereby indicating abandonment of arbitration.<sup>88</sup>

### **Procedural Defense to Enforcement -- Failure to Comply With Time Limit**

The right to arbitration may be waived by allowing an express contractual time period to pass.<sup>89</sup> Even so, some courts have been less stringent.<sup>90</sup>

Circuit courts are split regarding whether an arbitrator or a court is to determine whether waiver of a right to arbitration has occurred due to failure to comply with an express time clause.<sup>91</sup> Illinois courts generally follow the rule espoused in *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*,<sup>92</sup> finding that courts defer the arbitrability question to the arbitrator when it is unclear, uncertain or otherwise debatable whether the parties agreed to arbitrate the dispute in question.

### **Procedural Defenses to Enforcement — Statutes of Limitation and Laches**

Statutes of limitation are as applicable to arbitrations as they are in litigation.<sup>93</sup> Courts have found that the underlying statutes of limitation may be tolled as long as arbitration is demanded by one of the parties to the contract within the applicable statute of limitations.<sup>94</sup>

Likewise, the right to arbitrate can be waived by way of laches.<sup>95</sup> It has generally been held that the question of whether an arbitration demand is barred by laches is an issue to be decided by the arbitrators.<sup>96</sup>

Selection of arbitrators and the forum in which an arbitration occurs may affect many of the defenses discussed here. The next section addresses other considerations when choosing arbitrators and jurisdiction for an arbitration.

## **Jurisdiction/Selection of Arbitrators**

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### **Participation in Arbitration by an Out-Of-State Attorney — Is the Unauthorized Practice of Law a Concern?**

Lawyers routinely have clients located outside of the jurisdiction where they are licensed to practice law or, even more common, clients that have engaged in commercial transactions with parties located throughout the United States. When commercial transactions go sour, those clients often ask the lawyers with whom they have an established relationship to represent them in the resulting litigation, even if it is not pending in a jurisdiction where the lawyer is licensed to practice. Even the most inexperienced lawyers know that appearing in a court where they are not licensed to practice constitutes the unauthorized practice of law. Instead, the lawyer typically will have to retain local counsel and get admitted *pro hac vice* to represent the client in that litigation. But, what about a situation where you are asked to represent a client in an arbitration, which pursuant to the arbitration clause in the contract calls for the arbitration to take place in a state where you are not licensed to practice? Or a situation where your opponent in an arbitration set to take place in Illinois is represented by an out-of-state lawyer? Does participation in an arbitration proceeding held in a state where you are not licensed to practice constitute the unauthorized practice of law? The answer, of course, depends on the state in which the arbitration proceeding is held.

In Illinois, the representation of a client at an arbitration proceeding is not considered to be the practice of law.<sup>97</sup> Many other states, most notably New York, have taken a similar approach to Illinois and allow out-of-state attorneys to represent clients at arbitration.<sup>98</sup> Moreover, as noted by the First District in *Colamar*, the AAA Rules, which governed the arbitration at issue, do not require that the party's representative be an attorney.<sup>99</sup>

However, practitioners should be aware that even when an out-of-state attorney is permitted to represent a client at an arbitration, there may be special procedures that must be followed to do so. For instance, California requires that a specific set of conditions be followed before an out-of-state attorney can represent a client at an arbitration.<sup>100</sup> In addition to being in good standing in the jurisdiction in which the lawyer is admitted, the out-of-state attorney must have a California attorney of record and follow a number of other procedural requirements. The out-of-state attorney must disclose the title of the court in which the out-of-state attorney has applied to appear *pro hac vice* and as an out-of-state attorney arbitration counsel within the preceding two years, file a certificate with the arbitral panel, serve a copy on the state bar of California, and pay a filing fee.<sup>101</sup> The failure to follow the provisions required by the statute is grounds for disapproval of the appearance by the arbitrator or arbitration panel and disqualification from serving as an attorney in the arbitration.<sup>102</sup> The attorney is also subject to the disciplinary jurisdiction of the California State Bar, which can have ramifications in the jurisdiction where the attorney is licensed to practice.<sup>103</sup> Notably, lawyers licensed outside of the United States are not permitted to act as out-of-state arbitration counsel.<sup>104</sup>

An examination of every state's requirements for participation of an out-of-state attorney in arbitration proceedings is beyond the scope of this article. However, practitioners asked to represent a client at an out-of-state arbitration would be wise to thoroughly research the requirements, if any, of the state in which an arbitration is being held if not licensed to practice law in that state. Failure to do so could result in disqualification, sanctions, and possibly an argument that the arbitration award is void.

### **The Process for Selecting Arbitrators — Potential Pitfalls**

While most arbitration agreements provide a mechanism for appointing arbitrators, the importance of agreeing on a selection process should not be overlooked. In Illinois, the failure to specify a method for the appointment of arbitrators can have potentially severe consequences on the arbitration proceeding if the parties cannot subsequently agree on the method.

For example, the Illinois UAA provides as follows with respect to the method of selecting arbitrators:

Sec. 3. Appointment of arbitrators. If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, any method of appointment of arbitrators agreed upon by the parties to the contract shall be followed. An arbitrator so appointed has all the powers of one specifically named in the agreement. When an arbitrator appointed fails or is unable to act, his successor shall be appointed in the same manner as the original appointment. *If the method of appointment of arbitrators is not specified in the agreement and cannot be agreed upon by the parties, the entire arbitration agreement shall terminate.*<sup>105</sup>

Thus, the failure to specify the method for the appointment of arbitrators in the arbitration agreement could result in the termination of the arbitration agreement in its entirety if the parties cannot subsequently agree on the process.<sup>106</sup> Moreover, the failure to appoint a selection process raises the possibility at least that a party who wants to bypass arbitration need only refuse to agree on the appointment process to invalidate the arbitration agreement.

If, however, an arbitration agreement is valid and enforceable, the parties proceed to choose arbitrators and begin the arbitration process, including possibly some amount of discovery. The next section of this article addresses issues concerning discovery in the context of arbitration.

## **Discovery in Arbitration**

*By: John J. O'Malley*

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Whether to allow discovery, and if so, what kind of discovery and how much, is often one of the more contentious issues in many arbitrations. The object of arbitration is to foster the final disposition of disputes in an easier, faster, and more economical manner than by litigation.<sup>107</sup> A “hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process.”<sup>108</sup> Parties agree to arbitration to resolve their disputes expeditiously and inexpensively. Discovery is inconsistent with either goal.

Discovery in arbitration is limited.<sup>109</sup> Generally, the parties will exchange the documents they intend to use during the arbitration and identify the witnesses they intend to call but interrogatories and depositions generally are not available in arbitration.<sup>110</sup> Because all arbitrations occur due to an agreement to arbitrate, the assumption is the parties are familiar with one another and the background to the dispute. Thus, the parties do not need discovery to resolve the dispute expeditiously and inexpensively. The parties willingly accept the absence of full-blown discovery in return for the benefits of a quick, efficient and less expensive resolution of their disputes.<sup>111</sup>

In reality, one of the parties often believes that it is at an information disadvantage and needs discovery to level the playing field. In other cases, one of the parties perceives that an advantage can be obtained by subjecting the other party to discovery. In most arbitrations, one party will be advocating no discovery and the other party will be advocating as much discovery as it can obtain from the arbitrator. The result is that in recent years arbitration has been broadly criticized due to many arbitrations becoming almost indistinguishable from court litigation due to, among other reasons, extensive discovery.<sup>1</sup>

### **Discovery Controlled by Arbitration Agreement**

In rare cases, the arbitration agreement will specifically address the issue of discovery and state whether discovery is or is not permitted. If permitted, arbitration agreements will sometimes, but not always, provide what type and amount of discovery is permitted. Other arbitration agreements will provide what type of discovery is not permitted. If the arbitration agreement speaks to those issues, it will control.<sup>113</sup>

However, most arbitration agreements say nothing about discovery. The arbitration agreement may specify the governing law, the place of the arbitration and the number of arbitrators but is usually silent with regard to discovery. Instead, the arbitration agreement simply provides that the arbitration will be administered by a particular organization pursuant to the organization's rules. In those situations, whether discovery will be permitted will be decided by the arbitrator, guided by any rules that the parties have adopted.<sup>114</sup> Virtually all arbitration rules permit some discovery. What kind of discovery and how much will depend on the rules and the arbitrator's discretion.

### **American Arbitration Association Rules**

Many arbitration agreements adopt the American Arbitration Association's (AAA) Commercial Arbitration Rules. The AAA's Commercial Arbitration Rules do not mention interrogatories or depositions. Instead, the Rules address only the production of documents and the identification of any witnesses to be called at the hearing. The applicable rule is entitled “Exchange of Information” and provides:

- (a) at the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct:
  - (i) the production of documents and other information, and

(ii) the identification of any witnesses to be called.<sup>115</sup>

Note that the parties are not absolutely entitled to even this limited discovery. The Rule makes clear that the arbitrator “may” permit this limited discovery “consistent with the expedited nature of arbitration.” The rule goes on to provide:

(c) the arbitrator is authorized to resolve any disputes concerning the exchange of information.<sup>116</sup>

Except for that reference to a production of documents, there is no reference in the AAA’s Commercial Arbitration Rules to any pre-hearing discovery.

The AAA has different rules when the claim is at least \$500,000, exclusive of interest, fees, and costs. In those cases, the AAA’s Procedures for Large, Complex Commercial Disputes apply (“The Procedures”).<sup>117</sup> The Procedures allow for broader discovery than the rule above. The Procedures for Large, Complex Commercial Disputes authorize an arbitrator to permit interrogatories and depositions. The Procedures provide:

At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.<sup>118</sup>

The Procedures do not address what is “good cause” for the additional discovery nor do they limit the number of interrogatories or depositions that can be allowed.

In light of the specific reference to interrogatories and depositions in the Procedures and the lack of any such reference in the Commercial Arbitration Rules, it would seem that a strong argument could be made that interrogatories and depositions are not permitted in arbitrations governed by the Commercial Arbitration Rules.

### **Other Rules**

Some arbitration agreements adopt the JAMS arbitration rules. The JAMS rules provide that 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.”<sup>119</sup> Although the JAMS rules do not mention interrogatories, the rules specifically permit each party to take one deposition of an opposing party or of one individual under the control of the opposing party. The JAMS rules provide that 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.<sup>120</sup>

The Commercial Arbitration Rules of ADR Systems of America LLC (ADR) are similar to the JAMS rules. The ADR Rules do not mention interrogatories but do allow the arbitrator to order a certain level of document production<sup>121</sup> and depositions.<sup>122</sup>

The Commercial Arbitration Rules of Resolute Systems, LLC mention that discovery is an issue to be discussed during an administrative conference<sup>123</sup> but are otherwise silent with regard to discovery.

The Financial Industry Regulatory Authority (FINRA) administers the largest dispute resolution forum for investors and securities firms. It has a detailed Code of Arbitration Procedure for arbitrations involving the securities industry. Although the FINRA Code of Arbitration Procedure expressly requires the production of certain documents, interrogatories are “generally not permitted”<sup>124</sup> and depositions are “strongly discouraged”<sup>125</sup> except under very limited circumstances.

Some arbitration agreements adopt the UNCITRAL<sup>126</sup> Arbitration Rules. The UNCITRAL rules make no mention of interrogatories or depositions. Like the AAA’s Commercial Arbitration Rules, the UNCITRAL Rules do not make even an exchange of documents mandatory. Whether to require the production of documents is left to the arbitrator’s discretion.<sup>127</sup> The UNCITRAL rules provide only:

At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such period of time as the arbitral tribunal shall determine.<sup>128</sup>

The International Chamber of Commerce Rules of Arbitration make no reference to discovery and do not contain reference to an exchange of documents.

The International Institute for Conflict Prevention & Resolution (CPR) is another organization the parties can choose to administer an arbitration. The CPR’s Arbitration Rules mention discovery but leave to the discretion of the arbitrator whether to allow discovery, as well as the type and amount of discovery. The CPR Rule states:

The tribunal may require and facilitate such discovery as it deems is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.<sup>129</sup>

The tension between the arbitration goals of resolving disputes expeditiously and inexpensively, and delay and added cost caused by discovery is specifically addressed by the CPR Commentary on Individual Rules. With regard to the rule on discovery, the Commentary states:

Arbitration is not for the litigator who will “leave no stone unturned.” Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items which a party has a substantial, demonstrable need.<sup>130</sup>

Requiring a party in arbitration to establish a “substantial, demonstrable” need for any discovery request will help ensure that the arbitration is expeditious, economical, less burdensome, and less adversarial than litigation.

When the arbitration agreement does not adopt any particular set of rules, the arbitration is governed by either the Federal Arbitration Act<sup>131</sup> or the Illinois Uniform Arbitration Act.<sup>132</sup> As discussed later, the FAA allows for compelling testimony and the production of documents before the arbitrator.<sup>133</sup> The Illinois UAA allows for compelling testimony and the production of documents and expressly permits evidence depositions under certain circumstances.<sup>134</sup>

### Depositions of Non-Parties

Compelling discovery from non-parties presents additional issues. There is ample authority permitting arbitrators to issue a subpoena to a non-party compelling the attendance at the hearing and to produce records at the hearing. For example, Section 7 of the FAA provides:

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.<sup>135</sup>

Section 7 clearly permits arbitrators to compel a non-party to attend “before them.”<sup>136</sup> Not so clear is the authority of the arbitrators to issue subpoenas for depositions prior to the hearing.

The Sixth and Eighth Circuits have decided 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.<sup>137</sup> However, the Second, and Fourth Circuits have ruled to the contrary.<sup>138</sup> There is now a “growing consensus” that arbitrators do not have the power to subpoena third parties for prehearing discovery.<sup>139</sup> There is no Seventh Circuit decision directly on point and there are conflicting decisions from the Northern District of Illinois.<sup>140</sup>

Although the UAA does not contain the limitation found in the FAA that testimony must be before the arbitrators, the UAA does not specify that pre-hearing discovery (other than evidence depositions under certain circumstances) is permitted.<sup>141</sup> There is no case law addressing the issue of pre-hearing discovery under the UAA.

### Depositions of Non-Parties Before the Arbitrators

One recognized tactic to ensure that certain testimony is available for arbitration is to ask that the testimony be taken in the arbitrator’s presence. Although Section 7 of the FAA does not permit prehearing depositions of third parties outside the presence of the arbitrator, it expressly permits an arbitrator to compel the attendance of third parties before the arbitrator. The FAA provides:

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....(emphasis supplied).<sup>142</sup>

There is nothing in Section 7 that limits the subpoena power to the final hearing on the merits. As long as the testimony of the non-party witness is being taken in the arbitrator’s presence, a subpoena to compel the witness to attend will be enforced.

The court in *Hay Group* recognized that Section 7 of the FAA permits a subpoena “in which the non-party has been called to appear in the physical presence of the arbitrator.”<sup>143</sup> The fact that the testimony would be taken months in advance of the “merits hearing” does not affect the legitimacy of the subpoena. In *Stolt-Nielson SA v. Celanese AG*,<sup>144</sup> the arbitrators issued a subpoena for testimony to be taken before the arbitrators eleven months before the start of the “arbitration hearing on the merits” and during the period set aside for fact depositions.<sup>145</sup> In rejecting plaintiff’s objection to the subpoena, the court stated:

Any rule there may be against compelling non-parties to 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....’<sup>146</sup>

In *Alliance Healthcare Services, LLC v. Argonaut Private Equity, LLC*, the court reached the same conclusion and held that “permitting an arbitrator to hold a preliminary hearing that is not a hearing on the merits ‘does not transform [the preliminary hearing] into a [prohibited] discovery device.’”<sup>147</sup>

Indeed, because Section 7 of the FAA authorizes arbitrators to summon a witness to testify before them “or any of them,” Section 7 authorizes the use of subpoenas at preliminary proceedings even in front of a single arbitrator, before the full panel hears the more central issues.<sup>148</sup> That was precisely the issue presented, and approved in *Alliance Healthcare Services, LLC*.<sup>149</sup> Of course, that approach will result in the additional cost of having the arbitrator or arbitrators present for the deposition.

### **Territorial Limits of Arbitration Subpoena**

There is still one last obstacle to obtaining discovery in an arbitration from a non-party: the territorial limits of an arbitration subpoena. In the ordinary court case, a deposition subpoena to a third party can be obtained and enforced in the district where the deponent resides. However, that is not the case with an arbitration subpoena.

Section 7 of the FAA confers authority to enforce an arbitration subpoena only upon the United States District Court for the district in which the arbitration is taking place. Section 7 of the FAA provides:

...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...in the same manner provided by law for securing the attendance of witnesses...for neglect or refusal to attend in the courts of the United States.<sup>150</sup>

Federal Rule of Civil Procedure 45 requires a subpoena to be issued “from the court for the district where the hearing or trial is to be held”<sup>151</sup> and limits the effectiveness of the subpoena to the district of the hearing or within 100 miles of the hearing.<sup>152</sup>

Because of the 100-mile limit of Rule 45 and the requirement that an arbitration subpoena can only be enforced by the district court where the arbitration is pending, arbitration subpoenas to third parties are effectively limited to 100 miles from the place of the arbitration.<sup>153</sup>

Once discovery is had, or not, and the arbitration occurs, one party may be dissatisfied with the outcome. The next section answers the questions of whether one may appeal an arbitration award and the circumstances that allow an arbitration award to be vacated.

### **Appealing the Arbitration Award**

*By: Moyenda Mutharika Knapp  
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The arbitration is over, a party receives an unfavorable ruling from the court, and they want to appeal. How does that party appeal? The answer depends on whether the case is pending in federal or state court.



Section 16 of the Federal Arbitration Act (FAA) governs the appeal of arbitration awards in federal court actions.<sup>154</sup> Section 16 of the FAA provides that:

- (a) An appeal may be taken from—
  - (1) an order—
    - (A) refusing a stay of any action under section 3 of this title [9 USCS § 3],
    - (B) denying a petition under section 4 of this title [9 USCS § 4] to order arbitration to proceed,
    - (C) denying an application under section 206 of this title [9 USCS § 206] 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 [9 USCS § 3];
  - (2) directing arbitration to proceed under section 4 of this title [9 USCS § 4];
  - (3) compelling arbitration under section 206 of this title [9 USCS § 206]; or
  - (4) refusing to enjoin an arbitration that is subject to this title.<sup>155</sup>

This section of the article discusses Section 16(a)(3) of the FAA, which allows for the appeal of any final arbitration decision that is the subject of the FAA's provisions, and addresses what a final decision is under the FAA.<sup>156</sup> The Supreme Court of the United States considered the question of finality in *Green Tree Financial Corp.—Alabama and Green Tree Financial Corp. v. Randolph*. It analyzed “whether an order compelling arbitration and dismissing a party’s underlying claims is a ‘final decision with respect to an arbitration’ within the meaning of § 16 of the Federal Arbitration Act, 9 U.S.C. § 16, and thus is immediately appealable pursuant to that Act.”<sup>157</sup> The Court held that it was.<sup>158</sup>

In that case, the parties had entered into a contract where they agreed that all claims, disputes, and controversies must be resolved by binding arbitration.<sup>159</sup> However, when a dispute arose, the plaintiff sued in court.<sup>160</sup> The defendant responded by filing a motion to compel the arbitration, to stay the case, or to dismiss it.<sup>161</sup> The district court granted the motion to compel, denied the request to stay the case, and dismissed the action with prejudice.<sup>162</sup> The plaintiff’s request for reconsideration was denied, and an appeal followed.<sup>163</sup> The Court of Appeals for the Eleventh Circuit considered the matter and determined that the district court order was final and appealable.<sup>164</sup> The Supreme Court affirmed this decision, although it reversed another ruling made by the Eleventh Circuit in that case.<sup>165</sup>

The FAA did not define the phrase “final decision,” however the Supreme Court adopted the long-standing meaning of a “final decision” as “a decision that ‘ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment’.”<sup>166</sup> Since the district court order mandated that the parties

proceed with arbitration and dismissed the case with prejudice, it left nothing more to be done at the trial court level except for the court to execute the order.<sup>167</sup> It was thus a final decision pursuant to Section 16(a)(3) of the FAA from which a party could appeal.<sup>168</sup> Finally, the Supreme Court, in considering the respondent's arguments, noted that although the "FAA does permit parties to arbitration agreements to bring a separate proceeding in a district court to enter judgment on an arbitration award once it is made or to vacate it or modify it," this did not affect the validity of the district court decision in the case before it.<sup>169</sup>

Notably, appellate jurisdiction of an appeal is proper pursuant to 28 U.S.C. § 1291, which gives the court of appeals jurisdiction over final district court decisions. It is worth noting that Section 3 of the FAA provides an exception to the finality requirement by allowing the appeal of an order "refusing a stay of any action under section 3 of this title."<sup>170</sup> "By that provision's clear and unambiguous terms, any litigant who asks for a stay under § 3 is entitled to an immediate appeal from denial of that motion—regardless of whether the litigant is in fact eligible for a stay."<sup>171</sup>

As indicated at the beginning of this section, the procedures relating to appeal are different depending on whether the matter is pending in federal court or state court. State court matters are governed by the Uniform Arbitration Act (UAA).<sup>172</sup> Section 5/18 of the UAA provides that "appeals may be taken in the same manner and on the same terms as other civil cases."<sup>173</sup> The appellate court rules applicable to state court actions are contained in Illinois Supreme Court Rules 301 to 314. Notably then, Illinois Supreme Rule 304(a) applies to arbitration cases.<sup>174</sup>

The UAA also requires a decision to be final before the appellate court has jurisdiction to hear the appeal.<sup>175</sup> In the *Department of Central Management Services* case, the Supreme Court of Illinois vacated an appellate court order following arbitration, finding that there was not a final judgment at the trial court level to confer jurisdiction upon the appellate court.<sup>176</sup>

In that case, following a decision by the arbitrator in favor of grievant American Federation of State, County and Municipal Employees (Federation), the Illinois Department of Mental Health and Developmental Disabilities and the Department of Central Management Services (collectively, Departments) filed an application with the circuit court pursuant to Sections 12 and 13 of the UAA seeking to have the award vacated.<sup>177</sup>

Section 12 of the UAA requires that:

(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 one of the arbitrators or misconduct prejudicing the rights of any party;
- (3) the arbitrators exceeded their powers;
- (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5 [710 ILCS 5/5], as to prejudice substantially the rights of a party; or
- (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 [710 ILCS 5/2] and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by the circuit court is not ground for vacating or refusing to confirm the award.

- (b) An application under this Section shall be made within 90 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 90 days after such grounds are known or should have been known.
- (c) In vacating the award on grounds other than stated in clause (5) of subsection (a) the court may order a rehearing before new arbitrators chosen as provided in Section 3 [710 ILCS 5/3], or if the award is vacated on grounds set forth in clauses (3) and (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 3 [710 ILCS 5/3]. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.
- (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.
- (e) Nothing in this Section or any other Section of this Act shall apply to the vacating, modifying, or correcting of any award entered as a result of an arbitration agreement which is a part of or pursuant to a collective bargaining agreement; and the grounds for vacating, modifying, or correcting such an award shall be those which existed prior to the enactment of this Act.<sup>178</sup>

Section 13 of the UAA provides that:

- (a) Upon application made within 90 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.<sup>179</sup>

Contrary to the requirements under Section 12(b) of the UAA that the application to vacate the award be made within 90 days of delivery of the award (unless there are certain exceptions not applicable to the case before the Illinois Supreme Court), the Departments filed their application on the 91st day.<sup>180</sup> The Federation moved to dismiss the application as untimely pursuant to Section 5/2-619 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619, and requested that the award be confirmed.<sup>181</sup> The trial court granted the Federation's motion, denied the Departments' application to vacate the award, but did not enter an order confirming the award.<sup>182</sup>

The case proceeded to the appellate court, which affirmed the trial court decision.<sup>183</sup> The supreme court, on its "independent duty to ensure that appellate jurisdiction is proper," because neither party had raised that issue, considered the appellate court's jurisdiction to consider the case's merits.<sup>184</sup>

While a Section 5/2-619 motion is normally an “adjudication on the merits” and a “final judgment” in an ordinary civil case, the Illinois Supreme Court noted that the Federation’s motion to dismiss was filed in response to the Departments’ application to vacate the award under Section 12 of the UAA<sup>185</sup> Section 12(d) makes it clear that if the application to vacate the award is denied, the “court shall confirm the award.”<sup>186</sup> Accordingly, the trial order simply denying the motion to vacate the award was not final.<sup>187</sup>

Moreover, the supreme court noted that even if the motion to vacate was denied, the award could still be modified or corrected.<sup>188</sup> Section 5/14 of the UAA provides that:

Upon the granting of an order confirming, modifying or correcting an award, judgment shall be entered in conformity therewith and be enforced as any other judgment. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court as to the court seems just.<sup>189</sup>

However, if there is “no motion to modify or correct the award pending when the application to vacate is denied, an order must then be granted by the court confirming the award.”<sup>190</sup> “Only after the court grants such an order, or orders that the award be modified or corrected, is judgment finally entered.”<sup>191</sup> Since these steps were not taken, the trial court order was not final, and the appellate court did not have jurisdiction to hear the appeal, its order was vacated by the supreme court, and the appeal dismissed.<sup>192</sup>

Before considering appeal, the arbitrating party should ensure that the trial court order upon which it seeks leave to appeal was a final order under which appeal could be taken. Then, the party should proceed to appeal under the applicable Federal Rules or Illinois Supreme Court Rules governing the appellate process.

Above, this article explained the advantages and disadvantages of arbitration, which are applicable to arbitrations that occur in the United States, as well as international arbitration. In the following section, the authors provide further insight into international arbitrations.

## **An Introduction to International Arbitration: Practical Insights**

*By: Vilma T. Arce Stark and John F. O’Brien III*

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Corporations of all sizes do business worldwide and enter into contracts requiring the parties to submit disputes arising out of a contract to binding arbitration. International arbitration is a dispute resolution process developed to allow parties from different countries to resolve their disputes in a neutral forum without the formalities or possible biases of their respective legal systems. Because international arbitration is a creature of contract, parties of different legal systems and cultural backgrounds can create their own dispute resolution processes by selecting the applicable rules and laws. International institutions or rule-making bodies, as well as any combination of state (*i.e.*, domestic) and international laws, may govern the substantive and procedural issues arising in the arbitration proceedings.

As with any dispute, unforeseen or contentious issues may arise. If there are gaps in the agreement or parties disagree over how to resolve an issue, the arbitrators and/or international institution may determine the rules or laws under which they will proceed. In a majority of countries, international treaties govern and ensure enforcement of the final arbitration award subject to limited defenses that may be asserted by a party moving to vacate or modify an arbitration award. When combined, the national laws of various jurisdictions may affect the arbitration proceedings or ultimate enforcement of an award.

Most U.S. trained attorneys are unfamiliar with the strategic decisions they must make in the context of international arbitration. Framing the arbitration proceedings from the start is just as crucial as preparing for enforcement of an award in a foreign jurisdiction at the end.<sup>193</sup> Advantages to international arbitration include

its speed, flexibility and ease of international enforceability. This section of the article discusses how to analyze the arbitration provision in a contract and its scope, the selection of governing rules and arbitrators, various strategic considerations, and enforcement of the arbitral award.

### **International Arbitration Proceedings: Framed By the Contract**

As simple as it may seem, the first and most important thing attorneys must do when a client is involved in an international contract dispute is ask “what does the contract say?” The contract may or may not require arbitration, define the conduct that constitutes a breach of the contract, and specify the law applicable to disputes arising from a breach. If the contract requires arbitration, the arbitration agreement may or may not: indicate the forum of the arbitration, provide the number of and method for selecting arbitrator(s), and reference specific rules governing the arbitration proceedings. If the contract does not provide for arbitration, the parties may agree to submit their dispute to arbitration in writing. Similarly, if the arbitration agreement is silent on the selection of arbitrators, rules, the seat or anything else, parties may structure the arbitration proceedings before they begin and they may continue defining rules as issues come up.

Attorneys must use the provisions of the contract as a compass when navigating through international arbitration. Numerous issues surface throughout the proceedings. U.S. attorneys are used to litigating each issue in court. But, because arbitration is a creature of contract, an arbitrator’s jurisdiction is limited to the powers conferred to her by that contract. Attorneys should regularly refer to the contract and determine whether disputed issues are arbitrable under it. Arbitrability is a term used in arbitration to define that which is subject to arbitration. An issue is non-arbitrable when it falls outside the scope of the contract or the arbitration proceedings. The seat of the arbitration or the international institution governing the proceedings may all have different laws, rules and jurisprudence on arbitrability. If an issue falls outside the four corners of the arbitration agreement, attorneys should work closely with counsel in the seat of the arbitration (particularly if the arbitration is seated in a foreign jurisdiction) to determine how to best proceed.

Indeed, almost every strategic decision boils down to the language of the contract, the laws of the relevant jurisdictions, and the effect of those laws on the proceedings and result.

### **Procedural and Administrative Considerations: Institutional or *Ad Hoc* Arbitration**

Arbitration can be institutional or *ad hoc*. Institutional arbitration is conducted under the auspices of an arbitral institution, and will result from the parties’ agreement to apply the rules of a particular arbitral institution. The institution often manages or administers the financial and other practical aspects of the arbitration. Arbitration is *ad hoc* when the parties have not agreed on a set of rules and/or administrator, or when the parties have agreed on rules that are not linked to an arbitral institution. The arbitrators or parties may administer the proceedings without the support of a neutral institution. The parties’ contract may specify an institution or it may be silent on the rules governing the arbitration. If the contract is silent, attorneys should learn about the various international institutions available to them and consider the advantages and disadvantages of *ad hoc* arbitration.

A leading international arbitration institution is the International Court of Arbitration of the International Chamber of Commerce (“ICC”),<sup>194</sup> headquartered in Paris. The ICC has national committees in nearly 60 countries. Every year, well over 500 new cases involving parties from over 100 countries are filed with the ICC. As is the case with all institutional arbitrations, ICC arbitrations are conducted under the institution’s own set of procedural rules. The American Arbitration Association’s International Centre for Dispute Resolution (“ICDR”)<sup>195</sup> and the CPR Institute for Dispute Resolution (“CPR”),<sup>196</sup> both based in New York City, also handle international arbitrations under their respective procedural rules. Other leading international arbitral institutions with their own set of procedural rules include the London Court of International Arbitration

("LCIA")<sup>197</sup> and the Singapore International Arbitration Center ("SIAC").<sup>198</sup> There is also the International Centre for the Settlement of Investment Disputes ("ICSID"),<sup>199</sup> an international institution that governs disputes between investors and states, such as expropriation.

Attorneys should learn the differences between the institutions and learn what is or is not possible within each institution. For example, the ICC and ICDR now provide for emergency (*i.e.*, injunctive or interim) relief prior to the constitution of the arbitral tribunal.<sup>200</sup> Attorneys should consult counsel in the seat of the arbitration, however, to determine whether such relief is enforceable and how to enforce such relief. And, although the ICC once had no mechanism for requesting interim relief, parties could (and still can) seek such relief directly from the courts.<sup>201</sup> Typically, there are ways to ultimately reach a desired result, but attorneys must first analyze the rules and laws of several jurisdictions to develop an appropriate strategy.

A set of rules widely used in *ad hoc* arbitrations and even some administered arbitrations are the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules.<sup>202</sup> These rules should not be confused with the UNCITRAL Model Law on International Commercial Arbitration, which some nations have adopted as part of their legislation on international commercial arbitration. Parties may use the UNCITRAL Arbitration Rules to resolve a variety of disputes, including disputes between private commercial entities, investor-State disputes, and State-to-State disputes.<sup>203</sup> Among the reasons parties may opt for *ad hoc* arbitration is to avoid the services and cost of an international institution. Even in *ad hoc* arbitrations, attorneys should consider adopting a set of international rules, over domestic rules, because international rules were specifically designed for international disputes.

Procedural rules should not be confused with the applicable law provision in the contract, which governs the law arbitrators will use to decide the substantive issues of the dispute. When parties disagree or fail to select procedural rules, arbitrators may choose the law applying to procedure as procedural issues arise. Traditionally, the law of the seat of the arbitration, or *situs*, applies. This, however, is no longer necessarily true. For example, in *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, the arbitrators determined that the law of the arbitration would be governed by international law, not the law of the seat of the proceedings.<sup>204</sup> To avoid surprises, counsel should determine the law governing the proceedings, as well as the law applicable to the substance of the dispute.

### **Strategic and Other Considerations Unique to International Arbitration**

One of the most valuable features of international arbitration is the parties' ability to select the arbitrator (or a tribunal of arbitrators), and thus, ensure that the dispute is heard by a tribunal that they consider independent, impartial, and competent in the relevant subject matter. Selecting arbitrators is among the parties' most important strategic decisions. Whether a potential list of arbitrators is provided by an international institution or recommended by opposing counsel, attorneys should always thoroughly research potential arbitrators. Their record could offer important insight on possible biases and preferences.

There are also no mandatory rules regarding discovery. Limited discovery is generally preferred, especially when opposing counsel or members of the tribunal are accustomed to a civil law (as opposed to a common law) system. Limiting discovery helps minimize the cost of arbitration. Parties may, nonetheless, agree to discovery. There are no rules regarding the types of documents that must be disclosed as part of the arbitral process. Some parties and arbitrators refer to the International Bar Association ("IBA") Rules of the Taking of Evidence in International Commercial Arbitration<sup>205</sup> for guidance. The IBA Rules attempt to strike a balance between no discovery (which is the custom in civil law countries) and excessive and costly discovery (which is typical in common law countries, like the U.S.). Some arbitrators direct the parties to exchange documents and they may draw an adverse inference from a failure to produce documents if the circumstances suggest that the non-produced documents should exist.<sup>206</sup> Although international arbitration rules or

agreements do not expressly provide for discovery, parties are required to disclose the documents upon which they rely to support their arguments.<sup>207</sup> This is intended to enable parties to prepare for the proceedings without spending money on costly discovery. Attorneys should also be aware that rules and institutions may or may not permit witness preparation (*i.e.*, interviewing, familiarizing, and coaching) for the arbitration proceedings, and those permitting it may do so subject to mandatory provisions of any applicable local law.<sup>208</sup> Because laws worldwide vary drastically with respect to what is ethical and permitted, counsel will need to work closely with local counsel to act accordingly.

At the arbitration proceeding, U.S. attorneys should also fight against their adversarial instincts. Objections to questions, evidence, and testimony based on the Federal Rules of Evidence do not apply in international proceedings, unless the parties otherwise agree. Non-U.S. arbitrators and attorneys will not take kindly to what they will perceive as efforts to obstruct the arbitral process.

### **Enforcement of Arbitration Awards**

Arbitral awards are generally final and binding on the parties. A party may, however, institute proceedings to correct clerical or factual errors or to interpret an arbitration award through the international institution, if one was selected to manage the proceedings. The ICC and ICDR, for instance, allow parties to submit an application for correction of such errors or for the interpretation of an award within 30 days after the receipt of such award.<sup>209</sup> In ICSID proceedings, an internal system of review seeking to interpret, revise, or annul the award may be invoked by any party to the dispute.<sup>210</sup> And ICC awards must be approved by the ICC's Court of Arbitration before they become final, regardless of whether the parties request such a review.<sup>211</sup> Parties may also move to vacate an award within the specific jurisdiction in which the award is enforced.

Enforcement of an international arbitration award is generally best sought in the jurisdiction in which the losing party has assets because "it is far easier to enforce an arbitration award worldwide than it is to attempt to enforce a civil judgment. There is no comparable worldwide treaty—no full faith and credit international law concept—requiring countries to enforce judicial judgments from other countries. And courts [worldwide] are commonly reluctant to do so."<sup>212</sup> Moreover, if payment is not forthcoming, local courts may need to intervene by seizing the losing party's assets to satisfy the judgment. The jurisdiction with the losing party's assets is typically that party's home country, but may include other jurisdictions.

To simplify the enforcement process of international arbitration awards,<sup>213</sup> the national laws of most countries include international treaties and agreements that these same countries have adopted. These treaties include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")<sup>214</sup> and the Inter-American Convention on International Commercial Arbitration ("Panama Convention").<sup>215</sup> Most countries in the Americas are signatories of the Panama Convention. It mirrors the New York Convention in most respects.

Although most countries have adopted the New York Convention and/or the Panama Convention, each country may have additional state rules that apply to international arbitrations. Thus, if enforcement of an international arbitration award is sought in a country outside the seat of the arbitration, communicating with local counsel in that jurisdiction at the outset is of utmost importance. Courts in Mexico, for example, demand strict compliance with service of the party in their home jurisdiction in accordance with national law.<sup>216</sup> In addition, because the violation of a country's public policy is grounds for vacatur,<sup>217</sup> communicating with local counsel can minimize possible surprises at the time of enforcement. It is worth thoroughly discussing with local counsel whether an opposing party's home jurisdiction (or other jurisdictions in which counsel will possibly seek enforcement of an award) recognizes claims and defenses asserted in the arbitration to ensure the integrity of the proceedings. Because most countries are signatories of international treaties that guarantee the

enforcement of foreign arbitration awards, it is easier in those countries to enforce an arbitration award than it is to enforce a foreign judgment.<sup>218</sup>

An action to confirm and enforce an arbitration award in the United States may be filed in federal or state court. Federal and state arbitration statutes and laws apply when enforcing international arbitration awards in the United States. Included in the FAA<sup>219</sup> are the New York Convention and the Panama Convention, which apply to international arbitration awards.<sup>220</sup> For purposes of enforcement, the FAA confers federal question subject-matter jurisdiction on federal courts.<sup>221</sup> Thus, if an enforcement proceeding is filed in state court, the opposing party may remove the action to federal court. Federal courts must also have personal jurisdiction over the respondent, which means the respondent must have sufficient minimum contacts with the jurisdiction.<sup>222</sup> The FAA applies in state courts as well, but the FAA does not pre-empt state arbitration statutes.<sup>223</sup> And, regardless of whether the action is filed in state or federal court, there are some issues that may ultimately be determined by state law or federal common law and may, therefore, vary across federal and state jurisdictions. For example, there is a split across federal circuits on whether, in addition to the New York Convention, Chapter 1 of the FAA applies when seeking to vacate an international arbitration award.<sup>224</sup>

International treaties and national legislation, like the FAA, indicate when an international arbitration award may be vacated or modified. The New York Convention is explained in more detail, since it has the most signatories.

### **The New York Convention**

The New York Convention, which has been in effect in the United States for nearly 40 years and has been ratified or accepted by more than 140 countries, sets out a relatively straightforward and effective mechanism for the enforcement of international arbitration awards.<sup>225</sup> The New York Convention is the basis for the entire system of the enforcement of international arbitration awards as it exists today. The goal of the New York Convention is “to encourage the recognition and enforcement of international arbitration awards and agreements”<sup>226</sup> and its “underlying theme...is...the autonomy of international arbitration.”<sup>227</sup>

Signatories to the New York Convention guarantee recognition of foreign arbitral awards in the signatory country, except on the limited grounds set out in the Convention itself. The New York Convention sets forth the grounds on which a court may refuse to recognize or enforce an arbitration award. The New York Convention provides that a court “shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award itself is relied upon”<sup>228</sup> unless the party against whom the award is invoked provides “proof” that one of seven limited grounds for non-recognition exist.<sup>229</sup> Article V provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
  - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the case; or
  - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from



those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.<sup>230</sup>

The grounds to refuse recognition of a foreign award under the New York Convention are identical to the grounds contained in the Panama Convention.<sup>231</sup>

Importantly, as a result of the New York Convention, the award need not be confirmed in the seat of the arbitration before seeking enforcement of the award in other countries that have ratified the Convention.

In the United States, the New York Convention is implemented through the FAA. As the Supreme Court explained, “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.’”<sup>232</sup>

The FAA consists of three chapters. Chapter 1<sup>233</sup> contains a set of default rules designed to “overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.”<sup>234</sup> Chapter 2 implements the New York Convention and governs international or non-domestic awards.<sup>235</sup> Chapter 3 provides for the enforcement of the Panama Convention and sets forth the interplay between the New York Convention and the Panama Convention. The FAA also allows district courts to assist arbitrators in taking evidence by compelling the attendance of witnesses at an arbitral hearing. But the interplay between state, federal and international laws is one that can be difficult to balance.

### **Conclusion**

There are many good reasons why arbitration has become an increasingly popular method to resolve legal matters, especially in international disputes. Although arbitration has its advantages, it also has many disadvantages, including the limited right to appeal an award. Drafting a proper arbitration clause in a contract is very important. Once the parties agree to arbitrate a dispute, counsel must consider where the arbitration takes place and the selection of the arbitrator.

### **(Endnotes)**

<sup>1</sup> See Roebuck, Sources for the History of Arbitration, 14 Arbitration International 237-343 (1998) and Ager, Interstate Arbitration in the Greek World, 337-90 BC (1996).

<sup>2</sup> Jerry Cruz, Arbitration vs. Litigation, An Unintentional Experiment.

- <sup>3</sup> *Ibid.*, 5.
- <sup>4</sup> *Ibid.*, 5.
- <sup>5</sup> President John F. Kennedy, 87th State of the Union Address (January 11, 1962).
- <sup>6</sup> *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 445-46, 530 N.E.2d 439 (Ill. 1988).
- <sup>7</sup> John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, Vol. 58, No. 1, Dispute Resolution Journal (February - April 2003) at <http://www.adr.org/si.asp?id=3620>.
- <sup>8</sup> *Tortoriello v. Gerald Nissan of North Aurora, Inc.*, 379 Ill. App. 3d 214, 225, 882 N.E.2d 157, 168-69 (2nd Dist. 2008).
- <sup>9</sup> *Tortoriello*, 379 Ill. App. 3d at 224-25, 882 N.E.2d at 168.
- <sup>10</sup> *Id.*
- <sup>11</sup> *Donaldson*, 124 Ill. 2d at 445-46, 530 N.E.2d at 443-444.
- <sup>12</sup> *Id.*
- <sup>13</sup> *Id.* at 448-49, 530 N.E.2d at 445.
- <sup>14</sup> John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, Vol. 58, No. 1, Dispute Resolution Journal (February - April 2003) at <http://www.adr.org/si.asp?id=3620>.
- <sup>15</sup> John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, Vol. 58, No. 1, Dispute Resolution Journal (February - April 2003) at <http://www.adr.org/si.asp?id=3620>.
- <sup>16</sup> Walter E. Stern, *Drafting Arbitration Clauses: A Litigation Perspective* (November 3, 1999) at <http://www.modrall.com/files/1108071194550938.art>.
- <sup>17</sup> Walter E. Stern, *Drafting Arbitration Clauses: A Litigation Perspective* (November 3, 1999) at <http://www.modrall.com/files/1108071194550938.art>.
- <sup>18</sup> *Edward Electric Company v. Automation, Inc.*, 229 Ill. App. 89, 104-05, 593 N.E.2d 833, 842-43 (1st Dist. 1992).
- <sup>19</sup> See *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Rosen v. SCIL, LLC*, 343 Ill. App. 3d 1075, 799 N.E.2d 488, 493 (1st Dist. 2003).
- <sup>20</sup> *Id.*
- <sup>21</sup> See *Comdisco, Inc. v. Dun & Bradstreet Computer Leasing, Inc.*, 285 Ill. App. 3d 796, 674 N.E.2d 902, 905, 221 Ill.Dec. 109 (1st Dist. 1996).
- <sup>22</sup> 9 U.S.C. § 1, *et seq.*
- <sup>23</sup> *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 384, 808 N.E.2d 957, 962 (2004), *quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
- <sup>24</sup> 9 U.S.C. § 2.
- <sup>25</sup> 9 U.S.C. § 1.
- <sup>26</sup> 710 ILCS 5/1, *et seq.*
- <sup>27</sup> *Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 75, 697 N.E.2d 727, 732 (1998).
- <sup>28</sup> *Jensen v. Quik International*, 213 Ill. 2d 119, 820 N.E.2d 462, 467 (2004); *Cook County v. American Federation of State, County and Mu. Employees, Dist. Council 31*, 294 Ill. App. 3d 985, 691 N.E.2d 777 (1st Dist. 1998).
- <sup>29</sup> See, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986); *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1367 (N.D. Ill. 1990).

- <sup>30</sup> See *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 530 N.E.2d 439, 445 (1988).
- <sup>31</sup> See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).
- <sup>32</sup> See Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990 (ADA), *etc.*
- <sup>33</sup> 775 ILCS 5/1-101, *et seq.*,
- <sup>34</sup> See *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 635 (7th Cir. 1999).
- <sup>35</sup> See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 40 (1974).
- <sup>36</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).
- <sup>37</sup> 219 Ill. 2d 135, 847 N.E.2d 99 (2006).
- <sup>38</sup> See *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir 2005); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Koveleskie v. SBC Capital Mkts, Inc.*, 167 F.3d 361, 368 (7th Cir. 1999); *Haskins v. Prudential Insurance Company of America*, 230 F.3d 231 (6th Cir. 2000); *American Heritage Life Insurance Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002); *Sydnor v. Conesco*, 252 F.3d 302, 307 (4th Cir. 2001); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3rd Cir. 1998).
- <sup>39</sup> See *Caley*, *supra* note 38; *Patterson*, *supra* note 38
- <sup>40</sup> See *Flood v. Country Mutual Insurance Co.*, 41 Ill. 2d 91, 93, 242 N.E.2d 149, 151 (1968) (“arbitration agreements will not be extended by construction or implication”).
- <sup>41</sup> See, *AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 89 L.Ed.2d 648, 106 S.Ct. 1415, 1418 (1986); *Rauh v. Rockford Products Corp.*, 143 Ill. 2d 377, 574 N.E.2d 636, 641 (1991).
- <sup>42</sup> See *La Salle National Bank v. International Limited*, 129 Ill. App. 2d 381, 263 N.E.2d 506, 513 (2nd Dist. 1970).
- <sup>43</sup> See 9 U.S.C. § 2 and 710 ILCS 5/1.
- <sup>44</sup> *AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 89 L.Ed.2d 648, 106 S.Ct. 1415, 1418 (1986).
- <sup>45</sup> *Tinder v. Pinkerton Security*, 305 F.3d 728, 734 (7th Cir. 2002).
- <sup>46</sup> See *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 847 N.E.2d 99, 109 (2006); *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 685 N.E.2d 434 (2nd Dist. 1997).
- <sup>47</sup> *Mid-Town Petroleum, Inc. v. Gowen*, 243 Ill. App. 3d 63, 611 N.E.2d 1221 (1st Dist. 1993).
- <sup>48</sup> See *Penn v. Ryan’s Family Steak Houses, Inc.*, 269 F.3d 753, 758 (7th Cir. 2001).
- <sup>49</sup> See *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Bess v. DirecTV, Inc.*, 381 Ill. App. 3d 229, 885 N.E.2d 488 (5th Dist. 2008); *Ragan v. AT&T Corp.*, 355 Ill. App. 3d 1143, 824 N.E.2d 1183 (5th Dist. 2005).
- <sup>50</sup> See *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967).
- <sup>51</sup> *Id.* at 1806; *Aste v. Metropolitan Life Insurance Co.*, 312 Ill. App. 3d 972, 728 N.E.2d 629 (1st Dist. 2000).
- <sup>52</sup> *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress International, Ltd.*, 1 F.3d 639, 642 n.4 (7th Cir. 1993); *First Options v. Kaplan*, 514 U.S. 938 (1995).
- <sup>53</sup> *Kaplan v. Kaplan*, 25 Ill. 2d 181, 182 N.E.2d 706, 709 (1962).
- <sup>54</sup> *Id.*
- <sup>55</sup> *Alexander v. Standard Oil Co.*, 97 Ill. App. 3d 809, 423 N.E.2d 578, 582 (5th Dist. 1981).
- <sup>56</sup> See *Carlile v. Snap-On Tools*, 271 Ill. App. 3d 833, 648 N.E.2d 317, 322 (4th Dist. 1995).
- <sup>57</sup> See *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

- <sup>58</sup> See *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 857 N.E.2d 250, 263 (2006).
- <sup>59</sup> *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 854 N.E.2d 607, 622 (2006); *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 408 N.E.2d 403, 409 (1<sup>st</sup> Dist. 1980).
- <sup>60</sup> *Razor*, *supra* 854 N.E.2d at 622.
- <sup>61</sup> See also, 810 ILCS 5/2-302.
- <sup>62</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Streams Sports Club, Ltd. v. Richmond*, 99 Ill. 2d 182, 457 N.E.2d 1226, 1232 (1983).
- <sup>63</sup> See *Vassilkovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20, 830 N.E.2d 619, 626 (1st Dist. 2005).
- <sup>64</sup> *Id.*
- <sup>65</sup> *Design Benefit Plans, Inc. v. Enright*, 940 F. Supp. 200, 206 (N.D.Ill. 1996).
- <sup>66</sup> *Id.* at 206.
- <sup>67</sup> See, *Green Tree Financial Corp. — Alabama v. Randolph*, 531 U.S. 79, 148 L.Ed.2d 373, 121 S.Ct. 513, 522 (2000).
- <sup>68</sup> See, *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 170 F.3d 1, 15 (1st Cir. 1999); *Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752, 764 (5th Cir. 1999); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999).
- <sup>69</sup> See *Cole v. Burns International Security Services*, 105 F.3d 1465, 1484 (D.C. Cir. 1997); *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999).
- <sup>70</sup> See, *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998). It is important to note that all of the aforementioned cases were decided prior to the Supreme Court's decision in *Green Tree*. While none of the decisions have been overruled, each has been questioned by subsequent decisions in lieu of the Supreme Court's ruling in *Green Tree*. Moreover, more recent decisions which have applied *Green Tree*'s burden-shifting approach to claims of prohibitively expensive arbitration fees have instead adopted a case-by-case analysis as discussed, *infra*. See *Toledano v. O'Connor*, 501 F. Supp. 2d 127 (D.C. Cir. 2007).
- <sup>71</sup> See, *Safranek*, *supra*, 379 F.Supp.2d at 935; *Booker v. Robert Half International, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001).
- <sup>72</sup> *Gannon*, 262 F.3d at 682.
- <sup>73</sup> 105 F.3d 1465 (D.C. Cir. 1997)
- <sup>74</sup> *Id.* at 1483.
- <sup>75</sup> See, e.g., *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 170 F.3d 1, 15 (1st Cir. 1999).
- <sup>76</sup> *Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 697 N.E.2d 727 (1998).
- <sup>77</sup> See AIA Document B141, *Standard Form of Agreement Between Owner and Architect* ¶ 1.3.5.4. But see *Ure v. Wangler Construction Co.*, 232 Ill. App. 3d 492, 597 N.E.2d 759, (1st Dist. 1992)(the court refused to vacate the arbitration award on the grounds that the arbitrator had consolidated two arbitrations in contravention of the above clause because the protesting party had participated without objection and had waived thereby its right to insist on the non-joinder clause).
- <sup>78</sup> *Mid-America Regional Bargaining Ass'n v. Modern Builders Industrial Concrete Co.*, 101 Ill. App. 3d 83, 427 N.E.2d 1011 (1st Dist. 1981). See, AAA Rule R-30.
- <sup>79</sup> 710 ILCS 5/2(a); 9 U.S.C. §4.
- <sup>80</sup> 710 ILCS 5/2(a), 5/2(d); 9 U.S.C. §3.

- <sup>81</sup> 565 U.S. \_\_ No. 10-1521 (November 7, 2011).
- <sup>82</sup> *Farris v. Hedgepeth*, 58 Ill. App. 3d 1040, 374 N.E.2d 1086 (2d Dist. 1978).
- <sup>83</sup> 710 ILCS 5/2(b).
- <sup>84</sup> 710 ILCS 5/12(a)(5); *Board of Education of Community Unit School District No. 4 Champaign County v. Champaign Education Ass’n*, 15 Ill. App. 3d 335, 304 N.E.2d 138 (4th Dist. 1973).
- <sup>85</sup> 710 ILCS 5/12(a)(5).
- <sup>86</sup> *Himco Systems, Inc. v. Marquette Electronics, Inc.*, 86 Ill. App. 3d 476, 407 N.E.2d 1013, 1016 (1st Dist. 1980); *Gibbons v. United Transportation Union*, 462 F. Supp. 838, 842 (N.D. Ill. 1978).
- <sup>87</sup> *Magallanes Investments, Inc. v. Circuit Systems, Inc.*, 994 F.2d 1214, 1217 (7th Cir. 1993) (holding that party that litigates arbitrable questions before court may waive right to request arbitration); *Epstein v. Yoder*, 72 Ill. App. 3d 966, 391 N.E.2d 432 (1st Dist. 1979) (waiver where party failed to raise issues of arbitrability in answer and counterclaim, participated extensively in discovery, and was at summary judgment stage).
- <sup>88</sup> *City of Centralia, Illinois v. Natkin & County*, 257 Ill. App. 3d 993, 630 N.E.2d 458, 461 (5th Dist. 1994); *Gateway Drywall & Decorating, Inc. v. Village Construction Co.*, 76 Ill. App. 3d 812, 395 N.E.2d 613 (5th Dist. 1979) (waiver of arbitration by filing an answer without asserting the right to arbitration).
- <sup>89</sup> *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192 (7th Cir. 1987).
- <sup>90</sup> *City of Parkersburg, West Virginia v. Turner Construction Co.*, 612 F.2d 155 (4th Cir. 1980) (the right to arbitrate a major dispute was not waived in spite of the expiration of an express 30-day time provision as the intent of the parties was to only apply the deadline to minor disputes); *In re Koch Oil, S.A.*, 751 F.2d 551 (2nd Cir. 1985) (upheld award filed after contract provision giving arbitrators authority had expired).
- <sup>91</sup> *See Geneva Sec. v. Johnson*, 138 F.3d 688, n. 1 (7th Cir. 1998) (collecting cases).
- <sup>92</sup> 124 Ill. 2d 435, 530 N.E.2d 439 (1988).
- <sup>93</sup> *Geneva Sec. v. Johnson*, 138 F.3d 688 (7th Cir. 1998).
- <sup>94</sup> *Murphy v. United States Fidelity & Guaranty Co.*, 120 Ill. App. 3d 282, 458 N.E.2d 54, 58 (5th Dist. 1983).
- <sup>95</sup> *Robbins v. Chipman Trucking, Inc.*, 866 F.2d 899, 902 (7th Cir. 1988) (employer’s request for arbitration was untimely and barred; employer did not write to AAA nor notify required office within time period required by Pension Act).
- <sup>96</sup> *Halcon Int’l, Inc. v. Monsanto Australia Ltd.*, 446 F.2d 156 (7th Cir. 1971); *Consolidated Broadcasting Corp. v. American Arbitration Ass’n*, 115 Ill. App. 3d 577, 450 N.E.2d 1252 (1st Dist. 1983).
- <sup>97</sup> *Colmar Ltd., v. Fremantlemedia North America, Inc.*, 344 Ill. App. 3d 977, 801 N.E.2d 1017 (1st Dist. 2003).
- <sup>98</sup> NY CLR CPLR § 7506(d); *Williamson v. Quinn Construction Corp.*, 537 F. Supp. 613, 616 (S.D. NY 1982).
- <sup>99</sup> *Colmar*, 344 Ill. App. 3d at 983; *See AAA, Commercial Dispute Resolution Procedure, Commercial Arbitration Rule R-24* (June. 1, 2009) (“Any party may be represented by counsel or other authorized representative”).
- <sup>100</sup> *Cal Code Civ. Proc.* § 1282.4. (Note: these provisions are only operative until January 1, 2013)
- <sup>101</sup> *Id.*
- <sup>102</sup> *Id.*
- <sup>103</sup> *Id.*
- <sup>104</sup> Cal. Rules of Court, Rule 9.43 (2012).
- <sup>105</sup> 710 ILCS 5/3 (2011)(emphasis added).
- <sup>106</sup> *Id. See also, County of Will v. Local 1028*, 67 Ill. App. 3d 745 748, 385 N.E. 2d 168, 171 (3d Dist. 1979)

<sup>107</sup> *Gelderman, Inc. v. Mullins*, 171 Ill. App. 3d 255, 260, 524 N.E.2d 1212, 1216 (1st Dist. 1988).

<sup>108</sup> *Comsat Corporation v. National Science Foundation*, 190 F.3d 269, 276 (4th Cir. 1999).

<sup>109</sup> *Peterson v. Superior Bank FSB*, 242 Ill. App. 3d 1090, 1095, 611 N.E.2d 1139, 1142 (1st Dist. 1993).

<sup>110</sup> *Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 533, 537, 491 N.E.2d 1322, 1325 (1st Dist. 1986).

<sup>111</sup> *Drinane v. State Farm Mutual Automobile Insurance Company*, 153 Ill. 2d 207, 212, 606 N.E.2d 1181, 1183 (1992).

<sup>112</sup> See Introduction to ADR Systems of America LLC Commercial Arbitration Rules.

<sup>113</sup> *Howard v. Rent-A-Center, Inc.*, 2010 WL 3009515 \*6 (E.D. Tenn.) (“Court concludes Plaintiff’s request for discovery is controlled by the parties agreement.”).

<sup>114</sup> See *Madrigal v. New Cingular Wireless Services, Inc.*, 2009 WL 2513478 \*7 (E.D. Cal.).

<sup>115</sup> American Arbitration Association Commercial Arbitration Rule R-21(a).

<sup>116</sup> American Arbitration Association Commercial Arbitration Rule R-21(c).

<sup>117</sup> American Arbitration Association Commercial Arbitration Rule R-1(c). Pursuant to Rule R-1(c), the parties may also agree to use the Procedures for Large, Complex Commercial Disputes in cases involving claims under \$500,000 or in nonmonetary disputes.

<sup>118</sup> American Arbitration Association Procedures for Large, Complex Commercial Disputes L-4(d).

<sup>119</sup> JAMS Comprehensive Arbitration Rules & Procedures, Rule 17(a).

<sup>120</sup> JAMS Comprehensive Arbitration Rules & Procedures, Rule 17(b).

<sup>121</sup> ADR Systems of America LLC’s Commercial Arbitration Rules, 8.3.

<sup>122</sup> ADR Systems of America LLC’s Commercial Arbitration Rules, 8.5.

<sup>123</sup> Resolute Systems, LLC’s Commercial Arbitration Rules, Rule 6.

<sup>124</sup> FINRA Code of Arbitration Procedure, Rule 12507.

<sup>125</sup> FINRA Code of Arbitration Procedure, Rule 12510.

<sup>126</sup> United Nations Commission on International Trade Law.

<sup>127</sup> The arbitrators are to “conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties dispute.” UNCITRAL Arbitration Rules, Article 17.1.

<sup>128</sup> UNCITRAL Arbitration Rules, Article 27.3.

<sup>129</sup> Conflict Prevention & Resolution’s Arbitration Rules, Rule 11.

<sup>130</sup> Conflict Prevention & Resolution’s Commentary on Individual Rules, Rule 11.

<sup>131</sup> 9 U.S.C. § 1-16 (2006).

<sup>132</sup> 710 ILCS 5/1-23 (2011).

<sup>133</sup> 9 U.S.C. § 7 (2006).

<sup>134</sup> 710 ILCS 5/7 (2011).

<sup>135</sup> 9 U.S.C. § 7 (2006).

<sup>136</sup> See also American Arbitration Association Commercial Arbitration Rule R-31(d).

<sup>137</sup> *In re Security Life Ins. Co. of America*, 228 F.3d 865, 870-71 (8th Cir. 2000); *American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999)(in dicta).

<sup>138</sup> *Life Receivables Trust v. Syndicate 102 at Lloyds of London*, 549 F.3d 210, 212 (2nd Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407-09 (3rd Cir. 2004); *Comsat Corporation v. National Science Foundation*, 190 F.3d 269, 275-6 (4th Cir. 1999)(pre-hearing discovery may be permitted upon a showing of a “special need.”).

<sup>139</sup> *Life Receivables Trust v. Syndicate 102 at Lloyds of London*, 549 F.3d 210, 216 (2nd Cir. 2008).

<sup>140</sup> *Compare Amgen Inc. v. Kidney Center of Delaware County*, 879 F. Supp. 878 (N.D. Ill. 1995) with *Matria Healthcare LLC*, 584 F. Supp. 2d 1078 (N.D. Ill. 2008).

<sup>141</sup> 710 ILCS 5/7 (2001).

<sup>142</sup> 9 U.S.C. § 7 (2006).

<sup>143</sup> *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3rd Cir. 2004).

<sup>144</sup> *Stolt-Nielson SA v. Celanese AG*, 430 F.3d 567 (2nd Cir. 2005).

<sup>145</sup> *Stolt-Nielson SA*, 430 F.3d 567 at 577.

<sup>146</sup> *Id.* at 577-8.

<sup>147</sup> *Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 3489807 \*2 (N.D. Ill.)(citing *Stolt-Nielsen*).

<sup>148</sup> *Stolt-Nielson SA v. Celanese AG*, 430 F.3d 567, 579 (2nd Cir. 2005).

<sup>149</sup> *Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC*, \_\_ F. Supp. 2d \_\_\_, 2011 WL 3489807 \*3 (N.D. Ill.).

<sup>150</sup> 9 U.S.C. § 7 (2006).

<sup>151</sup> Fed.R.Civ.P. 45(a)(2)(A).

<sup>152</sup> Fed.R.Civ.P. 45(b)(2)(B).

<sup>153</sup> *Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89, 95-6 (2nd Cir. 2006); *Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 3489807 \*5 (N.D. Ill.); *but see Amgen, Inc. v. Kidney Center of Delaware County*, 879 F. Supp. 878, 882-3 (N.D. Ill. 1995).

<sup>154</sup> 9 U.S.C. §16.

<sup>155</sup> 9 U.S.C. §16.

<sup>156</sup> 9 U.S.C. §16 (a)(3).

<sup>157</sup> 531 U.S. 79, 82 (2000).

<sup>158</sup> *Id.* at 182.

<sup>159</sup> *Id.* at 83.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 83-84.

<sup>164</sup> *Id.* at 84.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 86 ((citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 463, 467 (1994) and *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (quoting *Calvin v. United States*, 325 U.S. 229, 233 (1945))).

<sup>167</sup> *Green Tree Financial Corp.–Alabama*, 531 U.S. at 86, 89.

<sup>168</sup> *Id.* at 86-87.

<sup>169</sup> *Id.* at 86.

<sup>170</sup> 9 U.S.C. § 16(a)(1)(A); *Arthur Anderson, LLP v. Carlisle*, 129 S. Ct. 1896, 1900 (2009).

<sup>171</sup> *Id.*

<sup>172</sup> 710 ILCS 5/1, *et seq.*

<sup>173</sup> *Saltzman Printers, Inc. v. Gunthorp-Warren Printing Co.*, 192 Ill. App. 3d 130, 133 (1st Dist. 1989); 710 ILCS 5/18.

<sup>174</sup> *Id.*

<sup>175</sup> *Department of Central Management Svcs. v. American Fed. of State, County, and Municipal Employees*, 182 Ill. 2d 23, 239 (1998).

<sup>176</sup> *Id.* at 239.

<sup>177</sup> *Id.* at 236.

<sup>178</sup> 710 ILCS 5/12.

<sup>179</sup> 710 ILCS 5/13.

<sup>180</sup> *Department of Central Management Svcs.*, 182 Ill. 2d at 236.

<sup>181</sup> *Id.* at 236-37.

<sup>182</sup> *Id.* at 237, 239.

<sup>183</sup> *Id.* at 237.

<sup>184</sup> *Id.* at 238.

<sup>185</sup> *Id.* at 238-39.

<sup>186</sup> 710 ILCS 5/12(d); *Department of Central Management Svcs.*, 182 Ill. 2d at 239.

<sup>187</sup> *Id.* at 239.

<sup>188</sup> *Id.*

<sup>189</sup> 710 ILCS 5/14.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Vilma T. Arce Stark and John F. O'Brien III are attorneys in the Commercial Litigation Group at Williams Montgomery & John, Ltd. Any views expressed herein are solely those of the authors and are not necessarily those of their firm or the firm's clients.

This article is intended to provide practitioners with an introduction to the international arbitration process, and is by no means exhaustive.

<sup>194</sup> See <http://www.iccwbo.org>.

<sup>195</sup> See <http://www.adr.org>.

<sup>196</sup> See <http://www.cpradr.org>.

<sup>197</sup> See <http://www.lcia.org>.

<sup>198</sup> See <http://www.siac.org.sg/cms/>.

<sup>199</sup> See <http://icsid.worldbank.org/ICSID/Index.jsp>.



- <sup>200</sup> Art. 37 of the ICDR Int'l Arbitration Rules; Art. 29 of the ICC Arbitration Rules.
- <sup>201</sup> Art. 29(7) of the ICC Arbitration Rules (stating that provisions on emergency relief are not intended to prevent "any party from seeking urgent interim or conservatory measures from a competent judicial authority.").
- <sup>202</sup> See <http://www.uncitral.org/>.
- <sup>203</sup> See [http://www.cnudmi.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.cnudmi.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html).
- <sup>204</sup> *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Gov't of the Libyan Arab Republic*, 17 I.L.M. (1978).
- <sup>205</sup> See [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#takingevidence](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence).
- <sup>206</sup> UNCITRAL Notes on Organizing Arbitral Proceedings, ¶ 50-51; see also Art. 9(5) of the IBA Rules ("If a party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.").
- <sup>207</sup> See e.g. Art. 20 of the ICC Arbitration Rules (providing that after the Arbitral Tribunal studies "written submissions of the parties and all documents relied upon," it may then hear the parties together in person); Art. 20(4) and Art. 21 of the UNCITRAL Arbitration Rules (stating that "statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant," and that respondent's response should "as far as possible, be accompanied by all documents and other evidence relied upon by the respondent."); Art. 16(4) of the ICDR Arbitration Rules ("Documents or information supplied to the tribunal by one party shall at the same time be communicated by that party to the other party or parties.").
- <sup>208</sup> Ian Meredith & Hussain Khan, *Witness Preparation in International Arbitration – A Cross Cultural Minefield*, MEALEY'S INT'L ARB. REP., Sept. 2011, Vol. 26, #9, available at, [http://www.klgates.com/files/Publication/b27f15d0-46bf-418b-8d2a-c0cb795389bd/Presentation/PublicationAttachment/739ca00e-ad24-460b-a72e-c92e67f48abf/Meredith\\_Khan\\_Mealeys.pdf](http://www.klgates.com/files/Publication/b27f15d0-46bf-418b-8d2a-c0cb795389bd/Presentation/PublicationAttachment/739ca00e-ad24-460b-a72e-c92e67f48abf/Meredith_Khan_Mealeys.pdf) (last visited Mar. 16, 2012).
- <sup>209</sup> Art. 35 of the ICC Arbitration Rules; Art. 30 of the ICDR Arbitration Rules.
- <sup>210</sup> Section 5, Arts. 50-52 of the ICSID Convention, Regulations and Rules.
- <sup>211</sup> Art. 33 of the ICC Arbitration Rules.
- <sup>212</sup> Susan Wiens & Roger Haydock, *Confirming Arbitration Awards: Taking the Mystery Out of a Summary Proceeding*, 33 Wm. Mitchell L. Rev. 1293, 1311-12 (2007) (internal quotation marks and citation omitted); see also Loukas Mistelis & Crina Baltag, *Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 AM. REV. OF INT'L ARB. 319, 347 (2008) (stating that "[t]he State where the non-prevailing party has most of its assets is the major factor in choosing the place of enforcement of arbitral awards.").
- <sup>213</sup> See e.g., *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 576 n. 4 (7th Cir. 2007) ("One of the goals of the New York Convention was to facilitate the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs.") (internal quotation marks and citation omitted).
- <sup>214</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].
- <sup>215</sup> Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, Organization of American States, Treaty Series, No. 42 [hereinafter Panama Convention].
- <sup>216</sup> Courts in Mexico strictly adhere to the stringent standards for service of process required by Article 14 of the Federal Constitution of Mexico and Article 1462 of the Code of Commerce of Mexico. Article 14 of the Federal Constitution of Mexico states: "No one shall be deprived of his liberty or real property . . . but through a judicial ruling . . . which comply with formalities essential to the proceeding." And, specific to arbitration awards, Article 1462 of the Commercial Code of Mexico provides that: "the recognition or enforcement of an arbitral award may be denied, regardless of the country in

which it was determined, when: . . . it was not duly notified of . . . the arbitral proceedings.”; *see also* James O. Ehinger, *Pre-Litigation Planning in Multinational Cases: How to Help Insure that a U.S. Judgment will be Enforceable Overseas*, available at: <http://www.myazbar.org/AZAttorney/Archives/April97/4-97a2.htm> (last visited Mar. 16, 2012) (stating that Mexico considers “service of process” a fundamental right and “will refuse to recognize the validity of litigation instituted against one of its citizens by any . . . process [other than what is required by Mexican law and in Mexico].”).

<sup>217</sup> Art. V(2)(a) of the New York Convention.

<sup>218</sup> Although many of the same countries are signatories of The Hague Convention, which recognizes the enforcement of a foreign judgment, enforcing such judgments is more cumbersome than enforcing an arbitration award.

<sup>219</sup> 9 U.S.C. §§ 1-16, 201-208, 301-307 (2011). The United States is also a party to the 1975 Inter-American Convention of International Commercial Arbitration. Jan. 30, 1975, S. Treaty Doc. No. 97-12, O.A.T.S. No. 42, 14 I.L.M. 336 [hereinafter Panama Convention]. In addition to the U.S., the following countries have ratified the Panama Convention: Argentina, Bolivia, Brazil, Chile, Columbia, Cost Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela. Like the New York Convention, arbitration awards rendered in the United States should be enforceable in all countries that are signatories to the Panama Convention under the Convention’s terms.

<sup>220</sup> *See* 9 USC §§ 201-208, 301-307.

<sup>221</sup> *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1119-20 (9th Cir. 2002) (stating that the New York Convention, through the FAA, confers federal courts with subject matter jurisdiction over the enforcement of arbitration awards).

<sup>222</sup> *Id.*, at 1120-22.

<sup>223</sup> *See Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 927 N.E.2d 1207, 1215 (2010) (“[T]he FAA contains no express preemption provision, and it does not indicate a congressional intent to occupy the entire field of arbitration. Thus, state law is preempted by the FAA to the extent that [the FAA] actually conflicts with state law.”); *Volt Info. Scis. Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (“The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.”).

<sup>224</sup> *See e.g., Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277 (3d Cir. 2010) (finding that grounds for vacatur of an international arbitration award issued in the United States are the same grounds as those applied to a domestic arbitration award); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998) (finding that Chapter 1 of the FAA does not apply to a motion to vacate an international arbitral award that falls under the New York Convention).

<sup>225</sup> Signatories to the New York Convention include the United States, all members of the European Union, all other major trading states across the globe, as well as many Latin American, African, Asian, and Middle Eastern States.

<sup>226</sup> *Jacad (Europe) Ltd. v. Int’l Mktg. Strategies, Inc.*, 401 F.3d 701, 705 (6th Cir. 2005).

<sup>227</sup> *Gulf Petro Trading Co. v. Nigerian Nat’l Petroleum Corp.*, 512 F.3d 742, 746 (5th Cir. 2008) (internal quotation omitted).

<sup>228</sup> New York Convention, *supra* note 13, art. III, 21 U.S.T. at 2519.

<sup>229</sup> *See id.*, art. V, 21 U.S.T. at 2520.

<sup>230</sup> *Id.*

<sup>231</sup> *See* Panama Convention, *supra* note 15, art. 5.

<sup>232</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (alterations in original) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

<sup>233</sup> 9 U.S.C. §§ 1-16.

<sup>234</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989).

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