Theodore Roosevelt Inn of Court

PROGRAM NOTICE

PROGRAM TITLE: **Arbitration 101: Nuts and Bolts from "A" to "Z"**

DATE: **April 17, 2024, 6:00PM – 7:50PM**

PROGRAM CHAIRS: **Kevin Schlosser, Esq. and Yvonne Marin, Esq.**

PRESENTERS: **Hon. Leonard Austin (ret.) and Omid Zareh, Esq.**

LAW STUDENT: **Madison Heath (CUNY Law School, 3L)**

6:00-6:05

- **Introductions of Speakers, roadmap of presentation.**

- **Brief introduction and overview of the Federal Arbitration Act** (9 USCS, Ch 1)

Vignettes

6:05 – 6:20

- **Scene I: Attorney - Client Meeting Regarding Arbitration**

6:20-6:45

- **Scene II: Preliminary Conference with Arbitrator and Counsel**

6:45-7:15

- **Scene III: Arbitration Hearing**

Further Information

7:15-7:30

- **Post Award Proceedings and Enforcement - Confirming or Vacating an Award; CPLR Art 75**

7:30- 7:50

- **Part 137 Attorney Client Fee Dispute Program - Arbitration**

- **Final thoughts and question and answer**

HON. LEONARD B. AUSTIN

Associate Justice, Supreme Court of the State of New York, Appellate Division, Second Judicial Department (Ret.)

The Honorable Leonard B. Austin has enjoyed a remarkable legal career, which culminated in his ascension to the Appellate Division, Second Department as an Associate Justice in March 2009. He served there, with distinction, for nearly 13 years, handling approximately 1,000 matters yearly, involving a wide breadth of complex subject areas.

Justice Austin was assigned to the Commercial Division in Nassau County for 9 years, during which time he heard and resolved well over 2,000 cases addressing a wide variety of commercial matters, including corporate (limited liability company and partnership dissolutions; shareholder derivative claims), employment issues (including restrictive covenants), and construction contract claims. In addition, he has heard and tried numerous medical and dental malpractice, product liability, and real estate cases. While serving in the trial court, he handed down approximately 500 decisions each year of which more than nearly 100 were published annually. He also developed a streamlined method of handling construction cases that has served as a model throughout the state.

During his tenure in the Commercial Division, Justice Austin, at the behest of his colleagues, drafted the original Statewide Rules of the Commercial Division of the Supreme Court which required mediating between upstate and downstate concerns to reach a consensus. In addition, he has served on the Pattern Jury Instruction Committee which is responsible for drafting jury charges and regularly updated commentaries on the law. He was also a member of the Chief Judge's Commercial Division Advisory Council.

His distinguished judicial career began in 1999, when he was assigned to serve in a dedicated Matrimonial Part in Suffolk County. During that time, he worked collaboratively with parties in fostering resolutions that were in the best interest of all involved, including the children, by recommending creative solutions to difficult financial and emotional issues.

Prior to serving on the bench, Justice Austin was engaged in a successful law practice for 21 years at which time he focused primarily on complex commercial litigation, matrimonial and family issues, personal injury, real estate matters, as well as appeals. Additionally, in 1980 and 1981, he served as counsel to the Speaker of the New York State Assembly as his representative to the Agriculture Committee and the Commerce and Industry Committee.

In 2023, Justice Austin was once again voted a Top 10 Arbitrator in the *New York Law Journal* "Best Of" survey for the second year in a row. He can facilitate the settlement of cases involving a wide range of practice areas. He is a hard-working and detail-oriented jurist known for his intelligence, patience, and ability to assist in the resolution of even the most complex matters.

In a letter of thanks, one of the attorneys in a class action case handled by Justice Austin stated, "I could never argue too much with your legal positions, and without your assistance and patience the case would never have settled." Additionally, according to the New York Judge Reviews and The Robing Room, some attorneys who have appeared before him have commented:

– "Brilliant jurist genuinely wants to help people and do justice…always listens to both sides before making a decision.;"
– "He is hands-on, proactive, practical, efficient, intelligent. I have nothing but good things to say about Judge Austin.;"
– "He has a strong preference for settling cases.;"

– "He is relentless about trying to get cases resolved from the first day you show up…always pushing some way to get the matter resolved.;" "Very committed to doing the right thing.;" and
– "I would say he is a very effective at getting cases resolved for the benefit of both parties."

Justice Austin has authored numerous opinions that have significantly impacted New York jurisprudence and practice. Such opinions addressed issues of conflict of laws, long-arm jurisdiction, burden of proof in no-fault threshold cases, discovery sanctions, dissolution of limited liability companies, inheritance rights of second adopted children, the rights of a biological mother in surrogacy birth, tolling the statute of limitations in an accounting malpractice claim, and vicarious liability of a landlord and co-tenants in a dog bite case.

Furthermore, Justice Austin authored several articles dealing with equitable distribution, consumer law, and class actions. He also served as the President of the American College of Business Court Judges, the Theodore Roosevelt Inn of Court, and Presiding Justice (President) of the Judicial Section of the New York State Bar Association. He is also active in the Supreme Court Justices Association. Justice Austin is also a frequent lecturer to the Bar in the fields of e-discovery, appellate practice, commercial and matrimonial law, and civil practice. He is an Adjunct Professor of Law at Hofstra University School of Law where he teaches New York Civil Procedure and Litigation Drafting Skills.

AREAS of EXPERIENCE

- Business/Commercial/Corporate
- Consumer
- Employment
- Matrimonial / Family Matters
- Partnership Law
- Negligence
- Construction
- Torts and Product Liability
- Medical and Dental Malpractice
- Real Estate

REPRESENTATIVE MATTERS
Published Decisions: Appellate Division

- Loughlin v Meghji, 186 AD3d 1633 (dissent)
- Rosario v Our Lady of Consolation Nursing and Rehabilitation Care Center, 186, AD3d 1426 (dissent)
- Askari v McDermott, Will & Emery, LLP, 179 AD3d 127 (opinion)
- Matter of Koegel, 160 AD3d 11 (opinion)
- America/International 1994 Venture v Mau, 146 AD3d 40 (opinion)
- Matthew H. (Anonymous) v County of Nassau, 131 AD3d 135 (opinion)
- Maimonides Medical Center v First United American Life Insurance Co., 116 A.D.3d 207 (opinion)
- People v. Brown, 122 AD3d 133, lv denied 24 NY3d 1042
- re Askin, 113 AD3d 72 (opinion)
- Dee v Rakower, 112 AD3d 204 (opinion)
- Boyle v Starwood Hotels & Resorts Worldwide, Inc., 110 AD3d 938 (dissent), affd, 23 NY3d 1012
- In re Svenningsen, 105 A.D.3d 164 (opinion)
- Arpino v F.J.F. & Sons Electric Co. Inc., 102 A.D.3d 201 (opinion)
- T.V. v New York Dept. of Health, 88 A.D.3d 290 (opinion)
- Perl v. Meher, 74 A.D.3d 930 (dissent), reversed 18 N.Y.3d 208

- Matter of 1545 Ocean Avenue LLC, 72 A.D.3d 121 (opinion)
- Symbol Technologies, Inc. v. Deloitte & Touche, LLP, 69 A.D.3d 191 (opinion)

Supreme Court: Official Report

- Ballas v. Virgin Media, Inc., 18 Misc. 3d 1106 (2007), affd, 60 A.D.3d 712
- Goldstein v. Saltzman, 13 Misc.3d 1023 (2006)
- Bitetto v. F. Chau & Associates LLP, 10 Misc.3d 595 (2005)
- Joachim v. Flanzig, 3 Misc.3d 371 (2004)
- Sutton Associates v. Lexis-Nexis, 196 Misc.2d 30 (2003)
- Reliastar Life Ins. Co. of New York v. Leopold, 192 Misc.2d 385 (2002)
- Fiorenti v. Central Emergency Physicians, PLLC,187 Misc.2d 805 (2001)
- Eredics v. Chase Manhattan Bank, 186 Misc. 2d 19 (2000), affd., 292 A.D.2d 338 (2nd Dept. 2002), affd., 98 N.Y.2d 606 (2003).
- Middle Village Assoc. v. Pergament Home Centers, Inc.,184 Misc. 2d 552 (2000)

Published On-line by State Reporter (Selected from more than 200 published decisions)

- JMF Consulting Group III v. Beverage Marketing USA, Inc., 22 Misc.3d 1119(A)
- Glickenhouse v Karp, 2009 WL 564599, affd. 60 AD3d 630 (2nd Dept. 2009)
- Fine Cut Diamonds Corp. v. Shetrit, 22 Misc.3d 1117(A) (2009)
- Sutphin Management Corp. v Rep 755 Real Estate, LLC, 20 Misc.3d 1135(A) (2008)
- Kaprall v WE: Women's Entertainment LLC, 20 Misc.3d 1132(A) (2008), affd, 74 A.D.3d 1151
- Sutton & Edwards, Inc. v 68-60 Austin Street Realty Corp., 20 Misc.3d 1101(A) (2008)
- Autz v Fagan, 16 Misc.3d 1140(A) (2007)
- Gristede's Operating Corp./Namdor v Centre Financial LLC, 16 Misc.3d 1132(A) (2007)
- Tyree Organization, Ltd. v Cashin Associates, P.C., 16 Misc.3d 1118(A) (2007)
- Beverage Marketing USA, Inc. v South Beach Beverage Co., Inc., 15 Misc.3d 1124(A) (2007), affd., 58 A.D.3d 657 (2nd Dept. 2009)
- Riark LLC v Dacosto, 14 Misc.3d 1240(A) (2007)
- Techon Contracting, Inc. v Incorporated Vill. of Lynbrook, 14 Misc.3d 1240 (2007)
- Tyree Organization, Ltd. v Cashin Associates, P.C., 14 Misc.3d 1220(A) (2007)
- D.A.S. Contracting Corp. v Nova Casualty Co., 14 Misc.3d 1213(A) (2007)
- Kantor v Mesibov, 14 Misc.3d 1228(A) (2006)
- Maini v Syscore Consulting Corp., 13 Misc.3d 1215(A) (2006)
- Cohen v Nassau Educators Federal Credit Union, 12 Misc.3d 1164(A), affd., 37 A.D.3d 751 (2nd Dept. 2007)
- Wisell v Indo-Med Commodities, Inc., 11 Misc.3d 1089(A) (2006), on reargument, 14 Misc.3d 1209(A) (2006)
- Tal Tours (1996) Inc. v Goldstein, 9 Misc.3d 1117(A) (2005), affd., 34 A.D.3d 786 (2nd Dept. 2006)
- Erlichman v Encompass Ins. Co., 4 Misc.3d 1002(A) (2004)
- Treeline Garden City Plaza LLC v UBS Warburg Real Estate Investments, 3 Misc.3d 1009(A) (2004)
- Spector v Toys "R" Us, Inc., 2 Misc.3d 1006(A) (2004), affd. 12 A.D.3d 358 (2nd Dept. 2004)
- Harbor Footwear Grp., Ltd. v ASA Trading, 1 Misc.3d 911(A) (2004)
- Stanley Tulchin Associates, Inc. v Grossman, 2002 WL 31466800, 2002 NY Slip Op. 50428 (2002)

New York Law Journal (selected from more than 350 published decisions)

- Sodexho Management Inc. v Nassau Health Care Corp., p. 19, col. 3 (10/6/04), affd., 23 A.D.3d 370 (2nd Dept. 2005)
- Lipco Electrical Corp. v ASG Consulting Corp., p. 20, col. 3 (8/26/04)
- Lipton v American Institute of Certified Public Accountants, p.21, col. 4 (8/5/03)
- Krasinski v The Polemeni Organization, LLC, p. 17, col. 1 (6/19/03)
- Adikes v North Fork Bancorporation, p. 26, col. 5 (6/20/02)

LECTURES and PUBLICATIONS

- Panelist*, Building on a Solid Foundation: Arbitrating Construction Disputes*, CLE webinar presented through the New York State Academy of Trial Lawyers, 2023
- Author, *Arbitration Construction Disputes: Building on a Solid Foundation*, New York Law Journal ADR Special Report, 2023
- Author, *Reflections on Entering the World of ADR or How I Found Something To Do To Keep Me Out of the House After Retirement*, New York Law Journal, 2022
- Panelist, *Residential Mortgage Foreclosure: Review and Update*, 2020, Appellate Division, Second Department
- Speaker, *Current Commercial Decisions in the Second Department*, Nassau County Bar Association Academy of Law Commercial Litigation Committee, 2020
- Lecturer, *May it Please the Court? Civility and Decorum in the Courtroom*, Nassau County Bar Association Academy of Law, 2019
- Lecturer, *2019 Residential Mortgage Foreclosure Seminar: Appellate Update/Motion Practice*, Office of Court Administration, 2019
- Panelist, *Real Life Ethics for Trial Lawyers*, Nassau Suffolk Trial Lawyers Association, 2019
- Panelist, *Pattern Jury Instructions*, Suffolk County Bar Association Academy of Law, 2019
- Panelist, *Bridge-the-Gap I: Ethics and Skills for Newly Admitted New York Attorneys*, 2019
- Panelist, *A View from the Appellate Bench, Nassau County Bar Association Academy of Law*, 2019
- Panelist, *New York Appellate Practice*, New York State Bar Association, 2019
- Lecturer, *Mind Your Manners: Civility & Courtroom Decorum*, Nassau County Bar Association Academy of Law, 2019
- Panelist, *Mediation Matters: Trends, Successes and Disappointments in Court-Sanctioned Mediation, Nassau County Bar Association Academy of Law*, 2019

HONORS and AWARDS

- *New York Law Journal* "Best Of" survey, Top Ten - Best Individual Arbitrator Category, 2022, 2023
- Elected a Charter Member of the Alumni Hall of Fame, 2021, Maurice Dean School of Law, Hofstra University

JUDICIAL EXPERIENCE

- Justice of the Supreme Court, Elected, 1998, Re-elected, 2012
  - Associate Justice, Appellate Division, Second Judicial Department, 2009-2021
  - Associate Justice, Appellate Division, Second Judicial Department, 2009-2021
  - Assigned to the Commercial Division, 2001-2009
  - Nassau County, assigned to a Dedicated Matrimonial Part and the Commercial Division, 2000
  - Suffolk County, assigned to a Dedicated Matrimonial Part, 1999

QUASI JUDICIAL EXPERIENCE

- Nassau County District Court, Small Claims Arbitrator and Case Arbitrator, 1986-1998
- Office of Court Administration, Matrimonial Fee Arbitrator, 1996-1998

LEGAL EXPERIENCE

- Adjunct Professor of Law, Hofstra University School of Law, 2002-Present
- Private Practice, Leonard B. Austin, P.C., 1993-1998
- Partner, Wolfson, Grossman & Austin, 1988-1990
- Partner, Stillman, Herz & Austin, 1980-1988
- Associate Counsel, Hon. Stanley Fink, Speaker, New York State Assembly, Counsel to the Commerce and Industry and Agricultural Committees, 1980-1981
- Partner, Stillman & Austin, 1979-1980
- Private Practice, Leonard B. Austin, P.C., 1978-1979

PROFESSIONAL LICENSES and ADMISSIONS

- New York State Bar
- United States Court of Appeals, Second Circuit
- United States District Court, Eastern District of New York
- United States District Court, Southern District of New York
- United States District Court, Northern District of New York
- Florida State Bar

PROFESSIONAL AFFILIATIONS and ASSOCIATIONS

- New York State Bar Association
- Nassau County Bar Association
- Suffolk County Bar Association
- New York State Women's Bar Association, Nassau County Chapter
- New York State Trial Lawyers Association
- Association of Justices of the Supreme Court, Executive Board, 2014-Present
- Florida Bar Association
- Jewish Lawyers Association of Nassau County, Board of Directors, 2008-Present
- Life Fellow, The New York Bar Foundation

EDUCATION

- Hofstra University School of Law, J.D.
- Georgetown University, B.A.

Kevin Schlosser

Shareholder, Litigation & Dispute Resolution Department Chair

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Garden City, New York 11530
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kschlosser@msek.com

Practice Areas

Litigation & Dispute Resolution

Education

Hofstra University Law School
J.D. with distinction, 1984

John Jay College of Criminal Justice,
City University of New York
B.A., 1981
magna cum laude

Memberships

American Inns of Court Executive Board,
Theodore Roosevelt Chapter,
Past President

National Institute for Trial Advocacy,
Instructor

American Bar Association, Litigation Section

New York State Bar Association, Commercial and Federal Litigation Section

Nassau County Bar Association,
Commercial Litigation Committee

Suffolk County Bar Association, Commercial Division Committee

New York State Bar Foundation Fellow

Admissions

New York State

U.S. Supreme Court

U.S. Court of Appeals for the Second Circuit

U.S. District Court, Eastern and Southern Districts of New York

U.S. District Court, Eastern District of Michigan

U.S. District Court, Eastern District of Wisconsin

Kevin Schlosser is a Shareholder and the Chair of the Litigation & Dispute Resolution Department at Meyer, Suozzi, English & Klein, P.C. located in Garden City, N.Y. Mr. Schlosser has been involved in all aspects of state and federal litigation since starting his legal career in 1984. An experienced civil litigator, Mr. Schlosser has engineered the legal strategy for a broad range of cases and arbitrations, including complex commercial matters, corporate and partnership disputes, business torts, fraud, breach of fiduciary duty, breach of contract, business valuations, employment and restrictive covenants, intellectual property, trademarks, copyrights, unfair competition, false and misleading advertising, trade secrets, professional liability and malpractice claims, construction law and mechanics liens, real estate, commercial landlord-tenant disputes, ERISA, health law, Federal Fair Debt Collection Practices Act class actions, products liability, insurance coverage, claims and defense, including disability insurance claims, and the prosecution and defense of other tort-related claims. His clients consist of some of the largest companies in the world, as well as local businesses and individuals, including senior law partners, accountants, doctors and others in the professions. A proven appellate lawyer, he is also an accomplished trial attorney, whose victories include million-dollar recoveries and a record-breaking jury verdict.

Mr. Schlosser also serves as a private neutral arbitrator and party-appointed arbitrator in complex commercial disputes. He is a member of the Commercial Panel of the National Roster of Arbitrators of the American Arbitration Association, and approved to serve as an arbitrator on any AAA-designated arbitrations. As a panel arbitrator, Mr. Schlosser has presided over arbitrations of a complex international multi-million dollar contractual dispute as well as partnership, shareholder, employment and contractual disputes. Mr. Schlosser also serves as a Mediator, Court-Appointed Referee and as a "Private Judge" pursuant to the CPLR. For more on Meyer Suozzi's roster of Private Judges, **click here**.

In addition to his litigation experience, Mr. Schlosser also acts as general outside corporate counsel, advising corporate clients on the full spectrum of legal affairs. Because of his experience in the Commercial Division of the Supreme Court of the State of New York since its inception, Mr. Schlosser is frequently tapped to serve as local Long Island counsel to many other law firms in New York City and out of state, including in Nassau and Suffolk Counties.

Kevin Schlosser

Notable Experience Includes:

- Won a $12.6 million judgment in a jury trial in the Commercial Division, Nassau County, in a breach of contract case involving a stock purchase agreement
- Won at trial in Commercial Division, New York County, defeating $1.2 million commission claim by Trump Securities
- Appeared as litigation counsel to the National Football League and obtained the immediate vacatur of an injunction through an order of the Appellate Division in Long Island, thereby permitting the NFL to pursue its policy of mandatory drug testing of professional football players
- In a jury trial in the United States District Court for the Eastern District of New York, obtained a verdict entirely rejecting claim for nearly $14 million in alleged lost profits in an international breach of contract case, breaking down plaintiff's financial experts through vigorous cross-examination
- Has appeared as lead counsel in copyright, trademark, Lanham Act, contract and antitrust cases throughout the country, including in United States District Courts in California, Hawaii, Illinois, Michigan, New York, Oklahoma and Wisconsin.
- Successfully defended a $65 million shareholder derivative action alleging breach of fiduciary duties and corporate waste against the former president of a public bank, resulting in the entire action against the president being dismissed with no monetary payment from the president and his counsel fees being reimbursed in their entirety by the bank
- Successfully defended a $25 million action alleging several counts of fraud, breach of contract and business torts against the largest casino operator in the world
- Obtained summary judgment dismissing case and prevailed on appeal to the New York Appellate Division, First Department, and Court of Appeals in an action alleging damages of over $20 million, asserting intentional interference with contract and interference with business relations against largest casino operator in the world
- Prevailed on appeal to the New York Appellate Division, Second Department, to sustain claim of punitive damages in a commercial fraud and breach of fiduciary duty action
- Prevailed in arbitration in dispute between senior law partners concerning the proper method for allocating fees in cases handled by the law firm
- Obtained injunctive relief on behalf of product manufacturer/seller in United States District Court for the Eastern District of New York barring competitors from selling competing, offending product, and prevailed after trial in challenge to the injunction
- Obtained final judgment against large manufacturer's competitor and former employee under restrictive covenants and non-disclosure agreements based upon claims of misappropriation of trade secrets and breach of contract in Commercial Division, Nassau County
- Obtained highest jury award on record for damages in an action for nuisance and interference with real property rights on behalf of property owners in the Supreme Court, Suffolk County
- Obtained jury verdict in Supreme Court, Nassau County, on behalf of international distributor-commercial tenant on the ground of constructive eviction even though tenant continued to remain in the leased premises for lengthy period of time, in which jury awarded tenant significant monetary damages against the landlord and relieved the tenant of any further obligation for rent on remaining lease term after the tenant moved to new space

- Obtained summary judgment and prevailed on appeal to New York Appellate Division, Second Department, and New York Court of Appeals in an action against insurer on behalf of insured manufacturer declaring that insurer must defend underlying false advertising and Lanham Act claims pending in federal district court
- Obtained favorable resolution of several actions arising from partnership dispute and sale of real property in New York City, including $14 million fraud claims, breach of fiduciary duty claims and breach of contract
- Spearheaded as general outside counsel to an international manufacturer (the largest of its kind in the world) the favorable settlement of a $25 million products liability action after several rounds of mediation, successfully resolving complex insurance coverage issues and coordinating three outside defense firms in the defense of the manufacturer
- Recovered, by way of judgment and settlements, millions of dollars on behalf of disabled professionals and other employees under private and ERISA disability insurance policies
- As general outside corporate counsel to an international manufacturer, provides on-going oversight of all legal affairs of the company, including employment, regulatory, acquisitions and joint ventures, licensing and intellectual property transactions, distribution agreements, independent contractor agreements, operating agreements and related matters

Mr. Schlosser serves in various teaching capacities: He is a member of the faculty of the National Institute for Trial Advocacy; has chaired the Continuing Legal Education Program on New York Civil Motion Practice at Hofstra Law School; and is a member of the Continuing Legal Education faculty panel of the New York State Bar Association and the Nassau County Bar Association Academy of Law, where he instructs experienced practicing attorneys. He has given CLE seminars and presentations with some of the most prominent judges in the state and federal courts, including Supreme Court Commercial Division Justices Timothy S. Driscoll, Vito M. DeStefano, Stephen Bucaria, Emily Pines, Elizabeth Hazlitt Emerson, Jerry Garguilo, James Hudson, Saliann Scarpulla and Thomas Whelan, Appellate Division Justices Leonard Austin, Karla Moskowitz, Barbara Kapnick and federal judiciary such as U.S. District Court Judges Shira Scheindlin, Richard J. Sullivan and Nicholas G. Garaufis and Magistrate Judges Arlene R. Lindsay, William Wall, and the late Magistrate Judge A. Kathleen Tomlinson. Many of Mr. Schlosser's activities can be viewed in detail by clicking on the relevant links on his profile page. Click here to view details from meetings of Nassau County Bar Association's Commercial Litigation Committee, which Mr. Schlosser chaired from 2013-2015. Mr. Schlosser is also an active member of the Commercial Division Committee of the Suffolk County Bar Association.

In 2016, Mr. Schlosser served as the President of the Theodore Roosevelt American Inn of Court and was a speaker at the Nov. 17, 2020 program titled Litigating in a Post-COVID-19 World and Contract Obligations in a Post-COVID-19 World. Additionally, Mr. Schlosser was Chair of the Nov. 17, 2021 program titled Best Practices: A View from the Bench.

Mr. Schlosser has written extensively on many aspects of the law, publishing numerous articles in leading legal publications. He has authored the "Litigation Review" column for the New York Law Journal and served on the Board of Editors of the Nassau Lawyer, which is the official publication of the Nassau County Bar Association. Many of Mr. Schlosser's articles can be viewed by clicking on the "Publications" link on his profile page or view the comprehensive list in this document. He is also the author of a well-recognized blog, www.nyfraudclaims.com, which covers new developments concerning claims of fraud and misrepresentation under New York law.

Active in charitable organizations, Mr. Schlosser received the 2003 Leadership Award presented by the Long Island Chapter of the National Multiple Sclerosis Society. He has also served as a faculty member of the Construction Management Institute, sponsored by the New York State Chapter of the National Association of Minority Contractors, helping minority-owned contractors enhance their developing businesses.

During law school, Mr. Schlosser was a Member and then Articles Editor of the Hofstra Law Review. In his capacity as Articles Editor, Mr. Schlosser interacted with and edited articles of some of the most prominent and well-respected legal scholars, including law professors, evidence experts and Congressional leaders. He also clerked for the Honorable George C. Pratt, United States Circuit Court Judge, where he drafted several court decisions, including a complex anti-trust ruling. He also obtained valuable trial experience while clerking in the Criminal Division of the United States Attorney's Office for the Eastern District of New York, where he assisted in the prosecution of several major felony cases. Mr. Schlosser graduated law school with the highest honors. Additionally, he was a founding officer of a national criminal justice honor society at John Jay College of Criminal Justice of the City University of New York. At the outset of his career, Mr. Schlosser acquired intensive litigation experience, having been trained at two prominent firms based in New York City: Patterson, Belknap, Webb & Tyler, and Chadbourne & Parke. In 1990, he became associated with one of Long Island's largest law firms, where he rose to the level of a managing partner and head of its litigation department, the largest practice group in the firm. After joining Meyer, Suozzi and becoming a partner in 2002, Mr. Schlosser was appointed Co-Chair of the firm's Litigation Department in November 2002. In 2006, Mr. Schlosser became Chair of the firm's Litigation and Dispute Resolution Department and has held that position through the present. He is also a member of the firm's Management Committee. Mr. Schlosser is rated "AV Preeminent" by Martindale-Hubbell, the highest level in professional excellence and ethics. Mr. Schlosser was recognized by Long Island Pulse Magazine in 2010 and 2011 as the region's "Top Legal Eagle for Litigation." Mr. Schlosser has been named to the New York Super Lawyers list as one of the top attorneys in New York from 2012-2023.

Kevin Schlosser Published Articles

THE IMPACT OF FRAUD CLAIMS ON CONTRACTUAL ARBITRATION AND JURY WAIVER PROVISIONS
Spring 2023, Vol. 28, No. 1
NY Litigator

LITTLE KNOWN FRAUD FUN FACTS: THE SECRET IS OUT
Spring 2023
The Legal Brief

THE USE OF PRIVATE JUDGES: NEW WORLD, NEW WAVE?
November 6, 2020
New York Law Journal

RENEWED ALLURE IN HIRING "PRIVATE JUDGES" UNDER THE CPLR
May 28, 2020
The Suffolk Lawyer

CAN ALLEGATIONS OF FRAUD VITIATE CONTRACTUAL JURY WAIVERS, ARBITRATION CLAUSES AND FORUM SELECTION PROVISIONS?
June 2019
The Suffolk Lawyer

LAWYERS' ROLE KEY TO PRESERVING AND PREVENTING FRAUD CLAIMS
December 2, 2016
New York Law Journal

NEW YORK SHOULD CATCH THE FEDERAL ESI WAVE BEFORE IT'S TOO LATE
December 23, 2015
New York Law Journal

READING RESTRICTIVE COVENANT TEA LEAVES FROM STATE'S HIGH COURT
July 24, 2015
New York Law Journal

TIME TO REVISE EMPLOYMENT RESTRICTIVE COVENANTS
April 16, 2014
New York Law Journal

COURTS BOLSTER RELEASE OF FIDUCIARY DUTIES AND FRAUD
April 16, 2013
The Nassau Lawyer

GRAPPLING WITH FIDUCIARY DUTIES IN ENFORCING CONTRACTS
October 27, 2011
New York Law Journal

FEDERAL PLEADINGS ARE RECEIVING HEIGHTENED SCRUTINY UNDER NEW STANDARD
Focus on Commercial Litigations
October 28, 2009
The Suffolk Lawyer

SECOND CIRCUIT BROADENS DISABILITY INSURANCE REMEDIES - Article by Kevin Schlosser and Robert C. Angelillo
March 7, 2009
New York Law Journal

NEW FEDERAL CASE EXPANDS RIGHTS OF DISABILITY INSURANCE CLAIMANTS
Slupinski v. First Unum Life Insurance 2nd Circuit Attorney Fees and Interest Awarded
February 2, 2009
www.msek.com

LIBERALIZING DISCOVERY IN ERISA DISABILITY INSURANCE CASES
Litigation Review
September 23, 2008
New York Law Journal

NASSAU COMMERCIAL DIVISION ADDS E-JURISPRUDENCE
Litigation Review
July 22, 2008
New York Law Journal

NEW PERSONNEL IN THE COMMERCIAL DIVISIONS
Litigation Review
May 27, 2008
New York Law Journal

DODGING AN E-BULLET SANCTION
Litigation Review
March 25, 2008
New York Law Journal

CLARIFYING PUNITIVE DAMAGE CONFUSION
Litigation Review
January 22, 2008
New York Law Journal

A CORPORATE DISSOLUTION MINEFIELD
Litigation Review
November 27, 2007
New York Law Journal

RARE CASE HIGHLIGHTS PITFALLS OF UNCONSCIONABLE CONTRACTS
Litigation Review
September 25, 2007
New York Law Journal

RECENT ISSUES IN COLLATERAL ESTOPPEL
Litigation Review
July 24, 2007
New York Law Journal

RES JUDICATA AND PIERCING THE CORPORATE VEIL
Litigation Review
May 22, 2007
New York Law Journal

BINDING SETTLEMENTS THROUGH EMAIL?
Litigation Review
March 27, 2007
New York Law Journal

AFFIRMATIVE STEPS TO PRESERVE AFFIRMATIVE DEFENSES
Litigation Review
January 23, 2007
New York Law Journal

WEAVING JURISDICTION FROM THE WEB
Litigation Review
November 28, 2006
New York Law Journal

PRIVILEGE PROTECTIONS FOR ACCOUNTANTS
Litigation Review
September 26, 2006
New York Law Journal

INADVERTENT WAIVER OF PRIVILEGE IN THE E-AGE
Litigation Review
July 25, 2006
New York Law Journal

ADMISSIBILITY OF ETHICS CODES IN LEGAL MALPRACTICE ACTIONS
Litigation Review
May 23, 2006
New York Law Journal

HIGH-FLYING TORT DECISIONS
Litigation Review
March 28, 2006
New York Law Journal

NEW STATEWIDE UNIFORM RULES FOR COMMERCIAL DIVISION
March 1, 2006
Nassau Lawyer

LIMITATIONS ON MARITAL PRIVILEGE
Litigation Review
January 24, 2006
New York Law Journal

DISQUALIFYING EXPERTS BASED ON CONFLICTS OF INTEREST
Litigation Review
November 22, 2005
New York Law Journal

THE FINE ART OF DRAFTING PLEADINGS
Litigation Review
September 27, 2005
New York Law Journal

JURY OR NON-JURY? THAT IS THE QUESTION
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July 26, 2005
New York Law Journal

DEFAULT JUDGMENT MOTIONS
Litigation Review
May 24, 2005
New York Law Journal

APPLYING SIMPLE PREJUDGMENT INTEREST NOT SO SIMPLE
Litigation Review
March 22, 2005
New York Law Journal

RIGHTS OF DISABILITY INSURANCE CLAIMANTS BOOSTED WITH DECISION
Outside Counsel
February 15, 2005
New York Law Journal

NASSAU DECISION PAVES WAY TO GREATER USE OF "BLACK BOX" EVIDENCE
Litigation Review
January 25, 2005
New York Law Journal

Kevin Schlosser Published Articles

STATE LAW ON COST OF E-DISCOVERY IS STARTING TO TAKE SHAPE
Litigation Review
November 23, 2004
New York Law Journal

TWO RECENT SPOLIATION RULINGS IMPOSE SEVERE SANCTIONS
Litigation Review
September 28, 2004
New York Law Journal

RESTRICTIVE COVENANTS REMAIN RIPE AREA OF LITIGATION
Litigation Review
July 27, 2004
New York Law Journal

JUDGES OFFER INSIGHTS ON ORAL ARGUMENT
Litigation Review
May 25, 2004
New York Law Journal

NEW LOCAL FEDERAL RULE FOR SUMMARY JUDGMENT MOTIONS
Litigation Review
March 23, 2004
New York Law Journal

ATTORNEY CONFLICTS OF INTEREST IN CORPORATE DISPUTES
Litigation Review
January 27, 2004
New York Law Journal

ELECTRONIC CASE FILING COMING TO A COURTHOUSE NEAR YOU
Litigation Review
November 25, 2003
New York Law Journal

COMMERCIAL DIVISION JUDGES HELP SHAPE PROCEDURE AND LAW
Litigation Review
September 23, 2003
New York Law Journal

E-VOLVING E-MAIL E-DICTS
Litigation Review
August 4, 2003
New York Law Journal

DISABILITY INSURANCE UNDER ERISA: ITS NOT YOUR ORDINARY STATE CONTRACT CLAIM
October 6, 2002
The Nassau Lawyer

CORPORATE HEALTHCARE TRANSACTIONS: AVOIDING CRIMES, DISMISSALS AND EMBARRASSMENT
April 1, 2002
The Nassau Lawyer

MAXIMIZE DISABILITY INSURANCE, MINIMIZE MALPRACTICE EXPOSURE WITH PREVENTIVE LEGAL MEDICINE
June 1, 2001
N.Y. Hospital & Health News

E-MAIL E-MERGING E-NORMOUSLY IN LITIGATION
April 1, 2001
The Nassau Lawyer

MILLION - DOLLAR RECOVERY IN DISABILITY INSURANCE CASE HOLDS LESSONS
June 1, 2000
N. Y. Hospital & Health News

'PAY-WHEN-PAID' REVISITED
March 15, 2000
New York Law Journal

HOW TO AVOID LITIGATING DISPUTES IN A FOREIGN, INCONVENIENT FORUM
November 1, 1999
Construction Law

SURETY'S SUBROGATION RIGHTS REJECTED IN COURT'S LATEST DECISION ON LIEN LAW
April 8, 1999
New York Law Journal

ANOTHER BOMB EXPLODES IN THE LIEN LAW MINEFIELD
February 11, 1998
New York Law Journal

HIGH COURT BOLSTERS LIEN LAW TRUST PROTECTIONS
January 14, 1997
New York Law Journal

HAS 'PAY-WHEN-PAID' BEEN LAID TO REST?
January 10, 1996
New York Law Journal

THE STATUTORY MINEFIELD OF EDUCATION LAW §3813
September 28, 1994
New York Law Journal

RENEWED ALLURE IN HIRING "PRIVATE JUDGES" UNDER THE CPLR
May 28, 2020
New York Law Journal

LAWYERS' ROLE KEY TO PRESERVING AND PREVENTING FRAUD CLAIMS
December 2, 2016
New York Law Journal

NEW YORK SHOULD CATCH THE FEDERAL ESI WAVE BEFORE IT'S TOO LATE
December 23, 2015
New York Law Journal

READING RESTRICTIVE COVENANT TEA LEAVES FROM STATE'S HIGH COURT
July 24, 2015
New York Law Journal

TIME TO REVISE EMPLOYMENT RESTRICTIVE COVENANTS
April 16, 2014
New York Law Journal

COURTS BOLSTER RELEASE OF FIDUCIARY DUTIES AND FRAUD
April 16, 2013
The Nassau Lawyer

GRAPPLING WITH FIDUCIARY DUTIES IN ENFORCING CONTRACTS
October 27, 2011
New York Law Journal

FEDERAL PLEADINGS ARE RECEIVING HEIGHTENED SCRUTINY UNDER NEW STANDARD
Focus on Commercial Litigations
October 28, 2009
The Suffolk Lawyer

SECOND CIRCUIT BROADENS DISABILITY INSURANCE REMEDIES - Article by Kevin Schlosser and Robert C. Angelillo
March 7, 2009
New York Law Journal

LIBERALIZING DISCOVERY IN ERISA DISABILITY INSURANCE CASES
Litigation Review
September 23, 2008
New York Law Journal

NASSAU COMMERCIAL DIVISION ADDS E-JURISPRUDENCE
Litigation Review
July 22, 2008
New York Law Journal

NEW PERSONNEL IN THE COMMERCIAL DIVISIONS
Litigation Review
May 27, 2008
New York Law Journal

DODGING AN E-BULLET SANCTION
Litigation Review
March 25, 2008
New York Law Journal

CLARIFYING PUNITIVE DAMAGE CONFUSION
Litigation Review
January 22, 2008
New York Law Journal

A CORPORATE DISSOLUTION MINEFIELD
Litigation Review
November 27, 2007
New York Law Journal

RARE CASE HIGHLIGHTS PITFALLS OF UNCONSCIONABLE CONTRACTS
Litigation Review
September 25, 2007
New York Law Journal

RECENT ISSUES IN COLLATERAL ESTOPPEL
Litigation Review
July 24, 2007
New York Law Journal

RES JUDICATA AND PIERCING THE CORPORATE VEIL
Litigation Review
May 22, 2007
New York Law Journal

BINDING SETTLEMENTS THROUGH EMAIL?
Litigation Review
March 27, 2007
New York Law Journal

AFFIRMATIVE STEPS TO PRESERVE AFFIRMATIVE DEFENSES
Litigation Review
January 23, 2007
New York Law Journal

Kevin Schlosser Published Articles

WEAVING JURISDICTION FROM THE WEB
Litigation Review
November 28, 2006
New York Law Journal

PRIVILEGE PROTECTIONS FOR ACCOUNTANTS
Litigation Review
September 26, 2006
New York Law Journal

INADVERTENT WAIVER OF PRIVILEGE IN THE E-AGE
Litigation Review
July 25, 2006
New York Law Journal

ADMISSIBILITY OF ETHICS CODES IN LEGAL MALPRACTICE ACTIONS
Litigation Review
May 23, 2006
New York Law Journal

HIGH-FLYING TORT DECISIONS
Litigation Review
March 28, 2006
New York Law Journal

NEW STATEWIDE UNIFORM RULES FOR COMMERCIAL DIVISION
March 1, 2006
Nassau Lawyer

LIMITATIONS ON MARITAL PRIVILEGE
Litigation Review
January 24, 2006
New York Law Journal

DISQUALIFYING EXPERTS BASED ON CONFLICTS OF INTEREST
Litigation Review
November 22, 2005
New York Law Journal

THE FINE ART OF DRAFTING PLEADINGS
Litigation Review
September 27, 2005
New York Law Journal

JURY OR NON-JURY? THAT IS THE QUESTION
Litigation Review
July 26, 2005
New York Law Journal

DEFAULT JUDGMENT MOTIONS
Litigation Review
May 24, 2005
New York Law Journal

APPLYING SIMPLE PREJUDGMENT INTEREST NOT SO SIMPLE
Litigation Review
March 22, 2005
New York Law Journal

RIGHTS OF DISABILITY INSURANCE CLAIMANTS BOOSTED WITH DECISION
Outside Counsel
February 15, 2005
New York Law Journal

NASSAU DECISION PAVES WAY TO GREATER USE OF "BLACK BOX" EVIDENCE
Litigation Review
January 25, 2005
New York Law Journal

STATE LAW ON COST OF E-DISCOVERY IS STARTING TO TAKE SHAPE
Litigation Review
November 23, 2004
New York Law Journal

TWO RECENT SPOLIATION RULINGS IMPOSE SEVERE SANCTIONS
Litigation Review
September 28, 2004
New York Law Journal

RESTRICTIVE COVENANTS REMAIN RIPE AREA OF LITIGATION
Litigation Review
July 27, 2004
New York Law Journal

JUDGES OFFER INSIGHTS ON ORAL ARGUMENT
Litigation Review
May 25, 2004
New York Law Journal

NEW LOCAL FEDERAL RULE FOR SUMMARY JUDGMENT MOTIONS
Litigation Review
March 23, 2004
New York Law Journal

ATTORNEY CONFLICTS OF INTEREST IN CORPORATE DISPUTES
Litigation Review
January 27, 2004
New York Law Journal

ELECTRONIC CASE FILING COMING TO A COURTHOUSE NEAR YOU
Litigation Review
November 25, 2003
New York Law Journal

COMMERCIAL DIVISION JUDGES HELP SHAPE PROCEDURE AND LAW
Litigation Review
September 23, 2003
New York Law Journal

E-VOLVING E-MAIL E-DICTS
Litigation Review
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MAXIMIZE DISABILITY INSURANCE, MINIMIZE MALPRACTICE EXPOSURE WITH PREVENTIVE LEGAL MEDICINE
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N.Y. Hospital & Health News

E-MAIL E-MERGING E-NORMOUSLY IN LITIGATION
April 1, 2001
The Nassau Lawyer

MILLION - DOLLAR RECOVERY IN DISABILITY INSURANCE CASE HOLDS LESSONS
June 1, 2000
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'PAY-WHEN-PAID' REVISITED
March 15, 2000
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HOW TO AVOID LITIGATING DISPUTES IN A FOREIGN, INCONVENIENT FORUM
November 1, 1999
Construction Law

SURETY'S SUBROGATION RIGHTS REJECTED IN COURT'S LATEST DECISION ON LIEN LAW
April 8, 1999
New York Law Journal

ANOTHER BOMB EXPLODES IN THE LIEN LAW MINEFIELD
February 11, 1998
New York Law Journal

HIGH COURT BOLSTERS LIEN LAW TRUST PROTECTIONS
January 14, 1997
New York Law Journal

HAS 'PAY-WHEN-PAID' BEEN LAID TO REST?
January 10, 1996
New York Law Journal

THE STATUTORY MINEFIELD OF EDUCATION LAW §3813
September 28, 1994
New York Law Journal

Kevin Schlosser Seminars

Participates in New York State Bar Association's Panel Discussion
There Has to be a Better Way: Changing How We Practice to Obtain Professional Satisfaction
May 6, 2023

Participates in New York State Bar Association's Panel Discussion
An Evening with the Commercial Division Justices
September 17, 2020

Panelist at the New York State Bar Association's Commercial and Federal Litigation Section
Restrictive Covenants: The Good, the Bad and What the Future Holds
June 17, 2020

Participates in New York State Bar Association's Panel Discussion
An Evening with the Commercial Division Justices
June 14, 2017

Moderator at the New York State Bar Association's Panel Discussion
An Evening with the Commercial Division Justices
June 21, 2016

Speaks at the New York County Lawyers' Association CLE Program
Noncompetition and Confidentiality Provisions in Employment Agreements: Current Status of the Law in New York and State and National Trends
November 4, 2015

Participates in New York State Bar Association's Panel Discussion
An Evening with the Commercial Division Justices
June 8, 2015

Moderates for American Inns of Court
Litigation Overload Facing Federal and State Courts-Trying to Stem the Tide & What Makes a Great Commercial Court
May 27, 2015

Participates in the State Commercial and Federal Court Round-Up Program
June 4, 2014

Participates on Panel for the Hofstra Law's Moot Court Board
March 13, 2014

Moderates NBI Program
As Judges See It: Top Mistakes Lawyers Make in Civil Litigation
June 7, 2013

Speaks at Nassau Academy of Law Program
Advice from the Experts: Successful Strategies for Winning Commercial Cases in New York State Courts
May 9, 2013

Chairs Civil Action Program at the Theodore Roosevelt American Inn of Court
Strategies and Techniques of Direct and Cross Examination of Witnesses at Trial
February 11, 2013

Participates in the Hofstra Law Intramural Competition
January 24, 2013

Serves as Instructor at the Hofstra Trial Techniques Program
The National Institute of Trial Advocacy and the E. David Woycik, Jr. Intensive Trial Advocacy Program
January 4, 2013

Speaks at Suffolk Academy of Law CLE Program
Strategies and practical advice for maximizing the effectiveness of each stage of the litigation
October 11, 2012

Presents in First Ever Joint Seminar for Appellate Division Justices
April 25, 2012

Presents CLE to Suffolk County Bar Association with the Honorable Emily Pines
The CPLR in Everyday Practice
April 19, 2012

Speaks at the Theodore Roosevelt American Inn of Court at the Nassau County Bar Association
A Civil Action - Jury Selection
February 15, 2012

Kevin Schlosser Seminars

Speaks at the Alexander Hamilton Inn of Court at Touro Law School
Alexander Hamilton Inn of Court Program on Injunctions
January 24, 2012
Presents CLE on Expert Witness Discovery at Nassau County Bar Association
June 2, 2011

Speaks at the Nassau County Bar Association
E-Discovery: What the Litigator Needs to Know to Avoid Professional Liability
June 7, 2010

Presents CLE to ACC-GNY Corporate Counsels
June 8, 2011

Achieving 20-20 Hindsight: Practical Solutions to Avoid Rescission, Unenforceability and Misinterpretation of Your Contracts
June 8, 2011

Presents CLE to Inns of Court
April 19, 2010

Presents CLE to Inns of Court
Undoing the Done: Contract? What Contract?
February 3, 2009

Kevin Schlosser Participates as a CLE Instructor at the Annual Meeting at the American Bar Association
Zapped! The New and Complex World of E-Discovery
August 8, 2008

Presents Seminar for the New York State Bonding Initiative
Legal Aspects of Contract Management and Key Issues Regarding Tort Law in the State of New York
May 8, 2008

Lectures at Hofstra Law School
March 20, 2008

Participates at the Federal Civil Practice Update - CLE
May 15, 2007

Speaks at the Theodore Roosevelt American Inn of Court at the NCBA
Inadvertent Waiver of Attorney- Client and Work Product Privileges in the Electronic Age
February 8, 2007

Presents Construction Law Seminar
Construction Management Training Course
July 18, 2006

Presented CLE with the Honorable Leonard B. Austin to the Westchester Women's Bar Association
Electronic Discovery: The New Frontier, An Interactive, Practical Guide to the Latest State and Federal Principles
October 5, 2006

Speaks at First American Title Company
Electronic Evidence in Litigation- the New Frontier
May 17, 2005

Speaks at the Theodore Roosevelt American Inn of Court at the Nassau County Bar Association
Electronic Discovery
May 12, 2005

Speaks at the Nassau Academy of Law, Nassau County Bar Association
Super Sunday Civil Litigation CLE Program Segment on Electronic Discovery
January 11, 2004

Speaks at the Nassau County Bar Association
Electronic Discovery
October 27, 2004

Speaks at the New York State CPA Society
What a savvy litigator looks for in a financial expert witness
November 24, 2003

Speaks at the Nassau Academy of Law, Nassau County Bar Association
Mastering Civil Litigation - Electronic Discovery
December 2, 2003

WZMP
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Omid Zareh

Mr. Zareh is a founding member of Weinberg Zareh Malkin Price LLP.

His practice focuses on executives and companies in corporate planning and all phases of complex, commercial litigation. He advises in varied areas of law including attorney professional responsibility, partnership break-ups, technology, real property, and contractual and corporate disputes. His clients range from law firms, entrepreneurs, start-up companies, established financial companies, and alcohol manufacturers.

Mr. Zareh is a member of the bars of New York State and New Jersey, as well as the Federal Circuit. He is a member of the Grievance Committee and the Ethics Committee, and the former Chair of the Ethics Committee of the Nassau County Bar Association. He is a former Vice President of the NYU Law Alumni Association, and has participated in a number of community and professional organizations, and often lectures about the law.

Mr. Zareh currently serves as a board member of different organizations, including real estate holding companies. Currently, he is a member of the Nassau County Board of Directors and counsel to the Nassau Academy of Law Advisory Board.

While attending New York University Law School, Mr. Zareh was the Legal Theory Editor of the Review of Law and Social Change.

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Commercial

Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Commercial Disputes

AMERICAN ARBITRATION ASSOCIATION®

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Table of Contents

Commercial Arbitration Rules and Mediation Procedures

(Including Procedures for Large, Complex Commercial Disputes)

Important Notice

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

Introduction

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

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

Standard Arbitration Clause

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

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

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

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

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

Administrative Fees

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

Mediation

Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds $100,000, the Rules provide that the parties shall mediate their dispute upon the administration of the arbitration or at any time when the arbitration is pending. In mediation, the neutral mediator assists the parties in reaching a

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

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

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

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

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

Large, Complex Cases

Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $1,000,000 exclusive of claimed interest, arbitration fees and costs. The key features of these Procedures include:

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

Commercial Arbitration Rules

R-1. Agreement of Parties*

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

(b) Unless the parties agree or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $100,000, exclusive of interest, attorneys' fees, and arbitration fees and costs. Parties may also agree to use these Procedures in larger cases. Unless the parties agree otherwise, these Procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Procedures E-1 through E-10, in addition to any other portion of these Rules that is not in conflict with the Expedited Procedures.

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

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

(e) All other cases shall be administered in accordance with Rules R-1 through R-60 of these Rules.

* *The AAA will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims and including work-related claims under independent contractor agreements. A dispute arising out of an employment plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.*

* *Beginning June 1, 2021, the AAA will apply the Consumer Arbitration Fee Schedule to any dispute between an online marketplace or platform and an individual user or subscriber (using or subscribed to the service as an individual and not incorporated) and the dispute does not involve work or work-related claims.*

R-2. AAA, Delegation of Duties, Conduct of Parties, Administrative Review Council

(a) When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration.

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

(c) The AAA requires that parties and their representatives conduct themselves in accordance with the AAA's *Standards of Conduct for Parties and Representatives* when utilizing the AAA's services. Failure to do so may result in the AAA's declining to further administer a particular case or caseload.

(d) For cases proceeding under the Procedures for Large, Complex Commercial Disputes, and for other cases where the AAA, in its sole discretion, deems it appropriate, the AAA may act through its Administrative Review Council to take the following administrative actions:

i) determine challenges to the appointment or continuing service of an arbitrator;

ii) make an initial determination as to the locale of the arbitration, subject to the power of the arbitrator to make a final determination; or

iii) decide whether a party has met the administrative requirements to file an arbitration under these Rules.

R-3. National Roster of Arbitrators

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

R-4. Filing Requirements and Procedures

(a) Filing Requirements

i) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration. The filing fee must be paid before a matter is considered properly filed.

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

a) The filing party shall include a copy of the court order.

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

c) The party filing the Demand with the AAA is the claimant and the opposing party is the respondent regardless of which party initiated the court action. Parties may request that the arbitrator alter the order of proceedings if necessary pursuant to Rule R-33.

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

iv) Information to be included with any arbitration filing includes:

a) the name of each party;

b) the address of each party and, if known, the telephone number and email address;

c) if applicable, the name, address, telephone number, and email address of any known representative for each party;

d) a statement setting forth the nature of the claim including the relief sought and the amount involved; and

e) the locale requested if the arbitration agreement does not specify one.

(b) Filing Procedures

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

a) through AAA WebFile®, located at **www.adr.org;**

b) by filing the complete Demand or Submission with any AAA office, regardless of the intended locale of hearing; or

c) by emailing the complete Demand or Submission to **casefiling@adr.org,** with payment to follow as directed by the AAA.

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

iii) Any papers, notices, or process necessary or proper for the initiation of an arbitration under this Rule may be served on a party:

a) by mail addressed to the party or its authorized representative at their last known address;

b) by electronic service/email, with the prior agreement of the party being served;

c) by personal service; or

d) by any other service methods provided for under the applicable procedures of the courts of the state where the party to be served is located.

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

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

vi) The AAA has the authority to make an administrative determination whether the filing requirements set forth in this Rule have been met.

vii) If the filing does not satisfy the filing requirements set forth in Section (a) above, the AAA shall acknowledge to all named parties receipt of the incomplete filing, and the filing may be returned to the initiating party.

(c) *Authority of arbitrator.* Any decision made by the AAA regarding filing requirements and procedures shall not interfere with the arbitrator's authority to determine jurisdiction pursuant to Rule R-7.

R-5. Answers and Counterclaims

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

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

amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of filing. The claimant may file an answering statement or reply in response to the counterclaim with the AAA within 14 calendar days after notice of the filing of the counterclaim is sent by the AAA.

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

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

R-6. Changes of Claim

(a) A party may at any time prior to the close of the hearing or by any earlier date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in the administrative fee, the balance of the fee is due before the change of claim or counterclaim amount may be accepted by the arbitrator. After the arbitrator is appointed, however, a party may increase the amount of its claim or counterclaim, or alter its request for non-monetary relief, only with the arbitrator's consent.

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

(c) A party that filed a claim or counterclaim of an undisclosed or undetermined amount must specify the amount of the claim or counterclaim to the AAA, all parties, and the arbitrator at least seven calendar days prior to the commencement of the hearing or by any other date established by the arbitrator. If the disclosed amount of the claim or counterclaim results in an increased filing fee, that fee must be paid at the time the claim or counterclaim amount is disclosed. For good cause shown and with the consent of the arbitrator, a party may proceed to the hearing with an undisclosed or undetermined claim or counterclaim, provided that the final amount of the claim or counterclaim is set forth in a post-hearing brief or submission and any appropriate filing fee is paid.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer such matters first to a court.

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

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

R-8. Consolidation and Joinder

(a) Consolidation

i) Two or more arbitrations may be consolidated if all parties to all of the arbitrations to be consolidated so agree.

ii) Unless all parties agree to consolidation, the party requesting consolidation of two or more arbitrations must file with the AAA and serve on all other parties a written request for consolidation with the supporting reasons for such request within 90 days of the date the AAA determines that all administrative filing requirements were satisfied for the last-filed case that is part of the consolidation request. Such time limit may be extended by the arbitrator appointed in the first-filed case upon a showing of good cause for the late request. The other parties to the arbitrations shall provide their written responses to the consolidation request within 10 calendar days after the AAA sends notice of receipt of the request.

iii) At its discretion, the AAA either may direct that the consolidation request be decided by the arbitrator appointed in the first-filed case or may appoint a consolidation arbitrator for the sole purpose of deciding the consolidation request.

iv) The arbitrator deciding consolidation may order consolidation of two or more cases for all purposes or for such limited purposes and under such conditions as the arbitrator may direct.

v) Absent agreement of all parties, an arbitrator appointed for the sole purpose of deciding the consolidation request shall have no further power to act, and shall be removed from the case, after the consolidation request is decided.

vi) In deciding whether to consolidate, the arbitrator or consolidation arbitrator shall take into account all relevant circumstances, including:

a) the terms and compatibility of the agreements to arbitrate,

b) applicable law,

c) the timeliness of the request to consolidate and the progress already made in the arbitrations,

d) whether the arbitrations raise common issues of law and/or fact, and

e) whether consolidation of the arbitrations would serve the interests of justice and efficiency.

(b) Joinder

i) Additional parties may be joined to an arbitration if all parties to the arbitration and the parties proposed to be joined so agree.

ii) Absent such consent, all requests for joinder must be submitted to the AAA prior to the appointment of an arbitrator pursuant to these Rules or within 90 days of the date the AAA determines that all administrative filing requirements have been satisfied. The arbitrator may extend this deadline on a showing of good cause for the late request.

iii) If the existing parties and the parties proposed to be joined are unable to agree to the joinder of those additional parties to an ongoing arbitration, the arbitrator shall decide whether parties should be joined. If an arbitrator has not yet been appointed in the case, the AAA may appoint an arbitrator for the sole purpose of deciding the joinder request. Absent agreement of all parties, the arbitrator appointed for the sole purpose of deciding the joinder request shall have no further power to act, and shall be removed from the case, after the joinder request is decided.

iv) The party requesting the joinder of one or more parties to a pending arbitration must file with the AAA a written request that provides the names and contact information for such parties; the names and contact information for the parties' representatives, if known; and the supporting reasons for such request, including applicable law. The requesting party must provide a copy of the joinder request to all parties in the arbitration and all parties it seeks to join at the same time it files the request with the AAA. The other parties to the arbitration and the parties sought to be joined shall provide their written responses to the joinder request within 14 days after the AAA sends notice of receipt of the request for joinder.

v) The requesting party shall comply with the provisions of Rule R-4(a) as to all parties sought to be joined.

(c) If an arbitrator determines that separate arbitrations shall be consolidated or that the joinder of additional parties is permissible, that arbitrator may also determine:

i) whether any arbitrator previously appointed to an existing case that was consolidated shall remain on the newly constituted case;

ii) whether any arbitrator previously appointed to a case where additional parties have been joined shall remain;

iii) if appropriate, a process for selecting the arbitrator(s) to fill any vacancies; and

iv) unless agreed otherwise by the parties, the allocation among the parties of arbitrator compensation and expenses, subject to reapportionment by the arbitrator appointed to the ongoing or newly constituted case in the final award.

(d) The AAA may take reasonable administrative actions to accomplish any consolidation or joinder ordered by the arbitrator or as agreed to by the parties. Pending the determination on a consolidation or joinder request, the AAA shall have the authority to stay the arbitration or arbitrations impacted by the consolidation or joinder request, at its sole discretion.

R-9. Interpretation and Application of Rules

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

R-10. Mediation

In all cases where a claim or counterclaim exceeds $100,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally }opt out of this Rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this Rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-11. Administrative Conference

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

R-12. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, or a determination by the arbitrator that

applicable law requires a different locale, the locale shall be that specified in the arbitration agreement.

Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days after the AAA sends notice of the filing of the Demand or by the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA shall initially determine the locale of arbitration, subject to the power of the arbitrator after appointment to make a final determination on the locale.

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

(c) If the parties' arbitration agreement specifies more than one possible locale, the filing party may select any of the specified locales at the time of filing, subject to the power of the arbitrator to finally determine the locale.

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

R-13. Appointment from National Roster

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

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

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. At its discretion, the AAA may limit the number of strikes permitted. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if

for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

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

R-14. Direct Appointment by Party

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

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Rule R-19 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Rule R-19(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

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

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

R-15. Appointment of Chairperson by Party-Appointed Arbitrators, Parties, or the AAA

(a) Where there is a panel of three or more arbitrators, one arbitrator will be designated as the panel chairperson. Such designation will be according to the terms of the parties' arbitration agreement. However, if the parties' arbitration agreement does not specify how the chairperson is to be selected, the chairperson can be designated, at the AAA's discretion, by the party-appointed arbitrators, the parties, the panel, or the AAA.

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

(c) Absent the agreement of the parties, the chairperson shall be appointed from the National Roster, and the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Rule R-13, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Rule.

R-16. Nationality of Arbitrator

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

R-17. Number of Arbitrators

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

(b) Use of terms such as "the arbitrator", "an arbitrator", or "the arbitrators" in the arbitration agreement, without further specifying the number of arbitrators, shall not be deemed by the AAA to reflect an agreement as to the number of arbitrators.

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

R-18. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this Rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-42.

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

(c) Disclosure of information pursuant to this Rule R-18 is not an indication that the arbitrator considers the disclosed circumstance likely to affect impartiality or independence.

R-19. Disqualification of Arbitrator

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

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

(b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Rule R-14 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

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

R-20. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate *ex parte* with a candidate for direct appointment pursuant to Rule R-14 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Rule R-20(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Rule R-19(b), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Rule R-19(b), the AAA shall as an administrative practice suggest to the parties that they agree further that Rule R-20(a) should nonetheless apply prospectively.

(c) As set forth in Rule R-44, unless otherwise instructed by the AAA, in the Rules, or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-21. Vacancies

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

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

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

R-22. Preliminary Hearing

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

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

R-23. Pre-Hearing Exchange and Production of Information

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

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

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

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

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

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

R-24. Enforcement Powers of Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of Rules R-22 and R-23 and any other rule or procedure and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

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

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

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

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

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

R-25. Date, Time, Place, and Method of Hearing

The arbitrator shall set the date, time, place, and method (including video, audio or other electronic means when appropriate) for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 calendar days in advance of the hearing date, unless otherwise agreed by the parties.

R-26. Attendance at Hearing

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

R-27. Representation

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

R-28. Oaths

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

R-29. Official Record of Proceedings

(a) Any party desiring a transcribed record of a hearing shall make arrangements directly with a transcriber or transcription service and shall notify the arbitrator and the other parties of these arrangements at least seven calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.

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

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

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

R-30. Interpreters

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

R-31. Postponements

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

R-32. Arbitration in the Absence of a Party or Representative

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

R-33. Conduct of Proceedings

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

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

(c) The arbitrator may also allow for some or all of the presentation of evidence by alternative means including video, audio or other electronic means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.

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

R-34. Dispositive Motions

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

(b) Consistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion.

(c) Fees, expenses, and compensation associated with a motion or an application to make a motion may be assessed as provided for in Rule R-49(c).

R-35. Evidence

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

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

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

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

R-36. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence

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

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

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

R-37. Inspection or Investigation

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

R-38. Interim Measures

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

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

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

R-39. Emergency Measures of Protection

(a) Unless the parties agree otherwise, the provisions of this Rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013. This Rule shall not apply to cases administered pursuant to the Expedited Procedures.

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

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

(d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule R-7, including the authority to rule on her or his own jurisdiction, and shall resolve any disputes over the applicability of this Rule R-39.

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

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

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

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

(i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the merits arbitrator to determine finally the apportionment of such costs. The emergency arbitrator may take into consideration whether the request for emergency relief was made in good faith.

R-40. Closing of Hearing

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

(b) If documents or responses are to be filed as provided in Rule R-36, or if briefs are to be filed, the hearing shall be declared closed as of the date the arbitrator is satisfied that the record is complete, and such date shall occur no later than seven calendar days from the date of receipt of the last such submissions or hearing transcript.

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

R-41. Reopening of Hearing

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

R-42. Waiver of Rules

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

R-43. Extensions of Time

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

R-44. Serving of Notice and Communications

(a) The service methods set forth in Rule R-4(b)(iii) may also be used for the delivery of any filing, notice or communication throughout the course of the arbitration proceeding.

(b) The AAA, the arbitrator, and the parties may also use alternative methods of communication or other platforms as directed by the AAA or as agreed by the parties or directed by the arbitrator to exchange any communication or other notice required by these Rules during the course of the arbitration.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any party submitting any document or written communication to another party, the AAA or the arbitrator, shall simultaneously provide that material to all other participants, including the AAA.

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

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

(f) The AAA may initiate administrative communications with the parties or their representatives either jointly or individually.

(g) Any method of service on or notice to a party must be made in such a manner to provide that party with reasonable opportunity to be heard with regard to the dispute.

R-45. Confidentiality

(a) Unless otherwise required by applicable law, court order, or the parties' agreement, the AAA and the arbitrator shall keep confidential all matters relating to the arbitration or the award.

(b) Upon the agreement of the parties or the request of any party, the arbitrator may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

R-46. Majority Decision

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

(b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to

resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

(c) Absent an objection of a party or another member of the panel, the chairperson may sign any order on behalf of the panel.

R-47. Time of Award

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

R-48. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. Signatures may be executed in electronic or digital form. The award shall be executed in the form and manner required by law.

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

R-49. Scope of Award

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

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

(c) In the final award or any order disposing of all of the case, the arbitrator shall assess the fees, expenses, and compensation provided in Rules R-55, R-56, and R-57. The arbitrator may also assess such fees, expenses, and compensation in any order or award disposing of part of the case. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator may include:

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

R-50. Award Upon Settlement – Consent Award

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses as set forth in Rule R-49(c).

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

R-51. Delivery of Award to Parties

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

R-52. Modification of Award

(a) Within 20 calendar days after the transmittal of any award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, interpret the award or correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to re-determine the merits of any claim already decided. The other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

(b) If the arbitrator has established a different schedule for such requests, responses, and disposition, the arbitrator's schedule will supersede the deadlines set forth in this Rule.

R-53. Release of Documents for Judicial Proceedings

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

R-54. Applications to Court and Exclusion of Liability

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

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

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

(d) Parties to an arbitration under these Rules shall be deemed to have consented that the AAA shall not be liable to any party in any action for damages, or injunctive or other relief, for any act or omission in connection with any arbitration administered in whole or in part by the AAA or conducted under these Rules. Parties shall also be deemed to have consented that the arbitrator shall not be liable to any party in any action for damages, or injunctive or other relief, for an act or omission in connection with any arbitration administered in whole or in part by the AAA.

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

R-55. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fee schedule in effect when the Demand is filed will apply throughout the pendency of the case. The administrative fees shall be paid initially by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-56. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-57. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation at the time their AAA resume is presented to the parties for consideration pursuant to Rule R-13, unless otherwise determined by the AAA. Such compensation will be consistent with the provisions of the arbitrator's executed *Notice of Compensation Arrangements*.

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

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

R-58. Deposits

(a) The AAA will require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's compensation and expenses, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case. A party's failure to make the requested deposits by the date established by the AAA may result in the AAA's or the arbitrator's taking any appropriate steps as set forth in Rule R-59.

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

(c) The AAA shall request from the arbitrator an itemization or explanation for the arbitrator's request for deposits.

(d) The AAA will allocate the deposits requested among the parties and will establish due dates for the collection of those deposits.

R-59. Remedies for Nonpayment

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

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

- **i)** limiting a party's ability to assert or pursue its claim, and
- **ii)** prohibiting a non-paying party from filing any motion.

(b) In no event, however, shall a party be precluded from defending a claim or counterclaim.

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

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

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

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

R-60. Sanctions

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

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

Preliminary Hearing Procedures

P-1. General

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

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

P-2. Checklist

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

- **i)** the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to Rule R-10;
- **ii)** whether all necessary or appropriate parties are included in the arbitration;
- **iii)** whether a party will seek a more detailed statement of claims, counterclaims or defenses;
- **iv)** whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
- **v)** which
  - **a)** arbitration rules;
  - **b)** procedural law; and
  - **c)** substantive law govern the arbitration;
- **vi)** issues related to cybersecurity, privacy and data protection to provide for an appropriate level of security and compliance in connection with the proceeding;
- **vii)** whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation,
  - **a)** any preconditions that must be satisfied before proceeding with the arbitration;
  - **b)** whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;

c) consolidation of the claims or counterclaims with another arbitration; or

d) bifurcation of the proceeding.

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

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

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

xi) whether any measures are required to protect confidential information;

xii) Whether the parties shall disclose:

a) whether any non-party (such as a third-party funder or an insurer) has undertaken to pay or to contribute to the cost of a party's participation in the arbitration, and if so, to identify the person or entity concerned and to describe the nature of the undertaking; and

b) whether any non-party (such as a funder, insurer, parent company, or ultimate beneficial owner) has an economic interest in the outcome of the arbitration, and if so, to identify the person or entity concerned and to describe the nature of the interest;

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

xiv) whether, according to a schedule set by the arbitrator, the parties will:

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

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

c) exchange pre-hearing submissions, including exhibits;

xv) the date, time and place of the arbitration hearing;

a) whether, at the arbitration hearing,

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

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

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

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

xix) whether post-hearing submissions will be filed;

xx) the form of the arbitration award; and

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

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

Expedited Procedures

E-1. Limitation on Extensions

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

(b) Any other extension requests may be granted only after consideration of Procedure E-7.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, any time prior to the appointment of the arbitrator. However, after the arbitrator is appointed, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $100,000, the case will be administered under the regular Commercial Arbitration Rules unless all parties and the arbitrator agree that the case may continue to be administered under the Expedited Procedures.

E-3. Serving of Notice

In addition to notice provided by Rule R-44, the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

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

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

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Rule R-19.

The parties shall notify the AAA within seven calendar days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Discovery, Motions, and Conduct of Proceedings

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

(b) No other discovery shall be permitted except as allowed by the arbitrator for good cause shown. If the arbitrator allows additional discovery, the AAA, in consultation with the arbitrator, may remove the case from the Expedited Procedures.

(c) There shall be no motions except as allowed by the arbitrator for good cause shown.

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

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

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

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

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

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

(e) Unless the parties have agreed to a form of award other than that set forth in Rule R-48, when the parties have agreed to resolve their dispute by this Procedure, the

arbitrator shall render the award within 14 calendar days from the date the hearing is closed.

(f) If the parties agree to a form of award other than that described in Rule R-48, the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.

(g) The award is subject to all other provisions of the regular Commercial Arbitration Rules which pertain to awards.

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

In cases in which a hearing is to be held, the arbitrator shall set the date, time, place, and method of the hearing, to be scheduled to take place no more than 60 days after the preliminary hearing or as otherwise mutually agreed to between the parties and the arbitrator. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

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

(b) For good cause shown, the arbitrator may schedule one additional day of hearings to be completed within seven business days after the initial day of hearing or as soon as practicable as determined by the arbitrator. In cases where the hearing is scheduled to exceed one day, the AAA, in consultation with the arbitrator, may remove the case from the Expedited Procedures.

(c) Generally, there will be no stenographic record. Any party desiring a transcribed record of the hearing may arrange for one pursuant to the provisions of Rule R-29.

E-9. Time of Award

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

E-10. Arbitrator's Compensation

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

(b) For cases that are removed from the Expedited Procedures after the preliminary hearing is held, the arbitrator shall be compensated pursuant to Rule R-57.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

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

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

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

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

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

L-2. Arbitrators

(a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. With the exception in paragraph (b) below, if the parties do not agree upon the number of arbitrators and a claim or counterclaim involves at least $3,000,000 then three arbitrators shall hear and determine the case; otherwise one arbitrator shall hear and determine the case.

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

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

L-3. Management of Proceedings

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

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

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

(d) The parties and the arbitrator shall address issues pertaining to the pre-hearing exchange and production of information in accordance with Rule R-23 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within a scheduling order.

(e) The arbitrator, or any single member of the panel, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within their discretion, including, without limitation, the issuance of orders set forth in Rules R-23 and R-24 of the AAA Commercial Rules.

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

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

Administrative Fee Schedules (Standard and Flexible Fees)

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

Commercial Mediation Procedures

M-1. Agreement of Parties

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

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

M-2. Initiation of Mediation

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

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

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

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

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

(iv) Any specific qualifications the mediator should possess.

M-3. Representation

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

M-4. Appointment of the Mediator

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

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

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

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

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

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

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

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

M-6. Vacancies

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

M-7. Duties and Responsibilities of the Mediator

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

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

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

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

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

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

M-8. Responsibilities of the Parties

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

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

M-9. Privacy

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

M-10. Confidentiality

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

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

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

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

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

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

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

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

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

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

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

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

M-13. Exclusion of Liability

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

M-14. Interpretation and Application of Procedures

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

M-15. Deposits

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

M-16. Expenses

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

M-17. Cost of the Mediation

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

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Drafting Dispute Resolution Clauses

A Practical Guide

AMERICAN ARBITRATION ASSOCIATION®

Available online at **adr.org**

This *Drafting Dispute Resolution Clauses - A Practical Guide* is intended to assist parties in drafting alternative dispute resolution (ADR) clauses for domestic and international cases. This Guide has been updated to correspond with the AAA®'s Commercial Arbitration Rules in effect on October 1, 2013. For a more complete discussion of the international clauses, a *Guide To Drafting Clauses for International Cases* may be found at **www.icdr.org.**

In addition to the suggested standard clauses and optional language, the AAA has compiled a checklist of considerations for the drafter, as well as examples of supplemental language which go beyond the basic clauses. Useful commentary that helps to identify points of interest is provided throughout the Guide. Parties with questions regarding drafting an AAA clause should contact their local AAA/ICDR® office or visit the AAA's clause drafting tool **www.clausebuilder.org.** Contact information for AAA offices is listed on the AAA's website, **www.adr.org.**

Table of Contents

Drafting Dispute Resolution Clauses
A Practical Guide

Introduction

Millions of business contracts provide for mediation and arbitration as ways of resolving disputes. A large number of these contracts provide for administration by the American Arbitration Association® (AAA), a public-service, not-for-profit organization offering a broad range of conflict management procedures.

The agreement to arbitrate or mediate can empower the parties with a great deal of control—over the process and the arbitrator who hears the case, or the mediator who assists the parties in settlement efforts. A well-constructed AAA dispute resolution clause can provide certainty by defining the process prior to a dispute, after which agreement becomes more problematic. This Guide is designed to assist drafters in constructing basic clauses for negotiation, mediation, and arbitration, as well as more comprehensive clauses that address a variety of issues.

The first section of this booklet contains a brief checklist of some of the more important elements a practitioner should keep in mind when drafting or adopting any dispute resolution clause, no matter how basic. The second section describes the major features of arbitration. The third section provides a series of clauses that the AAA feels are appropriate for use in a general commercial setting and which meet different needs and concerns in such a context. The fourth section contains a series of clauses that the AAA deems appropriate for use in the particular contexts of international disputes, construction disputes, employment disputes, and patent disputes. The final section consists of examples of supplemental language which go beyond the basic dispute resolution clauses in Sections III and IV. While the AAA does not necessarily recommend such expanded provisions, it recognizes that such additions are used from time to time to meet specific wishes or needs of the parties. Explanatory text sets forth factors one might take into account when considering whether to include such supplemental language.

AAA services are available through offices located in major cities throughout the United States, in addition to Mexico, Singapore, and Bahrain, as well as through arrangements with other institutions worldwide. Hearings may be held at locations convenient for the parties and AAA offices in most major cities offer hearing rooms. In addition, the AAA provides education and training, produces specialized publications and conducts research on out-of-court dispute settlement. Typically, the parties' agreement to mediate or arbitrate is contained in a future-disputes clause in their contract; the clause may provide that any disagreement will be resolved by AAA Administration under the mediation or arbitration rules of the American Arbitration Association.

The American Arbitration Association is known for the high quality of its panels of mediators and arbitrators, including a Large, Complex Case Panel. A special AAA international center, the International Centre for Dispute Resolution®, administers cases around the globe and anywhere in the U.S.

I. A Checklist for the Drafter of ADR Clauses

Drafting clear, unambiguous clauses contributes to the efficiency of the ADR process. For example, arbitration agreements require a clear intent to arbitrate. It is not enough to state that "disputes arising under the agreement shall be settled by arbitration." While that language indicates the parties' intention to arbitrate and may authorize a court to enforce the clause, it leaves many issues unresolved. Issues such as when, where, how and before whom a dispute will be arbitrated are subject to disagreement once a controversy has arisen, with no way to resolve them except to go to court.

Some of the more important elements a practitioner should keep in mind when drafting, adopting or recommending a dispute resolution clause follow.

- The clause might cover all disputes that may arise, or only certain types.
- It could specify only arbitration – which yields a binding decision – or also provide an opportunity for non-binding negotiation or mediation.
- The arbitration clause should be signed by as many potential parties to a future dispute as possible.
- To be fully effective, "entry of judgment" language in domestic cases is important.
- It is normally a good idea to state whether a panel of one or three arbitrator(s) is to be selected, and to include the place where the arbitration will occur.
- If the contract includes a general choice of law clause, it may govern the arbitration proceeding. The consequences should be considered.
- Consideration should be given to incorporating the AAA's Procedures for Large, Complex Commercial Disputes for potentially substantial or complicated cases. For smaller, simpler cases the drafter may want to call for the Expedited Procedures that limit the extent of the process.
- The drafter should keep in mind that the AAA has specialized rules for arbitration in the construction, patent, payor provider (healthcare), and certain other fields. If anticipated disputes fall into any of these areas, the specialized rules should be considered for incorporation in the arbitration clause. A panel with specialized subject matter expertise and an experienced AAA administrative staff manages the processing of cases under AAA rules.
- The parties are free to customize and refine the basic arbitration procedures to meet their particular needs. If the parties agree on a procedure that conflicts with otherwise applicable AAA rules, the AAA will almost always respect the wishes of the parties.

II. Major Features of Arbitration

Arbitration is a private, informal process by which all parties agree, in writing, to submit their disputes to one or more impartial persons authorized to resolve the controversy by rendering a final and binding decision called an Award. Arbitration is used for a wide variety of disputes – from commercial disagreements involving construction and real estate, financial services, healthcare providers, computers or intellectual property and life sciences (to name just a few), to insurance claims and labor-union grievances. When an agreement to arbitrate is included in a contract, it can serve to expedite peaceful settlement without the necessity of going through the arbitration. Arbitration clauses can act as a form of insurance against loss of good will and business relationships.

The major features of arbitration are:

1. *A Written Agreement to Resolve Disputes by the Use of Impartial Arbitration.*
   Such a provision may be inserted in a contract for resolution of future disputes or may be an agreement to submit to arbitration an existing dispute.
2. *Informal Procedures.*
   Under the AAA rules, the procedure is efficient and straightforward: courtroom rules of evidence are not strictly applicable; there usually is no motion practice or formal discovery; and there is no requirement for transcripts of the proceedings or for written opinions of the arbitrators. Though there is often little formal discovery, the AAA's various commercial rules allow the arbitrator to require production of relevant information and documents. The AAA's rules are flexible and may be varied by mutual agreement of the parties.
3. *Impartial and Knowledgeable Neutrals to Serve as Arbitrators.*
   Arbitrators are selected for specific cases because of their knowledge of the subject matter. Based on that experience, arbitrators can render an award grounded on thoughtful and informed analysis.
4. *Final and Binding Awards that are Enforceable in a Court.*
   Court intervention and review is limited by applicable state or federal arbitration laws and award enforcement is facilitated by those same laws.

During its many years of existence, the AAA has refined its standard arbitration clause. That clause, when linked to AAA case management, offers the parties a simple, time-tested means of resolving disputes. Occasionally, parties or their counsel desire additional provisions. This booklet has been prepared as a general guide for drafting dispute resolution clauses. It contains examples of clauses and portions of clauses that have been used by parties in cases filed with the AAA. Readers should feel free to contact their local AAA office for further information.

The AAA's Commercial Arbitration Rules and Mediation Procedures provide for a streamlined, cost-effective arbitration process, and include a mediation step (subject to the authority of any party to unilaterally opt-out) for cases with claims greater than $75,000; access to dispositive motions; greater clarity concerning the exchange of information between the parties; the inclusion of emergency relief to allow for temporary injunctions; an increased emphasis on arbitrators effectively managing the process with additional tools, authority and specific enforcement powers; and the right for parties to seek sanctions for abusive conduct and for arbitrators to deal with non-paying parties.

III. Clauses Approved by the AAA for General Commercial Use

Arbitration

The standard arbitration clause suggested by the American Arbitration Association addresses many basic drafting questions by incorporating AAA rules. This simple approach has proven highly effective in hundreds of thousands of disputes. Additional language, which parties may wish to add in specific contexts, is discussed in Section IV of this booklet.

If the parties wish, standard clauses also may be used for negotiation and mediation. There are also standard clauses for use in large, complex cases.

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts (the language in the brackets suggests possible alternatives or additions).

STD 1 Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

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

STD 2 We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial [or other] Arbitration Rules the following controversy: [describe briefly]. We further agree that a judgment of any court having jurisdiction may be entered upon the award.

The preceding clauses, which refer to the time-tested rules of the AAA, have consistently received judicial support. The standard clause is often the best to include in a contract. By invoking the AAA's rules, such a clause meets the following requirements of an effective arbitration clause:

- It makes clear that all disputes are arbitrable. Thus, it minimizes dilatory court actions to avoid the arbitration process.
- It is self-enforcing. Arbitration can continue despite an objection from a party, unless the proceedings are stayed by court order or by agreement of the parties.
- It provides a complete set of rules and procedures. This eliminates the need to spell out dozens of procedural matters in the parties' agreement.

- It provides for the selection of a specialized, impartial panel. Arbitrators are selected by the parties from a screened and trained pool of available experts. Under the AAA rules, a procedure is available to disqualify an arbitrator for bias.
- It settles disputes over the locale of proceedings. When the parties disagree, locale determinations are made by the AAA as the administrator, precluding the need for intervention by a court.
- It makes possible administrative conferences. If the clause incorporates the AAA commercial, construction industry or related arbitration rules, an administrative conference with the parties' representatives and AAA case management to expedite the arbitration proceedings is available when appropriate.
- It makes available preliminary hearings in all but the simplest cases and provides arbitrators with a checklist of items to be discussed at the conference if the clause provides for AAA Commercial Rules. A preliminary hearing can be arranged in cases of any size to specify the issues to be resolved, clarify claims and counterclaims, provide for a pre-hearing exchange of information, and consider other matters that will expedite the arbitration proceedings.
- It also makes mediation available. The AAA Commercial Arbitration Rules and Mediation Procedures require parties to mediate or opt-out of the process. If the clause provides for any of the AAA's various commercial arbitration rules, mediation conferences can be arranged to facilitate a voluntary settlement, without additional administrative cost to the parties.
- It establishes time limits to ensure prompt resolution for all disputes. An additional feature of the various AAA rules is a special expedited procedure, which may be used to resolve smaller claims and other disputes that need more speedy resolutions.
- It provides for AAA administrative assistance to the arbitrator and the parties. To protect neutrality and avoid unilateral contact, most rules provide for the AAA to channel communications between the parties and the arbitrator. An AAA case manager may also provide guidance to help ensure the prompt conclusion of a proceeding.
- It establishes a procedure for serving notices. Depending on the rules used and the type of the case, notices may be served by regular mail, addressed to the party or its representative at the last known address. Under the rules, the AAA and the parties may use facsimile transmission or other written forms of electronic communication to give the notices required by the rules.
- Unless otherwise provided, it gives the arbitrator the power to decide matters equitably and to fashion appropriate relief. The AAA commercial rules allow the arbitrator to grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including specific performance.
- It allows *ex parte* hearings. A hearing may be held in the absence of a party who has been given due notice. Thus, a party cannot avoid an award by refusing to appear.
- It provides for enforcement of the award. The award can be enforced in any court having jurisdiction, with only limited statutory grounds for resisting the award. If, in a domestic transaction, as distinguished from an international one, the parties desire

that the arbitration clause be final, binding and enforceable, it is essential that the clause contain an "entry of judgment" provision such as that found in the standard arbitration clause ("and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof").

Negotiation

The parties may wish to attempt to resolve their disputes through negotiation prior to arbitration. A sample clause which provides for negotiation follows.

NEG 1

In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of 60 days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association in accordance with the provisions of its Commercial Arbitration Rules.

Mediation

The parties may wish to attempt mediation before submitting their dispute to arbitration. This can be accomplished by agreeing to mediation, a voluntary process that may be entered into either by a standalone agreement or incorporated into an arbitration clause as a first step and may be terminated at any time by either party.

The AAA Commercial Rules call for mediation to take place as part of the arbitration with parties given the choice to unilaterally opt out of the mediation step. Parties may desire to customize their mediation step in their agreement. Example Mediation 1 can be used for a customized clause and example Mediation 2 can be used to submit a dispute to mediation.

MED 1

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

MED 2 The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures [the clause may also provide for the qualifications of the mediator(s), the method for allocating fees and expenses, the locale of meetings, time limits, or any other item of concern to the parties].

An AAA administrator can assist the parties regarding selection of the mediator, scheduling, pre-mediation information exchange and attendance of appropriate parties at the mediation conference.

It is prudent to include time limits on steps prior to arbitration. Under a broad arbitration clause, the question of whether a claim has been asserted within an applicable time limit is generally regarded as an arbitrable issue, suitable for resolution by the arbitrator.

Large, Complex Cases

The large, complex case framework offered by the AAA is designed primarily for business disputes involving claims of at least $500,000, although parties are free to provide for use of the LCC Rules in other disputes. The key elements of the program are (1) selection of arbitrators who satisfy rigorous criteria to insure that the panel is an extremely select one; (2) training, orientation, and coordination of those arbitrators in a manner designed to facilitate the program; (3) establishment of procedures for administration of those cases that elect to be included in the program; (4) flexibility of those procedures so that parties can more speedily and efficiently resolve their disputes; and (5) administration of large, complex cases by specially trained, experienced AAA staff.

The procedures provide for an early administrative conference with the AAA, and a preliminary hearing with the arbitrators. Documentary exchanges and other essential exchanges of information are facilitated. The procedures also provide that a statement of reasons may accompany the award, if requested by the parties. The procedures are meant to supplement the applicable rules that the parties have agreed to use. They include the possibility of the use of mediation to resolve some or all issues at an early stage.

The parties can provide for future application of the procedures by including the following arbitration clause in their contract.

LCCP 1 Any controversy or claim arising from or relating to this contract or the breach thereof shall be settled by arbitration administered by the American Arbitration Association under its [applicable] Procedures for Large, Complex Commercial Disputes, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

A pending dispute can be referred to the program by the completion of a Submission to Dispute Resolution form if the underlying contract documents do not provide for AAA administration.

LCCP 2 We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its [applicable] Procedures for Large, Complex Commercial Disputes the following controversy [describe briefly]. Judgment of any court having jurisdiction may be entered on the award.

IV. Clauses for Use in Specific Contexts

The following clauses, which also can provide for periods of negotiation and/or mediation prior to arbitration, may be considered for use in specific contexts. The checklist of considerations in Section I above also should be consulted.

A. Clauses for Use in International Disputes

The International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association, administers international commercial cases under various arbitration rules worldwide. The ICDR administers cases under its own International Dispute Resolution Procedures, various AAA rules, the Commercial Arbitration and Mediation Center for the Americas (CAMCA) Rules, the Rules of the Inter-American Commercial Arbitration Commission (IACAC) and the UNCITRAL Arbitration Rules. Under Article 1 of the International Arbitration Rules, parties may designate either the ICDR or the AAA in the arbitration clause for the purposes of naming an administrative agency and conferring proper jurisdiction to the ICDR or the AAA. Following are samples of arbitration clauses pertinent to international disputes.

INTL 1 Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.

INTL 2 Any dispute, controversy, or claim arising out of or relating to this contract, or the breach thereof, shall be finally settled by arbitration administered by the Commercial Arbitration and Mediation Center for the Americas in accordance with its rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

INTL 3 Any dispute, controversy, or claim arising from or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission in effect on the date of this agreement.

INTL 4 Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration under the UNCITRAL Arbitration Rules in effect on the date of this contract. The appointing authority shall be the International Centre for Dispute Resolution. The case shall be administered by the International Centre for Dispute Resolution under its Procedures for Cases under the UNCITRAL Arbitration Rules.

The parties should consider adding a requirement regarding the number of arbitrators appointed to the dispute and designating the place and language of the arbitration. The parties may also submit an international dispute under the AAA's commercial and other specialized arbitration rules. Those procedures do not supersede any provision of the applicable rules but merely codify various procedures customarily used in international arbitration. Included among them are provisions specifying the neutrality of arbitrators, consecutive hearing days, the language of hearings, and opinions. The thrust of the procedures is to expedite international proceedings and keep them as economical as possible.

For strategic or long-term commercial international contracts, the parties may wish to provide a "step" dispute resolution process encouraging negotiated solutions, or mediation in advance of arbitration or litigation. A model step clause and mediation clause follow.

INTL 5 In the event of any controversy or claim arising out of or relating to this contract, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the International Mediation Procedures of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.

INTL 6 In the event of any controversy or claim arising out of or relating to this contract, the parties hereto agree first to try and settle the dispute by mediation administered by the International Centre for Dispute Resolution under its rules before resorting to arbitration, litigation, or some other dispute resolution technique.

Usually, the effective management of time and expense in arbitration is best left in the hands of experienced case managers and arbitrators. Occasionally, however, parties wish to ensure that matters are resolved in a minimum of time and without recourse to the expense and time necessitated by common law methods of pre-hearing information exchange. The clauses that follow limit the time frame of arbitration (clauses presented in the alternative) and the amount of pre-hearing information exchange available to the parties. One word of caution: once entered into, these clauses will limit the arbitrator's authority to mold the process to the specific dictates of the case.

INTL 7 The award shall be rendered within nine months of the commencement of the arbitration, unless such time limit is extended by the arbitrator.

Alternative

It is the intent of the Parties that, barring extraordinary circumstances, arbitration proceedings will be concluded within 60 days from the date the arbitrator(s) are appointed. The arbitral tribunal may extend this time limit in the interests of justice. Failure to adhere to this time limit shall not constitute a basis for challenging the award.

INTL 8 Consistent with the expedited nature of arbitration, pre-hearing information exchange shall be limited to the reasonable production of relevant, non-privileged documents, carried out expeditiously.

Enforcement of international awards is facilitated by the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which has been ratified by approximately 150 nations, and facilitated in this hemisphere by the Inter-American Convention on International Commercial Arbitration (the "Panama Convention").

B. Clauses for Use in Construction Disputes

The AAA Construction Industry Arbitration Rules and Mediation Procedures are designed to expedite the dispute resolution process and help the AAA be more responsive to the needs of the construction industry. The rules contain a "fast track" arbitration system for cases involving claims of less than $75,000; enhancements to the "regular track" rules; and a Large, Complex Construction case track for use in cases involving claims of at least $500,000. The parties can provide for arbitration of future disputes by inserting the following clause into their contracts.

CONST 1 Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

CONST 2 We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules the following controversy: (cite briefly). We further agree that the controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, and that a judgment of any court having jurisdiction may be entered on the award.

If parties wish to adopt mediation as part of their contractual dispute settlement procedure, they can insert the following mediation clause in conjunction with a standard arbitration provision, and may also provide that the requirement of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process.

CONST 3 If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution technique.

Parties also have the option of inserting a "step" mediation-arbitration clause into their contracts. A dispute resolution hybrid, the clause provides first for mediation and then, if the dispute is not resolved within a specified time frame, arbitration.

CONST 4 Any controversy or claim arising out of or relating to this contract or breach thereof, shall be settled by mediation under the Construction Industry Mediation Procedures of the American Arbitration Association. If within 30 days after service of a written demand for mediation, the mediation does not result in settlement of the dispute, then any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

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

CONST 5 The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures (the clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, the tolling of the statute of limitations, pre-arbitration step clause with time frames and any other item of concern to the parties).

C. Clauses for Use in Employment Disputes

Conflicts which arise during the course of employment, such as wrongful termination, sexual harassment and discrimination based on race, color, religion, sex, national origin, age and disability, have redefined responsible corporate

practice and employee relations. The AAA therefore has developed special rules called the Employment Arbitration Rules and Mediation Procedures. The AAA's policy on employment ADR is guided by the state of existing law, as well as its obligation to act in an impartial manner. In following the law, and in the interest of providing an appropriate forum for the resolution of employment disputes, the Association administers dispute resolution programs which meet the due process standards as outlined in its Employment Arbitration Rules and Mediation Procedures and the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship. If the Association determines that a dispute resolution program on its face substantially and materially deviates from the minimum due process standards of the Employment Arbitration Rules and Mediation Procedures and the protocol, the Association will decline to administer cases under that program. Other issues will be presented to the arbitrator for determination.

An employer intending to incorporate these rules or to refer to the dispute resolution services of the AAA in an employment ADR plan, shall, at least 30 days prior to the planned effective date of the program, (1) notify and (2) provide the Association with a copy of the employment dispute resolution plan. If an employer does not comply with this requirement, the Association reserves the right to decline its administrative services.

Parties can provide for arbitration of future disputes by inserting the following clause into their employment contracts, personnel manuals or policy statements, employment applications, or other agreements.

EMPL 1 Any controversy or claim arising out of or relating to this [employment application; employment ADR program; employment contract] shall be settled by arbitration administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes can be accomplished by use of the following clause.

EMPL 2 We, the undersigned parties, hereby agree to submit to arbitration, administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures, the following controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s) selected from the roster of arbitrators of the American Arbitration Association, and that a judgment of any court having jurisdiction may be entered on the award.

Parties may agree to use mediation on an informal basis for selected disputes, or mediation may be designated in a personnel manual as a step prior to arbitration, litigation, or some other dispute resolution technique. If the parties want to adopt mediation as a part of their contractual dispute-settlement procedure, they can add the following mediation clause to their contract.

EMPL 3 If a dispute arises out of or relates to this [employment application; employment ADR program; employment contract] or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures, before resorting to arbitration, litigation, or some other dispute resolution procedure.

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

EMPL 4 The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures (the clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties).

D. Clauses for Use in Patent Disputes

The suitability of arbitration as a prompt and effective means of resolving intellectual property disputes has been well recognized in recent years. Those who use and support arbitration as a way of resolving intellectual property and licensing disputes have acknowledged the following advantages of arbitration over litigation in this technical field: relative speed and economy, privacy, convenience, informality, reduced likelihood of damage to ongoing business relationships, greater suitability to international problems, and, especially important, the ability of the parties to select arbitrators who are experts and familiar with the subject matter of the dispute.

The award is binding only on the parties to the arbitration, and the parties may agree that the award will be modified if the patent that is the subject of the arbitration is subsequently determined to be invalid or unenforceable. If parties foresee the possibility of needing emergency relief akin to a temporary restraining order, they might incorporate the Emergency Measures of Protection (Rule 38) of the AAA Commercial Arbitration Rules (effective October 1, 2013), or specify an

arbitrator by name for that purpose in their arbitration clause, or authorize the AAA to name a preliminary relief arbitrator; for sample clauses, consult Section V, discussion of Preliminary Relief. Parties can provide for arbitration of future disputes by inserting the following clause into their contracts.

PATENT 1 Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Patent Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following clause.

PATENT 2 We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Patent Arbitration Rules the following controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

If parties want to adopt mediation as a part of their contractual dispute settlement procedure, they can insert the following mediation clause in conjunction with a standard arbitration provision.

PATENT 3 If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

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

PATENT 4 The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures (the clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties).

V. Other Provisions That Might be Considered

This section contains various provisions which expand upon and are supplemental to the basic dispute resolution clauses set forth in Sections III and IV. The listing of such provisions is not intended to be all-inclusive and does not necessarily indicate that the AAA endorses the use of such additional language. The AAA recognizes, however, that some drafters choose to expand their dispute resolution clauses to reflect at least some of these ideas. Since it is important that practitioners be well informed when making choices in drafting, the section also sets forth, where appropriate, certain of the pros and cons of adopting the various supplemental provisions.

A. Specifying a Method of Selection and the Number of Arbitrators

Under the AAA's arbitration rules, arbitrators are generally selected using a listing process. The AAA case manager provides each party with a list of proposed arbitrators who are generally familiar with the subject matter involved in the dispute. Each side is provided a number of days to strike any unacceptable names, number the remaining names in order of preference, and return the list to the AAA. The case manager then invites persons to serve from the names remaining on the list, in the designated order of mutual preference. The parties may agree to have one arbitrator or three (which significantly increases the cost). If parties do not agree on the number of arbitrator(s), it will be left to the discretion of the AAA to decide the appropriate number of arbitrators.

The parties may use other arbitrator appointment systems, such as the party-appointed method in which each side designates one arbitrator and the two thus selected appoint the chair of the panel.

The Commercial Arbitration Rules, Construction Industry Arbitration Rules, Employment Arbitration Rules along with other domestic specialty rules provide that unless the parties specifically agree in writing that the party-appointed arbitrators are to be non-neutral, arbitrators appointed by the parties must meet the impartiality and independence standards set forth within the rules. The AAA's International Arbitration Rules indicate that all arbitrators acting under their rules shall be impartial and independent.

If parties intend that their party-appointed arbitrators serve in a non-neutral capacity, this should be clearly stated within their clause.

The arbitration clause can also specify by name the individual whom the parties want as their arbitrator. However, the potential unavailability of the named individual in the future may pose a risk.

All of these issues and others can be dealt with in the arbitration clause. Some illustrative provisions follow.

ARBSEL 1 The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within 10 days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request the American Arbitration Association to appoint the third neutral arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall provide an oath or undertaking of impartiality.

ARBSEL 2 Within 14 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within 10 days of their appointment. [The party-selected arbitrators will serve in a non-neutral capacity.] If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association.

ARBSEL 3 In the event that arbitration is necessary, [name of specific arbitrator] shall act as the arbitrator.

When providing for direct appointment of the arbitrator(s) by the parties, it is best to specify a time frame within which it must be accomplished. Also, in many jurisdictions, the law permits the court to appoint arbitrators where privately-agreed means fail. Such a result may be time consuming, costly, and unpredictable. Parties who seek to establish an ad-hoc method of arbitrator appointment might be well advised to provide a fallback, such as, should the particular procedure fail for any reason, "arbitrators shall be appointed as provided in the AAA Commercial Arbitration Rules."

B. Arbitrator Qualifications

The parties may wish that one or more of the arbitrators be a lawyer or an accountant or an expert in computer technology, etc. In some instances, it makes more sense to specify that one of three arbitrators be an accountant, for example, than to turn the entire proceeding over to three accountants. Sample clauses providing for specific qualifications of arbitrators are set forth below.

QUAL 1 The arbitrator shall be a certified public accountant.

QUAL 2 The arbitrator shall be a practicing attorney [or a retired judge] of the [[specify]] [Court].

QUAL 3 The arbitration proceedings shall be conducted before a panel of three neutral arbitrators, all of whom shall be members of the bar of the state of [specify], actively engaged in the practice of law for at least 10 years.

QUAL 4 The panel of three arbitrators shall consist of one contractor, one architect, and one construction attorney.

QUAL 5 The arbitrators will be selected from a panel of persons having experience with and knowledge of electronic computers and the computer business, and at least one of the arbitrators selected will be an attorney.

QUAL 6 In the event that any party's claim exceeds $1 million, exclusive of interest and attorneys' fees, the dispute shall be heard and determined by three arbitrators.

Parties might wish to specify that the arbitrator should or should not be a national or citizen of a particular country. The following examples can be added to the arbitration clause to deal with this concern.

NATLY 1 The arbitrator shall be a national of [country].

NATLY 2 The arbitrator shall not be a national of either [country A] or [country B].

NATLY 3 The arbitrator shall not be of the nationality of either of the parties.

C. Locale Provisions

Parties might want to add language specifying the place of the arbitration. The choice of the proper place to arbitrate is most important because the place of arbitration implies generally a choice of the applicable procedural law, which in turn affects questions of arbitrability, procedure, court intervention and enforcement.

In specifying a locale, parties should consider (1) the convenience of the location (e.g., availability of witnesses, local counsel, transportation, hotels, meeting facilities, court reporters, etc.); (2) the available pool of qualified arbitrators within the geographical area; and (3) the applicable procedural and substantive law. Of particular importance in international cases is the applicability of a convention providing for recognition and enforcement of arbitral agreements and awards and the arbitration regime at the chosen site.

An example of locale provisions that might appear in an arbitration clause follows.

LOC 1 The place of arbitration shall be [city], [state], or [country].

D. Language

In matters involving multilingual parties, the arbitration agreement often specifies the language in which the arbitration will be conducted. Examples of such language follow.

LANG 1 The language(s) of the arbitration shall be [specify].

LANG 2 The arbitration shall be conducted in the language in which the contract was written.

Such arbitration clauses could also deal with selection and cost allocation of an interpreter.

E. Governing Law

It is common for parties to specify the law that will govern the contract and/or the arbitration proceedings. Some examples follow.

GOV 1 This agreement shall be governed by and interpreted in accordance with the laws of the State of [specify]. The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement.

GOV 2 Disputes under this clause shall be resolved by arbitration in accordance with Title 9 of the US Code (United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association.

GOV 3 This contract shall be governed by the laws of the state of [specify].

In international cases, where the parties have not provided for the law applicable to the substance of the dispute, the AAA's International Arbitration Rules contain specific guidelines for arbitrators regarding applicable law. See the discussion concerning International Disputes.

F. Conditions Precedent to Arbitration

Under an agreement of the parties, satisfaction of specified conditions may be required before a dispute is ready for arbitration. Examples of such conditions precedent include written notification of claims within a fixed period of time and exhaustion of other contractually established procedures, such as submission of claims to an architect or engineer. These kinds of provisions may, however, be

a source of delay and may require linkage with a statute of limitations waiver (see below). An example of a "condition precedent" clause follows.

CONPRE 1 If a dispute arises from or relates to this contract, the parties agree that upon request of either party they will seek the advice of [a mutually selected engineer] and try in good faith to settle the dispute within 30 days of that request, following which either party may submit the matter to mediation under the Commercial Mediation Procedures of the American Arbitration Association. If the matter is not resolved within 60 days after initiation of mediation, either party may demand arbitration administered by the American Arbitration Association under its [applicable] rules.

G. Preliminary Relief

While preliminary relief is provided for in the AAA's Commercial Rules, when a clause calls for other rules it is appropriate to provide specifically for it if a need for an interim remedy is anticipated. One way to do so is to incorporate the Emergency Measures of Protection (R-38) of the AAA Commercial Arbitration Rules and Mediation Procedures, discussed above. Alternatively, if the parties foresee the possibility of needing emergency relief akin to a temporary restraining order, they might specify an arbitrator by name for that purpose in their arbitration clause or authorize the AAA to name a preliminary relief arbitrator to ensure an arbitrator is in place in sufficient time to address appropriate issues.

Specific clauses providing for preliminary relief are set forth below.

PRELIM 1 Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal's determination of the merits of the controversy).

Note that the AAA's rules provide for interim relief by the arbitrator upon application of a party.

Pending the outcome of the arbitration, parties may agree to hold in escrow money, a letter of credit, goods, or the subject matter of the arbitration. A sample of a clause providing for such escrow follows.

ESCROW 1 Pending the outcome of the arbitration [name of party] shall place in escrow with [law firm, institution, or AAA] as the escrow agent, [the sum of _____, a letter of credit, goods, or the subject matter in dispute]. The escrow agent shall be entitled to release the [funds, letter of credit, goods, or subject matter in dispute] as directed by the arbitrator(s) in the award, unless the parties agree otherwise in writing.

H. Consolidation

Where there are multiple parties with disputes arising from the same transaction, complications can often be reduced by the consolidation of all disputes. Since arbitration is a process based on voluntary contractual participation, parties may not be required to arbitrate a dispute without their consent. However, parties can provide for the consolidation of two or more separate arbitrations into a single proceeding or permit the joinder of a third party into an arbitration. In a construction dispute, consolidated proceedings may eliminate the need for duplicative presentations of claims and avoid the possibility of conflicting rulings from different panels of arbitrators. However, consolidating claims might be a source of delay and expense. An example of language that can be included in an arbitration clause follows.

CONSOL 1 The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding companies, and other parties concerned with the construction of the structure are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first-filed of such proceedings shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s).

I. Document Discovery

Under the AAA rules, arbitrators are authorized to direct a prehearing exchange of documents. The parties typically discuss such an exchange and seek to agree on its scope. In most (but not all) instances, arbitrators will order prompt production of limited numbers of documents which are directly relevant to the issues involved. In some instances, parties might want to ensure that such production will in fact occur and thus provide for it in their arbitration clause.

In doing so, however, they should be mindful of what scope of document production they desire. This may be difficult to decide at the outset. If the parties address discovery in the clause, they might include time limitations as to when all discovery should be completed and might specify that the arbitrator shall resolve outstanding discovery issues. Sample language is set forth below.

DOC 1 Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of documents [relevant to the issues raised by any claim or counterclaim] [on which the producing party may rely in support of or in opposition to any claim or defense]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [arbitrator(s)] [chair of the arbitration panel], which determination shall be conclusive. All discovery shall be completed within [45] [60] days following the appointment of the arbitrator(s).

The AAA's various commercial arbitration rules provide an opportunity for an administrative conference with the AAA staff and/or a preliminary hearing with the arbitrator. The purposes of such meetings include establishing the extent of and a schedule for production of relevant documents and other information.

J. Depositions

Generally, arbitrators prefer to hear and be able to question witnesses at a hearing rather than rely on deposition testimony. However, parties are free to provide in their arbitration clause for a tailored discovery program, preferably to be managed by the arbitrator. This might occur, for example, if the parties anticipate the need for distant witnesses who would not be able to testify except through depositions or, in the alternative, by the arbitrator holding a hearing where the witness is located and subject to subpoena. In most cases where parties provide for depositions, they do so in very limited fashion, i.e., they might specify a 30-day deposition period, with each side permitted three depositions, none of which would last more than three hours. All objections would be reserved for the arbitration hearing and would not even be noted at the deposition except for objections based on privilege or extreme confidentiality. Sample language providing for such depositions is set forth below.

DEP 1 At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of [three] [insert number] per party and shall be held within 30 days of the making of a request. Additional depositions may be scheduled only with the permission of the

[arbitrator(s)] [chair of the arbitration panel], and for good cause shown. Each deposition shall be limited to a maximum of [three hours] [six hours] [one day's] duration. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

K. Duration of Arbitration Proceeding

While AAA Commercial Arbitration Rules normally provide for an award within 30 days of the closing of the hearing, parties sometimes underscore their wish for an expedited result by providing in the arbitration clause, for example, that there will be an award within a specified number of months of the notice of intention to arbitrate and that the arbitrator(s) must agree to the time constraints before accepting appointment. Before adopting such language, however, the parties should consider whether the deadline is realistic and what would happen if the deadline were not met under circumstances where the parties had not mutually agreed to extend it (e.g., whether the award would be enforceable). It thus may be helpful to allow the arbitrator to extend time limits in appropriate circumstances. Sample language is set forth below.

TIME 1 The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of the parties or by the arbitrator(s) if necessary.

L. Remedies

Under a broad arbitration clause and most AAA rules, the arbitrator may grant "any remedy or relief that the arbitrator deems just and equitable" within the scope of the parties' agreement. Sometimes parties want to include or exclude certain specific remedies. Examples of clauses dealing with remedies follow.

REM 1 The arbitrators will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.

REM 2 In no event shall an award in an arbitration initiated under this clause exceed $_____.

REM 3 In no event shall an award in an arbitration initiated under this clause exceed $_____ for any claimant.

REM 4 The arbitrator(s) shall not award consequential damages in any arbitration initiated under this section.

REM 5 Any award in an arbitration initiated under this clause shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount.

REM 6 If the arbitrator(s) find liability in any arbitration initiated under this clause, they shall award liquidated damages in the amount of $_____.

REM 7 Any monetary award in an arbitration initiated under this clause shall include pre-award interest at the rate of ____% from the time of the act or acts giving rise to the award.

M. "Baseball" Arbitration

"Baseball" arbitration is a methodology used in many different contexts in addition to baseball players' salary disputes, and is particularly effective when parties have a long-term relationship.

- The procedure involves each party submitting a number to the arbitrator(s) and
- serving the number on his or her adversary on the understanding that,
- following a hearing, the arbitrator(s) will pick one of the submitted numbers, nothing else.

A key aspect of this approach is that there is incentive for a party to submit a highly reasonable number, since this increases the likelihood that the arbitrator(s) will select that number. In some instances, the process of submitting the numbers moves the parties so close together that the dispute is settled without a hearing. Sample language providing for "baseball" arbitration is set forth below.

BASEBALL 1 Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers. The arbitrator shall be limited to awarding only one or the other of the two figures submitted.

N. Arbitration Within Monetary Limits

Parties are often able to negotiate to a point but are then unable to close the remaining gap between their respective positions. By setting up an arbitration that must result in an award within the gap that remains between the parties, the parties are able to eliminate extreme risk, while gaining the benefit of the extent to which their negotiations were successful.

There are two commonly-used approaches. The first involves informing the arbitrator(s) that the award should be somewhere within a specified monetary range. Sample contract language providing for this methodology is set forth below.

LIMITS 1 Any award of the arbitrator in favor of [specify party] and against [specify party] shall be at least [specify a dollar amount] but shall not exceed [specify a dollar amount]. [Specify a party] expressly waives any claim in excess of [specify a dollar amount] and agrees that its recovery shall not exceed that amount. Any such award shall be in satisfaction of all claims by [specify a party] against [specify a party].

A second approach is for the parties to agree but not tell the arbitrator(s) that the amount of recovery will, for example, be somewhere between $500 and $1,000. If the award is less than $500, then it is raised to $500 pursuant to the agreement; if the award is more than $1,000, then it is lowered to $1,000 pursuant to the agreement; if the award is within the $500-1,000 range, then the amount awarded by the arbitrator(s) is unchanged. Sample contract language providing for this methodology is set forth below.

LIMITS 2 In the event that the arbitrator denies the claim or awards an amount less than the minimum amount of [specify], then this minimum amount shall be paid to the claimant. Should the arbitrator's award exceed the maximum amount of [specify], then only this maximum amount shall be paid to the claimant. It is further understood between the parties that, if the arbitrator awards an amount between the minimum and the maximum stipulated range, then the exact awarded amount will be paid to the claimant. The parties further agree that this agreement is private between them and will not be disclosed to the arbitrator.

O. Assessment of Attorneys' Fees

The AAA rules generally provide that the administrative fees be borne as incurred and that the arbitrators' compensation be allocated equally between the parties and, except for international rules, are silent concerning attorneys' fees; but this can be modified by agreement of the parties. Fees and expenses of the arbitration, including attorneys' fees, can be dealt with in the arbitration clause. Defining the term 'prevailing party' within the contract is recommended to avoid misunderstanding. Some typical language dealing with fees and expenses follows.

FEE 1 The prevailing party shall be entitled to an award of reasonable attorney fees.

FEE 2 The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees.

FEE 3 Each party shall bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration.

FEE 4 The arbitrators may determine how the costs and expenses of the arbitration shall be allocated between the parties, but they shall not award attorneys' fees.

P. Reasoned Opinion Accompanying the Award

In domestic commercial cases, arbitrators usually will write a reasoned opinion explaining their award if such an opinion is requested by all parties. While some take the position that reasoned opinions detract from finality if they facilitate post-arbitration resort to the courts, parties sometimes desire such opinions, particularly in large, complex cases or as already provided by most applicable rules in international disputes. If the parties want such an opinion, they can include language such as the following in their arbitration clause.

OPIN 1 The award of the arbitrators shall be accompanied by a reasoned opinion.

OPIN 2 The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.

OPIN 3 The award shall include findings of fact [and conclusions of law].

OPIN 4 The award shall include a breakdown as to specific claims.

Q. Confidentiality

While the AAA and arbitrators adhere to certain standards concerning the privacy or confidentiality of the hearings (see the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI), parties might also wish to impose limits on themselves as to how much information regarding the dispute may be disclosed outside the hearing. The following language might help serve this purpose.

CONF 1 Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

The preceding language could also be modified to restrict only disclosure of certain information (e.g., trade secrets).

R. Appeal

The basic objective of arbitration is a fair, fast and expert result, achieved economically. Consistent with this goal, an arbitration award traditionally will be set aside only in egregious circumstances such as demonstrable bias of an arbitrator. Sometimes, however, the parties desire a more comprehensive appeal, most often in the setting of legally complex cases. Parties may include the AAA Appellate Rules in their agreement by including the following clause.

APP 1 "Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA's Optional Appellate Arbitration Rules ("Appellate Rules"); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof..."

S. Mediation-Arbitration

A clause may provide first for mediation under the AAA's mediation procedures. If the mediation is unsuccessful, the mediator could be authorized to resolve the dispute under the AAA's arbitration rules. This process is sometimes referred to as "Med-Arb." Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions ex parte, improperly influencing the arbitrator. The AAA Commercial Arbitration Rules and Mediation Procedures (effective October 1, 2013) provide for a mediation/arbitration process that runs concurrently. A sample of a med-arb clause follows that runs sequentially can be used to submit a present dispute or to vary the revised AAA Commercial Rules in a dispute resolution clause.

MEDARB 1 If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. Any

unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator.

T. Statute of Limitations

Parties may wish to consider whether the applicable statute of limitations will be tolled for the duration of mediation proceedings, and can refer to the following language.

STATLIM 1 The requirements of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process.

U. Dispute Resolution Boards

A Dispute Resolution Board (DRB) provides a prompt, rational, impartial review of disputes by mutually accepted experts, which frequently results in substantial cost savings and can eliminate years of wasted time and energy in litigation. DRB procedures may be made a part of construction contract documents.

The contract should contain a paragraph reflecting the agreement to establish the DRB. The text of the actual procedures also should be physically incorporated into the general conditions or supplementary conditions of the contract for construction wherever possible and practical, and such documents as the invitation to bidders or the request for proposals should mention that the formation of a DRB is contemplated. The DRB procedures should be coordinated with the other dispute resolution procedures required by the contract documents.

Suggested language for incorporation in the contract follows.

DRB 1 The parties shall impanel a Dispute Resolution Board of one or three members in accordance with the Dispute Resolution Board Guide Specifications of the American Arbitration Association. The DRB, in close consultation with all interested parties, will assist and recommend the resolution of any disputes, claims, and other controversies that might arise among the parties.

V. Mass Torts

ADR techniques can be employed privately by parties facing the prospect of mass tort litigation to explore in a nonbinding fashion the options for management, evaluation, and/or resolution of the dispute. A wide range of binding and nonbinding techniques, including neutral evaluation, mediation, and arbitration can be used to explore the potential for resolution of a dispute and/or to develop a basic framework for discussions. Although these options have limitations and may not be a substitute for litigation with possible full evidentiary trials, they can provide a useful framework for early discussion of the issues. The parties should be able to formulate procedures to assure confidentiality and to protect against the inappropriate use of information.

Conclusion

A dispute resolution clause should address the special needs of the parties involved. An inadequate ADR clause can produce as much delay, expense, and inconvenience as a traditional lawsuit. When writing a dispute resolution clause, keep in mind that its purpose is to resolve disputes, not create them. If disagreements arise over the meaning of the clause, it is often because it failed to address the particular needs of the parties. Use of standard, simple AAA language may avoid difficulties. Drafting an effective ADR agreement is the first step on the road to successful dispute resolution.

After a dispute arises, parties can request an administrative conference with a AAA case manager to assist them in establishing appropriate procedures necessary for their unique case. This can be done before or after mediator or arbitrator selection. Such conferences can expedite the proceedings in many cases.

This brochure describes ways in which some parties have modified the AAA's time-tested standard clause to deal with specific concerns. Given that commercial transactions vary greatly, its purpose is not to urge use of the provisions cited, but rather to suggest the range of possible options. To arrive at the most suitable and effective ADR clause, parties should consult legal counsel for guidance and advice.

Rules, forms, procedures and guides, as well as information about applying for a fee reduction or deferral, are subject to periodic change and updating.

To ensure that you have the most current information, see our website at **www.adr.org.** Also, for assisted clause drafting, please visit the AAA's clause building tool at **www.clausebuilder.org.**

Articles on Challenging Arbitration Agreements and/or Awards Based Upon Alleged Fraud

By Kevin Schlosser

NEW YORK FRAUD CLAIMS BLOG

www.nyfraudclaims.com

First Department Rejects Effort to Vacate Arbitration Award Based Upon Alleged Fraud on Tribunal For Procedural and Substantive Reasons

June 20, 2023

In the recent decision in *Republic of Kazakhstan v Chapman*, 2023 NY Slip Op 03211 (1st Dep't Decided June 13, 2023), the First Department affirmed the dismissal of claims seeking to vacate an arbitration award based upon allegations of fraud. The decision is a good source of accepted principles, including relating to claims of aiding and abetting fraud, conspiracy to commit fraud and the element of reasonable reliance.

Arbitration Awards

As often recognized, is it extremely difficult to vacate an arbitration award. The grounds are quite limited. One accepted ground, embodied in the Federal Arbitration Act (FAA), is where the award was "procured by fraud." A party seeking to challenge an arbitration award based upon evidence of fraud submitted to the arbitrator(s) must prove a number of elements.

Specifically, the FAA provides that an arbitration award may be vacated "where the award was procured by corruption, fraud, or undue means." 9 USC § 10(a)(1). A petitioner seeking to vacate an arbitration award on the basis that it was procured by fraud must plead that "(1) respondent engaged in fraudulent activity; (2) even with the exercise of due diligence, petitioner could not have discovered the fraud prior to the award issuing; and (3) the fraud materially related to an issue in the arbitration." *Odeon Capital Group LLC v. Ackerman,* 864 F 3d 191, 196 (2d Cir 2017). In the context of a request to vacate an arbitration award, a petitioner need not demonstrate that, but for the alleged fraud, the arbitrators would have reached a different result *(id.).* Rather, the petitioner must demonstrate that there is a nexus between the alleged fraud and the decision of the arbitrator *(id.).*

In *Chapman*, the First Department did not have to address the issues under the FAA because it found that plaintiff had already litigated those issues both in the arbitration and in a separate federal court action and lost. Thus, the First Department ruled that collateral estoppel barred the claims there. The First Department also rejected the plaintiffs' claim based upon what it argued was newly-discovered evidence of the alleged fraud:

These allegations cannot undermine the preclusive effect of the earlier decisions. "There is a well-settled rule prohibiting challenges to arbitral awards on the basis of newly discovered evidence . . . Without such a rule, the arbitration award would be the beginning rather than the end of the controversy and the protracted litigation which arbitration is meant to avoid would be invited" (*Matter of Hirsch Constr. Corp. [Cooper]*, 181 AD2d 52, 55 [1st Dept 1992][internal quotation marks and citation omitted], *lv denied* 81 NY2d 701 [1992] [rejecting challenge to arbitration award on the basis of "newly discovered evidence which was not before the arbitrators"]; *Matter of DiNapoli v Peak Automotive, Inc.*, 34 AD3d 674, 675 [2d Dept 2006], citing *Matter of Hirsch*; *see also* Restatement [Second] of Judgments, § 27, comment c [1982] ["(I)f the party against whom preclusion is sought did in fact litigate an issue of ultimate fact (i.e., an issue requiring application of law to fact) and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that . . . (issue)"]; *Karaha Bodas Co., L.L.C. v Perusahaan Pertambangan Minyak Da Gas Bumi Negara*, 500 F3d 111, 122 [2d Cir 2007]).

No Underlying Fraud

The First Department also ruled that plaintiff had failed to allege viable claims of fraud in any event.

The Court first rejected the claims of "aiding and abetting" fraud because plaintiff had not properly alleged an underlying fraud claim. Specifically, the Court ruled plaintiff could not have justifiably relied on alleged misrepresentations made by an adversary in the course of litigation:

Even if collateral estoppel did not apply to all of plaintiff's claims, those claims would still warrant dismissal for failure to state a cause of action (CPLR 3211 [a] [7]). The aiding and abetting fraud and conspiracy to commit fraud claims fail, since the complaint does not include detailed allegations of an underlying fraud (*see* CPLR 3016 [b]; *Habberstad v Revere Sec. LLC*, 183 AD3d 532, 533 [1st Dept 2020]; *Kovkov v Law Firm of Dayrel Sewell, PLLC*, 182 AD3d 418, 419 [1st Dept 2020]). Specifically, the allegations do not support justifiable reliance on the Statis' misrepresentations of fact or omissions (*see Rapaport v Strategic Fin. Solutions, LLC*, 190 AD3d 657, 657-658 [1st Dept 2021]), as they "were undertaken in the course of adversarial

proceedings and were fully controverted" by plaintiff's own proffered evidence (*Sammy v Haupel*, 170 AD3d 1224, 1226-1227 [2d Dept 2019]; *see also Shaffer v Gilberg*, 125 AD3d 632, 635 [2d Dept 2015] [the plaintiff "always maintained that he knew" promissory notes were fake]; *Zappin v Comfort*, 2022 WL 6241248, at *15 [SD NY 2022] ["In the context of an adversarial proceeding, Plaintiff is hard-pressed to assert reliance on claims that he constantly disputed"]). Plaintiff's allegations of misrepresentations to parties other than arbitrator tribunals or courts additionally fail for lack of damages.

I have commented upon these principles often and specifically the *Sammy* case cited above. See *Fraud Claims Fail Because Plaintiff Could Not Have Believed the Alleged Misrepresentation was False and Thus No Reasonable Reliance*.

The First Department also rejected the "conspiracy" and aiding and abetting claims because they were insufficiently conclusory:

The claim for conspiracy to commit fraud also fails because the allegations of an "agreement among the conspirators" are "conclusory" (*Kovkov*, 182 AD3d at 419), while the aiding and abetting claim fails because the complaint includes only "'allegations which would be sufficient to state a claim against the principal participants in the fraud' combined with conclusory [*3]allegations that the aider and abettor had actual knowledge of such fraud" (*Goel v Ramachandran*, 111 AD3d 783, 792 [2d Dept 2013], quoting *National Westminster Bank v Weksel*, 124 AD2d 144, 149 [1st Dept 1987], *lv denied* 70 NY2d 604 [1987]).

Commentary

The First Department decision in *Chapman* is a good summary of the law relating to vacating arbitration awards based upon alleged newly-discovered evidence of claimed fraud, as well as principles governing claims of aiding and abetting fraud, conspiracy to commit fraud and the element of justifiable reliance.

Commercial Division Rejects Conclusory Claims of "Grand Fraudulent Scheme" Attempting to Avoid Arbitration

Feb 13, 2023

The so-called doctrine of severability as applied to agreements to arbitrate disputes is well-recognized. Basically, provisions that require disputes to be resolved by arbitration that are contained as part of broader contracts are viewed separately from any other provision of the contract for purposes of determining any challenge to arbitration based upon fraud or fraudulent inducement. Generally, if the alleged fraud did not particularly target the arbitration provision itself, courts will not allow a party to the broader contract in which that provision is contained to avoid arbitration based upon a claim of fraudulent inducement. I have written often about these concepts. See, e.g., *Federal Court Rejects Challenge to Arbitration Clause Based Upon Alleged Fraudulent Inducement*; *Special Rules for Nullifying Arbitration Agreements for Alleged Fraud*; *Courts Reinforce Strict Standards for Nullifying Arbitration Provision Based Upon Fraud*; *Second Department Reinforces Vitality of Arbitration Clauses in Face of Fraud Claim*.

Of course, if the broader contract is being challenged based upon the rarely-sustainable argument of fraud in the factum, which would make the entire contract void *ab initio*, that would potentially be decided by the court rather than in arbitration. See *First Department Explains Distinction Between Void and Voidable Documents and Corresponding Fraud*.

Given the rather consistent governing law, it is somewhat remarkable that parties continue to seek to circumvent arbitration provisions with nothing more than conclusory arguments of fraud in the inducement of the contract or unspecified assertions that the arbitration provision was used as part of a "grand fraudulent scheme." A recent example of such ineffective arguments is reflected in the decision of the New York Supreme Court Commercial Division in Kings County in *Gowanus Park LLC v. KSK Construction Group LLC*, Index No. 517124/2022, Jan. 25, 2023 (Ruchelsman, J.).

Gowanus Facts

In *Gowanus*, the plaintiff property owner entered into a contract with defendant KSK Construction Group LLC for the construction of a four-story residential building. In connection with the promised construction, the parties entered into a standard AIA contract, which contained a broad arbitration provision requiring any disputes to be resolved by arbitration before the American Arbitration Association, under the Construction Industry Arbitration Rules. Those Rules broadly delegate questions of the

arbitrator's own jurisdiction and the existence, scope, or validity of the arbitration agreement to the arbitrator. See NYSCEF No. 7, pp.2-3.

The plaintiff instituted an action in court alleging, among other things, that defendant "made material representations and omissions regarding its experience and ability to manage and complete the construction project to induce [plaintiff] to enter into an agreement with [defendant]. [Plaintiff] relied on [defendant]'s representations and omissions and entered into the contract with [defendant]. In fact, however, [defendant] was wholly incapable of managing or completing the project and subsequently walked off the job. Moreover, most of the work performed by [defendant] was riddled with defects and had to be redone at significant cost to [plaintiff]." See NYSCEF No. 1.

Defendant moved to stay the action against it in view of and pending the arbitration that had already been commenced between the parties under the AIA contract.

In opposition to the motion to stay the pending arbitration, plaintiff claimed in rather conclusory fashion that defendant's "fraudulent misrepresentations were part of a grand scheme that permeate[d] the entire" AIA contract. See NYSCEF No. 7.

The Commercial Division granted the motion to stay, enforced the arbitration provisions and rejected plaintiff's conclusory assertions.

Arbitration is Upheld

The Court first acknowledged the public policy favoring arbitration and alternative dispute resolution mechanisms. The Court then explained the manner in which challenges to arbitration provisions is determined:

An allegation of fraud in the inducement only affects the arbitration clause when either the fraud relates to the arbitration clause itself or where the fraud was "part of a grand scheme that permeated the entire contract"(see, *Anderson Street Realty. Corp., v. New Rochelle Revitalization LLC*, 78 AD3d 972, 913 NYS2d 114 [2d Dept., 2010]). "To demonstrate that fraud permeated the entire contract, it must be established that the agreement was not the result of an arm's length negotiation … or the arbitration clause was inserted into the contract to accomplish a fraudulent scheme" (id).

Thus, even *332 East 66 Street. Inc., v. Walker*, 59 Misc3d 1216(A), 106 NYS34 727 (Supreme Court New York County 2018) cited by the plaintiff held that "generally, under a broad arbitration provision, the claim of fraud in the inducement of the agreement is deemed to be included as a matter for arbitrators to determine" (.id). The court did explain that to avoid arbitration the fraud had to relate to the arbitration clause itself or that "something greater than the substantive provisions of the agreement were induced by fraud" (id).

***

In this case the plaintiff alleges there was a grand scheme of fraud that permeated the entire contract. However, mere fraudulent inducement does not establish the fraud permeated the entire contract (*Tiki Boatworks LLC v. Crusin' Tikis LLC*, 2021 WL1198256 [N.D.N.Y. 2021]). Consequently, without additional evidence that fraudulent inducement included something greater than the provisions of the agreement itself no such fraudulent scheme has been presented and there is no basis upon which to deny arbitration (see, *Markowitz v. Friedman*, 144 A.D.3d 993, 42 NYS3d 213 [2d Dept., 2016]). The plaintiff has failed to produce any evidence that the contract entered into between the parties was not an arms length negotiation or that any alleged fraud in the inducement was a scheme which permeated the entire contract.

Thus, the court granted the motion to stay the action pending the arbitration.

Federal Court Rejects Challenge to Arbitration Clause Based Upon Alleged Fraudulent Inducement

Feb 16, 2021

Overturning an agreement to arbitrate by claiming fraudulent inducement is not easy or straightforward. I have explained the analysis applied by the New York State Courts in a number of posts. *See,e.g.*, *Special Rules for Nullifying Arbitration Agreements for Alleged Fraud*, Nov 29, 2016; *Courts Reinforce Strict Standards for Nullifying Arbitration Provision Based Upon Fraud*, Jul 5, 2017; *Second Department Reinforces Vitality of Arbitration Clauses in Face of Fraud Claim*, Jul 16, 2018.

Basically, as I have explained, if the agreement to arbitrate is part of a broader agreement, courts focus on whether the arbitration provision itself was the subject of a scheme to defraud, rather than the entire agreement. Thus, even when there are grounds to rescind a contract based upon established fraud, courts will still enforce provisions of that contract in which the parties agreed to arbitrate disputes regarding that contract unless it can be shown that the alleged fraud related specifically to the arbitration clause. So, even if the broader contract itself would be subject to rescission based upon fraud, the issue of fraud must be decided in arbitration.

EDNY Case

A recent decision by the United States District Court for the Eastern District of New York (Garaufis, J.), followed a similar analysis and rejected a challenge to an arbitration clause, in *More Roofing, Inc. v. Scrivens*, 19-CV-4925 (NGG)(LB) (E.D.N.Y. Feb. 5, 2021).

In *Scrivens*, the plaintiff was a construction contractor. Plaintiff had hired two employees, a manager for its New Jersey office, and an assistant to work with him. The manager caused plaintiff to enter into eight contracts with two subcontractors. Plaintiff alleged that the manager breached his fiduciaries duties to plaintiff and falsified information about these subcontractors that he supplied to the plaintiff's principal to induce the plaintiff to give these jobs to the respective subcontractors, certain of whom the manager allegedly had a personal interest in. Plaintiff asserted a number claims, including fraud against the individual (former) employees as well as a claim of fraudulent inducement against one of the subcontractors which entered into the subcontracts with plaintiff.

The defendant subcontractor moved to dismiss or to compel arbitration based upon an arbitration clause contained in the subcontract with plaintiff. The relevant arbitration clauses provided: "'Any claim arising out of or related to this Subcontract … shall be subject to arbitration.'"

The Court therefore determined whether the claim of fraudulent inducement of the subcontracts was to be decided in arbitration or in the federal court action.

Federal Principles

The Court in *Scrivens* relied upon the Second Circuit's analysis of federal arbitration principles explained in *Sphere Drake Ins. v. Clarendon Nat. Ins. Co.*, 263 F.3d 26 (2d Cir. 2001). *Sphere* involved a similar fact pattern in which employees were accused of breaching their fiduciary duties by causing the plaintiff to enter into contracts. As relevant, the Second Circuit explained the principles to be applied when arbitration clauses are challenged:

If a party alleges that a contract is void and provides some evidence in support, then the party need not specifically allege that the arbitration clause in that contract is void, and the party is entitled to a trial on the arbitrability issue pursuant to 9 U.S.C.A. § 4 and the rule of *Interocean [Shipping Co. v. Nat'l Shipping Trading Corp.*, 462 F.2d 673 (2d Cir. 1972)]. However, under the rule of *Prima Paint [Corp. v. Flood Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)], if a party merely alleges that a contract is voidable, then, for the party to receive a trial on the validity of the arbitration clause, the party must specifically allege that the arbitration clause is itself voidable. Accordingly, to defeat the arbitration clauses in the contracts at issue, Sphere Drake must allege that the contracts as a whole are void or that the arbitration clauses in the contracts are voidable. Of course, it is not enough for Sphere Drake to make allegations — Sphere Drake must also produce some evidence substantiating its claim. *See Interbras Cayman Co. v. Orient Victory Shipping Co., S.A.*, 663 F.2d 4, 7 (2d Cir. 1981) (per curiam).

Sphere, 263 F.3d at 32.

The Second Circuit further explained what is referred to as "the severability doctrine:"

— that "arbitration clauses as a matter of federal law are `separable' from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.' 388 U.S. at 402, 87 S.Ct. 1801; *cf. Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 452 (2d Cir. 1995) (discussing, in dicta, separability of arbitration clauses).")

Id. at 31.

In following *Sphere*, the District Court in *Scrivens* found the facts analogous, and ruled:

[Plaintiff] has made specific allegations of fraud against [the former employees], including that they falsified documents and signatures, and engaged in undisclosed self-dealing. … However, [plaintiff] makes no claims about [the defendant subcontractor's] knowledge of or involvement in any fraudulent activity. The closest allegation that could be so construed is [plaintiff]'s assertion that Defendant Frank Cyrwus was "complicit in the fraud," …, but it offers no evidence of his complicity, nor does it ever clarify the relationship between Cyrwus and [the defendant subcontractor], the company that bears his name. To show that its contracts with [the defendant subcontractor] are void, [plaintiff] would need to offer evidence of [the defendant subcontractor's] knowledge of or involvement in the fraud beyond "merely speculation." *Sphere Drake,* 263 F.3d at 33. Because it has failed to do so, and because it makes no claims about fraud in the inducement of the arbitration clauses specifically, [plaintiff] has not met its burden to show that the dispute is unsuitable for arbitration. ***…*** Accordingly, [plaintiff] must direct its claims against [the defendant subcontractor] to an arbitrator, not the court.

Commentary

The analysis applied by federal courts and under the Federal Arbitration Act is similar to that applied by the New York State Courts. Unless the entire contract at issue is void, the arbitration clause must specifically be tainted by alleged fraud in order to be disregarded. In federal court, the issues are decided in a manner similar to summary judgment, so the party alleging that the arbitration clause is voidable for fraud must raise material factual issues so as to require a trial on that issue in federal court rather than in arbitration.

Second Department Reinforces Vitality of Arbitration Clauses in Face of Fraud Claim

Jul 16, 2018

As explained in my previous posts, there are special rules that the courts apply to arbitration clauses in contracts when the entire contract is being challenged based upon a claim of fraudulent inducement. Given that courts like to see disputes resolved through arbitration, they take pains to enforce contractual arbitration clauses.

For example, if the agreement to arbitrate is part of a broader agreement, courts focus on whether the arbitration provision itself was the subject of a scheme to defraud, rather than the entire agreement. Thus, even when there are grounds to rescind a contract based upon established fraud, courts will still enforce provisions of that contract in which the parties agreed to arbitrate disputes regarding that contract unless it can be shown that the alleged fraud related specifically to the arbitration clause. So, even if the broader contract itself would be subject to rescission based upon fraud, the issue of fraud must be decided in arbitration.

A recent decision of the Appellate Division, Second Department, addresses the issues and reinforces the favorable treatment of arbitration clauses — *Zafar v Fast Track Leasing, LLC*, 2018 NY Slip Op 04774 (2d Dep't Decided on June 27, 2018).

"Broad" Arbitration Clause

In *Zafar*, the subject contract concerned plaintiffs' promotion and marketing of defendant's services to for-hire vehicle drivers. According to the Second Department: The contract contained "a broad arbitration provision which, in relevant part, mandated that 'any dispute, controversy or claim arising out of or relating to [contract] shall be settled promptly by arbitration.'" The contract "also included a provision whereby [plaintiff] acknowledged that the agreement was executed 'voluntarily and without any duress or undue influence,' and that [plaintiff] understood the terms, consequences, and binding effect of the" contract.

The contract also "contained a moral turpitude clause which provided that [defendant] could immediately terminate the [contract] via certain notice provisions, without a right to cure by [plaintiff], at any time following the time that it became aware that [plaintiff] or any [plaintiff] representative had committed any act or become involved in any situation or occurrence which brought [defendant] or [plaintiff] 'into public disrepute, scandal or ridicule,' shocked or offended the community, or 'derogate[d] from the public image.'"

The Underlying Dispute

As relevant to the appeal, defendant terminated the contract pursuant to the moral turpitude clause after it learned that one of plaintiff's principals had been sentenced to a

prison term upon his conviction of the crime of scheme to defraud in the first degree. The plaintiffs thereafter commenced an action in court against the defendants, alleging fraud, unjust enrichment and breach of fiduciary duty, seeking to impose a constructive trust in connection with the contract. The defendant then moved pursuant to the Federal Arbitration Act (9 USC § 1 *et seq.*) and CPLR 7503(a) to compel the plaintiffs to arbitrate the dispute pursuant to the arbitration provision of the contract and to stay the court proceedings pending arbitration. The Supreme Court granted the defendants' motion, and the plaintiffs appealed.

Second Department Reinforces Arbitration Clauses

The Second Department affirmed, reinforcing the vitality of arbitration provisions. Although the arbitration clause in the contract was fairly standard (requiring that "any dispute, controversy or claim arising out of or relating to [contract] shall be settled promptly by arbitration"), the Second Department viewed this as the requisite "broad" language sufficient to uphold the arbitration requirement even in the face of the fraud claim. As reviewed in my earlier post, the Second Department's view of the arbitration clause as "broad" was consistent with the way the courts treat these arbitration provisions:

Examples of "broad" arbitration clauses for these purposes are found in *Anderson St. Realty Corp. v New Rochelle Revitalization, LLC*, 78 AD3d 972 (2d Dep't 2010)("the arbitration clause was broad, since it applied if 'any disagreement, deadlock, interpretation or dispute shall arise' under the … agreement"); *Riverside Capital Advisors, Inc. v Winchester Global Trust Co. Ltd.*, 21 AD3d 887 (2d Dep't 2005)("An arbitration clause in the severance agreement stated that 'any controversy or claim arising out of or in relation to this Agreement or the breach thereof will, to the fullest extent permitted by law, be settled by arbitration.'"); and *Ferrarella v Godt*, 131 AD3d 563 (2d Dep't 2015)("Stock Purchase Agreement contained an arbitration clause which provided, in pertinent part: 'In the event any dispute shall arise pursuant to any term or provision of this Agreement, the same shall be settled by arbitration in accordance with the rules and regulations of the American Arbitration Association (hereinafter 'AAA') within the County of Queens.'").

In *Zafar*, the Second Department ruled:

A party may not be compelled to arbitrate a dispute unless there is evidence which affirmatively establishes that the parties clearly, explicitly, and unequivocally agreed to arbitrate the dispute (*see God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP, 10 AD3d 671*, 672, *affd* 6 NY3d 371). Under both federal and New York law, unless it can be established that there was a grand scheme to defraud which permeated the entire agreement, including the arbitration provision, a broadly worded

arbitration provision will be deemed separate from the substantive contractual provisions, and the agreement to arbitrate may be valid despite the underlying allegation of fraud (*see Riverside Capital Advisors, Inc. v Winchester Global Trust Co. Ltd., 21 AD3d 887*, 889; *Stellmack A.C. & Refrig. Corp. v Contractors Mgt. Sys. of NH,* 293 AD2d 956, 957; *see also Cologne Reins. Co. of Am. v Southern Underwriters,* 218 AD2d 680).

The broad arbitration clause in the [contract], together with the other provisions of the [contract], demonstrate that the plaintiffs explicitly and unequivocally agreed to arbitrate the matters that are the subject of this action. In addition, the plaintiffs' bare conclusory assertions of fraud failed to establish that any alleged fraud was part of a grand scheme that permeated the entire agreement, including the arbitration clause (*see Matter of Weinrott [Carp],* 32 NY2d 190, 197; *Cologne Reins. Corp. of Am. v Southern Underwriters,* 218 AD2d at 681).

Commentary

It may seem logical that if a party is induced by fraud to enter into a contract, the entire contract is vulnerable to the fraud claim, and thus, rescission. However, when it comes to arbitration provisions in the challenged contract broadly requiring arbitration as the means of resolving all disputes concerning that contract, the courts will enforce that arbitration requirement unless the alleged fraud relates specifically to the arbitration clause in particular. Thus, the dispute concerning the contract is still subject to arbitration for the resolution of the claims, including the fraud claims.

Special Rules for Nullifying Arbitration Agreements for Alleged Fraud

Nov 29, 2016

One of the powerful remedies for establishing fraud is the ability to rescind or nullify an agreement that was induced by fraud. See my post discussing the broad scope of remedies for fraud. There are special rules, however, for nullifying provisions in which parties agree that disputes regarding a given agreement are to be resolved by arbitration. Courts are particularly fond of agreements to arbitrate and take pains to see that they are enforced.

If the agreement to arbitrate is part of a broader agreement, courts focus on whether the arbitration provision itself was the subject of a scheme to defraud, rather than the entire agreement. Thus, even when there are grounds to rescind an agreement based upon established fraud, courts will still give effect to the provisions of that agreement in which the parties agreed to arbitrate disputes regarding that agreement unless it can be shown that the fraud related specifically to the agreement to arbitrate. So, even if the broader agreement itself would be subject to rescission based upon fraud, the issue of fraud is to be decided in arbitration.

A recent decision of the Appellate Division, Second Department, addresses the issues and illustrates the point — *Markowits v Friedman*, 2016 NY Slip Op 07932 (2d Dep't Decided on November 23, 2016). In *Markowits,* defendants entered into two agreements with the plaintiff whereby they agreed to sell an interest in the subject companies and an option to purchase the remainder interests. The parties then modified the agreements to provide supplemental payment terms. In connection with the modification, they executed related documents, including a promissory note from plaintiff for a portion of the purchase price, and a confession of judgment in the same sum. They also agreed "to submit to arbitration 'any disputes [which should] arise between them concerning the sale . . . relating directly or indirectly to the aforementioned transaction,'" except for filing and entering of the confession of judgment. Thereafter, plaintiff allegedly failed to make a payment due pursuant to the agreements. The defendants held him in default of the promissory note, accelerated the debt, and filed the confession of judgment.

Plaintiffs thereafter sued alleging, among other things, that the defendants "breached warranties in the contracts of sale by concealing civil actions and government investigations pending against the companies, and that the [defendants'] failure to disclose these actions and investigations fraudulently induced plaintiff to enter into the modification agreements."

Defendants then moved "pursuant to CPLR 7503 to stay all … proceedings in the action [that were not subject to a substantive motion to dismiss] and compel arbitration" — relying upon the agreement to arbitrate their disputes regarding the subject transactions.

The lower court granted the motion to compel arbitration and the Second Department affirmed. The Second Department first acknowledged: "Arbitration is a favored method of dispute resolution in New York." The Court then instructed that the threshold issue of whether there is a valid agreement to arbitrate is for the court, and that once it determines the parties agreed to arbitrate, the court's role ends without addressing the merits of the particular claims.

Although the plaintiffs contended that the arbitration agreement was invalid because it was fraudulently induced, the Court noted that a "broad arbitration provision is separable from the substantive provisions of a contract such that the agreement to arbitrate is valid even if the substantive provisions of the contract were induced by fraud." The Court continued: "The issue of fraud in the inducement affects the validity of the arbitration clause only when the fraud relates to the arbitration provision itself, or was part of a grand scheme that permeated the entire contract" for which the plaintiff "must … establish[] that the agreement was not the result of an arm's length negotiation, or the arbitration clause was inserted into the contract to accomplish a fraudulent scheme."

The Court then found that plaintiffs failed to make the required showing to nullify the arbitration provisions, ruling that "the arbitration agreement was not a free-standing contract which was fraudulently induced, but was one of numerous documents executed as part of the … modification agreement, which must be 'read together and interpreted as forming part of one and the same transaction." The Court concluded: "Since the plaintiffs' claim of fraudulent inducement relates to the … modification agreement, with all its related documents, and not the arbitration agreement itself, the arbitration agreement is valid and the claim of fraudulent inducement is for the arbitrator" to decide.

Thus, where an agreement contains what the courts consider to be a "broad" arbitration clause, the issue as to whether fraud can be established will be for the arbitrator to decide (not the courts) if the court finds that the arbitration provision itself was not induced by fraud. Examples of "broad" arbitration clauses for these purposes are found in *Anderson St. Realty Corp. v New Rochelle Revitalization, LLC*, 78 AD3d 972 (2d Dep't 2010)("the arbitration clause was broad, since it applied if 'any disagreement, deadlock, interpretation or dispute shall arise' under the … agreement"); *Riverside Capital Advisors, Inc. v Winchester Global Trust Co. Ltd.*, 21 AD3d 887 (2d Dep't 2005)("An arbitration clause in the severance agreement stated that 'any controversy or claim arising out of or in relation to this Agreement or the breach thereof will, to the fullest extent permitted by law, be settled by arbitration.'"); and *Ferrarella v Godt*, 131 AD3d 563 (2d Dep't 2015)("Stock Purchase Agreement contained an arbitration clause which provided, in pertinent part: 'In the event any dispute shall arise pursuant to any term or provision of this Agreement, the same shall be settled by arbitration in accordance with the rules and regulations of the American Arbitration Association (hereinafter 'AAA') within the County of Queens.'").

Table of Contents

[Fill in the spaces next to the instructions. Other spaces are for Court use.]

At a(an) IAS/Special Term Part __ of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Courthouse thereof, located at 100 Supreme Court Drive, Mineola, New York on the __ day of 20_____

PRESENT: HON._____
Justice of the Supreme Court

----------x

In the Matter of the Application of

_____,
[2. Fill in name(s)] Petitioner(s)

-against-

_____
[3. Fill in name(s)] Respondent(s)

----------x

[1. Index No. & Year]
Index No.
_____/_____

ORDER TO SHOW CAUSE TO CONFIRM ARBITRATION AWARD PURSUANT TO CPLR ARTICLE 7510

Upon the reading and filing the petition(s) of **[4. Your name(s)]** _____, sworn to on **[5. Date the Verified Petition notarized]** _____ , 20___ and upon the exhibits attached to the petition, and **[6. Identify other supporting papers, such as, additional affidavits]** ARBITRATION DETERMINATION _____

_____

_____

_____

Let the respondent(s) show cause at IAS PART___, Room ____, of this Court, to be held at the Courthouse, 100 Supreme Court Drive, Mineola, New York, on _____ , 20__ , at ____o'clock in the ____noon or as soon as the parties to this proceeding may be heard why an order should not be made, providing the following relief: **[7. Describe what you are asking the Court to do]**

Confirming the Arbitration Award; Awarding your petitioner fees, costs and disbursements

for the reasons that **[8.Describe the reasons your request should be granted]**

Sufficient cause appearing therefor, let personal service of a copy of this order, and the petition and all other papers upon which this order is granted, upon all parties to this proceeding, on or before _____, 20___ be deemed good and sufficient service hereof.

ENTER

_____

J.S.C.

[Fill in the spaces next to the instructions. Attach copies of the indicated documents and mark them as exhibits.]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

In the Matter of the Application of

[9. Index No. & Year]
Index No.
_____ / _____

_____,
[10. Fill in name(s)] Petitioner(s)

PETITION

-against-

_____,
[11. Fill in name(s)] Respondent(s)

----------x

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU:

The petition of **[12. Your name]** _____respectfully shows to this Court as follows:

1) Your petitioner(s) resides at **[13. Your address]**

_____.

2) The respondent (s) **[14. Identify respondent]** and **[15. Your involvement]**

_____

_____.

The facts concerning the litigation including underlying events and the nature of actions and decisions taken by respondents that petitioner wishes to challenge are as follows.

[16. Describe facts and events before your application was made. State the actions and decisions taken by respondents. Add more pages if needed]

3)_____

_____

_____

_____

4)_____

_____

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5)_____

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_____

_____

6)_____

_____

_____

_____

7) Attached hereto are copies of relevant documents in support of petitioner's case, including determination(s) issued by respondent(s) that have a bearing on this case and/or of which petitioner herein complains, if any. **[17. Identify all documents including written decisions, determinations made by respondents that are relevant to this case.]**

_____

_____

_____

_____

[18. Attach each document to this packet and label it as Exhibit A, Exhibit B, etc... List Exhibits below]

_____

_____

_____

_____

8) A prior application **[19. Check that a prior application has been made only if you are seeking the same relief again]** ☐ has or ☐ has not been made for the relief requested herein. If a prior application has been made then provide the following information **[20. What Court, when, who made the application, the result of the application, attach a copies of the application and explain why you are making another application.]**

_____

_____

_____

_____

_____

_____

_____

_____

WHEREFORE, your deponent prays that this Court **[21. Describe what you are asking the Court to do]**

_____

_____

_____

_____

_____

_____

_____

and such other relief as the Court may find just and proper.

[22. Date and County papers are signed in]

Dated:_____ , New York

_____ , 20___

_____

Petitioner Signature

[23. Your signature]

_____

Print Petitioner Name

[24. Print Your Name]

[Fill in the spaces next to the instructions.]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
----------x
In the Matter of the Application of

[25. Index No. & Year]
Index No.
_____ / _____
VERIFICATION

_____,
[26. Fill in name(s)] Petitioner(s)

-against-

_____,
[27. Fill in name(s)] Respondent(s)

----------x

STATE OF NEW YORK}
SS. :}
COUNTY OF _____}
[28. Insert County where papers signed and notarized]

_____**[29. Insert Your Name]** , being duly sworn, deposes and says: I am the_____ **[30. Insert Petitioner or Respondent]** in this matter. I have read the foregoing _____ **[31. Insert the name(s) of the above documents e.g. affidavit, petition etc.]** and know the contents thereof. The same are true to my knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters I believe them to be true

_____
[32. SIGN YOUR NAME BEFORE NOTARY]

_____
_____
[33. PRINT YOUR NAME]

Sworn to before me this
day of _____, 20 __

_____
Notary Public
[34. Verification must be notarized]

[Fill in the spaces next to the instructions. Other spaces are for Court use.]

At a(an) lAS/Special Term Part __ of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Courthouse thereof, located at 100 Supreme Court Drive, Mineola, New York on the __ day of 20 __

PRESENT: HON. _____.
Justice of the Supreme Court

----------x

In the Matter of the Application of

_____,
[36. Fill in name(s)] Petitioner(s)

-against-

_____,
[37. Fill in name(s)] Respondent(s)

----------x

[35. Index No. & Year]
Index No.
_____/_____

ORDER AND JUDGMENT CONFIRMING ARBITRATION AWARD

An application having been made by petitioner and having duly come on to be heard on _____ , 20 ___ , for an order and judgment confirming an award,

NOW, on reading and filing the following papers submitted to the Court,_____

_____

_____

and upon the Court's decision thereon dated _____it is

ORDERED that the application is granted and the award rendered in favor of petitioner and against respondent is confirmed; and it is further

ORDERED and ADJUDGED that petitioner **[38. Your name]** _____ , having an address at **[39. Your address, City State and Zip Code]** _____, shall have judgment and recover against respondent **[40. Insert Respondent name]** _____, having an address at **[41. Insert Respondent address,**

city, state and zip code], _____,
in the amount of $ _____ , plus interest at the rate of ____ % per annum from the date of _____ , as computed by the Clerk in the amount of $_____ together with costs and disbursements in the amount of $_____ as taxed by the Clerk, for the total amount of $_____ , and that the petitioner have execution therefor.

Dated: _____

ENTER:

_____

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

In the Matter of the Application of

[42. Index No. & Year]

_____,
[43. Fill in name(s)] Plaintiff(s)/Petitioner(s)

Index No.
_____ / _____

-against-

_____,
[44. Fill in name(s)] Defendants/Respondent(s)

----------x

_____

_____

[45. Insert name(s) of papers submitted]

._____

[46. YOUR SIGNATURE]

._____

[47. PRINT YOUR NAME]

._____

[48. YOUR ADDRESS]

._____

[49. CITY, STATE ZIP CODE]

._____

[50. YOUR PHONE NUMBER]

NY CLS CPLR § 7510

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 75 Arbitration (§§ 7501 — 7516)

§ 7510. Confirmation of award.

The court shall confirm an award upon application of a party made within one year after its delivery to them, unless the award is vacated or modified upon a ground specified in section seventy-five hundred eleven of this article.

History

Add, L 1962, ch 308, eff Sept 1, 1963; *L 2023, ch 679, § 1*, effective November 21, 2023.

Annotations

Notes

Prior Law

Earlier statutes: CPA §§ 1458, 1461, 1463; CCP §§ 2373, 2376; 2 RS 542, §§ 9, 12.

Advisory Committee Notes:

This section is substantially the same as CPA §§ 1461 and 1463. It retains the former provision that the grounds for vacating or modifying an award may be urged in opposition to a motion to confirm although a motion based on such grounds is not then timely. Thus, a party is not compelled to move to vacate an award but may assert the alleged invalidity when the opposing party seeks to confirm the award. Cf. § 203(c) (if a defense or counterclaim arises from the same transaction as the adversary's claim, it may be interposed to the extent of that claim notwithstanding that it could not be maintained at the time of the commencement of the action).

The application to confirm, vacate or modify the award is interrelated and is therefore integrated under this article. If application to vacate or to modify an award is denied, the subsequent order will confirm it. Similarly, an order modifying an award will confirm it as modified without another application. See § 7511(c). See also Pirsig, Toward a Uniform Arbitration Act, 9 Arb J (ns) 115, 117 (1954).

Although judgment may not be entered directly upon an award that has not been confirmed, it may be enforced even after the time to confirm has expired by bringing an action on it unless the parties have agreed otherwise. See 21 Carmody-Wait, Cyclopedia of New York Practice 584–87 (1956). Yet, because of the expeditious summary judgment provided by rule 3212, the latter manner of enforcement is no more burdensome than by confirmation. In order to avoid the anomaly, the limitation applicable to bringing an action has been shortened to one year. See §

215(5). Arbitration is urged as a quick method of disposing of disputes. There is no reason to permit suits on awards to be brought years after the award was made.

Amendment Notes

The 2023 amendment by ch 679, § 1, substituted "them" for "him and "seventy-five hundred eleven of this article" for "7511."

Commentary

EXPERT ANALYSES:

By Dennis M. Rothman.

Confirmation of the award is a condition precedent to the entry of a judgment on the award. *C.P.L.R. 7514(a)*. *C.P.L.R. 7510*, as to confirmation, and *C.P.L.R. 7511*, as to vacatur or modification, are curiously asymmetric as to timing. One has only ninety days from the delivery of the award to apply to vacate or modify, *C.P.L.R. 7511(a)*, but a year from the final award of the arbitrators in which to apply to confirm. *C.P.L.R. 7510*. However, even if the opponent of an award has allowed his ninety-day period in which to challenge the award expire, the subsequent application of the proponent of the award to confirm it revives the right to move to vacate or modify.

There is yet another curious twist to the one-year time limit for confirmation. Even if one lets the one-year period to expire without moving for confirmation, one may nonetheless bring an action on the award, notwithstanding the failure to apply for confirmation. *C.P.L.R. 215(5)*. Although the one-year time limit stated in *C.P.L.R. 215(5)* might appear to mandate the failure of the action as time-barred, not all one-year limitations are identical. The running of the statute of limitations may be tolled for many reasons. E.g., *C.P.L.R. 207*, *208*. The running of the one-year time period of *C.P.L.R. 7510* is not subject to the same tolls. [101] Hence, the time for confirmation may expire while the statute of limitations has not yet run, leaving it possible to bring an action. This inconsistency should probably be addressed by the Legislature, but to date, and for many years, it seems to have escaped revision, or even serious attention.

Dennis M. Rothman, a former staff law clerk to the United States Court of Appeals for the Second Circuit, practices business litigation – in the courts and in various alternative dispute resolution forums – in and around New York City, where he is a partner at Lester Schwab Katz & Dwyer. The assistance of Jonathan Cooper, a second year law student at Cordozo School of Law, is gratefully acknowledged.

NOTES TO DECISIONS

I.Generally

A.In General

1.Generally

2.Caption and index number

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[10] There is an exception. See the note to *C.P.L.R. 7512* on death or incompetency of a party.

3.Contempt

4.Declaratory judgment

5.Disclaimer

6.Due process

7.Effect of federal law

8.Infant petitioner

9.Jurisdictional matter

10.Mootness

11.Non-resident petitioner

12.Post-award interest; costs; attorneys' fees

13.Service of application for confirmation of arbitration award

14.Reconsideration by arbitrator

15.Res judicata; collateral estoppel

16.Scope of judicial review, generally

17.—Article 78 proceeding

18.—Effect of arbitration rules of American Arbitration Association (AAA)

19.—Jurisdiction; standing

20.—Waiver

21.Tolling of statute of limitations

B.Confirmation Of Arbitration Award

1.Properly Granted

22.Generally

23.Appraisals

24.Automobiles, generally

25.—Mobile homes

26.Contractors' disputes

27.Criminal law matters

28.Discovery

29.Employment, generally

30.—Civil service

31.—Police, correctional officers and the like

32.Insurance, generally

33.—Auto insurance

34.Partnership matters

35.School matters

2.Properly Denied

36.Generally

37.Automobiles generally

38.Criminal law matters

39.Employment, generally

40.—Unions; collective bargaining

41.Estate matters

42.Insurance, generally

43.—Auto insurance

44.Matrimonial matters

II.Under Former Civil Practice Laws

45.Generally

46.Failure of submission to provide for entry of judgment

47.Disqualification of arbitrator

48.Irregular award

49.Refusal to confirm

50.Necessity of objection at trial

51.Counter motion

52.Radio broadcast of proceedings

53.Appeal

54.Attachment

55.Venue

I. Generally

A. In General

1. Generally

Application to confirm arbitration award was improperly dismissed for failure to commence new proceeding in accordance with Court of Appeals' holding *in Matter of Solkav Solartechnik, G.m.b.H., 91 NY2d 482*, which construed § 7502(a) as permitting confirmation applications only within pending proceedings or actions, as legislature promptly responded to Solartechnik by amending § 7502(a) to clarify that all arbitration-related applications should be concentrated in single proceeding or action to promote judicial economy and prevent forum shopping and, although legislature did not state that CLS *CPLR § 7502(a)(iii)* was to have retroactive effect, its remedial purpose should be effectuated through retroactive application. *Gleason v Michael Vee, Ltd., 96 N.Y.2d 117, 726 N.Y.S.2d 45, 749 N.E.2d 724, 2001 N.Y. LEXIS 979 (N.Y. 2001)*.

The plan of Article 75 of the CPLR is to make no practical distinction between motions to confirm and motions to modify or vacate in that both types of motion must result in either confirmation, modification or vacation without regard to the type of motion made and therefore on a motion for confirmation as well as for modification or vacation, the court may await the arbitrator's final disposition, including a reconsideration of the award under § 7509. This section is a statute of limitations. *Belli v Matthew Bender & Co., 24 A.D.2d 72, 263 N.Y.S.2d 846, 1965 N.Y. App. Div. LEXIS 3161 (N.Y. App. Div. 1st Dep't 1965)*.

Where partners, upon dissolution of their agreement, agreed orally to submit certain controversies between them to their rabbi, the proceeding was not intended to have the attributes of an arbitration pursuant to *CPLR 7501*, and absent the threshold requirement of a written arbitration or submission agreement, the respondent's continuation with the arbitration proceeding did not constitute a waiver of statutory requirements. *Hellman v Wolbrom, 31 A.D.2d 477, 298 N.Y.S.2d 540, 1969 N.Y. App. Div. LEXIS 4298 (N.Y. App. Div. 1st Dep't 1969)*.

In making an arbitration award relating to the discharge of a city employee from her permanent Civil Service position based upon her failure to reside within the city limits as required by a provision of a local ordinance, the arbitrator neither exceeded the scope of the matter submitted to him nor gave the collective bargaining agreement a completely irrational construction in ruling that the city was obligated to comply with the procedural requirements of the collective bargaining agreement instead of the requirements of that ordinance. *Maiore v Buffalo, 78 A.D.2d 979, 433 N.Y.S.2d 674, 1980 N.Y. App. Div. LEXIS 13745 (N.Y. App. Div. 4th Dep't 1980)*.

In proceedings to confirm award of arbitration against Office of Employee Relations, in which first petition for confirmation was directed to improper parties, Special Term erroneously dismissed as time barred second petition directed at correct parties where second petition was not labeled amended petition and did not make reference to earlier proceeding; such errors of pleading were mere defects in form and, absent prejudice to respondents, should have been disregarded by Special Term. *Public Employees Federation v Governor's Office of Employee Relations, 111 A.D.2d 451, 488 N.Y.S.2d 510, 1985 N.Y. App. Div. LEXIS 51538 (N.Y. App. Div. 3d Dep't 1985)*.

Insurer was entitled to vacate judgment confirming arbitration award, which had been entered on insurer's default on petitioner's proceeding to confirm award pursuant to CLS *CPLR § 7510*, where petitioner had failed to advise

court that insurer had commenced action to adjudicate dispute de novo as it was entitled to do under *CLS Ins § 5106*. *Capuano v Allstate Ins. Co., 122 A.D.2d 138, 504 N.Y.S.2d 523, 1986 N.Y. App. Div. LEXIS 59193 (N.Y. App. Div. 2d Dep't 1986)*.

In arbitration proceeding involving partnership, partners who did not actively participate had standing to seek confirmation of arbitrator's award where they had been served with demand for arbitration, had submitted document supporting one party to arbitration, and had been billed for causing adjournment of arbitration hearing; moreover, arbitrator's award was binding on them, and they could have sought to vacate or modify it had they so desired. *In re Fishman, 126 A.D.2d 546, 510 N.Y.S.2d 670, 1987 N.Y. App. Div. LEXIS 41681 (N.Y. App. Div. 2d Dep't 1987)*.

Defendant was not entitled to vacatur of its default in responding to application to confirm arbitrator's award where it had also failed to appear at earlier arbitration hearing and failed to move to stay arbitration within 20 days after service on it of demand for arbitration. *Fok v Insurance Co. of North America, 151 A.D.2d 722, 542 N.Y.S.2d 786, 1989 N.Y. App. Div. LEXIS 9126 (N.Y. App. Div. 2d Dep't 1989)*.

Petitioner was not entitled to reinstatement to her previous employment on ground that respondents' failure to enter judgment confirming arbitration award in their favor resulted in abandonment of order of IAS court which denied petitioner's motion to vacate or modify award; although CLS *CPLR § 7510* implies that application to confirm arbitration award must be made within one year from its rendition, there was no need for respondents to cross-petition for confirmation of award since CLS *CPLR § 7511(e)* mandates automatic confirmation upon denial of motion to vacate or modify award. *White v Department of Law, 184 A.D.2d 229, 584 N.Y.S.2d 555, 1992 N.Y. App. Div. LEXIS 7746 (N.Y. App. Div. 1st Dep't)*, app. denied, *80 N.Y.2d 759, 591 N.Y.S.2d 137, 605 N.E.2d 873, 1992 N.Y. LEXIS 3468 (N.Y. 1992)*.

Where parties waived transcript of arbitration proceeding, it was proper for memoranda submitted to arbitrator to be submitted to court on petition for confirmation of arbitration award. *Ross v Riviera Trading Corp., 204 A.D.2d 120, 614 N.Y.S.2d 106, 1994 N.Y. App. Div. LEXIS 5133 (N.Y. App. Div. 1st Dep't 1994)*.

In proceeding to confirm arbitration award granting petitioner reinstatement "with full back pay," wherein respondents contended that earnings and unemployment benefits received by petitioner after she was laid off should be deducted from back pay award, while petitioner insisted that phrase "full back pay" did not authorize any setoff, petitioner was aggrieved by court's decision to remand "to appropriate government agency" issue of what constituted full back pay. Court erred by remanding proceeding to "appropriate government agency" to resolve issue, as question of whether to permit offset or deduction was within scope of issue submitted to arbitrator; if arbitrator's award created new controversy over meaning of "full back pay," proper remedy was to vacate award as indefinite or nonfinal, not to remand issue to different forum. *Civil Serv. Emples. Ass'n, Local 1000 ex rel. Hinton v State, 223 A.D.2d 890, 636 N.Y.S.2d 234, 1996 N.Y. App. Div. LEXIS 380 (N.Y. App. Div. 3d Dep't 1996)*.

In proceeding to confirm arbitration award which determined that city had violated its collective bargaining agreement with petitioner, city's "unprecedented financial condition" did not justify its pursuit of patently meritless appeal in order to preserve its statutory stay under CLS *CPLR § 5519* (and avoid its obligations to petitioner) for longest possible time; thus, imposition of sanctions against city was warranted. *Troy Police Benevolent & Protective Ass'n v City of Troy, 223 A.D.2d 995, 636 N.Y.S.2d 499, 1996 N.Y. App. Div. LEXIS 559 (N.Y. App. Div. 3d Dep't 1996)*.

Court erred in granting reargument and, on reargument, vacating its prior determination confirming arbitration award where respondent, in seeking reargument, argued that there was no agreement to arbitrate, but it was undisputed that respondent never sought stay of arbitration within 20 days after service of notice of intention to

arbitrate; by failing to so move, respondent was precluded from arguing absence of agreement to arbitrate. *RRN Assocs. v DAK Elec. Contr. Corp., 224 A.D.2d 250, 637 N.Y.S.2d 409, 1996 N.Y. App. Div. LEXIS 1037 (N.Y. App. Div. 1st Dep't 1996)*.

Ninety-day period of CLS *CPLR § 7511(a)* can be effectively shortened when first judicial proceeding addressed to arbitration award is one to confirm and is commenced within 90-day period; under such circumstances, cross motion to vacate must be made within proceeding to confirm so that 2 mirror issues, i.e., confirmation and vacatur, can be expeditiously decided together. *Lyden v Bell, 232 A.D.2d 562, 649 N.Y.S.2d 33, 1996 N.Y. App. Div. LEXIS 10473 (N.Y. App. Div. 2d Dep't 1996)*.

Petitioner's failure to allege its corporate status in confirmation petition in accordance with CLS *CPLR § 3015(b)* was minor pleading defect that resulted in no prejudice to respondent, and thus was properly disregarded. *Etkin & Co. v Play It Again Apparel, 235 A.D.2d 264, 652 N.Y.S.2d 285, 1997 N.Y. App. Div. LEXIS 288 (N.Y. App. Div. 1st Dep't 1997)*.

Although upholding confirmation of arbitration award under CLS *CPLR § 7510*, Appellate Division would deny petitioner's request for imposition of sanctions where respondent's actions in challenging petitioner, arbitrator, and process at every turn were not "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" under CLS Stds & Adm Policies § 130-1.1(c)(2) (*22 NYCRR § 130-1.1(c)(2)*). *Thompson v S.L.T. Ready-Mix, 245 A.D.2d 911, 666 N.Y.S.2d 798, 1997 N.Y. App. Div. LEXIS 13620 (N.Y. App. Div. 3d Dep't 1997)*.

Arbitrators' refusal to grant adjournment of hearing was not abuse of discretion where respondent did not respond to arbitrators' request for convenient dates, did not provide substantiating details of health problems of its president's husband that would prevent her attendance for unspecified period of time, did not indicate any pertinent evidence she would present, and did not explain why it could not send attorney or other representative to hearing with affidavits or other documentary evidence in support of its adjournment request. *Stanwood Mills, Inc. v Bonita Fabrics, Inc., 249 A.D.2d 244, 674 N.Y.S.2d 591, 1998 N.Y. App. Div. LEXIS 4798 (N.Y. App. Div. 1st Dep't 1998)*.

Petitioner seeking to enforce confirmed arbitration award could take full advantage of enforcement devices in CLS CPLR Art 52. *Prudential Blake Realty, Inc. v Schenectady Indus. Dev. Agency, Inc., 255 A.D.2d 622, 679 N.Y.S.2d 453, 1998 N.Y. App. Div. LEXIS 11688 (N.Y. App. Div. 3d Dep't 1998)*.

Proceeding to confirm arbitration award, commenced by petitioner after respondent tendered check payable to him and his wife but refused his request for check payable only to himself, was not governed by 90-day statute of limitations contained in CLS *CPLR § 7511* on ground that petition effectively sought to modify rather than confirm award, as petitioner sought no modification of total award, arbitrator granted no credit to respondent, and proceeding was timely commenced under CLS *CPLR § 7510*. *Spindler v N.Y. Cent. Mut. Fire Ins. Co., 283 A.D.2d 762, 727 N.Y.S.2d 483, 2001 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 3d Dep't 2001)*.

Trial court erred in denying a petition to confirm an arbitration award in its entirety pursuant to N.Y. *C.P.L.R. 7510*; a U-5 notice filed by a company was not entitled to absolute privileged, and therefore public policy did not preclude enforcement of the award. *Spasiano v 1717 Capital Mgmt., 1 A.D.3d 902, 767 N.Y.S.2d 736, 2003 N.Y. App. Div. LEXIS 12405 (N.Y. App. Div. 4th Dep't 2003)*, app. denied, *1 N.Y.3d 510, 777 N.Y.S.2d 19, 808 N.E.2d 1278, 2004 N.Y. LEXIS 257 (N.Y. 2004)*.

In an action by a corrections officer to affirm an arbitration award pursuant to N.Y. *C.P.L.R. 7510*, the trial court erred in awarding the officer back pay and reinstatement; in the underlying grievance challenging a correction's officer's suspension for sleeping on duty, an arbitrator erred in granting the officer administrative leave with pay on

the basis of harassment, as the arbitrator's authority was limited by the terms of the collective bargaining agreement to determinations of guilt and the appropriateness of the penalty. *In re N.Y. State Corr. Officers, 13 A.D.3d 961, 788 N.Y.S.2d 195, 2004 N.Y. App. Div. LEXIS 15866 (N.Y. App. Div. 3d Dep't 2004)*.

Trial court properly granted summary judgment to an association on its action seeking to collect on a disciplinary fine imposed against defendants, as the action was not a proceeding to confirm an arbitration award, and thus was not subject to a one-year limitation period under N.Y. *C.P.L.R. 7510*. *National Assn. of Sec. Dealers, Inc. v Fiero, 33 A.D.3d 547, 827 N.Y.S.2d 4, 2006 N.Y. App. Div. LEXIS 12804 (N.Y. App. Div. 1st Dep't 2006)*, rev'd, *10 N.Y.3d 12, 853 N.Y.S.2d 267, 882 N.E.2d 879, 2008 N.Y. LEXIS 136 (N.Y. 2008)*.

Trial court erred in confirming an arbitration award that, inter alia, required the payment of back pay for the period of an employee's interim suspension because the award was based upon a determination that the employer lacked probable cause to suspend the employee, and the arbitrator did not rely on the hearing evidence to reach that determination, but instead relied solely on the information contained in the notice of suspension and referenced an earlier decision that he rendered regarding the same CBA, but a different employee, and made the same error in that case by imposing a new requirement that probable cause be established in the notice of suspension. *Matter of Czerwinski (New York State Dept. of Corr. & Community Supervision), 173 A.D.3d 1325, 103 N.Y.S.3d 170, 2019 N.Y. App. Div. LEXIS 4503 (N.Y. App. Div. 3d Dep't 2019)*.

Insured was not bound by arbitration agreement between insurers where insured, who did not receive notice of arbitration hearing, was not present during arbitration, and where insured, whose attorney never received notice of intention to arbitrate, was not a party to the arbitration agreement. *Hartford Accident & Indem. Co. v Maryland Casualty Co., 75 Misc. 2d 410, 347 N.Y.S.2d 380, 1973 N.Y. Misc. LEXIS 1699 (N.Y. Sup. Ct. 1973)*.

State was not required to obtain confirmation of arbitration award before terminating claimant's employment on basis of award since collective bargaining agreement did no more than incorporate CLS Art 75 by reference, and Article 75 permits but does not require confirmation. *White v State, 161 Misc. 2d 938, 615 N.Y.S.2d 811, 1994 N.Y. Misc. LEXIS 331 (Ct. Cl. 1994)*.

Bank's petition to confirm an arbitration award under N.Y. *C.P.L.R. §§ 7510*, *7514* was improperly denied because the defect in form due to the fact that the bank's supporting affidavit was notarized by a Maryland notary public and not accompanied by a certificate of conformity under N.Y. *C.P.L.R. § 2309(c)* and N.Y. *Real Prop. Law § 299-a(1)* was merely a defect in form that could be corrected nunc pro tunc and did not prejudice a substantial right of respondent under N.Y. *C.P.L.R. §§ 2001*, *2101(f)*. MBNA Am. Bank, N.A., Matter of v *MBNA Am. Bank, N.A., Matter of v Stehly, 855 N.Y.S.2d 814, 19 Misc. 3d 12, 2008 N.Y. Misc. LEXIS 104 (N.Y. App. Term 2008)*.

Because a direct transaction occurred in New York between two diamond dealers, the arbitrators had jurisdiction over a matter between one of the dealers and a seller involving the same diamonds; the seller's waiver of its right to object to the arbitrators' jurisdiction under N.Y. *C.P.L.R. § 7511(b)(1)(iii)*, entitled the dealer to confirmation of the award under N.Y. *C.P.L.R. § 7510*. *Elul Diamonds Co. v Z Kor Diamonds, Inc., 238 N.Y.L.J. 3, 2007 N.Y. Misc. LEXIS 4906 (N.Y. Sup. Ct. June 6, 2007)*.

Union's petition for confirmation of 1997 arbitration award was timely under CLS *CPLR § 7510*, regardless of union's failure to timely confirm 1993 award, where it is undisputed that 1997 award was delivered to union on March 6, 1997, and that union filed petition to confirm on April 30, 1997, because filing was well within one-year period of § 7510. *New York Hotel & Motel Trades Council v Hotel St. George, 988 F. Supp. 770, 1997 U.S. Dist. LEXIS 20861 (S.D.N.Y. 1997)*.

2. Caption and index number

When initial petition to stay arbitration is dismissed or otherwise ends in final judgment, subsequent application to confirm arbitration award may not be brought under same caption and index number, but requires separate special proceeding. *Solkav Solartechnik, G.m.b.H. v Besicorp Group Inc., 91 N.Y.2d 482, 672 N.Y.S.2d 838, 695 N.E.2d 707, 1998 N.Y. LEXIS 1030 (N.Y. 1998)*.

Motion to confirm arbitration award was properly made under same caption and index number as pending attachment proceeding. *Derfner & Mahler, LLP v Rhoades, 257 A.D.2d 431, 683 N.Y.S.2d 509, 1999 N.Y. App. Div. LEXIS 240 (N.Y. App. Div. 1st Dep't 1999)*, app. denied, *1999 N.Y. App. Div. LEXIS 5220 (N.Y. App. Div. 1st Dep't Apr. 22, 1999)*.

3. Contempt

Following petitioner's return from disciplinary suspension for sexual misconduct, employer had right to reassign him to equivalent position at his former salary, but without private office or telephone, until he completed sexual harassment training program, where collective bargaining agreement governing petitioner's employment gave employer authority to reassign him; thus, court erred in holding employer in contempt for failing to return petitioner immediately to his former position pursuant to its order confirming arbitration award. *Fisher v City Univ. of N.Y. John Jay College of Crim. Justice, 285 A.D.2d 594, 727 N.Y.S.2d 912, 2001 N.Y. App. Div. LEXIS 7569 (N.Y. App. Div. 2d Dep't 2001)*.

4. Declaratory judgment

In an action resulting from an automobile accident in which a New Jersey pedestrian was hit by a New Jersey driver, pedestrian's insurance company's alleged failure to procure confirmation of an arbitration award within one year did not constitute a bar to its recovery, where insurance company's answer in the declaratory judgment action requested that the court declare the arbitration finding to be binding, which answer was submitted well within the one-year limit and preserved insurance company's right to have the award confirmed. *Allstate Ins. Co. v Hartford Accident & Indem. Co., 90 A.D.2d 781, 455 N.Y.S.2d 385, 1982 N.Y. App. Div. LEXIS 18990 (N.Y. App. Div. 2d Dep't 1982)*.

5. Disclaimer

In negligence action for injuries sustained in automobile accident, wherein arbitration proceedings were initiated as to validity of insurer's disclaimer of coverage, court lacked jurisdiction to consider motion by Motor Vehicle Accident Indemnification Corporation (MVAIC) which, inter alia, sought to confirm arbitrator's denial of insurer's disclaimer, since confirmation of arbitration award may only be obtained in special proceeding instituted for that purpose, in which all necessary parties have been joined, after acquiring necessary personal jurisdiction by proper service of notice of petition and petition in same manner as service of summons; neither MVAIC nor insurer was named party in negligence action and service by mail of notice of motion and supporting affirmation was insufficient to secure requisite personal jurisdiction. *Ray v McDowell, 143 Misc. 2d 347, 540 N.Y.S.2d 660, 1989 N.Y. Misc. LEXIS 227 (N.Y. Civ. Ct. 1989)*.

6. Due process

In a proceeding to confirm an arbitration award, a claim by one of the parties to the arbitration agreement that it was deprived of due process was properly rejected where the party, having been provided with adequate notice of and an opportunity to be heard at the hearing, failed to appear at the hearing without requesting either an adjournment or a continuance. *Kingsley v Redevco Corp., 61 N.Y.2d 714, 472 N.Y.S.2d 610, 460 N.E.2d 1095, 1984 N.Y. LEXIS 4018 (N.Y. 1984)*.

In a proceeding pursuant to N.Y. *C.P.L.R. 7510*, the trial court erred in confirming an amended arbitration award regarding underinsured motorist benefits where the arbitrator amended the initial award after receiving a letter from respondent insured, there was no support for the insured's claim under N.Y. *C.P.L.R. 7511(c)(1)* that there had been a miscalculation of figures in the original award, there was no other valid basis for amending the award, and petitioner insurer was not afforded its due process right to be heard with regard to the insured's request for modification. *N.Y. Cent. Mut. Fire Ins. Co. v Pinckney, 303 A.D.2d 757, 756 N.Y.S.2d 869, 2003 N.Y. App. Div. LEXIS 3332 (N.Y. App. Div. 2d Dep't 2003).*

7. Effect of federal law

Trial court's confirmation of an arbitrators' award directing a bus driver's reinstatement to her employment was reversed because the driver was removed from her job after she was unable, without a medical reason, to produce a urine sample for random drug testing, and was deemed to be refusing to provide a sample, and federal regulations, specifically 49 C.F.R. §§ 653.35(a) and 653.49(a)(2), requiring her removal overrode both her collective bargaining agreement and the arbitrators' determination to reinstate her. *Dowleyne v N.Y. City Transit Auth., 309 A.D.2d 583, 765 N.Y.S.2d 361, 2003 N.Y. App. Div. LEXIS 10577 (N.Y. App. Div. 1st Dep't 2003)*, rev'd, *3 N.Y.3d 633, 782 N.Y.S.2d 401, 816 N.E.2d 191, 2004 N.Y. LEXIS 1600 (N.Y. 2004)*.

In a Financial Industry Regulatory Authority, Inc. (FINRA) arbitration wherein two separate brokers/dealers sought confirmation of respective arbitration awards recommending expungement of complaints against them regarding the handling of certain client assets and accounts, the cases were remanded to the original FINRA arbitrators since the arbitrators failed to make any affirmative findings supporting their conclusions in each case to expunge the records. *Matter of Johnson (Summit), 864 N.Y.S.2d 873, 22 Misc. 3d 631, 240 N.Y.L.J. 75, 2008 N.Y. Misc. LEXIS 5894 (N.Y. Sup. Ct. 2008)*.

8. Infant petitioner

For the purpose of confirming an arbitration award, infant petitioner had the option of waiting until her disability ceased or maintaining a special proceeding by her guardian ad litem, and until she chose the latter, the limitations period set forth in *CPLR § 7510* was not tolled by operation of *CPLR § 208*. *Elliot v Green Bus Lines, Inc., 58 N.Y.2d 76, 459 N.Y.S.2d 419, 445 N.E.2d 1098, 1983 N.Y. LEXIS 2825 (N.Y. 1983)*.

9. Jurisdictional matter

Supreme Court had jurisdiction to entertain respondent's motion to confirm arbitration award, made within context of prior special proceeding commenced by petitioner in which court granted respondent's motion to dismiss petitioner's application to stay arbitration on ground that petitioner "sufficiently participated" in arbitration so as to foreclose relief under CLS *CPLR § 7503(b)*, in light of clear mandate of CLS *CPLR § 7502(a)*. *Solkav Solartechnik, GES. M.B.H. v Besicorp Group, 227 A.D.2d 94, 652 N.Y.S.2d 654, 1997 N.Y. App. Div. LEXIS 345 (N.Y. App. Div.*

3d Dep't 1997), rev'd, dismissed, *91 N.Y.2d 482, 672 N.Y.S.2d 838, 695 N.E.2d 707, 1998 N.Y. LEXIS 1030 (N.Y. 1998)*.

To grant a petition to confirm an arbitration award on a credit card debt, a court must require the following: (1) submission of the written contract containing the provision authorizing arbitration; (2) proof that the card holder agreed to arbitration in writing or by conduct; and (3) a demonstration of proper service of the notice of the arbitration hearing and of the award. In addition, the court must consider any supplementary information advanced by either party regarding the history of the parties' actions. Petition seeking confirmation of a credit card debt arbitration award must include a written agreement to arbitrate, because under N.Y. *C.P.L.R. 7501*, such an agreement confers jurisdiction upon state courts to enforce it, and because under N.Y. *C.P.L.R. 7514*, any judgment should include a copy of the arbitration agreement. *MBNA Am. Bank v Straub, 815 N.Y.S.2d 450, 12 Misc. 3d 963, 2006 N.Y. Misc. LEXIS 1281 (N.Y. Civ. Ct. 2006)*.

Court had jurisdiction to confirm an arbitration award because the fact that *N.Y. Uniform City Ct. Act § 206* was silent as to confirming an arbitration award did not automatically reflect an intention to deny city courts outside of New York City that authority; the Civil Practice Law and Rules were to be liberally construed to secure the just, speedy, and inexpensive determination of every civil judicial proceeding. *FIA Card Servs. v Homer, 896 N.Y.S.2d 570, 27 Misc. 3d 448, 2008 N.Y. Misc. LEXIS 7547 (N.Y. County Ct. 2008)*.

Argument that a petition to confirm an arbitration award should be dismissed as untimely under N.Y. *C.P.L.R. 7510* was without merit; the arbitrators signed the award on May 15 and May 16, 2007, and the petition was filed on May 13, 2008, and even assuming that the award was delivered on the day that award was signed, the petition was brought within one year of delivery of the award. Respondent's reliance on a Dispute Resolution order dated May 8, 2007 was misplaced, because it was not an award for which petitioner sought confirmation; the Dispute Resolution order itself did not set forth any amount to be recovered against respondent. *Matter of RBC Capital Mkts. Corp. v Bittner, 877 N.Y.S.2d 877, 24 Misc. 3d 728, 241 N.Y.L.J. 90, 2009 N.Y. Misc. LEXIS 989 (N.Y. Sup. Ct. 2009)*.

10. Mootness

Given the existence of some proof of insurance coverage of defendant in an action arising from an automobile accident, in the form of a statement from the Department of Motor Vehicles, plaintiffs' insurer was entitled to stay of the arbitration proceedings initiated by plaintiffs pursuant to the uninsured motorist indorsement of their policy pending a hearing on the issue of defendant's coverage, even though the statement from the Department of Motor Vehicles contained an apparent contradiction as to the model year of the vehicle involved and apparently referred to a period of time prior to the accident and prior to the revocation of defendant's license and registration for failure to carry insurance. The appeal by plaintiff's insurer on this issue was not rendered moot by virtue of the fact that a judgment to confirm the arbitration award had been obtained and the judgment paid, since confirmation of an arbitrator's award and vacatur and modification thereof are governed by *CPLR 7510*, *7511*, and there are no grounds specified in those sections that would moot or affect a pending application for a stay; nor are any grounds specified in *CPLR 7503*, governing a stay of arbitration, that would moot the appeal since the judgment was obtained in the proceeding to confirm the award. *Country-Wide Ins. Co. v Leff, 78 A.D.2d 830, 433 N.Y.S.2d 437, 1980 N.Y. App. Div. LEXIS 13507 (N.Y. App. Div. 1st Dep't 1980)*.

Order confirming an arbitration award was proper because, pursuant to N.Y. *C.P.L.R. 7510*, a court was required to confirm an arbitration award unless the award was vacated or modified upon a ground specified in N.Y. *C.P.L.R. 7511*, and mootness was not one of the grounds specified; whether or not the award had been fully satisfied was irrelevant. The N.Y. *C.P.L.R. 7510* directive to confirm an award was not qualified by the broad terms of N.Y. *C.P.L.R. 404(a)*, and did not require confirmation of an award only upon the application of a party who prevailed in

whole or in part in an arbitration. *Matter of Bernstein Family Ltd. P'ship v Sovereign Partners, L.P., 66 A.D.3d 1, 883 N.Y.S.2d 201, 2009 N.Y. App. Div. LEXIS 5676 (N.Y. App. Div. 1st Dep't 2009)*.

11. Non-resident petitioner

CPLR 7502 (subd [a]) permits a nonresident to commence a proceeding in a court in the county in which one of the parties resides or is doing business to confirm an arbitration award pursuant to *CPLR 7510* and to enter the same as a judgment pursuant to *CPLR 7514*, in which proceeding the court has full jurisdiction to review the arbitration and the respective claims of the parties, including a claim that the arbitration award should be vacated. Accordingly, personal service of an application to vacate would be unnecessary in such a case, since, after the institution of an application to confirm the award, all subsequent applications are made by motion in the proceeding (*CPLR 7502*, subd [a]); service of a cross motion in the pending proceeding may be made by ordinary mail upon the nonresident's attorney. *Green Bus Lines, Inc. v Elliot, 102 Misc. 2d 1029, 424 N.Y.S.2d 1019, 1980 N.Y. Misc. LEXIS 2054 (N.Y. Sup. Ct. 1980)*.

12. Post-award interest; costs; attorneys' fees

In proceeding to confirm arbitration award arising from termination of account executive, court did not improperly terminate post-award interest in contravention of CLS *CPLR § 5002* where (1) relief requested in arbitration included damages for value of brokerage account, and (2) petitioner accepted moneys which had been frozen in account pending outcome of arbitration; it would have been inequitable to permit recovery of additional post-award interest after date when respondent tendered amount that would have fully satisfied remainder of award. *Venables v Painewebber, Inc., 205 A.D.2d 788, 613 N.Y.S.2d 441, 1994 N.Y. App. Div. LEXIS 6572 (N.Y. App. Div. 2d Dep't 1994)*.

Petitioner should not have been awarded costs in proceeding to confirm arbitration award. *Glantz v Nationwide Mut. Ins. Co., 226 A.D.2d 638, 641 N.Y.S.2d 136, 1996 N.Y. App. Div. LEXIS 4399 (N.Y. App. Div. 2d Dep't 1996)*.

Denial of a request for interest from the date of an arbitration award was proper because the money awarded was not pursuant to an existing obligation or breach of a duty; instead, the arbitration was to resolve an impasse relating to State employees' collective bargaining agreement. The award rendered did not warrant interest. *Matter of New York State Correctional Officers & Police Benevolent Assn., Inc. (State of New York), 49 A.D.3d 1074, 853 N.Y.S.2d 430, 2008 N.Y. App. Div. LEXIS 2474 (N.Y. App. Div. 3d Dep't)*, app. denied, *11 N.Y.3d 701, 864 N.Y.S.2d 389, 894 N.E.2d 653, 2008 N.Y. LEXIS 2498 (N.Y. 2008)*.

Law firm was not entitled to post-award, pre-judgment interest on an arbitration award in a fee dispute since it was holding $310,000 in escrow and chose not to avail itself of the funds when the $280,000 arbitrators' award became final, which former N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.46(b)(4), now N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.15(b)(4), allowed it to do; nonetheless, when the award became final, the law firm did not pay itself the amount of the award and transmit the balance to the client, but, rather, in addition to seeking the authorization for payment of the award, the law firm improperly sought to obtain a benefit by refusing to transmit the balance unless the client executed releases. The balance belonged to the client and the law firm had no legal claim to it, and accordingly, the law firm was required to "promptly pay" to the client the funds to which it was entitled after the arbitrators' award became final. *Matter of Levin & Glasser, P.C. v Kenmore Prop., LLC, 70 A.D.3d 443, 896 N.Y.S.2d 311, 2010 N.Y. App. Div. LEXIS 903 (N.Y. App. Div. 1st Dep't 2010)*.

While a general partner and an accountant were entitled to confirmation of an entire arbitration under N.Y. *C.P.L.R. 7510*, they did not prevail in the arbitration proceeding; therefore, they were not entitled to attorney fees and costs. *Wiederhorn v Merkin, 95 A.D.3d 429, 944 N.Y.S.2d 53, 2012 N.Y. App. Div. LEXIS 3452 (N.Y. App. Div. 1st Dep't)*, superseded, vacated, recalled, *98 A.D.3d 859, 952 N.Y.S.2d 478, 2012 N.Y. App. Div. LEXIS 6125 (N.Y. App. Div. 1st Dep't 2012)*.

Costs of proceeding to enforce arbitrator's award were assessed against insurer where, without any good reason, insurer chose to delay payment for more than one year. *Grabowski v Allstate Ins. Co., 85 Misc. 2d 845, 380 N.Y.S.2d 587, 1976 N.Y. Misc. LEXIS 2069 (N.Y. Sup. Ct. 1976)*.

In action claiming $3,226.71 for unpaid rent and attorney's fees, plus interest, wherein District Court sent matter to arbitration and award was granted in plaintiff's favor, plaintiff was not required to bring motion under CLS *CPLR § 7510* to confirm arbitrator's award in order to have judgment entered on award, as arbitration of claims seeking less than $6,000 was governed by CLS Adm Stds & Policies (22 NYCRR) part 28, not CLS CPLR Art 75. *Nicholls Park Assocs. v Gillard, 188 Misc. 2d 178, 727 N.Y.S.2d 253, 2001 N.Y. Misc. LEXIS 157 (N.Y. App. Term 2001)*.

Employee who was injured in an automobile accident and sought payment under the underinsured motorist provision of his employer's insurance policy preserved his right to seek interest on an arbitrator's award by endorsing a check he received from a company that insured his employer "under protest," and the trial court confirmed the arbitrator's award and awarded interest on the amount the arbitrator awarded. *Church Mut. Ins. Co. v Kleingardner, 774 N.Y.S.2d 265, 2 Misc. 3d 676, 2003 N.Y. Misc. LEXIS 1578 (N.Y. Sup. Ct. 2003)*.

District court erred in denying attorneys' fees under its equitable powers when it confirmed an arbitration award for unpaid wages because it misapprehended the basis for the employee's request, which was for statutory fees under New York law; a request for statutory fees was proper because the action on the award was a special proceeding and was considered to be an action to recover unpaid wages for fee-shifting purposes. *Odeon Capital Grp. LLC v Ackerman, 864 F.3d 191, 2017 U.S. App. LEXIS 13129 (2d Cir. N.Y. 2017)*.

13. Service of application for confirmation of arbitration award

A notice of petition to confirm an arbitration award was properly served on respondent corporation by service on a corporate employee, notwithstanding his testimony that he was not authorized to accept service, where after the process server went to the corporation's address and was informed it had moved, he went to new location, told the corporation's receptionist that he had some legal papers to serve on the company, and, as a result, the employee who was served appeared, read the papers, and said, "I can take these." *Smithtown General Hospital v American Transit Ins. Co., 94 A.D.2d 767, 462 N.Y.S.2d 712, 1983 N.Y. App. Div. LEXIS 18225 (N.Y. App. Div. 2d Dep't)*, app. dismissed, *60 N.Y.2d 643, 1983 N.Y. LEXIS 6208 (N.Y. 1983)*.

In arbitration proceeding arising from alleged wrongful discharge of 2 employees of building owned by respondent corporation, court should have vacated default judgment of confirmation for lack of jurisdiction over respondent where (1) demand and notices in arbitration proceeding were directed to respondent's office in Brooklyn, not to Manhattan address set forth in assent to arbitration agreement executed by its sole shareholder in 1988, and (2) where 1988 agreement provided that successors in ownership or control of building could adopt agreement within 30 days "unless they have otherwise indicated their intention not to be bound by this agreement," it was error to conclude that individual who purchased shares of respondent corporation, after acquiring control of building by lease in 1991, adopted collective bargaining agreement and was bound by its terms, and that service of confirmation paper by mail to Manhattan address set forth in 1988 agreement, not respondent's office in Brooklyn, was

reasonable. *Bevona v Blue Star Realty Corp., 264 A.D.2d 586, 694 N.Y.S.2d 656, 1999 N.Y. App. Div. LEXIS 9088 (N.Y. App. Div. 1st Dep't 1999)*.

In a proceeding to confirm a no-fault arbitration award in which the petition to confirm was the first application to the court in the controversy, the proceeding would be made returnable at least 18 days after service upon a representative of the Superintendent of Insurance, as agent for service of process, if that alternative method to personal service was to be used, since it was the intent of the Legislature that the insurance company responding to process have a least ten extra days beyond the eight days' answering time applicable to special proceedings in general, when service of process was made other than by personal delivery so as to give respondent a fair opportunity to appear. *Liebman v Great American Ins. Co., 116 Misc. 2d 500, 455 N.Y.S.2d 693, 1982 N.Y. Misc. LEXIS 3905 (N.Y. Civ. Ct. 1982)*.

14. Reconsideration by arbitrator

The plan of Article 75 of the CPLR is to make no practical distinction between motions to confirm and motions to modify or vacate in that both types of motion must result in either confirmation, modification or vacation without regard to the type of motion made and therefore on a motion for confirmation as well as for modification or vacation, the court may await the arbitrator's final disposition, including a reconsideration of the award under § 7509. Where an arbitration award is taken for a reconsideration under *CPLR 7509*, the one-year period mentioned in this section begins to run from the date of final determination of the arbitrators. *Belli v Matthew Bender & Co., 24 A.D.2d 72, 263 N.Y.S.2d 846, 1965 N.Y. App. Div. LEXIS 3161 (N.Y. App. Div. 1st Dep't 1965)*.

Where determination of arbitrator did not sufficiently enter the issues submitted for arbitration, the matter would be remitted to the arbitrator. *Labor Relations Section of Northern New York Builders Exchange, Inc. v Gordon, 41 A.D.2d 25, 341 N.Y.S.2d 714, 1973 N.Y. App. Div. LEXIS 5049 (N.Y. App. Div. 4th Dep't 1973)*.

15. Res judicata; collateral estoppel

De novo adjudication of liability and damages issues in no-fault insurance case is not barred by prior confirmation of arbitrator's liability determination under CLS CPLR Art 75 since, where award is $5,000 or more, entire dispute is subject to plenary judicial adjudication under *CLS Ins § 5106*. *Greenberg v Ryder Truck Rental, Inc., 70 N.Y.2d 573, 523 N.Y.S.2d 67, 517 N.E.2d 879, 1987 N.Y. LEXIS 19266 (N.Y. 1987)*.

The doctrines of res judicata and collateral estoppel are applicable to issues resolved by arbitration where there has been a final determination on the merits, notwithstanding lack of confirmation of the award. *Hilowitz v Hilowitz, 85 A.D.2d 621, 444 N.Y.S.2d 948, 1981 N.Y. App. Div. LEXIS 16438 (N.Y. App. Div. 2d Dep't 1981)*.

In proceeding to confirm arbitration award, respondent would be estopped from pleading one-year statute of limitations (CLS *CPLR § 7510*) as defense on theory that its applications for reargument did not toll limitations period because they were predicated on improper grounds, since such claim would permit respondent to benefit from its own improper applications. *Kilstein v Agudath Council of Greater New York, Inc., 133 A.D.2d 809, 520 N.Y.S.2d 189, 1987 N.Y. App. Div. LEXIS 51849 (N.Y. App. Div. 2d Dep't 1987)*, app. denied, *71 N.Y.2d 805, 529 N.Y.S.2d 76, 524 N.E.2d 430, 1988 N.Y. LEXIS 617 (N.Y. 1988)*.

Arbitration award cannot serve as res judicata where award has not been confirmed by court under CLS *CPLR § 7510*; it is only judgment entered on arbitration after confirmation that is entitled to res judicata effect. *Allcity Ins.*

Co. v Vitucci, 151 A.D.2d 430, 543 N.Y.S.2d 86, 1989 N.Y. App. Div. LEXIS 8885 (N.Y. App. Div. 1st Dep't), aff'd, *74 N.Y.2d 879, 547 N.Y.S.2d 841, 547 N.E.2d 96, 1989 N.Y. LEXIS 3084 (N.Y. 1989)*.

In special proceeding to confirm arbitration award, insurance company was estopped from asserting one-year statute of limitations as defense where (1) following hearing, arbitrator concluded that insurance company had improperly discontinued insured's lost earnings benefits on basis of alleged fraud by him, which was unsubstantiated, (2) arbitrator's decision was not appealed, (3) when insured initially attempted to confirm award, hearing was held at which insurance company assured insured's counsel that payments would begin as soon as second arbitration on medical benefits was concluded, and (4) in reliance on such representation, insured did not again attempt to confirm award until more than one year after it was served on him. *Gentile v State Farm Ins. Co., 170 A.D.2d 508, 566 N.Y.S.2d 76, 1991 N.Y. App. Div. LEXIS 2016 (N.Y. App. Div. 2d Dep't 1991)*.

Court properly determined that prior arbitration award in favor of appellant, which was not confirmed within one year under CLS *CPLR § 7510*, warranted stay of subsequent arbitration proceeding initiated by appellant, premised on same claim. *Ulster Elec. Supply Co. v Local 1430, IBEW, 253 A.D.2d 765, 677 N.Y.S.2d 485, 1998 N.Y. App. Div. LEXIS 9420 (N.Y. App. Div. 2d Dep't 1998)*.

16. Scope of judicial review, generally

An arbitrator's resolution of questions of substantive law or fact is not judicially reviewable. *Professional Staff Congress/City University of New York v Board of Higher Education, 39 N.Y.2d 319, 383 N.Y.S.2d 592, 347 N.E.2d 918, 1976 N.Y. LEXIS 2411 (N.Y. 1976)*.

An arbitrators' determination in their award that a person had not acted as an insurance agent in the state was not reviewable in the Court of Appeals since that determination was for the arbitration tribunal to resolve and the award was properly confirmed and the insurer's cross-motion to vacate the award was properly denied. *Neirs-Folkes, Inc. v Drake Ins. Co., 53 N.Y.2d 1038, 442 N.Y.S.2d 487, 425 N.E.2d 875, 1981 N.Y. LEXIS 2563 (N.Y. 1981)*.

Where obligation to arbitrate arose not through voluntary agreement, but through statutory mandate of *CLS Ins §§ 5105(b)* and *5221(b)(6)*, arbitrator's rejection of statute of limitations defense, and implicit determination of applicable limitations period and accrual date, were subject to judicial review under arbitrary and capricious standard. *Motor Vehicle Accident Indemnification Corp. v Aetna Cas. & Sur. Co., 89 N.Y.2d 214, 652 N.Y.S.2d 584, 674 N.E.2d 1349, 1996 N.Y. LEXIS 3576 (N.Y. 1996)*.

Respondent was not served with proper notice of intention to arbitrate where notice of arbitration did not contain language required by CLS *CPLR § 7503(c)*; consequently, when petitioner sought confirmation of award in its favor pursuant to CLS *CPLR § 7510*, respondent could properly seek broader and additional remedies set forth in CLS *CPLR § 7511(b)(2)*. *Blamowski v Munson Transp., Inc., 91 N.Y.2d 190, 668 N.Y.S.2d 148, 690 N.E.2d 1254, 1997 N.Y. LEXIS 3717 (N.Y. 1997)*.

In determining whether to confirm or vacate arbitral award reinstating correctional officer who was suspended for flying Nazi flag from front porch of his home, court would not engage in balancing test to determine whether correctional officer's right to freedom of expression was outweighed by government's interest in operating correctional facilities safely because, by submitting issue of officer's conduct to arbitration, parties gave arbitrator, not court, responsibility of passing on implications of officer's offensive conduct under their collective bargaining agreement. *New York State Correctional Officers & Police Benevolent Ass'n v State, 94 N.Y.2d 321, 704 N.Y.S.2d 910, 726 N.E.2d 462, 1999 N.Y. LEXIS 3933 (N.Y. 1999)*.

Mere fact that one arbitrator disagrees with portion of another arbitrator's reasoning in reaching same result does not alter validity of award. *Rockland Community College Federation of Teachers, Local 1871 v Board of Trustees, 142 A.D.2d 732, 531 N.Y.S.2d 117, 1988 N.Y. App. Div. LEXIS 8152 (N.Y. App. Div. 2d Dep't 1988)*, app. dismissed, *73 N.Y.2d 974, 540 N.Y.S.2d 1007, 538 N.E.2d 359 (N.Y. 1989)*.

Award was properly confirmed where arbitrator set different buy-or-sell prices on stock in dispute among shareholders of close corporation which gave preferential treatment to customer companies owned by four of five shareholders, giving preferential treatment to shareholder who did not own a customer company; arbitrators were not required to disclose the decided issues nor facts found and an award is not reviewable for errors of law or fact. *Colletti v Mesh, 23 A.D.2d 245, 260 N.Y.S.2d 130, 1965 N.Y. App. Div. LEXIS 4048 (N.Y. App. Div. 1st Dep't)*, aff'd, *17 N.Y.2d 460, 266 N.Y.S.2d 814, 213 N.E.2d 894, 1965 N.Y. LEXIS 938 (N.Y. 1965)*.

Although assuming a valid agreement to arbitrate New Jersey arbitration award entered against New York domiciliary could be confirmed in New York pursuant to arbitration agreement giving arbitrator personal jurisdiction over parties, question whether a valid agreement existed (*CPLR § 7503*, subd a) could be raised in court upon petitioner's motion to confirm (*CPLR § 7510*, *§ 7511*, subd b(2)) where petitioner failed to serve upon respondent a notice of intention to arbitrate pursuant to *CPLR § 7503*, subd c. *Swan v Sit'n Chat Restaurant, Inc., 43 A.D.2d 949, 352 N.Y.S.2d 31, 1974 N.Y. App. Div. LEXIS 6042 (N.Y. App. Div. 2d Dep't 1974)*.

On city's appeal from order confirming arbitration award, Appellate Division would decline to rule on issue whether "Favored Nations" clause in collective bargaining agreement between city and firefighters' union was illegal where city failed to raise the issue before special term or at any time during prior litigation in which city unsuccessfully sought to stay arbitration. *Yonkers v International Ass'n of Firefighters, 58 A.D.2d 891, 396 N.Y.S.2d 888, 1977 N.Y. App. Div. LEXIS 13074 (N.Y. App. Div. 2d Dep't)*, app. denied, *43 N.Y.2d 643, 1977 N.Y. LEXIS 4971 (N.Y. 1977)*.

In proceeding to confirm arbitrator's award, Special Term erred in awarding retroactive pay and benefits to state university employee for period during which he was eligible to return to work after 6-month disciplinary suspension where arbitrator in underlying grievance proceeding had been aware of length of employee's leave without pay and had nonetheless made no mention of retroactive pay or benefits in her determination; mere fact that arbitration award is silent on issue does not enable court to permit additional relief with respect to that issue. *Civil Service Employees Asso. v State, 124 A.D.2d 435, 507 N.Y.S.2d 535, 1986 N.Y. App. Div. LEXIS 61425 (N.Y. App. Div. 3d Dep't 1986)*.

Absent showing that arbitration award is so ambiguous as to make it impossible to determine its meaning and intent, court may confirm award without remitting to arbitrator for clarification. *Marfrak Realty Corp. v Samfred Realty Corp., 140 A.D.2d 524, 528 N.Y.S.2d 417, 1988 N.Y. App. Div. LEXIS 5446 (N.Y. App. Div. 2d Dep't 1988)*, app. denied, *74 N.Y.2d 614, 547 N.Y.S.2d 848, 547 N.E.2d 103, 1989 N.Y. LEXIS 3139 (N.Y. 1989)*.

Motion to confirm arbitration award arising from dispute over various sales contracts was improperly denied where Supreme Court made finding that arbitrator had ignored certain facts and law, then made findings of fact concerning parties' knowledge and acts, and cited and relied on various provisions of parties' contract, UCC, and trade association market rules in making its conclusions of law; Supreme Court violated clear mandate of legislature that courts should not be involved in merits of dispute. *Graniteville Co. v First Nat'l Trading Co., 179 A.D.2d 467, 578 N.Y.S.2d 183, 1992 N.Y. App. Div. LEXIS 206 (N.Y. App. Div. 1st Dep't)*, app. denied, *79 N.Y.2d 759, 584 N.Y.S.2d 447, 594 N.E.2d 941, 1992 N.Y. LEXIS 1479 (N.Y. 1992)*.

In proceeding to confirm arbitration award pertaining to underinsured motorist coverage, claim of insurance company that arbitrator applied law of wrong state could not be entertained unless award was violative of public

policy, was totally irrational, or exceeded specifically enumerated limit on powers of arbitrator. *Barbee v Nationwide Mut. Ins. Co., 194 A.D.2d 604, 599 N.Y.S.2d 70, 1993 N.Y. App. Div. LEXIS 5591 (N.Y. App. Div. 2d Dep't 1993)*.

Court did not act improperly by interpreting "interest at 9 percent per annum" language of arbitration award to mean simple interest, rather than interest compounded yearly, notwithstanding subsequent memorandum of arbitration administrator which clarified meaning of award as "compounded yearly," since memorandum was not proper modification of award and was not signed or acknowledged. *Venables v Painewebber, Inc., 205 A.D.2d 788, 613 N.Y.S.2d 441, 1994 N.Y. App. Div. LEXIS 6572 (N.Y. App. Div. 2d Dep't 1994)*.

Whether or not general partners' sale of partnership property was permissible under parties' partnership agreement was question of law not reviewable by courts. *Revson v Hack, 239 A.D.2d 169, 657 N.Y.S.2d 51, 1997 N.Y. App. Div. LEXIS 4916 (N.Y. App. Div. 1st Dep't 1997)*.

In proceeding in which Supreme Court denied petition to stay arbitration and granted respondent's application under CLS *CPLR § 7510* to confirm arbitration award, Appellate Division would not review petitioner's argument that because respondent's claim was not arbitrable, arbitration award violated public policy and was made in excess of arbitrator's jurisdiction; petitioner's argument was in essence attack on Supreme Court's order holding that matter was arbitrable, and Appellate Division had previously held that Supreme Court's order was not subject to review. *Barnes v Council 82, AFSCME ex rel. Monroe, 246 A.D.2d 755, 666 N.Y.S.2d 527, 1998 N.Y. App. Div. LEXIS 322 (N.Y. App. Div. 3d Dep't 1998)*.

Lower court should not have modified an arbitration award on its own motion under N.Y. *C.P.L.R. 7511(a)* and should have confirms it under N.Y. *C.P.L.R. 7510*. That was because N.Y. *C.P.L.R. § 7511(a)* required that only a party could move to vacate or modify an arbitrator's award and there was no statute or public policy violated by the arbitrator's award. *Schlesinger v Schlesinger, 21 A.D.3d 942, 801 N.Y.S.2d 615, 2005 N.Y. App. Div. LEXIS 9057 (N.Y. App. Div. 2d Dep't 2005)*.

In a petition seeking to confirm an arbitration award in favor of a law firm in its fee dispute with a client, the trial court erred in awarding interest prior to the date of the award; the arbitrators had authority to award pre-award interest but did not do so. Because the law firm could have sought interest from the arbitrators, it was barred from seeking it from the court. *Matter of Levin & Glasser, P.C. v Kenmore Prop., LLC, 70 A.D.3d 443, 896 N.Y.S.2d 311, 2010 N.Y. App. Div. LEXIS 903 (N.Y. App. Div. 1st Dep't 2010)*.

Arbitrator's award under CLS *Gen Bus § 198-a* of refund of purchase price, license costs, registration, filing fees and state sales tax related to purchase of automobile would be affirmed notwithstanding automobile dealer's claim that automobile was "used" within meaning of CLS *Gen Bus § 198-b(a)(2)* as odometer read 5,089 at time of sale since, if error was made by arbitrator, it was error of fact and law that was not reviewable by court. *Subaru of America v McKelvey, 141 Misc. 2d 41, 532 N.Y.S.2d 617, 1988 N.Y. Misc. LEXIS 591 (N.Y. Sup. Ct. 1988)*.

Standard automobile liability insurance provision, which permits trial de novo when arbitration panel awards claim for underinsurance benefits in excess of $10,000 "minimum limit for bodily injury liability," is unenforceable since (1) provision is against public policy goal of providing arbitration as expeditious and inexpensive forum, and (2) provision is unconscionable in view of lack of mutuality and clear absence of choice on part of policyholder. *Hanover Ins. Co. v Losquadro, 157 Misc. 2d 1014, 600 N.Y.S.2d 419, 1993 N.Y. Misc. LEXIS 244 (N.Y. Sup. Ct. 1993)*.

Court denied father's motion to confirm arbitration award of religious tribunal (Beth Din) with respect to child support award of $50 per week per child, where award failed to provide any information as to how amount was

arrived at, was not in best interests of children, and did not comply with current public policy. *Rakoszynski v Rakoszynski, 174 Misc. 2d 509, 663 N.Y.S.2d 957, 1997 N.Y. Misc. LEXIS 508 (N.Y. Sup. Ct. 1997)*.

Trial court denied the teacher association's petition to confirm the arbitration award in its favor that found it teacher association had not violated public policy, that a stipulation it had entered with the school district had been violated, and that the teacher association was entitled to dues that it would have received had the work of the teacher, not a member of the teacher association and who had performed work in another school district, been performed by a member of the teacher association; enforcement of the arbitration award would require alteration of the statutory scheme embodied in *N.Y. Educ. Law § 3602-c*.2 because it would not have the special services mandated be provided by the school district in which the services are located, but, instead, would impermissibly require that the services be rendered by employees of the school district, which would be contrary to the law and which a trial court could not permit. *Lawrence Teacher's Assn. v Lawrence Pub. Schools, 815 N.Y.S.2d 396, 12 Misc. 3d 312, 235 N.Y.L.J. 84, 2006 N.Y. Misc. LEXIS 537 (N.Y. Sup. Ct. 2006)*, aff'd, *38 A.D.3d 779, 833 N.Y.S.2d 133, 2007 N.Y. App. Div. LEXIS 3770 (N.Y. App. Div. 2d Dep't 2007)*.

Pursuant to N.Y. *C.P.L.R. 7510* and *7511*, there was no authority for judicial intervention in a dispute between a disponent owner of a vessel and a vessel charterer regarding whether demurrage was owed to the owner, as no final arbitration award had been made between the parties pursuant to their charter party agreement; accordingly, a request for an attachment under N.Y. *C.P.L.R. 7502* was deemed moot, as there was no final arbitration award. *Pacnav S.A. v Effie Bus. Corp., 909 N.Y.S.2d 880, 29 Misc. 3d 1129, 2010 N.Y. Misc. LEXIS 4904 (N.Y. Sup. Ct. 2010)*.

17. —Article 78 proceeding

Contention that issues raised in grievance proceedings did not come within provisions of Civil Service Employees Association agreement and should not be considered within grievance procedure thereof, which contention had not received judicial review to confirm or vacate award, could be considered and determined on appeal to the Appellate Division in Article 78 proceeding wherein it was directed that employees be paid at certain grade levels. *Civil Serv. Emples. Ass'n v Bartlett, 51 A.D.2d 100, 380 N.Y.S.2d 329, 1976 N.Y. App. Div. LEXIS 11057 (N.Y. App. Div. 3d Dep't 1976)*, rev'd, *41 N.Y.2d 998, 395 N.Y.S.2d 445, 363 N.E.2d 1180, 1977 N.Y. LEXIS 2033 (N.Y. 1977)*.

18. —Effect of arbitration rules of American Arbitration Association (AAA)

Whether a rule of the American Arbitration Association was violated in the hearing of an arbitration claim is a matter for the arbitrators to decide and is not subject to review by the Court of Appeals where the rule in question was incorporated by reference into the parties' agreement providing for arbitration of all disputes and controversies. To be distinguished is the situation where a party asserts a claim that the statutory requirements as to notice of an arbitration hearing under *CPLR § 7506(b)* were not satisfied; in such cases the Court of Appeals is authorized to review the claim pursuant to *CPLR § 7511(b)*. *Kingsley v Redevco Corp., 61 N.Y.2d 714, 472 N.Y.S.2d 610, 460 N.E.2d 1095, 1984 N.Y. LEXIS 4018 (N.Y. 1984)*.

In proceeding to confirm award made by arbitrator who refused to recuse himself when asked to do so by respondent's counsel, it was proper for court to take judicial notice of rule 10 of Accident Claims Arbitration Rules of American Arbitration Association (AAA), which requires that decisions as to disqualifications of arbitrators for partiality are to be made by AAA and that its decisions are deemed to be conclusive; thus, it was proper to set aside award and direct parties to contact *Santana v Country-Wide Ins. Co., 184 Misc. 2d 294, 714 N.Y.S.2d 854, 2000 N.Y. Misc. LEXIS 183 (N.Y. App. Term 2000)*.

19. —Jurisdiction; standing

Arbitration clause providing that arbitrator's award was final and binding, except that "in the event either party determines that the arbitrator has varied the terms or illegally interpreted the terms of the agreement...such aggrieved party shall have the right to submit that sole issue to the Court...and the Court shall have jurisdiction of that particular issue," was ineffective to broaden scope of judicial review under CLS CPLR Art 75; clause in question was construed as precluding arbitrator from adding to, subtracting from, or otherwise modifying terms of parties' agreement. *County of Chemung v Civil Serv. Emples. Ass'n, 277 A.D.2d 792, 716 N.Y.S.2d 734, 2000 N.Y. App. Div. LEXIS 12219 (N.Y. App. Div. 3d Dep't 2000).*

Employee, in a proceeding pursuant to N.Y. *C.P.L.R. 7510*, lacked standing to file a petition to confirm the arbitration award that determined that the employee's suspension from the job was without probable cause; because the employee's union represented the employee in the arbitration proceedings, the union was the real party in interest. *Culkin v State, 12 A.D.3d 794, 783 N.Y.S.2d 885, 2004 N.Y. App. Div. LEXIS 13247 (N.Y. App. Div. 3d Dep't 2004)*.

Although a board of realtors, whose members acted as arbitrators, lacked standing under N.Y. *C.P.L.R. 7510*, *7511* to appeal the arbitration decision, because it was not a party thereto, pursuant to N.Y. *C.P.L.R. 5511*, the board could challenge the trial court's order awarding declaratory and injunctive relief against it, as such relief was not available in the context of a N.Y. C.P.L.R. art. 75 proceeding. *Matter of Neuhaus v Staten Is. Bd. of Realtors, Inc., 44 A.D.3d 1054, 845 N.Y.S.2d 792, 2007 N.Y. App. Div. LEXIS 11053 (N.Y. App. Div. 2d Dep't 2007)*.

Merits of a contractor's challenge to an arbitration award for contribution payments to benefit funds were not examined because the 90-day statute of limitations had run; the court borrowed N.Y. *C.P.L.R. § 7511(a)* which allowed for the swift resolution of labor disputes and refused to apply the New York courts' view that N.Y. *C.P.L.R. § 7510* allowed a challenge at confirmation. *N.Y. City Dist. Council of Carpenters Pension Fund v Dafna Constr. Co., 438 F. Supp. 2d 238, 2006 U.S. Dist. LEXIS 39190 (S.D.N.Y. 2006)*.

20. —Waiver

While party may seek judicial determination as to whether he or she has agreed to arbitration, time to do so is before arbitration commences and not on application to confirm award; claim that issue is not arbitrable is waived absent timely motion to stay arbitration. *Bevona v Valencia, 191 A.D.2d 192, 594 N.Y.S.2d 223, 1993 N.Y. App. Div. LEXIS 2068 (N.Y. App. Div. 1st Dep't 1993).*

Insurance company waived its contractual right to trial de novo of underinsured motorist claim in event of arbitration award exceeding $10,000 when it acquiesced in appointment of one arbitrator, as called for by rules of arbitral forum designated in insured's demand for arbitration, instead of 3 arbitrators, as called for in policy, and by otherwise failing to advise forum that dispute was to be arbitrated in accordance with policy and not rules of forum prescribed for binding arbitration. *General Accident Ins. Co. v Giacomazzo by Giacomazzo, 204 A.D.2d 236, 612 N.Y.S.2d 43, 1994 N.Y. App. Div. LEXIS 5623 (N.Y. App. Div. 1st Dep't 1994).*

Former client waived any claim in support of the client's N.Y. *C.P.L.R. 7511* petition and in opposition to an accounting firm's N.Y. *C.P.L.R. 7510* petition based on the arbitrators' use of summary judgment as: (1) the client submitted thorough briefs and entered evidence to support the client's opposition to the firm's summary judgment motion; (2) the client never objected to the arbitrators' use of summary judgment; and (3) the client did not request an evidentiary hearing on the merits. *Brooks v BDO Seidman, LLP, 917 N.Y.S.2d 842, 31 Misc. 3d 653, 2011 N.Y.*

Misc. LEXIS 834 (N.Y. Sup. Ct. 2011), aff'd, *94 A.D.3d 528, 942 N.Y.S.2d 333, 2012 N.Y. App. Div. LEXIS 2619 (N.Y. App. Div. 1st Dep't 2012)*.

21. Tolling of statute of limitations

Where petitioner in proceeding to confirm arbitration award received actual delivery of award, failure to serve award in manner provided by CLS *CPLR § 7507* did not toll one-year limitation period set forth in CLS *CPLR § 7510*. *Sassower v Greenspan, Kanarek, Jaffe & Funk, 121 A.D.2d 549, 504 N.Y.S.2d 31, 1986 N.Y. App. Div. LEXIS 58526 (N.Y. App. Div. 2d Dep't 1986)*.

Statute of limitations for confirming arbitration award was tolled during period in which arbitrators entertained merits of petitioner's request to clarify arbitration award. *Warner-Chappell Music v Aberbach de Mex., S.A., 224 A.D.2d 301, 638 N.Y.S.2d 35, 1996 N.Y. App. Div. LEXIS 1251 (N.Y. App. Div. 1st Dep't)*, app. denied, *88 N.Y.2d 805, 646 N.Y.S.2d 984, 670 N.E.2d 225, 1996 N.Y. LEXIS 1654 (N.Y. 1996)*.

B. Confirmation Of Arbitration Award

1. Properly Granted

22. Generally

Arbitration of dispute between two attorneys and their clients did not offend public policy, in that it arose from the settlement agreement executed by the parties rather than from the underlying dispute. *Waks v Waugh, 59 N.Y.2d 723, 463 N.Y.S.2d 425, 450 N.E.2d 231, 1983 N.Y. LEXIS 3085 (N.Y. 1983)*.

Where award is in enforceable form, it must be confirmed even though in the opinion of the court, it is an unwise one which may produce as much litigation as it disposes of. *De Vitre v Bohn, 22 A.D.2d 856, 254 N.Y.S.2d 235, 1964 N.Y. App. Div. LEXIS 2691 (N.Y. App. Div. 1st Dep't 1964)*.

Award was properly confirmed where arbitrator set different buy-or-sell prices on stock in dispute among shareholders of close corporation which gave preferential treatment to customer companies owned by four of five shareholders, giving preferential treatment to shareholder who did not own a customer company; arbitrators were not required to disclose the decided issues nor facts found and an award is not reviewable for errors of law or fact. *Colletti v Mesh, 23 A.D.2d 245, 260 N.Y.S.2d 130, 1965 N.Y. App. Div. LEXIS 4048 (N.Y. App. Div. 1st Dep't)*, aff'd, *17 N.Y.2d 460, 266 N.Y.S.2d 814, 213 N.E.2d 894, 1965 N.Y. LEXIS 938 (N.Y. 1965)*.

Where principal contention and opposition to confirmation of arbitration award was that the arbitration did not follow certain contractual procedures and since such contention was not a statutory ground for vacating or modifying an arbitration award, award would be confirmed. *Jasper v Royal Mink Corp., 41 A.D.2d 730, 341 N.Y.S.2d 867, 1973 N.Y. App. Div. LEXIS 4868 (N.Y. App. Div. 1st Dep't 1973)*.

In an action by a drapery company to confirm an arbitration award generally in its favor, arising out of the arbitration provisions of three unpaid invoices reflecting the sale of fabric by a manufacturer to the company, each containing a one-year period of limitation, the petition to confirm the award, with respect to breaches by the manufacturer which occurred more than one year prior to the initiation of arbitration, should have been granted, and the arbitrators did not exceed their authority in making an award with respect thereto, since the manufacturer's

failure to assert the affirmative defense of the one-year period of limitation constituted a waiver thereof. *Tilbury Fabrics, Inc. v Stillwater, Inc., 81 A.D.2d 532, 438 N.Y.S.2d 82, 1981 N.Y. App. Div. LEXIS 10997 (N.Y. App. Div. 1st Dep't 1981)*, aff'd, *56 N.Y.2d 624, 450 N.Y.S.2d 478, 435 N.E.2d 1093, 1982 N.Y. LEXIS 3292 (N.Y. 1982)*.

The court erred in refusing to set aside an order denying an application to confirm an arbitration award on the ground that the award was not duly acknowledged by the arbitrator where the acknowledgment was obtained a short time after the application to confirm was denied. *Abreu v Nationwide Mut. Ins. Co., 87 A.D.2d 572, 447 N.Y.S.2d 744, 1982 N.Y. App. Div. LEXIS 15823 (N.Y. App. Div. 2d Dep't 1982)*.

In a proceeding to confirm an arbitration award the court properly granted petitioner's application, despite an allegation that the arbitrators were guilty of misconduct in that they refused to hear evidence because they arbitrarily found that a settlement had been reached with respect to most of the issues before them, and despite the fact that although testimony indicated that an oral settlement had been reached it was never reduced to writing, where the parties consented to dispense with a stenographic recording of the proceeding in question and therefore could not be heard to complain that the proceedings were not stenographically recorded. *Neiman v Springer, 89 A.D.2d 922, 453 N.Y.S.2d 771, 1982 N.Y. App. Div. LEXIS 18108 (N.Y. App. Div. 2d Dep't 1982)*.

Where petitioner's application to confirm an arbitrator's award was timely (*CPLR § 7510*), and respondent failed to advance any of the statutory grounds for vacating or modifying the award (*CPLR § 7511*), the award would be confirmed, notwithstanding that respondent had already paid the amount awarded, with the interest on the award being limited from the date of the award to the date of the payment. *Ricciardi v Travelers Ins. Co., 102 A.D.2d 871, 477 N.Y.S.2d 35, 1984 N.Y. App. Div. LEXIS 19081 (N.Y. App. Div. 2d Dep't 1984)*.

Motion to confirm arbitration award, heard more than one year after delivery of award, was properly granted, since original motion was made within one-year period required by CLS *CPLR § 7510*, but adjourned after award was paid (and subsequently renoticed), and confirmation of award did not prejudice respondents, who had never moved to modify or vacate award. *Cortland v Murray Walter, Inc., 124 A.D.2d 875, 508 N.Y.S.2d 301, 1986 N.Y. App. Div. LEXIS 62209 (N.Y. App. Div. 3d Dep't 1986)*.

Court should have granted petition to confirm arbitration award since (1) arbitrator did not exceed his power by permitting petitioner to orally amend its claim at hearing without prior notice, where respondent's proof rendered petitioner's demand superfluous but raised new dispute which was also arbitrable under parties' agreement, and (2) respondent's claim of prejudice was negated by its failure to request adjournment of hearing in order to prepare case against newly asserted claim. *Faberge, Inc. v Felsway Corp., 149 A.D.2d 369, 539 N.Y.S.2d 944, 1989 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 1st Dep't)*, app. denied, *74 N.Y.2d 610, 546 N.Y.S.2d 554, 545 N.E.2d 868, 1989 N.Y. LEXIS 2762 (N.Y. 1989)*.

Arbitrator did not exceed his authority by accepting medical documentation that postdated hearing, and thus court erred in granting insurer's motion to vacate award on that basis. *Travelers Ins. Co. v Job, 239 A.D.2d 289, 658 N.Y.S.2d 585, 1997 N.Y. App. Div. LEXIS 5592 (N.Y. App. Div. 1st Dep't 1997)*.

Arbitration award was properly confirmed under CLS *CPLR § 7510*, despite respondent's claim that arbitrator improperly failed to apply substantive law regarding mitigation of damages, absent provision in arbitration clause modifying rule that arbitrators are not bound by principles of substantive law and rules of evidence. *Thompson v S.L.T. Ready-Mix, 245 A.D.2d 911, 666 N.Y.S.2d 798, 1997 N.Y. App. Div. LEXIS 13620 (N.Y. App. Div. 3d Dep't 1997)*.

Arbitration award was properly confirmed where arbitrators lacked authority to vacate award; after arbitrator renders award, he or she is generally without power to render new award or to modify original award. *Hanover Ins.*

Co. v American Int'l Underwriters Ins. Co., 266 A.D.2d 545, 698 N.Y.S.2d 908, 1999 N.Y. App. Div. LEXIS 12296 (N.Y. App. Div. 2d Dep't 1999).

In proceeding to confirm arbitration award, court improperly granted respondents' motion to vacate judgment entered on confirmation of arbitration award, to extent of directing rehearing before American Arbitration Association, where respondents were served with demand for arbitration and were notified of hearing date, but chose not to appear, arbitrator made express finding that respondents were properly served with arbitration demand, and respondents failed to show that award was procured through fraud or misconduct or any of other statutorily-defined grounds for vacatur of arbitration award. *Gluck v Eastern Analytical Lab., 271 A.D.2d 532, 706 N.Y.S.2d 354, 2000 N.Y. App. Div. LEXIS 4043 (N.Y. App. Div. 2d Dep't 2000)*.

Court improperly denied petitioner's motion to confirm arbitration award, despite prior contacts between arbitrator and petitioner's outside general counsel, where respondents were sufficiently aware of such contacts to place them on notice of arbitrator's prior relationship with petitioner's counsel, and by proceeding with arbitration without challenging or inquiring further of arbitrator, notwithstanding petitioner's counsel's presence at and participation in arbitration, respondents effectively waived any objections they had in connection with relationship between petitioner's counsel and arbitrator. *Rothman v RE/MAX of N.Y., Inc., 274 A.D.2d 520, 711 N.Y.S.2d 477, 2000 N.Y. App. Div. LEXIS 8210 (N.Y. App. Div. 2d Dep't 2000).*

Supplemental arbitration award was not precluded by doctrine of res judicata where arbitration hearing which resulted in supplemental award was grounded on new event and was not merely revisitation of static prior award; thus, court improperly denied petition to confirm supplemental award. *Bevona v Command Sec. Servs., 284 A.D.2d 125, 726 N.Y.S.2d 633, 2001 N.Y. App. Div. LEXIS 5711 (N.Y. App. Div. 1st Dep't 2001)*.

Since appellant's contention that he was not a party to an arbitration agreement was not a basis to deny confirmation of the portion of the arbitration award which was in favor of respondents and against him or to vacate that portion of the award, and since appellant did not establish any other ground under N.Y. *C.P.L.R. 7511* for vacating that portion of the arbitration award, the award was properly confirmed under N.Y. *C.P.L.R. 7510*. *Lurie v Sobus, 289 A.D.2d 578, 735 N.Y.S.2d 187, 2001 N.Y. App. Div. LEXIS 13052 (N.Y. App. Div. 2d Dep't 2001)*.

Trial court properly granted a union's motion pursuant to N.Y. *C.P.L.R. 7510* to confirm an arbitration award against a county; the award did not leave matters open for future contention, and thus it was final pursuant to N.Y. *C.P.L.R. 7511(b)(1)(iii)*, as all that remained was an accounting of damages. *Civil Serv. Emples. Ass'n v County of Nassau, 305 A.D.2d 498, 759 N.Y.S.2d 540, 2003 N.Y. App. Div. LEXIS 5373 (N.Y. App. Div. 2d Dep't 2003)*.

Trial court improperly dismissed the credit card company's petition under N.Y. *C.P.L.R. 7510* to confirm an arbitration award, as the debtor's improper venue argument failed; the agreement's requirement that an arbitration hearing be held in a card holder's federal judicial district was inapplicable, as the case involved a document hearing at which the parties did not appear and for which there were no venue requirements. *Matter of MBNA Am. Bank v Cucinotta, 33 A.D.3d 1064, 823 N.Y.S.2d 237, 2006 N.Y. App. Div. LEXIS 12510 (N.Y. App. Div. 3d Dep't 2006)*.

Arbitration award against credit card holder for $5,600 in attorney's fees for frivolous claim under the Truth in the Lending Act, *15 U.S.C.S. § 1601* et seq., was confirmed under N.Y. *C.P.L.R. §§ 7510* and *7514* as the arbitrator did not exhibit a manifest disregard of the law under 10 Del. C. § 5714(a)(3) as *N.Y. Comp. Codes R. & Regs. tit. 22, § 130-1.1(c)(1)* was cited as a basis for the decision. *Chase Bank USA, N.A. v Hale, 859 N.Y.S.2d 342, 19 Misc. 3d 975, 239 N.Y.L.J. 83, 2008 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 2008)*.

Arbitration award for an accounting firm against a former client was confirmed under N.Y. *C.P.L.R. 7510* as the use of summary judgment in arbitration proceedings was not misconduct as the arbitrators: (1) gave the parties time to

thoroughly brief the issues and submit evidence; (2) carefully considered the evidence presented; (3) issued a written decision; (4) were confronted with no objections to the use of the procedure; and (5) did not restrict the amount or type of evidence that the client was allowed to submit. *Brooks v BDO Seidman, LLP, 917 N.Y.S.2d 842, 31 Misc. 3d 653, 2011 N.Y. Misc. LEXIS 834 (N.Y. Sup. Ct. 2011)*, aff'd, *94 A.D.3d 528, 942 N.Y.S.2d 333, 2012 N.Y. App. Div. LEXIS 2619 (N.Y. App. Div. 1st Dep't 2012)*.

Order granting an employee's N.Y. *C.P.L.R. 7510* application to confirm an arbitration award was proper because, inter alia, while the county initially took the position that the entire matter was not arbitrable, it thereafter joined in the selection of the arbitrator, fully participated in the arbitration proceeding, and submitted to arbitration the issue of whether the grievance was arbitrable rather than availing itself of all its reasonable judicial remedies; the county thus waived its right to contest the arbitrator's power to decide the controversy. *Matter of Jandrew v County of Cortland, 84 A.D.3d 1616, 923 N.Y.S.2d 778, 2011 N.Y. App. Div. LEXIS 4080 (N.Y. App. Div. 3d Dep't 2011)*.

Because the bifurcated procedure employed by a rabbinical court did not constitute a ground under N.Y. *C.P.L.R. 7509* to vacate a final arbitration award in favor of a lender, because the borrowers were not prejudiced by the award, and because the evidence was sufficient to support the award, pursuant to N.Y. *C.P.L.R. 7510*, *7514*, the award was confirmed. *Shimon v Silberman, 891 N.Y.S.2d 891, 26 Misc. 3d 910, 243 N.Y.L.J. 2, 2009 N.Y. Misc. LEXIS 3436 (N.Y. Sup. Ct. 2009)*, app. dismissed, *92 A.D.3d 789, 940 N.Y.S.2d 277, 2012 N.Y. App. Div. LEXIS 1212 (N.Y. App. Div. 2d Dep't 2012)*.

Where within an agreement to arbitrate a controversy no express provision existed for consent to the entry of judgment or for judicial confirmation, the court could nonetheless confirm an arbitration award and enter judgment thereon. *Harris v Stroudsburg Fur Dressing Corp., 389 F. Supp. 226, 1975 U.S. Dist. LEXIS 13771 (S.D.N.Y. 1975)*, limited, *In re Application of Harris, 560 F. Supp. 940, 1983 U.S. Dist. LEXIS 17388 (S.D.N.Y. 1983)*, limited, No. A124836.

23. Appraisals

Court should have confirmed impartial appraiser's evaluation of property at $1.1 million where (1) lease provided that rent was to be calculated as percentage of property value, and that property value would be determined by procedure in which parties would each appoint appraiser and if 2 appraisers could not agree, third impartial appraiser would be chosen by appraisers, (2) tenant's appraiser set value of $465,000 while landlords' appraiser set value at $1.7 million, and (3) landlords thereafter accepted impartial appraiser's evaluation. *Brown v Estate of Rosenstock, 161 A.D.2d 221, 554 N.Y.S.2d 608, 1990 N.Y. App. Div. LEXIS 4920 (N.Y. App. Div. 1st Dep't 1990)*.

Court properly confirmed arbitration award which granted underinsured motorist benefits to petitioner, where respondent insurer contended that policy entitled it to offsets for Workers' Compensation benefits received by petitioner and settlement he received in underlying negligence action, but it failed to reconcile its position in earlier proceeding to stay arbitration that policy did not provide for offsets but only for "non-duplication" of certain benefits or recoveries, and arbitrator's award was consistent with non-duplication provision. *Fazio v Allstate Ins. Co., 276 A.D.2d 696, 714 N.Y.S.2d 759, 2000 N.Y. App. Div. LEXIS 10882 (N.Y. App. Div. 2d Dep't 2000)*.

24. Automobiles, generally

Arbitration award in favor of buyer of used vehicle would be confirmed where there was evidence that seller had made 3 or more unsuccessful attempts to repair transmission and power steering before it sold vehicle within

warranty period. *Courtesy Lincoln Mercury v Allen, 240 A.D.2d 574, 659 N.Y.S.2d 795, 1997 N.Y. App. Div. LEXIS 6626 (N.Y. App. Div. 2d Dep't 1997).*

Manufacturer's service records and service managers' opinions, and arbitrator's own test drive and inspection of vehicle, were adequate to show that defects complained of by plaintiff were either repaired or did not exist and that any remaining defects were insubstantial. *Daniel v GMC, 269 A.D.2d 337, 703 N.Y.S.2d 917, 2000 N.Y. App. Div. LEXIS 2252 (N.Y. App. Div. 1st Dep't 2000).*

25. —Mobile homes

Arbitrator's award of full purchase price of new motor home under New Car Lemon Law (CLS *Gen Bus § 198-a*) was amply supported by evidence and had rational basis where vehicle was out of service by reason of repair for more than 30 calendar days, and defect included major electrical deficiency, which substantially impaired value of vehicle. *Ianotti v Safari Motor Coaches, 225 A.D.2d 848, 638 N.Y.S.2d 839, 1996 N.Y. App. Div. LEXIS 2069 (N.Y. App. Div. 3d Dep't 1996).*

Arbitrator properly ruled in purchasers' favor, even if arbitrator erred in relying on presumption that arises when vehicle is "out of service" for 30 days (CLS *Gen Bus § 198-a(d)(2)*), where evidence, including testimony of purchasers and that elicited from authorized motor home dealer's service manager supported conclusion that problems in question were brought to dealer's attention and that they persisted despite its service technicians' repeated efforts to fix them; mere fact that purchasers had been able to utilize motor home for some purposes, despite continued existence of complained of defects, did not compel conclusion that its value had not been substantially impaired by reason thereof. *Jarvis v Safari Motor Coaches, 248 A.D.2d 899, 670 N.Y.S.2d 927, 1998 N.Y. App. Div. LEXIS 2817 (N.Y. App. Div. 3d Dep't 1998).*

It was not completely irrational for arbitrator to conclude that evidence did not show that respondent, motor home manufacturer, was unable, after reasonable number of attempts, to correct existing defect which substantially impaired value of motor home where it was undisputed that sole existing nonresidential defect in motor home involved throttle deficiency which respondent's expert stated was attributable to circuit board failure, repair records and work orders submitted by petitioners disclosed that they never complained about throttle defect or afforded respondent opportunity to repair it, and during hearing respondent offered to replace defective part, procedure which respondent's expert testified would take 2 hours. *Brandt v Monaco Coach Corp., 269 A.D.2d 671, 702 N.Y.S.2d 714, 2000 N.Y. App. Div. LEXIS 1281 (N.Y. App. Div. 3d Dep't 2000).*

Buyers of defective mobile home were entitled to confirmation of arbitrator's award of purchase price plus incidental costs where vehicle had been out of service for over 30 days during either first 18,000 miles or 24 months of their ownership, with 8 unsuccessful attempts at repair for same mechanical problems, and manufacturer was unable to repair those recurring problems despite reasonable opportunities to do so. *Monaco Coach Corp. v Brandt, 281 A.D.2d 787, 722 N.Y.S.2d 96, 2001 N.Y. App. Div. LEXIS 2493 (N.Y. App. Div. 3d Dep't 2001).*

26. Contractors' disputes

Court correctly confirmed arbitration award in favor of contractor, and denied motion to vacate award on ground that it violated CLS *Educ §§ 7201*, *7202*, *7301* and *7302* because contractor did not employ licensed engineer or architect, as arbitration award for "design and engineering new aluminum windows" did not clearly on its face violate Education Law licensing provisions or public policy. *Jaidan Indus. Inc. v M.A. Angeliades, Inc., 97 N.Y.2d 659, 738 N.Y.S.2d 1, 763 N.E.2d 1142, 2001 N.Y. LEXIS 3417 (N.Y. 2001).*

Since arbitration award sought to be confirmed involved petitioner's claim for work, labor and services and was independent of petitioner's class action brought under Lien Law, it was error to refuse to confirm such award and to consolidate it with Lien Law action for hearing before a referee. *Thelco Electrical Contractors, Inc. v Duffy, 43 A.D.2d 561, 43 A.D.2d 567, 349 N.Y.S.2d 407, 1973 N.Y. App. Div. LEXIS 3206 (N.Y. App. Div. 2d Dep't 1973)*.

An arbitration award in a dispute between a seller of jute carpet backing and a buyer who at first refused to accept the goods he had ordered would be confirmed, even though the arbitrator violated the arbitration rules of the Jute Carpet Backing Council when he considered an amended claim, submitted after the initial demand for arbitration and based on the buyer's subsequent acceptance of most of the goods, where an arbitration award will not be vacated just because the arbitrator makes a mistake of law or fact, where the arbitrator's determination was not so irrational as to mandate that the award be set aside, where the only conceivable outcome of setting aside the award would be to delay a new award, in that the buyer had no defense to the claim, and where had the arbitrator failed to consider the omitted claim there would have been no dispute to resolve, in that the initial claim was mooted by the buyer's acceptance of most of the goods. *Langston Enterprises, Inc. v Diamond Rug & Carpet Mills, Inc., 95 A.D.2d 740, 464 N.Y.S.2d 175, 1983 N.Y. App. Div. LEXIS 18638 (N.Y. App. Div. 1st Dep't 1983)*.

In proceedings involving a number of disputes concerning alleged breaches of contract between parties doing business in the New York City garment industry, a motion to confirm an arbitration award would be granted notwithstanding that there had been a series of substitutions of arbitrators for reasons of conflicting interests, and a number of reconstitutions of the arbitration panel extending over a period of several where the party challenging the award failed to establish either prejudice or partiality in the conduct of the proceedings affecting the award. *Milliken & Co. v Tiffany Loungewear, Inc., 101 A.D.2d 739, 99 A.D.2d 993, 473 N.Y.S.2d 443, 1984 N.Y. App. Div. LEXIS 17418, 1984 N.Y. App. Div. LEXIS 18370 (N.Y. App. Div. 1st Dep't)*, app. dismissed, *63 N.Y.2d 773, 1984 N.Y. LEXIS 6021 (N.Y. 1984)*.

Court would confirm arbitration award, notwithstanding respondent's contention that award violated strong public policy of state in that it included amount allegedly owed to petitioner for work performed during period when petitioner was unlicensed as home improvement contractor, since there was nothing on face of award to indicate that it violated public policy where award did not contain any findings as to whether petitioner was in fact home improvement contractor, whether and when petitioner obtained license, and whether and how much of award was attributable to work performed after petitioner's license had temporarily lapsed. *Hirsch Constr. Corp. v Anderson, 180 A.D.2d 604, 580 N.Y.S.2d 314, 1992 N.Y. App. Div. LEXIS 2845 (N.Y. App. Div. 1st Dep't 1992)*.

Because a contractor's willful withholding of nearly 1,000 photographs prejudiced the owner's defenses against the contractor's counterclaims, and because the owner likely would not have made concessions if the photographs had been disclosed, it was not irrational for an arbitrator to dismiss the contractor's counterclaims; therefore, the owner's N.Y. *C.P.L.R. 7510* application was properly granted. *Matter of Eastman Assoc., Inc. (Juan Ortoo Holdings, Ltd.), 90 A.D.3d 1284, 935 N.Y.S.2d 166, 2011 N.Y. App. Div. LEXIS 8859 (N.Y. App. Div. 3d Dep't 2011)*.

27. Criminal law matters

The trial court properly found that an arbitrator was within his powers in awarding petitioners, correction officers who had been suspended from employment following their indictment for job-related crimes, back pay for the period of their suspensions, pursuant to a collective bargaining ageement that empowered the arbitrator to resolve disputes as to the meaning of a section in the agreement setting forth procedures relating to removal or other disciplinary penalties; accordingly, the arbitrator's award of back pay and attorney's fees to petitioners for their defense against the criminal charges was proper, since neither the collective bargaining agreement nor the public

policy of the state required that the petitioners show that the acts giving rise to the criminal charges against them had been undertaken in good faith before reimbursement of their legal expenses could be made by their employers. *Security & Law Enforcement Employees, Dist. Council 82, etc. v County of Albany, 96 A.D.2d 976, 466 N.Y.S.2d 841, 1983 N.Y. App. Div. LEXIS 19597 (N.Y. App. Div. 3d Dep't 1983)*, app. denied, *60 N.Y.2d 706, 1983 N.Y. LEXIS 6360 (N.Y. 1983)*, aff'd, *61 N.Y.2d 965, 475 N.Y.S.2d 280, 463 N.E.2d 621, 1984 N.Y. LEXIS 4190 (N.Y. 1984)*.

Award of mediator-arbitrator at community dispute resolution center involving claims of aggravated harassment and reckless endangerment of property, submitted to mediator arbitrator pursuant to written agreement between parties providing that resolution process would be final and binding on parties, may be confirmed by Supreme Court since nature of award barring certain activities that might involve violations of criminal law is proper subject of dispute resolution program. *Rothchild v Diamond, 132 Misc. 2d 701, 504 N.Y.S.2d 965, 1986 N.Y. Misc. LEXIS 2762 (N.Y. Sup. Ct. 1986)*.

28. Discovery

Arbitration award was properly confirmed under CLS *CPLR § 7510*, despite respondent's claim that arbitrator committed misconduct under CLS *CPLR § 7511(b)(1)(i)* by failing to require petitioner to produce requested discovery materials, where arbitrator addressed relevant issues listed in subpoena during questioning of petitioner, who was then subjected to thorough cross-examination by respondent's attorney regarding those issues; thus, arbitrator's refusal to direct petitioner to comply with respondent's discovery demands was within bounds of rationality and clearly was not misconduct. *Thompson v S.L.T. Ready-Mix, 245 A.D.2d 911, 666 N.Y.S.2d 798, 1997 N.Y. App. Div. LEXIS 13620 (N.Y. App. Div. 3d Dep't 1997)*.

29. Employment, generally

Arbitrator's finding that dues "as certified by said association" were annual dues, which were being deducted monthly only for purposes of convenience, presumably was based upon membership obligations embodied in teachers' association's own constitution and, even if erroneous, thus was beyond challenge in proceeding to confirm arbitration award. *Levine v Mineola Union Free School Dist., 59 A.D.2d 702, 398 N.Y.S.2d 441, 1977 N.Y. App. Div. LEXIS 13652 (N.Y. App. Div. 2d Dep't 1977)*.

Arbitrators had rational basis for award in favor of former employee who (1) had been induced to work as head trader in employer's equity trading department on oral promise of employment for 2 ½ years at set salary, (2) commenced employment, (3) at first rejected all written contracts proposed by employer which contained provision permitting termination without cause, but finally executed such contract in wake of stock market crash, and (4) was then prematurely terminated; court properly confirmed award that closely approximated amount of salary and bonus employee would have received under oral agreement, implicitly rejecting statute of frauds and parol evidence defenses urged by employer. *King v Nikko Sec. Co. Int'l., Inc., 179 A.D.2d 490, 578 N.Y.S.2d 171, 1992 N.Y. App. Div. LEXIS 296 (N.Y. App. Div. 1st Dep't 1992)*.

Court properly confirmed arbitration award upholding respondents' termination of petitioner's employment since it was clear from record that penalty of dismissal was not imposed on constraint of petitioner's settlement of prior disciplinary proceeding but was based on petitioner's history of insubordination, and thus award was not wholly irrational. *White v Department of Law, 184 A.D.2d 229, 584 N.Y.S.2d 555, 1992 N.Y. App. Div. LEXIS 7746 (N.Y. App. Div. 1st Dep't)*, app. denied, *80 N.Y.2d 759, 591 N.Y.S.2d 137, 605 N.E.2d 873, 1992 N.Y. LEXIS 3468 (N.Y. 1992)*.

Court properly confirmed arbitration award in favor of plaintiff who was assaulted by co-worker while in defendant's employ, and properly denied defendant's motion to vacate award on ground that claim against it was barred by Workers' Compensation Law, where (1) defendant raised Workers' Compensation defense when plaintiff first brought personal injury action in Supreme Court, and it opposed co-worker's motion to stay action and proceed to arbitration, but it did not appeal court's ruling which granted stay outright and compelled arbitration of all claims, and (2) arbitrators apparently rejected argument that claim was barred by Workers' Compensation Law. *Lofthouse v Paragon Capital Corp., 253 A.D.2d 365, 676 N.Y.S.2d 162, 1998 N.Y. App. Div. LEXIS 8822 (N.Y. App. Div. 1st Dep't 1998)*.

Court erred in refusing to confirm arbitration award on ground that arbitrators failed to make complete award by directing that petitioner be reinstated to his former position or awarded back pay since it was undisputed that arbitrators properly found that petitioner's discharge was without proper reason, and respondents failed to provide any legal basis for vacating or modifying award. *Patry v Village of Tupper Lake, 262 A.D.2d 757, 691 N.Y.S.2d 611, 1999 N.Y. App. Div. LEXIS 6506 (N.Y. App. Div. 3d Dep't)*, app. denied, *94 N.Y.2d 753, 700 N.Y.S.2d 427, 722 N.E.2d 507, 1999 N.Y. LEXIS 3701 (N.Y. 1999)*.

Arbitrator's imposition of 2 ½ -year suspension on nurse found to have dispensed morphine without physician's prior order and to have failed to properly secure morphine tubex did not contravene public policy, and would not be vacated at instance of hospital that had been ordered to reinstate nurse, since hospital failed to identify any statute or regulation requiring nurse's termination. Reinstatement of nurse without back pay and benefits during 2 ½ -year suspension she had served for having dispensed morphine without physician's prior order and having failed to properly secure morphine tubex was reasonable, rational, and within arbitrator's authority, and would be confirmed over objection of hospital that had been ordered to reinstate her. *New York State Nurses Ass'n v Mount Sinai Hosp., 275 A.D.2d 538, 712 N.Y.S.2d 200, 2000 N.Y. App. Div. LEXIS 8427 (N.Y. App. Div. 3d Dep't 2000)*.

Court properly confirmed arbitration award interpreting clause in collective bargaining agreement providing for military leave with pay, as arbitrator's interpretation was not totally irrational, and he did not exceed his authority in awarding class relief where parties' joint request for arbitration expressly framed proceeding as "Class Action grievance" due to fact that numerous members of petitioner's union were subject to call for military duty and thus were affected by respondent's application of such clause in case of individual who filed grievance. *Correction Officers' Benevolent Ass'n v City of New York, 276 A.D.2d 394, 715 N.Y.S.2d 387, 2000 N.Y. App. Div. LEXIS 10747 (N.Y. App. Div. 1st Dep't 2000)*.

Court properly denied city's motion to vacate default judgment against it, and confirmed arbitration award of $15,000 in severance pay to petitioner, where city failed to appear at 4 scheduled court dates and, despite its attorney's personal assurances that there would be no default on fifth date, it was absent from court on that occasion as well; such conduct, evincing complete lack of regard for court and legal process, was not excusable law office failure. *Saunders v City of New York, 283 A.D.2d 213, 724 N.Y.S.2d 724, 2001 N.Y. App. Div. LEXIS 4838 (N.Y. App. Div. 1st Dep't 2001)*.

Since the only limitations under a collective bargaining agreement on an arbitrator's power to fashion a remedy short of dismissal was that the arbitrator could not compel acts that were prohibited either by the law or by the agreement, an arbitrator did not exceed his power, which would justify vacating the award under N.Y. *C.P.L.R. 7511(b)(1)(iii)*, where the arbitrator modified a college's termination of a teacher to a 15-month suspension without pay. Even though the arbitrator agreed that the teacher committed serious misconduct warranting a substantial discipline, the arbitrator did not err in reducing the penalty and the court affirmed the supreme court's decision to grant the teacher's petition under N.Y. *C.P.L.R. 7510* to confirm the award. *Matter of North Country Community Coll. Assn. of Professionals (North Country Community Coll.), 29 A.D.3d 1060, 814 N.Y.S.2d 770, 2006 N.Y. App.*

Div. LEXIS 5894 (N.Y. App. Div. 3d Dep't), app. denied, *7 N.Y.3d 709, 822 N.Y.S.2d 483, 855 N.E.2d 799, 2006 N.Y. LEXIS 2500 (N.Y. 2006)*.

Trial court erred in vacating that part of the award determining that a company lacked just cause for discharging an employee under the collective bargaining agreement; however, the arbitrator exceeded his authority by reinstating the employee and awarding her back pay and benefits as that remedy was not allowed. Matter of *Matter of Asset Protection & Sec. Servs., LP v Service Empls. Intl. Union, Local 200 United, 90 A.D.3d 1461, 935 N.Y.S.2d 743, 2011 N.Y. App. Div. LEXIS 9345 (N.Y. App. Div. 4th Dep't 2011)*, rev'd in part, *19 N.Y.3d 1009, 951 N.Y.S.2d 706, 976 N.E.2d 233, 2012 N.Y. LEXIS 2118 (N.Y. 2012)*.

Arbitration award in favor of a former employee, an attorney, was confirmed under N.Y. *C.P.L.R. § 7510* as the award was based on a proper consideration of the operative words, such as "good cause," in the employment agreement, which included a finding that no measurable performance requirements existed for any minimum origination and that the employer failed to offer the employee the opportunity to work despite his availability. *Goldberg v Thelen Reid Brown Raysman & Steiner LLP, 901 N.Y.S.2d 906, 25 Misc. 3d 1205(A), 238 N.Y.L.J. 76, 2007 N.Y. Misc. LEXIS 9090 (N.Y. Sup. Ct. 2007)*, aff'd, *52 A.D.3d 392, 860 N.Y.S.2d 93, 2008 N.Y. App. Div. LEXIS 5656 (N.Y. App. Div. 1st Dep't 2008)*.

30. —Civil service

Court properly confirmed arbitration award finding that city's decision to abolish position of "investigator" and replace it with competitive classification of "detective" violated collective bargaining agreement, despite city's contention that arbitrator's award violated public policy of ensuring that appointments and promotions in civil service be made according to merit as ascertained by competitive examination, since arbitrator merely determined that city's proposed action violated parties' collective bargaining agreement and directed return to status quo, whereby police officers who performed duties of investigator under current system received their appointments under dictates of CLS *Civ S § 58*. *Schenectady Police Benevolent Ass'n v City of Schnectady, 224 A.D.2d 908, 638 N.Y.S.2d 795, 1996 N.Y. App. Div. LEXIS 1526 (N.Y. App. Div. 3d Dep't)*, app. denied, *88 N.Y.2d 806, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1718 (N.Y. 1996)*.

Arbitration award holding that a city was required to pay for employees' retirement contributions was proper because, under the Triborough doctrine, embodied in *N.Y. Civ. Serv. Law § 209-a(1)(e)*, because a new agreement had not been negotiated when the employees joined the retirement system, all of the terms of the expired agreement were still in effect; through N.Y. Laws ch. 504, part A, § 8 (Section 8), the legislature recognized the need to provide for employees who had been accorded certain retirement benefits under agreements that were still in effect, and the determination to apply the Section 8 exception did not violate a defined and discernible public policy or create an explicit conflict with other laws and their attendant policy concerns. A determination to apply the Section 8 exception here did not constitute a "negotiation" of retirement benefits as prohibited by *N.Y. Civ. Serv. Law § 201(4)* and N.Y. *Retire. & Soc. Sec. Law § 470*. Matter of *Matter of City of Oswego (Oswego City Firefighters Assn., Local 2707), 93 A.D.3d 1243, 941 N.Y.S.2d 379, 2012 N.Y. App. Div. LEXIS 1963 (N.Y. App. Div. 4th Dep't 2012)*, rev'd, *21 N.Y.3d 880, 965 N.Y.S.2d 764, 988 N.E.2d 499, 2013 N.Y. LEXIS 578 (N.Y. 2013)*.

Confirmation of an arbitration award in an N.Y. *C.P.L.R. 7510* proceeding was proper because the arbitrator correctly found that the decision to eliminate correction sergeants from the list of personnel who could take the exam for an assistant warden position ran afoul of the competitive process envisioned by the Civil Service Law and violated *N.Y. Const. art. V, § 6*; an arbitration award may have only been vacated on public policy grounds where a court could have concluded, without engaging in any extended factfinding or legal analysis that a law prohibited, in an absolute sense, the particular matters to be decided, or that the award itself violated a well-defined constitutional,

statutory or common law of New York. Further, judicial restraint under the public policy exception was particularly appropriate where the case involved arbitration pursuant to a collective bargaining agreement. *Matter of Ulster County Sheriff's Empls. Assn., CWA Local 1105 (Ulster County Sheriff's Dept.), 100 A.D.3d 1327, 956 N.Y.S.2d 595, 2012 N.Y. App. Div. LEXIS 8176 (N.Y. App. Div. 3d Dep't 2012)*, app. denied, *20 N.Y.3d 859, 960 N.Y.S.2d 351, 984 N.E.2d 326, 2013 N.Y. LEXIS 286 (N.Y. 2013)*.

31. —Police, correctional officers and the like

Court correctly confirmed arbitration award which found that, while Department of Correctional Services (DOCS) had probable cause to suspend petitioner pursuant to collective bargaining agreement for flying Nazi flag from front porch of his house, petitioner was not guilty of bringing discredit to DOCS and his fellow employees and endangering safety and security of all facilities in DOCS as charged in notice of discipline, where DOCS failed to show that petitioner's conduct harmed its business, adversely affected his ability to perform his job, or led other employees to refuse to work; petitioner was properly reinstated to his position with full back pay and benefits. *New York State Law Enforcement Officers Union, Council 82 v State, 255 A.D.2d 54, 694 N.Y.S.2d 170, 1999 N.Y. App. Div. LEXIS 4424 (N.Y. App. Div. 3d Dep't)*, aff'd sub nom. *New York State Correctional Officers & Police Benevolent Ass'n v State, 94 N.Y.2d 321, 704 N.Y.S.2d 910, 726 N.E.2d 462, 1999 N.Y. LEXIS 3933 (N.Y. 1999)*.

Arbitrator properly found that discretion previously afforded to city police department command staff to grant or deny leave requests made with less than 72 hours' notice constituted "past practice," and thus that city's removal of such discretion and institution of blanket policy denying such leaves violated parties' collective bargaining agreement whereby "(s)chedules relating to days off and normal duty hours in effect ... shall continue unchanged unless mutually agreed upon, or for temporary periods in the event of (certain emergency situations)." *Troy Police Benevolent & Protective Ass'n v City of Troy, 271 A.D.2d 926, 707 N.Y.S.2d 265, 2000 N.Y. App. Div. LEXIS 4665 (N.Y. App. Div. 3d Dep't 2000)*.

An arbitration award which directed county officials to provide back pay to suspended corrections officers, under indictment in connection with their employment at the county jail, until the disciplinary charges were brought against them in accordance with the parties' collective bargaining agreement, and which awarded the officers attorneys' fees for the defense of the criminal charges in accordance with a provision of an agreement giving them a contractual right to reimbursement for legal fees incurred in job-related litigation would be confirmed, since the arbitrator did not act in excess of his powers and the officers were not public officers within the meaning of the prohibition against reimbursing public officers for expenses incurred in defending criminal prosecutions. *Security & Law Enforcement Employees, etc. v County of Albany, 116 Misc. 2d 766, 455 N.Y.S.2d 1004, 1982 N.Y. Misc. LEXIS 3953 (N.Y. Sup. Ct. 1982)*, aff'd, *96 A.D.2d 976, 466 N.Y.S.2d 841, 1983 N.Y. App. Div. LEXIS 19597 (N.Y. App. Div. 3d Dep't 1983)*.

32. Insurance, generally

Court's holding, in proceeding to confirm arbitration award, that absence of agreement to arbitrate was not basis for vacating or modifying arbitration award, and that insurer lost its opportunity for appellate review of denial of its application to stay arbitration by participating in arbitration without seeking interim stay of effectuation of denial order, did not result in claimant improperly receiving windfall underinsurance benefits by estoppel; rather, insurer's responsibility to pay was based on judicial and arbitration decisions rendered after it had opportunity for full and fair hearing on its disclaimer of benefits. *Commerce & Indus. Ins. Co. v Nester, 90 N.Y.2d 255, 660 N.Y.S.2d 366, 682 N.E.2d 967, 1997 N.Y. LEXIS 1374 (N.Y. 1997)*.

In motor vehicle personal injury action, application of insurance company that insured plaintiff's employer for both workers' compensation and automobile liability to confirm arbitration awards against defendant's insurance company for loss transfer of workers' compensation benefits and no-fault benefits would be granted where liability phase of personal injury action was tried to jury and defendant was found 80 percent at fault, and action was thereafter settled with plaintiff stipulating that there were no outstanding liens against his recovery and agreeing to be responsible for any such liens; stipulation of settlement did not expressly refer to right to loss transfer recovery, but only to outstanding liens, and plaintiff's employer's insurance company had not unequivocally waived its right to loss transfer recovery. *Doherty v Barco Auto Leasing Co., 144 A.D.2d 424, 533 N.Y.S.2d 976, 1988 N.Y. App. Div. LEXIS 11832 (N.Y. App. Div. 2d Dep't 1988)*.

In arbitration proceeding to enforce agreement whereby insurance carrier was to pay personal injury protection benefits (including loss of earnings and health service benefits) to petitioner, award in favor of petitioner was confirmed despite insurer's claim that only medical benefits were sought and no lost earnings could be awarded, as arbitrator's clear finding, that petitioner was not precluded from receiving no-fault benefits due to failing to attend 2 scheduled physical exams located 75 miles away, impliedly included both lost wages and medical bills. *Venditti v General Accident Ins., 236 A.D.2d 759, 654 N.Y.S.2d 205, 1997 N.Y. App. Div. LEXIS 2032 (N.Y. App. Div. 3d Dep't 1997)*.

Arbitration award should be confirmed, and further arbitration of insurance subrogation matter permanently stayed, where award had been rendered after hearing on jurisdictional matters, after which arbitrators found that claim was time-barred; after arbitration award is rendered, arbitrator is generally without power to render new award or modify original award and aggrieved party's remedy, if any, is to move to vacate award pursuant to CLS *CPLR § 7511* rather than engaging in ex parte communications with arbitrators in attempt to persuade them to vacate their own award. *Aetna Cas. & Sur. Co. v Vigilant Ins. Co., 241 A.D.2d 451, 660 N.Y.S.2d 58, 1997 N.Y. App. Div. LEXIS 7294 (N.Y. App. Div. 2d Dep't 1997)*.

Trial court properly confirmed the arbitration award in respondent's favor because the judiciary has a limited role in arbitration matters, the law had changed, and the evidence established that respondent was the sole named policyholder of the subject policy and had not assigned his rights in the demutualization proceeds. *Matter of Oneida Health Sys., Inc. (Hazem Qalla), 201 A.D.3d 1222, 162 N.Y.S.3d 507, 2022 N.Y. App. Div. LEXIS 338 (N.Y. App. Div. 3d Dep't)*, app. denied, *38 N.Y.3d 910, 192 N.E.3d 346, 172 N.Y.S.3d 419, 2022 N.Y. LEXIS 1210 (N.Y. 2022)*.

First insurer was entitled to an order confirming an arbitration award and granting counsel fees because nothing in the arbitrator's rules obligated him to allow the submission of supplemental papers, a second insurer failed to proffer evidentiary support of its coverage defense in the underlying arbitration despite having an opportunity to do so, and there was no basis for the second insurer's claim that the arbitrator either committed misconduct or exceeded his power in making the subject award. *State Farm Mut. Auto. Ins. Co. v GEICO Gen. Ins. Co., 58 Misc. 3d 490, 66 N.Y.S.3d 870, 2017 N.Y. Misc. LEXIS 4632 (N.Y. Dist. Ct. 2017)*.

33. —Auto insurance

The award of an arbitrator which determines the amount of compensation, rendered pursuant to provisions of the MVAIC Law, is not merely advisory but is binding upon the parties and, absent fraud or statutory wrongdoing, must be confirmed by the court if application is made by a party thereto within one year after delivery. *Kavares v Motor Vehicle Acci. Indemnification Corp., 29 A.D.2d 68, 285 N.Y.S.2d 983, 1967 N.Y. App. Div. LEXIS 2666 (N.Y. App. Div. 1st Dep't 1967)*, aff'd, *28 N.Y.2d 939, 323 N.Y.S.2d 431, 271 N.E.2d 915, 1971 N.Y. LEXIS 1261 (N.Y. 1971)*.

Court should have granted petitioner's application to confirm arbitration award to extent of directing insurer to pay him maximum no-fault benefit allowable for 25 months of lost work ($25,000) since (1) award was sufficiently definite to permit finding of fact that arbitrator intended to award petitioner statutorily permissible maximum, and (2) insurer's failure to appeal award to master arbitrator precluded broader scope of judicial review; however, remand to arbitrator was necessary insofar as insurer was directed to "compute and pay" interest on lost work claim from 30 days after it received proof of claim, in absence of finding as to when proof of claim was received. *Carty v Nationwide Ins. Co., 149 A.D.2d 328, 539 N.Y.S.2d 374, 1989 N.Y. App. Div. LEXIS 4381 (N.Y. App. Div. 1st Dep't 1989)*.

Court should have confirmed arbitrator's award of $190,000 under uninsured automobile endorsement of subject policy where policy provisions were ambiguous in that, on one hand, they appeared to limit recovery for bodily injury to $100,000 per person, but, on other hand, they also appeared to allow greater per person recovery where, as here, 2 or more people were injured in accident. *Mostow v State Farm Ins. Cos., 216 A.D.2d 300, 628 N.Y.S.2d 146, 1995 N.Y. App. Div. LEXIS 5920 (N.Y. App. Div. 2d Dep't 1995)*, aff'd, *88 N.Y.2d 321, 645 N.Y.S.2d 421, 668 N.E.2d 392, 1996 N.Y. LEXIS 1169 (N.Y. 1996)*.

Court properly confirmed arbitration awards of $100,000 to each of 2 insureds, despite insurer's claim that such awards exceeded $10,000 per person policy limit, where insurer did not submit affidavit from person with personal knowledge to controvert insureds' claim that arbitrator was informed at hearing, without objection by insurer, that policy limits as to accident were $100,000 per person and $300,000 per accident. *Sagona v State Farm Ins. Co., 218 A.D.2d 660, 630 N.Y.S.2d 352, 1995 N.Y. App. Div. LEXIS 8277 (N.Y. App. Div. 2d Dep't 1995)*.

Insured was entitled to confirmation of arbitration award in its entirety where (1) there was no question that, under terms of business automobile policy, parties were required to submit to binding arbitration of insured's underinsured motorist claim against insurer, (2) insured moved to have award confirmed, (3) insurer failed to come forward with sufficient basis to oppose motion or to vacate or modify award, and (4) request to confirm award was not rendered academic merely because insurer had agreed that insured was entitled to payment under policy. *Aetna Cas. & Sur. Co. v Mantovani, 240 A.D.2d 566, 658 N.Y.S.2d 926, 1997 N.Y. App. Div. LEXIS 6597 (N.Y. App. Div. 2d Dep't)*, app. denied, *90 N.Y.2d 810, 665 N.Y.S.2d 401, 688 N.E.2d 257, 1997 N.Y. LEXIS 3240 (N.Y. 1997)*.

Arbitrator did not exceed his authority or rule irrationally in determining that policy coverage for "all sums that the insured ... shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured" included future economic loss as well as pain and suffering. *Huntemann v Allstate Ins. Co., 272 A.D.2d 126, 708 N.Y.S.2d 851, 2000 N.Y. App. Div. LEXIS 5435 (N.Y. App. Div. 1st Dep't 2000)*.

Court would confirm arbitration award of $10,000 where petitioner was injured while one of 4 passengers in car involved in hit-and-run car accident, even though 2 of other passengers had been awarded damages in prior arbitration proceedings, which left only $2,500 of $10,000 per person, $20,000 per incident coverage available under uninsured motorist endorsement of policy for disposition of petitioner's claim and that of fourth passenger who also filed claim, since insurer was aware of but failed to consolidate multiple claims. *Belizaire v Aetna Cas. & Sur. Co., 171 Misc. 2d 473, 654 N.Y.S.2d 982, 1997 N.Y. Misc. LEXIS 21 (N.Y. Sup. Ct. 1997)*.

In an action between two insurers arising out of an automobile accident, the arbitration awards issued in favor of respondent would not be vacated because even if the arbitrator misapplied the law that petitioner was foreclosed from raising lack of jurisdiction because it did not properly file an affirmative defense, there was no objective evidence in the record that resolved the open question as to whether the underlying accident happened in the New York or New Jersey side of the Lincoln Tunnel, so it could not be said that the arbitrator's awards were unsupported

by a reasonable hypothesis. *Matter of American Tr. Ins. Co. v GEICO Gen. Ins. Co., 2022 N.Y. Misc. LEXIS 11225 (N.Y. Sup. Ct. 2022)*.

34. Partnership matters

In arbitration proceeding pursuant to partnership agreement which provided that arbitrator's award would be "final and binding" on partners, consent of all partners was required to approve settlement agreement which purported to nullify arbitrator's award since it constituted modification of partnership agreement; thus, absent approval of settlement agreement by all partners, Special Term properly confirmed arbitrator's award. *In re Fishman, 126 A.D.2d 546, 510 N.Y.S.2d 670, 1987 N.Y. App. Div. LEXIS 41681 (N.Y. App. Div. 2d Dep't 1987)*.

Arbitrator did not exceed his authority by not applying New York law, to which subject limited partnership agreement was expressly made subject, since New York choice of law provision was not in arbitration clause itself. Even if limited partners could sue only derivatively, it was not "totally irrational" to compensate them for anticipated revenue and tax advantages they would have individually realized had partnership property not been sold. *Revson v Hack, 239 A.D.2d 169, 657 N.Y.S.2d 51, 1997 N.Y. App. Div. LEXIS 4916 (N.Y. App. Div. 1st Dep't 1997)*.

35. School matters

Interpretation by arbitrator that agreement between school district and teachers' association required school district to deduct from last pay check of employee, who began an unpaid leave of absence after start of school year, and remit to the association the total annual dues then outstanding, where checkoff authorization had remained unrevoked, was not completely irrational and thus was entitled to be confirmed. *Levine v Mineola Union Free School Dist., 59 A.D.2d 702, 398 N.Y.S.2d 441, 1977 N.Y. App. Div. LEXIS 13652 (N.Y. App. Div. 2d Dep't 1977)*.

An arbitration award, which granted a furniture company the full amount of its claim and dismissed the counterclaim by a school, which had contracted with furniture company for the purchase and installation of carpeting and which terminated the contract and hired another contractor following a dispute with the furniture company, would be confirmed where the arbitrators neither refused to consider relevant and material evidence offered during the course of the hearings, nor effectively precluded school from offering relevant and material evidence at the hearings, but rather denied the school's request to submit additional evidence after both sides had presented their proof and the hearings had been concluded, which action did not amount to misconduct. *In re S. Wiener Furniture Co., 90 A.D.2d 875, 456 N.Y.S.2d 474, 1982 N.Y. App. Div. LEXIS 19144 (N.Y. App. Div. 3d Dep't 1982)*.

In an action to confirm an arbitration award that determined that a university erred in failing to treat all full-time faculty equally in terms of a salary reduction, the award would be confirmed where a dispute had arisen between the university and the union as to whether the provision of a collective bargaining agreement, requiring a reduction in salary for the period of a strike, should apply to all faculty members, or only to participants in the strike, where the arbitrator had based his determination on his findings as to the intent of the parties, and where it had been improper for the trial court to replace its judgment for that of the arbitrator inasmuch as the "federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Long Island Univ. Faculty Fed'n, Local 3998 v Bd. of Trs., 91 A.D.2d 686, 457 N.Y.S.2d 325, 1982 N.Y. App. Div. LEXIS 19566 (N.Y. App. Div. 2d Dep't 1982)*, aff'd, *60 N.Y.2d 855, 470 N.Y.S.2d 140, 458 N.E.2d 381, 1983 N.Y. LEXIS 3520 (N.Y. 1983)*.

An arbitration award to a school counselor whose salary and hours were reduced allegedly in violation of a collective bargaining agreement would be confirmed notwithstanding the school district's contention that the arbitrator exceeded his power in passing upon issues not submitted, framed or argued by the parties, since there was general agreement that the substance of the issue was whether the collective bargaining agreement was violated by the reduction in salary and hours, since a reading of the arbitrator's decision in its entirety revealed that the questions framed and resolved by the arbitrator were not outside the scope of the issue submitted by the parties, since the arbitrator employed the device of framing and resolving the questions as part of his analysis which led him to conclude that the grievance should be sustained, and since the path of analysis, proof and persuasion by which an arbitrator reaches such conclusion is beyond judicial scrutiny; even if it were found that the arbitrator misconstrued the agreement, disregarded its plain meaning, or misapplied substantive rules of law, the award would not be vacated unless it violated strong public policy, was totally irrational, or exceeded a specifically enumerated limitation on the arbitrator's power. *Gilboa Faculty Asso. v Gilboa-Conesville Cent. School Dist., 105 A.D.2d 478, 480 N.Y.S.2d 613, 1984 N.Y. App. Div. LEXIS 20521 (N.Y. App. Div. 3d Dep't)*, app. denied, *64 N.Y.2d 603, 485 N.Y.S.2d 1027, 475 N.E.2d 474, 1984 N.Y. LEXIS 6475 (N.Y. 1984).*

In proceeding commenced by teachers association against school district, court would confirm arbitration award which interpreted recognition clause of parties' collective bargaining agreement as requiring school district to compensate part-time evening high school teachers at same rate as full-time teachers, since award was neither completely irrational nor contrary to public policy. *Fallek v City School Dist., 145 A.D.2d 482, 535 N.Y.S.2d 112, 1988 N.Y. App. Div. LEXIS 13323 (N.Y. App. Div. 2d Dep't 1988)*, app. denied, *74 N.Y.2d 603, 542 N.Y.S.2d 518, 540 N.E.2d 713, 1989 N.Y. LEXIS 631 (N.Y. 1989).*

Since the only limitations under a collective bargaining agreement on an arbitrator's power to fashion a remedy short of dismissal was that the arbitrator could not compel acts that were prohibited either by the law or by the agreement, an arbitrator did not exceed his power, which would justify vacating the award under N.Y. *C.P.L.R. 7511(b)(1)(iii)*, where the arbitrator modified a college's termination of a teacher to a 15-month suspension without pay. Even though the arbitrator agreed that the teacher committed serious misconduct warranting a substantial discipline, the arbitrator did not err in reducing the penalty and the court affirmed the supreme court's decision to grant the teacher's petition under N.Y. *C.P.L.R. 7510* to confirm the award. *Matter of North Country Community Coll. Assn. of Professionals (North Country Community Coll.), 29 A.D.3d 1060, 814 N.Y.S.2d 770, 2006 N.Y. App. Div. LEXIS 5894 (N.Y. App. Div. 3d Dep't)*, app. denied, *7 N.Y.3d 709, 822 N.Y.S.2d 483, 855 N.E.2d 799, 2006 N.Y. LEXIS 2500 (N.Y. 2006).*

2. Properly Denied

36. Generally

An application by a guardian ad litem to confirm a no-fault arbitration award in favor of the infant petitioner, made beyond the one-year period prescribed in *CPLR § 7510*, is time-barred, since the toll of the statute of limitations prescribed in *CPLR § 208* does not apply. *Elliot v Green Bus Lines, Inc., 58 N.Y.2d 76, 459 N.Y.S.2d 419, 445 N.E.2d 1098, 1983 N.Y. LEXIS 2825 (N.Y. 1983)*.

The award of an arbitrator will not be confirmed pursuant to the court's general equity powers where the award is contrary to the public policy of the state or violates the law. *Meyers v Kinney Motors, Inc., 32 A.D.2d 266, 301 N.Y.S.2d 171, 1969 N.Y. App. Div. LEXIS 3611 (N.Y. App. Div. 1st Dep't 1969)*.

Petition to confirm arbitration award, which was final and as to which no motion had been presented for modification, made after one-year period for making of such an application had elapsed, was properly dismissed. *Teachers Ass'n v Tarrytown Bd. of Educ., 59 A.D.2d 890, 399 N.Y.S.2d 45, 1977 N.Y. App. Div. LEXIS 14077 (N.Y. App. Div. 2d Dep't 1977)*.

Supreme Court erred in confirming arbitrator's award as modified by arbitrator's post-award "Affirmation" in which arbitrator stated that it had been his intention to award interest on certain payments, and award should have been confirmed as originally entered (without additional interest), where arbitrator's purported modification substantially expanded award and thus exceeded his authority, arbitrator's affirmation was not result of application to modify, and affirmation not only contradicted original award but also contradicted 2 intervening rulings on applications to modify. *Cavallaro v Allstate Ins. Co., 124 A.D.2d 625, 507 N.Y.S.2d 886, 1986 N.Y. App. Div. LEXIS 61935 (N.Y. App. Div. 2d Dep't 1986)*.

Arbitrator who was limited by collective bargaining agreement to consideration of whether school district's decision constituted arbitrary and capricious abuse of discretion exceeded her authority by finding that school district failed to offer sufficiently "compelling" basis for its hiring decision, and thus teachers' application to confirm arbitration award was properly denied; moreover, arbitrator's award interfered with school district's non-delegable and nonnegotiable responsibility to determine requisite job qualifications and to decide which individual best fulfills those qualifications under CLS *Educ § 2573*. *Three Vill. Teachers' Ass'n v Three Vill. Cent. Sch. Dist., 128 A.D.2d 626, 512 N.Y.S.2d 878, 1987 N.Y. App. Div. LEXIS 44314 (N.Y. App. Div. 2d Dep't)*, app. denied, *70 N.Y.2d 608, 521 N.Y.S.2d 224, 515 N.E.2d 909, 1987 N.Y. LEXIS 18922 (N.Y. 1987)*.

Arbitration award directing corporation to issue stock warrants to petitioner was too indefinite to be enforceable where arbitration panel had not addressed provision of contract that required warrants to contain terms and conditions "satisfactory in form and substance to petitioner." *Sands Bros. & Co. v Generex Pharms., Inc., 279 A.D.2d 377, 720 N.Y.S.2d 450, 2001 N.Y. App. Div. LEXIS 669 (N.Y. App. Div. 1st Dep't 2001)*.

Trial court properly denied the plaintiff's motion to vacate and granted the defendants' cross motion to confirm an arbitration award because there was a colorable justification for the award rendered by the arbitration panel such that it could not be said to be irrational, and none of the plaintiff's remaining contentions warranted modification or reversal of the order. *Barone v Haskins, 193 A.D.3d 1388, 147 N.Y.S.3d 787, 2021 N.Y. App. Div. LEXIS 2748 (N.Y. App. Div. 4th Dep't 2021)*, app. dismissed, *37 N.Y.3d 1032, 175 N.E.3d 923, 154 N.Y.S.3d 41, 2021 N.Y. LEXIS 2140 (N.Y. 2021)*, app. denied, *37 N.Y.3d 919, 183 N.E.3d 1212, 163 N.Y.S.3d 494, 2022 N.Y. LEXIS 140 (N.Y. 2022)*.

An application for an order to confirm an arbitrator's award, made more than one year after the delivery of the award to the petitioner's attorney was time barred, notwithstanding the fact that subsequent to the granting by default of a prior timely motion to confirm, respondent moved within the one year period to vacate the default, which decision was sub judice for a period of months until the issuance of a final order vacating the default at a time when it was too late for petitioner to again move to confirm since the time which elapses between the date of the submission of a motion and the decision of the court should not operate as a toll of the running of the statute of limitations. *Daly v Criterion Ins. Co., 115 Misc. 2d 684, 454 N.Y.S.2d 615, 1982 N.Y. Misc. LEXIS 3756 (N.Y. Sup. Ct. 1982)*.

Bank's petition to confirm a credit card debt arbitration award was denied without prejudice when no agreement with an arbitration clause was tendered, there was no supporting affidavit establishing that any such agreement was binding, and the notice of the arbitration session and of the award had not been served as required by N.Y. *C.P.L.R. 7506* and *7507*. *MBNA Am. Bank v Straub, 815 N.Y.S.2d 450, 12 Misc. 3d 963, 2006 N.Y. Misc. LEXIS 1281 (N.Y. Civ. Ct. 2006)*.

37. Automobiles generally

Arbitrator improperly ordered auto manufacturer to refund purchase price of vehicle because of noise emanating from vehicle's gas tank where evidence failed to show that value of vehicle was substantially impaired by condition of gas tank, and characteristic of gas tank was not defect covered by express written warranty. *Saturn Corp. v Hurlburt, 284 A.D.2d 399, 725 N.Y.S.2d 677, 2001 N.Y. App. Div. LEXIS 6103 (N.Y. App. Div. 2d Dep't 2001)*.

38. Criminal law matters

Award directing corporation to redeem stock notwithstanding admitted deficit in its surplus account is violative of criminal (*Penal L § 190.35*) and civil (*Business Corp L §§ 513*, *514*) laws and cannot be confirmed, but will be modified to include a limitation that payments be limited to those years in which a surplus is available therefor. *Mantell v Unipak Aviation Corp., 28 A.D.2d 1134, 284 N.Y.S.2d 640, 1967 N.Y. App. Div. LEXIS 3032 (N.Y. App. Div. 2d Dep't 1967)*.

39. Employment, generally

Employer was entitled to vacatur of arbitration award under CLS *CPLR § 7511(b)(2)(iii)* where employee did not submit grievance to arbitration until 9 months after receiving employer's "Step 2 decision" letter denying his reinstatement; collective bargaining agreement required employee to attempt to resolve grievance through discussions with immediate supervisor and make formal written presentation to employer (if grievance remained unresolved) before submitting grievance to arbitration, and agreement provided that grievance could be submitted to arbitration only if done within 5 calendar days following receipt of employer's decision to deny grievance. *Blamowski v Munson Transp., Inc., 91 N.Y.2d 190, 668 N.Y.S.2d 148, 690 N.E.2d 1254, 1997 N.Y. LEXIS 3717 (N.Y. 1997)*.

Where agreement between county and county employees' association provided in connection with reimbursement for employees' travel expense that headquarters of all employees shall be designated as the administrative office of the employee's department, and agreement also provided that arbitrator would have no power to subtract from or modify any of the provisions of the agreement, arbitrator, in holding that meaning and intent of travel expense agreement must be inferred from past practice of designating such employees' residences as their official stations for mileage purposes the arbitrator in effect wrote a new contract for the parties and acted in excess of his power. *Civil Service Employees Asso., Steuben County Chapter v County of Steuben, 50 A.D.2d 421, 377 N.Y.S.2d 849, 1976 N.Y. App. Div. LEXIS 10641 (N.Y. App. Div. 4th Dep't 1976)*.

Court properly denied petition to confirm award of county Public Employee Relations Board where award contravened strong public policy by requiring college to retain teacher even though he was undisputedly unqualified to teach in certain department due to his lack of certain academic credentials. *Meehan v Nassau Community College, 231 A.D.2d 720, 647 N.Y.S.2d 865, 1996 N.Y. App. Div. LEXIS 9775 (N.Y. App. Div. 2d Dep't 1996)*.

Court properly denied employee's motion to confirm arbitration award of liquidated damages and attorneys' fees under CLS *Labor § 198*, and properly granted employer's motion to vacate award, because it was "totally irrational" of arbitrators to find that monies due, as result of mutually agreed upon equity participation by employee in employer's investments involving risk of loss, constituted "wages" under CLS *Labor § 190(1)* or that refusal to pay such monies constituted "deduction" from wages under CLS *Labor § 193*. *Apkon v Odyssey Partners, L.P., 236*

A.D.2d 225, 653 N.Y.S.2d 120, 1997 N.Y. App. Div. LEXIS 913 (N.Y. App. Div. 1st Dep't), app. denied, *89 N.Y.2d 815, 659 N.Y.S.2d 855, 681 N.E.2d 1302, 1997 N.Y. LEXIS 1215 (N.Y. 1997).*

Arbitrators' finding that petitioner was still employed by college as adjunct professor as of 1995-96 "Winterim," and entitled to benefits of employment contract, was totally irrational where all parties understood that after college's March 11, 1993 letter, petitioner was no longer employed by college in any capacity; thus, court improperly confirmed arbitrators' award. *Loiacono v Nassau Community College, 262 A.D.2d 485, 692 N.Y.S.2d 113, 1999 N.Y. App. Div. LEXIS 6625 (N.Y. App. Div. 2d Dep't),* app. denied, *94 N.Y.2d 753, 700 N.Y.S.2d 427, 722 N.E.2d 507, 1999 N.Y. LEXIS 3692 (N.Y. 1999).*

Petitioners failure to obtain judicial confirmation of prior arbitration award in timely fashion could not be cured by resort to successive arbitration, even if latest dispute stemmed from difficulty in implementing prior award or need to compute back pay, where prior award was stale, and not subject to resurrection by arbitrator's "reaffirmation"; thus, that aspect of latest award should not have been confirmed. *Bevona v Command Sec. Servs., 284 A.D.2d 125, 726 N.Y.S.2d 633, 2001 N.Y. App. Div. LEXIS 5711 (N.Y. App. Div. 1st Dep't 2001).*

40. —Unions; collective bargaining

Union's proceeding to confirm arbitration award against employer was properly dismissed where parties' agreement provided that arbitrator's decision "shall be advisory unless accepted by both parties," and employer rejected arbitrator's decision; different result was not required by provision of CLS *CPLR § 7510* that court "shall confirm" award on application of party nor by fact that parties had expressly requested arbitrator to fashion remedy if grievance were upheld. *Benjamin Rush Emples. United v McCarthy, 76 N.Y.2d 781, 559 N.Y.S.2d 958, 559 N.E.2d 652, 1990 N.Y. LEXIS 1440 (N.Y. 1990).*

In a proceeding brought pursuant to *CPLR § 7510* to confirm an arbitration award, it was properly determined that there was no clause in the subject collective bargaining agreement requiring arbitration, binding arbitration, or a binding grievance procedure which could subject the grievance board's recommendation to CPLR Art 78 confirmation, where the agreement indicated that the board's decision was advisory only, and the board itself recognized at the start of the hearing that "our panel operation here is merely to hear the subject and then to make a recommendation as to our findings. Whatever we do is not binding. It is not an arbitration award per se. It is merely an advisory statement of the grievance board." Furthermore, the respondent did not waive any claim that the agreement did not provide for binding arbitration, since the agreement required a hearing and decision by the board, which made it clear that its decision was merely advisory. *Hutcheson v County of Chemung, 101 A.D.2d 938, 475 N.Y.S.2d 658, 1984 N.Y. App. Div. LEXIS 18667 (N.Y. App. Div. 3d Dep't 1984).*

In Article 75 proceeding to confirm arbitration award which required town to give probationary employees 5 personal leave days pursuant to collective bargaining agreement, court properly denied motion to confirm award in regard to highway department, and remanded to arbitrator for further clarification of award, since highway department had long standing practice of providing its employees with 5 personal leave days which were prorated during first year of employment. *Puttre v Brookhaven, 143 A.D.2d 672, 532 N.Y.S.2d 883, 1988 N.Y. App. Div. LEXIS 9322 (N.Y. App. Div. 2d Dep't 1988).*

Respondent was free to terminate petitioner and was not bound by collective bargaining agreement to arbitrate grievance where there was only one unit employee employed on permanent basis by respondent; thus, court erred in granting petition to confirm arbitration award. *Blamowski v Munson Transp., 233 A.D.2d 846, 649 N.Y.S.2d 853, 1996 N.Y. App. Div. LEXIS 13311 (N.Y. App. Div. 4th Dep't 1996),* app. denied, *1997 N.Y. App. Div. LEXIS 1955*

(N.Y. App. Div. 4th Dep't Feb. 7, 1997), aff'd, *91 N.Y.2d 190, 668 N.Y.S.2d 148, 690 N.E.2d 1254, 1997 N.Y. LEXIS 3717 (N.Y. 1997)*.

Arbitrator exceeded his jurisdiction by imposing new penalty of suspension for housing custodian's violation of collective bargaining agreement where agreement unambiguously restricted arbitrator, in employee disciplinary proceedings, to issues of whether employee's guilt was proved and whether penalty imposed (termination) was in bad faith or unreasonable. *Civil Serv. Emples. Ass'n Inc., Local 1000 ex rel. Albany Hous. Auth. Unit, Local 801 v Albany Hous. Auth., 266 A.D.2d 676, 698 N.Y.S.2d 79, 1999 N.Y. App. Div. LEXIS 11396 (N.Y. App. Div. 3d Dep't 1999)*.

Trial court properly denied an application by a parole officer pursuant to N.Y. *C.P.L.R. 7510* to confirm an arbitration award, as the arbitrator erred by awarding the officer back pay for a period of time during which the officer received workers' compensation benefits, because the award impermissibly modified the terms of a collective bargaining agreement, and thus the award exceeded a specifically enumerated limitation on an arbitrator's power, N.Y. *C.P.L.R. 7511(b)(1)(iii)*. *Matter of Kocsis v New York State Div. of Parole, 41 A.D.3d 1017, 838 N.Y.S.2d 696, 2007 N.Y. App. Div. LEXIS 7319 (N.Y. App. Div. 3d Dep't 2007)*.

Where there was no provision for enforcement upon motion of a party to dispute of Public Employment Relations Board's arbitration award in continuing public employment wage dispute between police and fire associations and city, police and fire associations were not entitled to enforcement of such award under enforcement provision of arbitration statute. *Buffalo Police Benevolent Ass'n v Buffalo, 81 Misc. 2d 172, 364 N.Y.S.2d 362, 1975 N.Y. Misc. LEXIS 2354 (N.Y. Sup. Ct. 1975)*.

Because an arbitrator conferred a benefit on certain employees to which they were not contractually entitled, i.e., a job security clause, and thereby modified the terms of the parties' collective bargaining agreement in contravention of the explicitly enumerated limitation on the arbitrator's powers, the trial court properly refused to confirm that part of the arbitration award. *Matter of Buffalo Council of Supervisors v Board of Educ. of City School Dist. of Buffalo, 75 A.D.3d 1067, 905 N.Y.S.2d 404, 2010 N.Y. App. Div. LEXIS 5781 (N.Y. App. Div. 4th Dep't 2010)*.

41. Estate matters

Public policy precludes the submission of the distribution of a decedent's estate to arbitration. Thus, the trial court properly dismissed an action to confirm an arbitration award of a Rabbinical Tribunal where the subject matter of the arbitration, a letter of a decedent, purported to be his last will and testament and to provide for the distribution of his estate. *Berger v Berger, 81 A.D.2d 584, 437 N.Y.S.2d 690, 1981 N.Y. App. Div. LEXIS 11069 (N.Y. App. Div. 2d Dep't 1981)*.

42. Insurance, generally

In personal injury action, trial court erred in, sua sponte, confirming determination of New York Arbitration Committee that nonparty insurer of defendant did not sustain its disclaimer of coverage since CLS *CPLR § 7510* time limit for confirmation of arbitration award had expired and, in any event, sua sponte nature of confirmation deprived insurer of opportunity to object to award. *Moye v Thomas, 153 A.D.2d 673, 544 N.Y.S.2d 675, 1989 N.Y. App. Div. LEXIS 11002 (N.Y. App. Div. 2d Dep't 1989)*.

43. —Auto insurance

In arbitration proceeding arising from collision between auto and taxicab, in which insurer of auto defaulted and self-insured cab company was awarded reimbursement of 100 percent of first-party no-fault benefits it had paid to injured cab passengers, court erred in reducing arbitrator's award based on jury verdict in third-party action (finding cab driver 90 percent liable and driver of auto only 10 percent liable) without first conducting hearing on issue of whether insurer had been properly served with notice of arbitration; if insurer were not served, then arbitration award should be vacated and new hearing ordered, but if insurer were properly served and nevertheless failed to appear and present evidence as to jury verdict, arbitrator's award should be confirmed. *Nixon Taxi Corp. v State Farm General Ins. Co., 128 A.D.2d 616, 512 N.Y.S.2d 871, 1987 N.Y. App. Div. LEXIS 44308 (N.Y. App. Div. 2d Dep't 1987)*.

Portion of insured's complaint seeking compensatory damages, in action to enforce no-fault arbitration award, should have been denied as time barred, even though delay was partly caused by insurer's commencement and pursuit of improper procedure to vacate award, where master arbitrator refused insurer's request to review award on February 21, 1984, and insured did not commence action to enforce award until November 7, 1986; arbitrator's award became final, and thus one year statute began to run, when master arbitrator refused insurer's request to review award. *Polednak v Country-Wide Ins. Co., 153 A.D.2d 930, 545 N.Y.S.2d 736, 1989 N.Y. App. Div. LEXIS 11975 (N.Y. App. Div. 2d Dep't 1989)*, app. denied, *75 N.Y.2d 705, 552 N.Y.S.2d 928, 552 N.E.2d 176, 1990 N.Y. LEXIS 199 (N.Y. 1990)*.

Where petitioner and automobile insurance company entered into stipulation limiting role of arbitrator to decide issues of liability and amount of damages, which specifically stated that issue of dollar coverage under underinsured motorist provision would be later resolved by parties in court of competent jurisdiction, petitioner was not entitled to confirmation of damage award rendered by arbitrator and was required to undertake appropriate legal proceeding for determination of amount of underinsured coverage available under policy. *Susswein v Nationwide Ins. Co., 204 A.D.2d 849, 611 N.Y.S.2d 960, 1994 N.Y. App. Div. LEXIS 5184 (N.Y. App. Div. 3d Dep't 1994)*.

It was error to confirm arbitrator's award and to enjoin insurer from proceeding with trial de novo of uninsured motorist claim where arbitration award, which far exceeded maximum permitted under mandatory automobile accident indemnification endorsement attacked to insured's policy, was rendered pursuant to supplementary uninsured/underinsured motorist insurance endorsement relied on by insurer; such supplemental coverage, which insured may opt to purchase at additional premium, permits increased award but also permits either party to seek trial de novo in certain situations, and since insured sought benefit of supplementary endorsement in form of increased award, he could not avoid applicability of trial de novo provision by claiming ignorance thereof and nonreceipt of written endorsement. *Nationwide Mut. Ins. Co. v Alvarez, 207 A.D.2d 401, 615 N.Y.S.2d 723, 1994 N.Y. App. Div. LEXIS 8187 (N.Y. App. Div. 2d Dep't 1994)*.

Uninsured motorist provision of insurance carrier's policy, allowing both parties opportunity to seek trial de novo when arbitrator's award exceeded limits of uninsured motorist coverage required by *CLS Ins § 3420(f)(1)*, was valid. *Allstate Ins. Co. v Cipolla, 226 A.D.2d 456, 641 N.Y.S.2d 66, 1996 N.Y. App. Div. LEXIS 3624 (N.Y. App. Div. 2d Dep't 1996)*.

Arbitrators exceeded their authority by awarding $75,000 on claim for uninsured motorist benefits where underlying policy contained uninsured liability limits of $10,000 per person and $20,000 per accident. *Brijmohan v State Farm Ins. Co., 239 A.D.2d 496, 658 N.Y.S.2d 52, 1997 N.Y. App. Div. LEXIS 5384 (N.Y. App. Div. 2d Dep't 1997)*, aff'd, *92 N.Y.2d 821, 677 N.Y.S.2d 55, 699 N.E.2d 414, 1998 N.Y. LEXIS 1416 (N.Y. 1998)*.

Court erred in confirming arbitration award which exceeded $10,000 per person statutory limit of New York City Transit Authority's uninsured motorist coverage that was in effect at time of accident. *Spears v New York City*

Transit Auth., 262 A.D.2d 493, 692 N.Y.S.2d 100, 1999 N.Y. App. Div. LEXIS 6671 (N.Y. App. Div. 2d Dep't 1999), app. denied, *94 N.Y.2d 761, 707 N.Y.S.2d 142, 728 N.E.2d 338, 2000 N.Y. LEXIS 232 (N.Y. 2000)*.

Court properly vacated arbitration award on ground that arbitrator exceeded his powers where arbitrator determined that insurer could raise "liability defense" based on issue of contact between vehicles, even though that issue had been waived as "contractual coverage defense," and after holding hearing on issue of liability, arbitrator determined that respondent failed to show that decedent's vehicle was struck by hit-and-run vehicle, and dismissed claim. *Nationwide Ins. Co. v McDonnell, 272 A.D.2d 547, 708 N.Y.S.2d 146, 2000 N.Y. App. Div. LEXIS 5816 (N.Y. App. Div. 2d Dep't 2000)*.

44. Matrimonial matters

Court would deny husband's application to confirm arbitration award of Beth Din, which purported to determine all issues raised in parties' matrimonial action, where Beth Din did not give parties 8 days' notice before arbitration began, as required by CLS *CPLR § 7506(b)*, and parties had raised issue as to wife's representation by counsel at Beth Din, and whether he was precluded from participating in proceedings. *Stein v Stein, 184 Misc. 2d 276, 707 N.Y.S.2d 754, 1999 N.Y. Misc. LEXIS 653 (N.Y. Sup. Ct. 1999)*.

II. Under Former Civil Practice Laws

45. Generally

It is not the province of a court of equity to direct arbitrators how they shall consider a case pending before them. *Livingston v Sage, 95 N.Y. 289, 95 N.Y. (N.Y.S.) 289, 1884 N.Y. LEXIS 266 (N.Y. 1884)*.

An award in arbitration could be attacked only as prescribed in CPA §§ 1456 (§§ 7505, 7506(e) herein) 1457 (§ 7513, herein), since under CPA § 1453 the court had to grant an order confirming the award unless it was vacated, modified or corrected as prescribed in those sections. *In re Burke, 191 N.Y. 437, 84 N.E. 405, 191 N.Y. (N.Y.S.) 437, 1908 N.Y. LEXIS 1078 (N.Y. 1908)*.

An award of a lump sum was within the powers of the arbitrators even though the contract between the parties provided for installment payments. *Capelin v Klein, 3 N.Y.2d 911, 167 N.Y.S.2d 929, 145 N.E.2d 873, 1957 N.Y. LEXIS 772 (N.Y. 1957)*.

On appeal from the decision of an arbitrator the appellate division could not review the merits of the decision when there was nothing on the face of the award showing that the arbitrator decided wrongly; the court was limited in its review by CPA §§ 1456 (§§ 7505, 7506(c) herein) 1458, and was confined to the grounds specified in those sections. *In re Burke, 117 A.D. 477, 102 N.Y.S. 785, 1907 N.Y. App. Div. LEXIS 283 (N.Y. App. Div. 1907)*, aff'd, *191 N.Y. 437, 84 N.E. 405, 191 N.Y. (N.Y.S.) 437, 1908 N.Y. LEXIS 1078 (N.Y. 1908)*.

Where there is no ground for modification, correction or vacation of an award by arbitrators, it must be confirmed by the court. *Wheat Export Co. v New Century Co., 185 A.D. 723, 173 N.Y.S. 679, 1919 N.Y. App. Div. LEXIS 5562 (N.Y. App. Div.)*, aff'd, *227 N.Y. 595, 125 N.E. 926, 227 N.Y. (N.Y.S.) 595, 1919 N.Y. LEXIS 753 (N.Y. 1919)*.

Where finding by arbitrators was essential to determination and they applied only feasible remedy to situation which, if continued, would have ruined business of corporation, their award is binding on parties and court, as to

both law and facts. *Application of De Caro, 261 A.D. 975, 25 N.Y.S.2d 849, 1941 N.Y. App. Div. LEXIS 8397 (N.Y. App. Div. 1941)*.

On motion to confirm, and on cross-motion to vacate, award of arbitrators, supreme court had no jurisdiction to review findings either of fact or law of arbitrators. *Friedheim v International Paper Co., 265 A.D. 601, 40 N.Y.S.2d 144, 1943 N.Y. App. Div. LEXIS 6368 (N.Y. App. Div. 1943)*, aff'd, *292 N.Y. 664, 56 N.E.2d 95, 292 N.Y. (N.Y.S.) 664, 1944 N.Y. LEXIS 1822 (N.Y. 1944)*.

Contract providing for arbitration of disputes is assignable after its breach. *Packard Fabrics v Deering Milliken & Co., 277 A.D. 753, 96 N.Y.S.2d 878, 1950 N.Y. App. Div. LEXIS 3136 (N.Y. App. Div. 1950)*, aff'd, *302 N.Y. 643, 98 N.E.2d 113, 302 N.Y. (N.Y.S.) 643, 1951 N.Y. LEXIS 826 (N.Y. 1951)*.

Penalty provisions of arbitration contract were held unenforceable under any admissible theory under law, although a separable finding of actual damage for breach could be made. *Publishers' Ass'n of New York City v Newspaper & Mail Deliverers' Union, 280 A.D. 500, 114 N.Y.S.2d 401, 1952 N.Y. App. Div. LEXIS 3510 (N.Y. App. Div. 1952)*.

It may not be held as matter of law that agreement for arbitration was to be conducted solely under arbitration statutes, so as to bar enforcement of award by common-law remedies, though prior motion by plaintiff to confirm award was denied because application had not been made within one year. *Jones v John A. Johnson & Sons, Inc., 283 A.D. 1085, 131 N.Y.S.2d 362, 1954 N.Y. App. Div. LEXIS 6392 (N.Y. App. Div. 1954)*.

On a motion to confirm an arbitration award, Special Term may vacate or modify the award only on the grounds specified in the Civil Practice Act. *French Textiles Co. v Senor, 7 A.D.2d 896, 182 N.Y.S.2d 282, 1959 N.Y. App. Div. LEXIS 10079 (N.Y. App. Div. 1st Dep't 1959)*.

An award made under a general submission of a controversy between the parties is final and conclusive as to matters within the submission even though not brought to the attention of the arbitrators nor embraced in the award. *Garnett v Kassover, 8 A.D.2d 631, 185 N.Y.S.2d 435, 1959 N.Y. App. Div. LEXIS 9153 (N.Y. App. Div. 2d Dep't 1959)*.

The provisions of CPA § 1449 (§ 7501 herein) that a submission to arbitration shall be acknowledged or proved and certified in like manner as a deed to be recorded, required that the acknowledgment, when taken before the notary public of another state, be authenticated by the proper certificate as in the case of the deed; and, where such requirement was neglected, an order confirming the award could not be made under the provisions of CPA § 1456 (§§ 7505, 7506(e) herein). *Concrete Steel & Tile Const. Co. v Green, 121 N.Y.S. 237, 65 Misc. 210, 1909 N.Y. Misc. LEXIS 403 (N.Y. Sup. Ct. 1909)*, aff'd, *136 A.D. 928, 120 N.Y.S. 1119, 1910 N.Y. App. Div. LEXIS 351 (N.Y. App. Div. 1910)*.

Motion to confirm arbitration award against union is motion in already existing special proceeding commenced by service of notice instituting arbitration proceeding, and *General Associations Law § 13* does not apply. *Ruppert v International Brotherhood of Teamsters, etc., 2 Misc. 2d 744, 152 N.Y.S.2d 327, 1956 N.Y. Misc. LEXIS 1960 (N.Y. Sup. Ct.)*, modified, *2 A.D.2d 670, 153 N.Y.S.2d 553, 1956 N.Y. App. Div. LEXIS 4910 (N.Y. App. Div. 1st Dep't 1956)*.

Arbitration award which enjoins employer’s removal from city was confirmed, but that part of award which consists of mandatory injunction directing him to remove back to city all machinery theretofore removed in violation of contract was not confirmed. *Application of Pocketbook Workers Union, 14 Misc. 2d 268, 149 N.Y.S.2d 56, 1956 N.Y. Misc. LEXIS 2177 (N.Y. Sup. Ct. 1956)*.

Where the view taken by an arbitrator was a permissible one, the parties are concluded by the arbitrator's award. *Genuth v S. B. Thomas, Inc., 9 Misc. 2d 653, 168 N.Y.S.2d 328, 1957 N.Y. Misc. LEXIS 3712 (N.Y. Sup. Ct. 1957)*.

Where corporation president refused to attend arbitration hearing and formed new corporation on same premises, motion to confirm arbitration award granted where award made against old corporation known as "new corporation". *Minkoff v H. & L. Dress Corp., 10 Misc. 2d 828, 171 N.Y.S.2d 900, 1958 N.Y. Misc. LEXIS 4068 (N.Y. Sup. Ct. 1958)*.

Where question raised as to interpretation of contract for arbitration, motion to modify arbitrator's award on ground that arbitrator exceeded authority must be denied and in the absence of a motion to confirm the award, the court may not at that time confirm the award. *Auburn Plastics, Inc. v Federal Labor Union, 10 Misc. 2d 969, 173 N.Y.S.2d 361, 1958 N.Y. Misc. LEXIS 3447 (N.Y. Sup. Ct. 1958)*.

On motion to confirm and cross-motion to vacate arbitrator's award, where arbitrator had found that employee's discharge was not justified and this determination was within his province, the court would not disturb his determination and confirmed the award. *Bakery Drivers & Salesmen, Local Union v Rochester Maid, Inc., 15 Misc. 2d 1066, 182 N.Y.S.2d 419, 1959 N.Y. Misc. LEXIS 4333 (N.Y. Sup. Ct. 1959)*.

Where arbitrators determined value of deceased stockholder's stock and ordered surviving stockholders to pay same in accordance with provisions of stockholders' agreement, which agreement clearly set forth time and method of payment, surviving stockholders' objection that award did not determine when payments were to begin was without merit, and award was confirmed. *Estate of Gillman v Bloom, 21 Misc. 2d 62, 195 N.Y.S.2d 1021, 1959 N.Y. Misc. LEXIS 2416 (N.Y. Sup. Ct. 1959)*.

Third person, claimant as owner of stored effects, may not oppose motion to confirm award where he is not party to arbitration agreement. *In re Spottswood, 88 N.Y.S.2d 572, 1945 N.Y. Misc. LEXIS 2884 (N.Y. Sup. Ct. 1945)*.

Collective bargaining agreement prohibiting transfer of commissioner to another employer without consent of union, was not invalid. *In re General Dry Cleaners, Inc., 75 N.Y.S.2d 615, 1947 N.Y. Misc. LEXIS 3444 (N.Y. Sup. Ct. 1947)*.

To become effective, award must be filed or confirmed by court. *Flora Fashions, Inc. v Commerce Realty Corp., 80 N.Y.S.2d 384, 1948 N.Y. Misc. LEXIS 2563 (N.Y. Sup. Ct. 1948)*.

Assignee of prevailing party to arbitration proceeding may not move to confirm award. *Cadbury-Fry, Inc. v Opler, 91 N.Y.S.2d 742, 1949 N.Y. Misc. LEXIS 2706 (N.Y. Sup. Ct. 1949)*.

Connecticut award cannot be confirmed or rejected by New York court. *Landerton Co. v Public Service Heat & Power Co., 118 N.Y.S.2d 84, 1952 N.Y. Misc. LEXIS 2111 (N.Y. Sup. Ct. 1952)*.

By comparing CPA § 1461 with CPA § 1363 (now Mental Hygiene Law 104) it would be seen that application to vacate or modify award "must be served" within three months after award was filed or delivered. *Jones v John A. Johnson & Sons, Inc., 129 N.Y.S.2d 479, 1954 N.Y. Misc. LEXIS 3169 (N.Y. Sup. Ct.)*, aff'd, *283 A.D. 1085, 131 N.Y.S.2d 362, 1954 N.Y. App. Div. LEXIS 6392 (N.Y. App. Div. 1954)*.

On motion to confirm or vacate award of arbitrators, all reasonable intendments favor their award, and court may not review errors of fact or law made by arbitrators and render decision de novo on merits. *Suffolk & Nassau Amusement Co. v Ambrose, 143 N.Y.S.2d 427, 1955 N.Y. Misc. LEXIS 2847 (N.Y. Sup. Ct. 1955)*.

Where all questions of fact and law were submitted to arbitrators for their decision, court will not review their decision on merits. *Johnson v Princeton Worsted Mills, 144 N.Y.S.2d 259, 1955 N.Y. Misc. LEXIS 3720 (N.Y. Sup. Ct. 1955)*.

On motion to confirm arbitration award court will not review the merits. *Dessy-Atco, Inc. v Youngset Fashions, Inc., 205 N.Y.S.2d 577 (N.Y. Sup. Ct. 1960)*.

On motion to confirm arbitration award, findings of fact of arbitrators are conclusive in the absence of proof of fraud. *Dessy-Atco, Inc. v Youngset Fashions, Inc., 205 N.Y.S.2d 577 (N.Y. Sup. Ct. 1960)*.

46. Failure of submission to provide for entry of judgment

Even in the absence of a provision for the entry of judgment in a submission agreement, and the absence therein of the name of the court in which judgment was to be rendered on the award made pursuant to the submission, a summary judgment might, nevertheless, be obtained in the manner provided in CPA § 1461. *In re Resolute Paper Products Corp., 290 N.Y.S. 87, 160 Misc. 722, 1936 N.Y. Misc. LEXIS 1274 (N.Y. Sup. Ct. 1936)*.

47. Disqualification of arbitrator

Objection that an arbitrator was disqualified because engaged in business similar to that of petitioners may not be sustained. *Newburger v Rose, 228 A.D. 526, 240 N.Y.S. 436, 1930 N.Y. App. Div. LEXIS 12213 (N.Y. App. Div.)*, aff'd, *254 N.Y. 546, 173 N.E. 859, 254 N.Y. (N.Y.S.) 546, 1930 N.Y. LEXIS 1132 (N.Y. 1930)*.

Objection that an arbitrator was disqualified was waived on motion to confirm. *Newburger v Rose, 228 A.D. 526, 240 N.Y.S. 436, 1930 N.Y. App. Div. LEXIS 12213 (N.Y. App. Div.)*, aff'd, *254 N.Y. 546, 173 N.E. 859, 254 N.Y. (N.Y.S.) 546, 1930 N.Y. LEXIS 1132 (N.Y. 1930)*.

48. Irregular award

Unacknowledged award of arbitrator is not subject to motion to confirm it. *Sandford Laundry v Simon, 285 N.Y. 488, 35 N.E.2d 182, 285 N.Y. (N.Y.S.) 488, 1941 N.Y. LEXIS 1489 (N.Y. 1941)*.

Where acknowledgment of award was inadvertently omitted when it was signed but acknowledgment was made on day on which motion to confirm was heard, it was therefore before court when it "entertained" the motion. *In re Verly Bldg. Corp., 264 A.D. 885, 35 N.Y.S.2d 891, 1942 N.Y. App. Div. LEXIS 5252 (N.Y. App. Div. 1942)*.

Where submission agreement required parties to submit within 30 days after hearings were closed, and hearings were closed during 30-day period, submission was timely. *Franz Rosenthal, Inc. v Tannhauser, 279 A.D. 902, 111 N.Y.S.2d 221, 1952 N.Y. App. Div. LEXIS 5249 (N.Y. App. Div.)*, aff'd, *304 N.Y. 812, 109 N.E.2d 470, 304 N.Y. (N.Y.S.) 812, 1952 N.Y. LEXIS 1000 (N.Y. 1952)*.

Where Labor Management Relations Act §§ 151, 185 gives Federal courts jurisdiction of actions involving breaches of labor-management actions in all cases where employer is engaged in interstate commerce but does not limit right to arbitration, New York court has jurisdiction of motion to confirm arbitration award. *Application of Pocketbook Workers Union, 14 Misc. 2d 268, 149 N.Y.S.2d 56, 1956 N.Y. Misc. LEXIS 2177 (N.Y. Sup. Ct. 1956)*.

Where parties in good faith entered into bargaining agreement which set up machinery for processing of grievances, petitioning union, having filed its grievance and arbitral process having been commenced, could not set terms under which it would withdraw, and where such so-called withdrawal was conditioned that it be without prejudice, controversy was still before board unless latter consented or approved conditional award. *Simons v New York Herald Tribune, Inc., 15 Misc. 2d 116, 152 N.Y.S.2d 13, 1956 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 1956)*, aff'd, *3 A.D.2d 900, 163 N.Y.S.2d 400, 1957 N.Y. App. Div. LEXIS 5503 (N.Y. App. Div. 1st Dep't 1957)*.

Where respondent agreed to "abide by decision" of substituted arbitrator, he is deemed to have waived unauthorized substitution and is bound by latter's decision. *Building Service Employees International Union v Filene Holding Corp., 43 N.Y.S.2d 309, 1943 N.Y. Misc. LEXIS 2194 (N.Y. Sup. Ct. 1943)*.

49. Refusal to confirm

Arbitrator's award, outside scope of controversy submitted to arbitrator in accord with procedure specified in contract, was not confirmed. *Sheffield Farms Co. v Hibbits, 264 A.D. 843, 35 N.Y.S.2d 497, 1942 N.Y. App. Div. LEXIS 4989 (N.Y. App. Div. 1942)*.

Motion to confirm award was held in abeyance until coming in of referee's report as to alleged fraud in procuring submission to arbitration and relationship between arbitrator and plaintiff's attorney. *Sztejn v Columbia Bristle & Soft Hair Corp., 267 A.D. 94, 44 N.Y.S.2d 497, 1943 N.Y. App. Div. LEXIS 5975 (N.Y. App. Div. 1943)*.

Order denying confirmation of award was reversed where there had been a full submission of the controversy. *Brodnax Mills, Inc. v Neisler Mills Div. of Massachusetts Mohair Plush Co., 7 A.D.2d 220, 181 N.Y.S.2d 798, 1959 N.Y. App. Div. LEXIS 10074 (N.Y. App. Div. 1st Dep't 1959)*.

The court had no discretionary power to refuse the confirming order provided for in CPA § 1461 except under the conditions stated in CPA §§ 1457 (§ 7513 herein) and 1458 (§§ 7503(b), (c), 7510, 7511(b) herein). *Everett v Brown, 198 N.Y.S. 462, 120 Misc. 349, 1923 N.Y. Misc. LEXIS 798 (N.Y. Sup. Ct. 1923)*.

In absence of judicial confirmation of arbitrator's decision, determined in special proceeding under CPA § 1448 (§§ 1209, 7501 herein) et seq., court was not bound to adopt, indeed it could not ipso facto invoke, such decision. *Application of Re-Anne Mfg. Corp., 1 Misc. 2d 717, 149 N.Y.S.2d 161, 1955 N.Y. Misc. LEXIS 2107 (N.Y. Sup. Ct. 1955)*.

Confirmation of award was denied where the award was not final and binding upon the parties. *Kandler v O'Connor, 18 Misc. 2d 109, 187 N.Y.S.2d 702, 1959 N.Y. Misc. LEXIS 3742 (N.Y. Sup. Ct. 1959)*.

Party's default on erroneous advice of counsel that arbitration agreement was unenforceable, is not ground for denying confirmation of the award. *Couture Fabrics, Ltd. v Phyllis Dee, Inc., 20 Misc. 2d 399, 194 N.Y.S.2d 1001, 1959 N.Y. Misc. LEXIS 2525 (N.Y. Sup. Ct. 1959)*.

Discharge of employee for gross insubordination was found not warranted, and arbitrator's award to such effect was affirmed. *Finn v J. J. Hart, Inc., 133 N.Y.S.2d 335, 1954 N.Y. Misc. LEXIS 2192 (N.Y. Sup. Ct. 1954)*.

50. Necessity of objection at trial

Reargument of motion to confirm award of arbitration is proper, and upon reargument court may refer arbitration to official referee. *Holliday v Samuels, 278 A.D. 687, 103 N.Y.S.2d 338, 1951 N.Y. App. Div. LEXIS 4362 (N.Y. App. Div. 1951)*.

On motion to confirm award, claim that, under the contract, the question passed upon was not triable, was unavailable, objection not having been made at the trial. *Everitt v Board of Education, 228 N.Y.S. 222, 131 Misc. 507, 1928 N.Y. Misc. LEXIS 794 (N.Y. Sup. Ct.)*, aff'd, *224 A.D. 779, 230 N.Y.S. 832, 1928 N.Y. App. Div. LEXIS 11192 (N.Y. App. Div. 1928)*.

Where defendants submitted to arbitration, participated in proceedings, and made no claim that there was no valid contract of submission, they may not defeat confirmation of award by first claiming that they never entered into arbitration contract. *Nelson v Bestform Knitwear Corp., 87 N.Y.S.2d 353, 1941 N.Y. Misc. LEXIS 2668 (N.Y. Sup. Ct. 1941)*.

Where no application was made to vacate, modify or correct award, respondent was limited on motion to confirm to showing that award was unenforcible under CPA § 1458. *In re General Dry Cleaners, Inc., 75 N.Y.S.2d 615, 1947 N.Y. Misc. LEXIS 3444 (N.Y. Sup. Ct. 1947)*.

Where respondent did not request adjournment to obtain rebuttal evidence and where it did not appear that arbitrators knew anything about second hearing to afford respondent opportunity to offer rebuttal evidence, award was confirmed. *Republique Francaise v Am. Foreign S.S. Corp, 129 N.Y.S.2d 330, 1953 N.Y. Misc. LEXIS 2700 (N.Y. Sup. Ct. 1953)*.

51. Counter motion

On motion to confirm award, counter motion to vacate, modify and correct the award was not available in absence of showing of grounds specified in the two following sections. *Everitt v Board of Education, 228 N.Y.S. 222, 131 Misc. 507, 1928 N.Y. Misc. LEXIS 794 (N.Y. Sup. Ct.)*, aff'd, *224 A.D. 779, 230 N.Y.S. 832, 1928 N.Y. App. Div. LEXIS 11192 (N.Y. App. Div. 1928)*.

Where, instead of filing answer on motion to confirm award, party moved to vacate award, but it was evident from papers submitted that he also intended them to be in opposition to motion to confirm, court refused to exalt form over substance and considered both applications on the merits. *Florida Molasses Co. v First Nat'l Oil Corp., 22 Misc. 2d 640, 197 N.Y.S.2d 774, 1960 N.Y. Misc. LEXIS 3801 (N.Y. Sup. Ct.)*, aff'd, *11 A.D.2d 1027, 207 N.Y.S.2d 998, 1960 N.Y. App. Div. LEXIS 7944 (N.Y. App. Div. 2d Dep't 1960)*.

52. Radio broadcast of proceedings

The practice of broadcasting arbitration proceedings by radio is condemned; motion to confirm award is denied. *Brody v Owen, 259 A.D. 720, 18 N.Y.S.2d 28, 1940 N.Y. App. Div. LEXIS 6406 (N.Y. App. Div. 1940)*.

53. Appeal

Appeal dismissed on ground that constitutional question was not substantial. *In re Orange Pulp & Paper Mills, Inc., 288 N.Y. 505, 41 N.E.2d 924, 288 N.Y. (N.Y.S.) 505, 1942 N.Y. LEXIS 1361 (N.Y. 1942)*.

Since notice of appeal expressly limits review to so much of order as vacated award, court might not confirm award, despite CPA § 1461 providing for confirmation unless award was vacated, modified or corrected. *Gosschalk v Otto Gerdau Co., 275 A.D. 754, 87 N.Y.S.2d 541, 1949 N.Y. App. Div. LEXIS 4325 (N.Y. App. Div. 1949)*.

Courts do not review arbitrators' decisions de novo on the merits; all questions of law or fact are submitted to arbitrator for final decision. *Wagner v Russeks Fifth Avenue, Inc., 281 A.D. 825, 119 N.Y.S.2d 269, 1953 N.Y. App. Div. LEXIS 3441 (N.Y. App. Div. 1953)*.

Record held to require confirmation of award of arbitrators. *A. M. Perlman, Inc. v Rocket Dress Co., 285 A.D. 1021, 139 N.Y.S.2d 460, 1955 N.Y. App. Div. LEXIS 6537 (N.Y. App. Div. 1955)*.

54. Attachment

Attachment is available in common-law action on award, where plaintiff does not pursue summary method permitted by this section. *C. M. Sillevoldt, Inc. v Hay, 65 N.Y.S.2d 571, 1946 N.Y. Misc. LEXIS 2882 (N.Y. Sup. Ct. 1946)*.

55. Venue

Unless agreement to arbitrate provides otherwise Supreme Court for county in which corporate petitioner was both resident and doing business was proper county in which to bring motion to confirm award. *Big-W Constr. Corp. v Horowitz, 24 Misc. 2d 145, 192 N.Y.S.2d 721, 1959 N.Y. Misc. LEXIS 2915 (N.Y. Sup. Ct. 1959)*, aff'd, *14 A.D.2d 817, 218 N.Y.S.2d 530, 1961 N.Y. App. Div. LEXIS 8250 (N.Y. App. Div. 2d Dep't 1961)*.

Research References & Practice Aids

Cross References:

This section referred to in CLS NYC Civil Ct Act § 206.; CLS *UDCA § 206*.

Proceedings in certain courts, CLS NYC Civil Ct Act § 206.; CLS *UCCA § 206*.; CLS *UDCA § 206*.; CLS *UJCA § 206*.

Federal Aspects:

Confirmation of award, *9 USCS § 9*.

Law Reviews:

Arbitration under the Civil Practice Law and Rules in New York. 9 N.Y.L. Sch. L. Rev. 335.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, *New York Civil Practice: CPLR Ch. 7510*., Confirmation of award.

Matthew Bender's New York Civil Practice:

CPLR Manual § 2.18 .Limitations for particular actions.

CPLR Manual § 31.01. Arbitration in general.

CPLR Manual § 31.08. The award.

CPLR Manual § 31.09. Judicial proceedings after award; time limits.

Matthew Bender's New York Civil Practice:

CPLR Manual § 31.10 .Confirmation.

CPLR Manual § 31.11. Vacating or modifying the award.

1 Lansner, Reichler, *New York Civil Practice: Matrimonial Actions § 6.06*.

Matthew Bender's New York Practice Guides:

4 *New York Practice Guide: Business and Commercial §§ 24.02*., 24.03., 24.11.— 24.13.

Matthew Bender's New York Practice Guides:

LexisNexis AnswerGuide New York Civil Litigation § 15.18 .Applying to Confirm Arbitration Award; Entering Judgment Upon Award.

Matthew Bender's New York Practice Guides:

LexisNexis AnswerGuide New York Civil Litigation § 15.20 .Applying to Court to Vacate or Modify Arbitration Award.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property § 8.30.

Matthew Bender's New York Practice Guides:

Checklist for Applying to Confirm, Vacate or Modify Arbitration Award *LexisNexis AnswerGuide New York Civil Litigation § 15.17*.

FORMS:

Bender's Forms for the Civil Practice Form No. CPLR 7510:1 et seq.

LexisNexis Forms FORM 140-448.5.—Notice of Petition to Confirm Arbitration Award.

LexisNexis Forms FORM 1434-19134.—*CPLR 2214*, *7510*: Notice of Motion to Confirm Arbitration Award.

LexisNexis Forms FORM 1434-19137.—*CPLR 2214*, *CPLR 7510*: Affidavit in Support of Motion to Confirm Award.

LexisNexis Forms FORM 75-CPLR 7510:1.—Notice of Motion to Confirm Arbitration Award.

LexisNexis Forms FORM 75-CPLR 7510:2.—Affidavit in Support of Motion to Confirm Award.

2 *Medina's Bostwick Practice Manual (Matthew Bender), Forms 28:101* et seq. (arbitration).

Texts:

New York Insurance Law (Matthew Bender's New York Practice Series) §§ 30.01 [2][c][vii]., 51.10 [2][g][iii].

Hierarchy Notes:

NY CLS CPLR, Art. 75

Forms

Forms

Form 1

Notice of Motion To Confirm Arbitration Award

Notice of Motion

[Title of court and proceeding] Index No. _____ [if assigned]

[Caption]

Please take notice that upon the award of a majority of the arbitrators in the above-entitled arbitration proceeding, dated _____, and delivered to me on the _____ day of _____, 20_____, upon the agreement for arbitration, dated _____, upon the affidavit of _____, sworn to the _____ day of _____, 20_____, and upon the stenographer's minutes of the hearings before the arbitrators and of all the prior papers and proceedings had heretofore, the undersigned will move this court at a [motion] term thereof, to be held at the court house in the City of _____, in and for the County of _____, on the _____ day of _____, 20_____, at the opening of the court on that day, or as soon thereafter as counsel can be heard for an order

(1) confirming the award of the majority of the arbitrators;

(2) directing judgment to be entered thereon pursuant to statute in that case made and provided;

(3) for such other and further relief as to the court may seem just and proper, together with the costs of this motion.

[Date]

_____

Attorney for Plaintiff

Address _____

Telephone No. _____

To_____, Esq.,

Attorney for Defendant Address _____

Form 2

Petition to Confirm Award

Petition

[Title of court and cause] Index No. _____ [if assigned]

[Caption and introductory paragraph]

1. On the _____ day of _____, 20_____, petitioner and respondent _____ entered into a written agreement, a copy of which is annexed hereto as Exhibit "A", whereby they agreed in paragraph _____ thereof than any controversy or claim arising out of or relating to said agreement should be settled by arbitration by _____ and _____, and a third arbitrator to be named by said two arbitrators, and that judgment upon any such award rendered by said arbitrators should be entered in any court having jurisdiction thereof.

2. Thereafter and on or about the _____ day of _____, 20_____, petitioner and said respondent submitted to _____, _____, and _____, as arbitrators, for their adjudication and award all matters in dispute between petitioner and said respondent relating to certain disputes which arose in connection with the breach of said contract, and the amount due as damages from respondent to petitioner by reason of the alleged breach of said contract.

3. On or about the _____ day of _____, 20_____, at a time and place appointed, notice of which was given to both parties, the three arbitrators heretofore named, after having taken their oath of office, proceeded to hear the proofs of the parties. The hearing was adjourned from time to time, and nine meetings in all were held, all of which were attended by both parties to this proceeding and by the arbitrators aforesaid.

4. On or about the _____ day of _____, 20_____, after the said arbitrators had completed their investigations and studies of all the facts and circumstances, elements, and proofs entering into the controversy so submitted to them as aforesaid, and after they had considered all the evidence and arguments submitted by the parties to said arbitration agreement, a majority of them, to wit, _____ and _____, having come to a decision (_____ having made a dissenting award, which is hereto annexed as Exhibit "B"), made their award in writing duly signed and acknowledged on the _____ day of _____, 20_____, a copy of which is hereto annexed as Exhibit "C", whereby they determined and awarded that the contract aforesaid, dated the _____ day of _____, 20_____, had been broken and repudiated by _____, the respondent herein, without justifiable cause; that the said _____, respondent herein, pay to _____, petitioner, the sum of _____ dollars as damages therefor; that the proper fee and compensation of each arbitrator, _____, _____, and _____, was _____ dollars, making a total for all three of _____ dollars, and that petitioner and said _____ should each pay one-half of said amount, to wit, the sum of _____ dollars; that the fees of the stenographer hired to take down the minutes of the hearing amounted to _____ dollars, and that each party hereto should pay one-half of said amount, or the sum of _____ dollars;

WHEREFORE, petitioner respectfully prays that an order be made herein confirming said award, and directing that judgment be entered thereon in the Supreme Court, _____ County, and that the moving party be allowed the costs of this application to confirm.

_____

[Office address and

telephone number]

[Indorsement, address, telephone number and verification]

Form 3

Affidavit on Motion To Confirm Arbitration Award

Affidavit

[Title of court and proceeding] Index No. _____ [if assigned]

[Caption and introductory paragraph]

That on the _____ day of _____, 20_____, your deponent and _____ entered into an agreement of the same date, duly acknowledged in like manner as a deed to be recorded, a copy of which is hereto annexed, whereby they submitted to _____ and _____, and a third arbitrator to be named by the said two arbitrators, who subsequently named, by a writing hereto annexed, _____, as the third arbitrator, for their adjudication and award, all matters in dispute between your deponent, _____, and the above-named _____, relating to certain disputes which had arisen in connection with the breach of a certain contract entered into between the parties hereto and dated _____, which is annexed hereto and marked "Exhibit _____," and the amount due as damages from the said _____ to the said _____, by reason of the alleged breach of said contract, and mutually covenanted and promised that the award to be made by said arbitrators, or any two of them, would be well and faithfully kept by them and each of them, and that a judgment of the Supreme Court of the State of New York should be rendered upon the award made pursuant to said arbitration agreement in _____ County;

Thereafter, and on the _____ day of _____, 20_____, at a time and place appointed, notice of which was given to both parties, the three arbitrators heretofore named, having subscribed to their oath of office, proceeded to hear the proofs of the parties. That the hearing was adjourned from time to time and that nine meetings in all were held, all of which were attended by both parties to this proceeding and by the arbitrators aforesaid;

That on the _____ day of _____, 20_____, after the said arbitrators aforesaid, _____, _____ and _____, had completed their investigations and studies of all the facts, circumstances, elements, and proofs entering into the controversy so submitted to them as aforesaid, and after they had considered all the evidence and arguments submitted by the parties to said arbitration agreement, a majority of them, to wit, _____ and _____, having come to a decision, _____ having made a dissenting award which is hereto annexed, made their award in writing duly acknowledged, dated _____, and delivered to me on the _____ day of _____, 20_____, a copy of which is hereto annexed, whereby they determined and awarded that the contract aforesaid, dated the _____ day of _____, 20_____, had been broken and repudiated by _____, the

respondent herein, without justifiable cause, and that the said _____, respondent herein, pay to _____, your deponent, the sum of _____ dollars as damages therefor, that the proper fee and compensation of each arbitrator, _____, _____, and _____, was _____ dollars, making a total for all three of _____ dollars, and that your deponent _____ and said _____ should each pay one-half of said amount, to wit, the sum of _____ dollars;

That the fees of the stenographer hired to take down the minutes of the hearing amounted to _____ dollars, and that each party hereto should pay one-half of said amount, or the sum of _____ dollars;

Wherefore, your deponent respectfully prays that an order be made herein confirming said award and directing that judgment be entered thereon in the Supreme Court, _____ County, and that the moving party be allowed the costs of this motion to confirm.

[Signature of deponent]

[Print signer's name below signature]

[Jurat]

Form 4

Body of Order Confirming Arbitration Award and for Judgment Thereon

Supreme Court, _____ County.

Order

[Title of proceeding] Index No. _____

An application having been made by _____, to confirm the award of the sole arbitrator made in the above entitled proceeding, dated the _____ day of _____, 20_____, and delivered to the said _____ on the _____ day of _____ 20_____, and Petitioner further seeking entry of Judgment upon the said award, and _____ not opposing the motion, and upon reading and filing the Notice of Motion dated _____ on behalf of _____ for confirmation of the award and entry of judgment thereon, the petition, dated _____, together with the affidavit of _____, duly sworn to the _____ day of _____, 20_____, and a copy of the arbitration agreement and the award of the sole arbitrator, all submitted in support of the application, and the motion coming on regularly to be heard on the _____ day of _____, 20_____,

And it appearing that certain controversies existing between _____ and _____, both residing at _____, New York, _____ County, were submitted to arbitration for _____ to hear and determine as sole arbitrator pursuant to the provisions of a certain agreement dated _____; and the arbitrator having duly proceeded in the matter, and an award having been made and signed by the sole arbitrator,

NOW, after counsel for the parties herein having submitted the matter, and due deliberation having been had thereon, and it appearing to this Court that the above-entitled proceeding is in all respects regular, it is, on motion of _____, Esq., Attorney for the Petitioner,

ORDERED that the application is hereby granted, and it is further

ORDERED, that the award of _____ in the above-entitled proceeding, dated _____, whereby he determined and awarded that: (1) _____ is the proper beneficiary under Group Annuity Certificate number _____, issued by the _____ Insurance Company, and that _____ has no claim to any of the proceeds payable under that certificate; and (2) _____ is the proper beneficiary under Contract No. _____ issued by the _____ Annuity Association, and that _____ has no claim to any of the proceeds payable under that contract, and whereby the sole arbitrator determined and awarded that the proper fee for such arbitrator is $_____, and that each party here to, _____ and _____ pay one-half of said amount, to wit, the sum of _____ dollars, be and the same award is CONFIRMED; and it is further

ADJUDGED that _____ is the proper beneficiary under Group Annuity Certificate number _____, issued by the _____ Insurance Company, and that _____ has no claim to any of the proceeds payable under that certificate; and it is further

ADJUDGED, that _____ is the proper beneficiary under Contract No. _____ issued by the _____ Annuity Association, and that _____ has no claim to any of the proceeds payable under that contract,

THE PARTIES having waived any award of costs allowed on the motion to confirm the sole arbitrator's award

Signed this _____ day of _____ 19_____ at _____New York.

ENTER

_____

Justice, Supreme Court

_____ County

End of Document

NY CLS CPLR, Art. 75

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 75 Arbitration (§§ 7501 — 7516)

Article 75 Arbitration

History

Add, L 1962, ch 308, eff Sept 1, 1963.

End of Document

NY CLS CPLR § 7501

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 75 Arbitration (§§ 7501 — 7516)

§ 7501. Effect of arbitration agreement

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

History

Add, L 1962, ch 308; amd, L 1963, ch 532, § 47, eff Sept 1, 1963.

§ 7502. Applications to the court; venue; statutes of limitation; provisional remedies

(a) Applications to the court; venue. A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action.

(i) The proceeding shall be brought in the court and county specified in the agreement. If the name of the county is not specified, proceedings to stay or bar arbitration shall be brought in the county where the party seeking arbitration resides or is doing business, and other proceedings affecting arbitration are to be brought in the county where at least one of the parties resides or is doing business or where the arbitration was held or is pending.

(ii) If there is no county in which the proceeding may be brought under paragraph (i) of this subdivision, the proceeding may be brought in any county.

(iii) Notwithstanding the entry of judgment, all subsequent applications shall be made by motion in the special proceeding or action in which the first application was made.

(iv) If an application to confirm an arbitration award made within the one year as provided by *section seventy-five hundred ten* of this article, or an application to vacate or modify an award made within the ninety days as provided by subdivision (a) of *section seventy-five hundred eleven* of this article, was denied or dismissed solely on the ground that it was made in the form of a motion captioned in an earlier special proceeding having reference to the arbitration instead of as a distinct special proceeding, the time in which to apply to confirm the award and the time in which to apply to vacate or modify the award may, notwithstanding that the applicable period of time has expired, be made at any time within ninety days after the effective date of this paragraph, and may be made in whatever form is appropriate (motion or special proceeding) pursuant to this subdivision.

(b) Limitation of time. If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as provided in section 7503 or subdivision (b) of section 7511. The failure to assert such bar by such application shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar. Except as provided in subdivision (b) of section 7511, such exercise of discretion by the arbitrators shall not be subject to review by a court on an application to confirm, vacate or modify the award.

(c) Provisional remedies. The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for

commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above. If an arbitration is not commenced within thirty days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent. The court may reduce or expand this period of time for good cause shown. The form of the application shall be as provided in subdivision (a) of this section.

History

Add, L 1962, ch 308; amd, L 1985, ch 253, § 1, eff Jan 1, 1986; *L 2000, ch 226, § 1*, eff Aug 16, 2000; *L 2001, ch 567, § 1*, eff Dec 19, 2001; *L 2005, ch 703, § 1*, eff Oct 4, 2005.

End of Document

§ 7503. Application to compel or stay arbitration; stay of action; notice of intention to arbitrate.

(a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

(b) Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

(c) Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. Service of the application by mail shall be timely if such application is posted within the prescribed period. Any provision in an arbitration agreement or arbitration rules which waives the right to apply for a stay of arbitration is hereby declared null and void.

History

Add, L 1962, ch 308, eff Sept 1, 1963; amd, L 1964, ch 388 § 28, eff Sept 1, 1964; L 1973, ch 1028 § 1, eff Sept 1, 1973.

§ 7503. Application to compel or stay arbitration; stay of action; notice of intention to arbitrate.

End of Document

§ 7504. Court appointment of arbitrator

If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

NY CLS CPLR § 7505

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 75 Arbitration (§§ 7501 — 7516)

§ 7505. Powers of arbitrator

An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas. An arbitrator has the power to administer oaths.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

End of Document

§ 7506. Hearing

(a) Oath of arbitrator. Before hearing any testimony, an arbitrator shall be sworn to hear and decide the controversy faithfully and fairly by an officer authorized to administer an oath.

(b) Time and place. The arbitrator shall appoint a time and place for the hearing and notify the parties in writing personally or by registered or certified mail not less than eight days before the hearing. The arbitrator may adjourn or postpone the hearing. The court, upon application of any party, may direct the arbitrator to proceed promptly with the hearing and determination of the controversy.

(c) Evidence. The parties are entitled to be heard, to present evidence and to cross-examine witnesses. Notwithstanding the failure of a party duly notified to appear, the arbitrator may hear and determine the controversy upon the evidence produced.

(d) Representation by attorney. A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. This right may not be waived. If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney.

(e) Determination by majority. The hearing shall be conducted by all the arbitrators, but a majority may determine any question and render an award.

(f) Waiver. Except as provided in subdivision (d), a requirement of this section may be waived by written consent of the parties and it is waived if the parties continue with the arbitration without objection.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

§ 7507. Award; form; time; delivery

Except as provided in section 7508, the award shall be in writing, signed and affirmed by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders. The parties may in writing extend the time either before or after its expiration. A party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to the delivery of the award to him. The arbitrator shall deliver a copy of the award to each party in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested.

History

Add, L 1962, ch 308; amd, L 1981, ch 952, § 1, eff July 31, 1981.

NY CLS CPLR § 7508

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 75 Arbitration (§§ 7501 — 7516)

§ 7508. Award by confession

(a) When available. An award by confession may be made for money due or to become due at any time before an award is otherwise made. The award shall be based upon a statement, verified by each party, containing an authorization to make the award, the sum of the award or the method of ascertaining it, and the facts constituting the liability.

(b) Time of award. The award may be made at any time within three months after the statement is verified.

(c) Person or agency making award. The award may be made by an arbitrator or by the agency or person named by the parties to designate the abitrator.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

End of Document

NY CLS CPLR § 7509

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 75 Arbitration (§§ 7501 — 7516)

§ 7509. Modification of award by arbitrator

On written application of a party to the arbitrators within twenty days after delivery of the award to the applicant, the arbitrators may modify the award upon the grounds stated in subdivision (c) of section 7511. Written notice of the application shall be given to other parties to the arbitration. Written objection to modification must be served on the arbitrators and other parties to the arbitration within ten days of receipt of the notice. The arbitrators shall dispose of any application made under this section in writing, signed and acknowledged by them, within thirty days after either written objection to modification has been served on them or the time for serving said objection has expired, whichever is earlier. The parties may in writing extend the time for such disposition either before or after its expiration.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

End of Document

NY CLS CPLR § 7510

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 75 Arbitration (§§ 7501 — 7516)

§ 7510. Confirmation of award.

The court shall confirm an award upon application of a party made within one year after its delivery to them, unless the award is vacated or modified upon a ground specified in section seventy-five hundred eleven of this article.

History

Add, L 1962, ch 308, eff Sept 1, 1963; *L 2023, ch 679, § 1*, effective November 21, 2023.

End of Document

§ 7510-a. Confirmation of award for public sector arbitrations.

(a) The court shall confirm an award in a public sector arbitration proceeding upon application of a party made within one year after its delivery to the party, unless an application to vacate or modify the award upon a ground specified in section seventy-five hundred eleven of this article is made within ninety days after the delivery of the award to the party seeking to modify or vacate.

(b) This section shall only apply to awards from an arbitration between a public employer and an employee of the public employer.

(c) For the purposes of this section, "public employer" means (i) the state of New York, (ii) a county, city, town, village or any other political subdivision or civil division of the state, (iii) a school district or any governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission, or public benefit corporation, (vi) any other public corporation, agency or instrumentality or unit of government which exercises governmental powers under the laws of the state, or (vii) in the case of a county sheriff's office in those counties where the office of sheriff is an elected position, both the county and the sheriff, shall be designated as a joint public employer for all purposes of this article.

History

L 2023, ch 679, § 2, effective November 21, 2023.

§ 7511. Vacating or modifying award.

(a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:

(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbitrate had not been complied with; or

(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

(c) Grounds for modifying. The court shall modify the award if:

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

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.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

End of Document

NY CLS CPLR § 7512

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 75 Arbitration (§§ 7501 — 7516)

§ 7512. Death or incompetency of a party

Where a party dies after making a written agreement to submit a controversy to arbitration, the proceedings may be begun or continued upon the application of, or upon notice to, his executor or administrator or, where it relates to real property, his distributee or devisee who has succeeded to his interest in the real property. Where a committee of the property or of the person of a party to such an agreement is appointed, the proceedings may be continued upon the application of, or notice to, the committee. Upon the death or incompetency of a party, the court may extend the time within which an application to confirm, vacate or modify the award or to stay arbitration must be made. Where a party has died since an award was delivered, the proceedings thereupon are the same as where a party dies after a verdict.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

End of Document

NY CLS CPLR § 7513

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 75 Arbitration (§§ 7501 — 7516)

§ 7513. Fees and expenses

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. The court, on application, may reduce or disallow any fee or expense it finds excessive or allocate it as justice requires.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

End of Document

NY CLS CPLR § 7514

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 75 Arbitration (§§ 7501 — 7516)

§ 7514. Judgment on an award

(a) Entry. A judgment shall be entered upon the confirmation of an award.

(b) Judgment-roll. The judgment-roll consists of the original or a copy of the agreement and each written extention of time within which to make an award; the statement required by section 7508 where the award was by confession; the award; each paper submitted to the court and each order of the court upon an application under sections 7510 and 7511; and a copy of the judgment.

History

Add, L 1962, ch 308, eff Sept 1, 1963; amd, L 1963, ch 532, § 48; L 1964, ch 388, § 29, eff Sept 1, 1964.

End of Document

§ 7515. Mandatory arbitration clauses; prohibited.

(a) Definitions. As used in this section:

1. The term "employer" shall have the same meaning as provided in subdivision five of *section two hundred ninety-two of the executive law*.

2. The term "prohibited clause" shall mean any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law.

3. The term "mandatory arbitration clause" shall mean a term or provision contained in a written contract which requires the parties to such contract to submit any matter thereafter arising under such contract to arbitration prior to the commencement of any legal action to enforce the provisions of such contract and which also further provides language to the effect that the facts found or determination made by the arbitrator or panel of arbitrators in its application to a party alleging discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law shall be final and not subject to independent court review.

4. The term "arbitration" shall mean the use of a decision making forum conducted by an arbitrator or panel of arbitrators within the meaning and subject to the provisions of article seventy-five of the civil practice law and rules.

(b)

(i) Prohibition. Except where inconsistent with federal law, no written contract, entered into on or after the effective date of this section shall contain a prohibited clause as defined in paragraph two of subdivision (a) of this section.

(ii) Exceptions. Nothing contained in this section shall be construed to impair or prohibit an employer from incorporating a non-prohibited clause or other mandatory arbitration provision within such contract, that the parties agree upon.

(iii) Mandatory arbitration clause null and void. Except where inconsistent with federal law, the provisions of such prohibited clause as defined in paragraph two of subdivision (a) of this section shall be null and void. The inclusion of such clause in a written contract shall not serve to impair the enforceability of any other provision of such contract.

(c) Where there is a conflict between any collective bargaining agreement and this section, such agreement shall be controlling.

History

L 2018, ch 57, § 1 (Part KK, Subpart B), effective July 11, 2018; *L 2019, ch 160, § 8*, effective October 11, 2019.

End of Document

NY CLS CPLR § 7516

Current through 2024 released Chapters 1-49, 61-90

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 75 Arbitration (§§ 7501 — 7516)

§ 7516. Confirmation of an award based on a consumer credit transaction.

In any proceeding under section 7510 of this article to confirm an award based on a consumer credit transaction, the party seeking to confirm the award shall plead the actual terms and conditions of the agreement to arbitrate. The party shall attach to its petition (a) the agreement to arbitrate; (b) the demand for arbitration or notice of intention to arbitrate, with proof of service; and (c) the arbitration award, with proof of service. If the award does not contain a statement of the claims submitted for arbitration, of the claims ruled upon by the arbitrator, and of the calculation of figures used by the arbitrator in arriving at the award, then the petition shall contain such a statement. The court shall not grant confirmation of an award based on a consumer credit transaction unless the party seeking to confirm the award has complied with this section.

History

L 2021, ch 593, § 12, effective May 7, 2022.

End of Document

MEYER SUOZZI

ATTORNEYS AT LAW

Alternative Dispute Resolution Department Arbitrators, Mediators and Private Judges

Chair, Kevin Schlosser
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(516) 592-5709

FREQUENTLY ASKED QUESTIONS ABOUT ARBITRATION AND MEDIATION

Q: What is arbitration?

Arbitration is a common, private dispute resolution mechanism. Generally, parties choose arbitration over litigation because arbitration is usually faster, more efficient and less expensive than litigating a dispute in court. Sometimes it is referred to as "ADR," which means "alternative dispute resolution." Arbitrators are paid to decide the parties' dispute. Arbitrators are usually trained to handle disputes. They can be lawyers, former judges, and even have no legal training, such as accountants, architects and engineers.

Q: What is the difference between arbitration and litigation?

Litigation is a lawsuit that is heard in court by a judge (and/or jury). Litigation can be in a state court or federal court. You have rights of appeal in litigation. Arbitration, on the other hand, is a creature of contract. That

means that you have whatever rights are provided in an agreement to arbitrate. The part of a contract authorizing arbitration is often called "the arbitration clause." Under law, the rights of appeal are extremely limited after receiving an award from an arbitrator or panel of arbitrators. Before agreeing to arbitrate a dispute, or to put an arbitration clause into an agreement, a party should consider the pros and cons of arbitration.

Q: How do I know if I can arbitrate?

To find out if you have the right to arbitrate, you need to look at the particular agreement. For example, a shareholder agreement can have an arbitration clause, which would describe what disputes the parties have agreed to arbitrate.

Q: I want to have the ability to arbitrate a dispute, what do I do?

The parties can agree to arbitrate their dispute and put the arbitration clause into an agreement, or amend an agreement to add an arbitration clause, or even enter into an agreement to resolve a specific dispute by arbitration. We refer to these as "pre-dispute" arbitration clause if the parties agreed in a separate agreement to arbitrate future disputes.

An agreement to arbitrate generally includes provisions dealing with the selection of the locale of the arbitration (*i.e.*, County of Nassau), the

number of arbitrators (1 or 3), the availability of discovery in the arbitration process (if silent then you only get the discovery that the ADR company's rules provide, which usually means that it is streamlined), and even choose a specific arbitrator or specific arbitration company to handle the arbitration. There are many different forms of arbitration clauses that the parties can use.

Q: What kind of arbitrator do you want?

The parties usually will tell an arbitration provider what type of arbitrator they want or his or her background. For example, in a construction dispute, you might want an architect or engineer to be the sole arbitrator, or a member of a 3-arbitrator panel. In a commercial dispute, you might want an accountant or a lawyer to be the arbitrator(s). You also might want to consider what substantive experience the arbitrators should have (such as experience in employment law, or construction, or shareholder disputes or in a particular industry).

Since your case will be decided by the arbitrator or panel of arbitrators you select, it is important to give a great deal of thought to the identity, experience, and qualifications of the arbitrator(s). The arbitration provider will attempt to find the specific qualifications that you are looking

for. An arbitrator from an arbitration provider will have received specialized training in arbitration - what is called "alternative dispute resolution." The provider typically will give you a list of arbitrators to choose from, including their experience, biographical information and hourly (or daily) rates.

Q: I have an arbitration clause, now what?

The arbitration clause will be enforced by a court. That means that if the other side starts a lawsuit, and the parties, in their arbitration clause, had agreed to arbitrate that dispute, then a court will direct the parties to arbitrate the dispute, and will "stay" - that is, put a halt to - the litigation.

Q: How do I get to arbitration?

Under New York law, a party demands arbitration and then proceeds with setting up the arbitration under the auspices of the particular arbitration company that is mentioned in the arbitration clause. (Certain rights spring from serving a "notice of intent to arbitrate.") If no particular arbitration company is mentioned in the agreement, then the parties are free to choose a company. You then follow that company's rules, including paying the required filing fees. The administrator from the company will then direct the parties and assist in choosing an arbitrator (or arbitration panel) to decide the dispute. JAMS, NAM and the American Arbitration Association

are frequently chosen by parties (and can be designated in an arbitration clause) to hear the arbitration. During the life of the arbitration the arbitrators are paid by the parties, usually in an installment fashion, and on a schedule set by the administrator. The arbitrators' fees are paid either on an hourly or per diem basis. An arbitration clause may award to the prevailing party his or her filing fees and arbitrators' fees.

Q: What rights do I have in an arbitration?

In arbitration, each side (usually with counsel's assistance) presents witnesses and evidence. An arbitration is usually conducted in a stream-lined fashion. The arbitrator(s) will set a schedule for the arbitration and rule on the admissibility of evidence and render an award in the case. An award is a document that decides the parties rights and entitlement to an award of damages. There are very limited rights to appeal an arbitration award. A court will "confirm" an award, so that you can obtain a "judgment," which you can enforce to the same degree as a judgment issued by a court.

Q: Are there advantages to arbitration? Any disadvantages?

There is usually less discovery in arbitration and this means that it is less expensive and faster. Depending upon the case, having less

discovery can be helpful, or may make the case more difficult for a party to win. On the other hand, because it is faster and limits discovery, arbitration may be less expensive, and you may get an "award" sooner than if the same case were litigated in court. One disadvantage is that an arbitration award is very difficult to overturn on appeal, which can be a serious problem, if you lose.

Q: The arbitration is over and I received an award, what happens next?

Once an arbitration award is received, the arbitration is usually concluded. There may be rights to seek reargument, modification or clarification of an award, but often those rights are limited and must be exercised quickly. You need to check the arbitration association's rules and your arbitration clause. The arbitration award, if not paid, can be "confirmed" by a court. The losing party may seek to have a court "vacate" the award. The right to vacate the award is limited by state and/or federal statutes to certain stated grounds.

Once an award is confirmed by a court, you get a "judgment." You can use New York's judgment enforcement remedies in order to collect on the judgment.

A party can also settle a case after getting an award from the arbitrator(s).

Q: What is mediation?

Mediation is a settlement meeting, which is run by a trained mediator. The mediator's "job" is to help the parties to reach a settlement of their dispute. The mediator does not decide who is right, nor make an award of damages. Rather, the mediator helps to facilitate the resolution of the parties' dispute.

If there is a court case, the mediator usually reports back to the judge as to whether the case settled.

A mediator should have substantial training in various techniques that have been found to help parties address and resolve their disputes.

Q: What is the difference between arbitration and mediation?

A mediator is not deciding the case. In other words, a mediator does not determine which side would - or should - "win" a case. Rather, the mediator's role is *only* to facilitate a settlement. There is no "award" at the end of the mediation. Rather, if the parties were successful in settling their dispute, the parties will enter into an agreement that memorializes the terms of the settlement.

Usually the parties and the mediators will sign a "memorandum of understanding" [frequently called an "MOU"] that sets for the settlement terms. That settlement can be a binding and enforceable agreement or the parties can agree that they have only "agreed to agree" or that the settlement is effective only if they later agree on more formal documents.

You should consider having the settlement at the end of the mediation being "binding" so that the other side is not able to have "buyer's remorse" and walk away from a settlement that you thought you had.

In this regard, it is often helpful to include in the MOU another clause that allows the parties to use ADR to resolve any further disputes they may encounter regarding the terms of the settlement, the form of the documents, or the interpretation of the MOU. Another idea is to have someone (including the mediator) be designated to serve as an arbitrator to resolve a violation or breach of the MOU, should the mediation (of this second dispute about the MOU) fail.

Q: Can the mediator "force" the parties to settle?

No. A mediator cannot force a party to settle. Instead, it is the job of the mediator only to help the parties settle the case. If there is a court

case, the mediator usually reports back to the judge as to whether the case settled.

A trained mediator can assist the parties by identifying what "common interests" they may have in reaching a settlement; what possible future business relationships they may have; or possibly finding remedies or other business solutions that might not be available in a court.

For example, under applicable state law or contract, the parties might not have a right to buy-out a business partner. A mediation, however, can accomplish that result.

Q: What happens after the parties settle their dispute through mediation?

After a settlement is reached, the parties should outline the terms of the settlement in a signed agreement – this is the MOU discussed above.

The parties can choose to enter into a more formal agreement thereafter. Usually, once a settlement is reached, that agreement is enforceable in a court, or through arbitration – as long as it is in writing.

If mediation does not resolve the dispute, then the arbitration or litigation resumes, or can be commenced.

Q: Are there other benefits of ADR?

Yes. Because ADR is private what happens in the mediation or arbitration is confidential. This may be important if proprietary, confidential and/or trade secret information is involved. Competitors and others cannot learn what is happening during the pendency of the arbitration. The proceedings are private, and do not take place in a public courtroom. The settlement is also private and confidential, and not placed in the public court files. It may be difficult for a court to maintain the confidentiality of certain proceedings or a settlement, as there are court rules that may limit a judge's right to seal the record.

Q: How do I find a mediator?

Many Courts have panels of mediators who can be retained. That Court's rules apply to payment obligations. A mediator can also be hired from a private company such as the American Arbitration Association or NAM. Experienced mediators can also be found at law firms, such as Meyer, Suozzi, English & Klein, P.C.

Table of Contents

9 USCS, Ch. 1

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

CHAPTER 1. GENERAL PROVISIONS

Section

End of Document

9 USCS § 1

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

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

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

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 670*.

End of Document

9 USCS § 2

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

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

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4 [*9 USCS §§ 401* et seq.].

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 670*; Mar. 3, 2022, *P.L. 117-90*, § 2(b)(1)(A), *136 Stat. 27*.

End of Document

9 USCS § 3

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

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

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

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 670*.

End of Document

9 USCS § 4

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

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

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 USCS §§ 1 et seq.], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

History

HISTORY:

July 30, 1947, ch 392, § 1, 61 Stat. 671; Sept. 3, 1954, ch 1263, § 19, 68 Stat. 1233.

End of Document

9 USCS § 5

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

§ 5. Appointment of arbitrators or umpire

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

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 671*.

End of Document

9 USCS § 6

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

§ 6. Application heard as motion

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

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 671*.

End of Document

9 USCS § 7

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title [*9 USCS §§ 1* et seq.] or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 672*: Oct. 31, 1951, ch 655, § 14, *65 Stat. 715*.

End of Document

9 USCS § 8

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

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

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

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 672*.

9 USCS § 9

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

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

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title [*9 USCS §§ 10*, *11*]. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 672*.

End of Document

9 USCS § 10

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

§ 10. Same; vacation; grounds; rehearing

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

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

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

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

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

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

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

History

HISTORY:

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

End of Document

9 USCS § 11

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

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

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

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

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

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

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

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 673*.

End of Document

9 USCS § 12

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

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

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

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 673*.

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

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

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

(b) The award.

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

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

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

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 673*.

9 USCS § 14

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

§ 14. Contracts not affected

This title [*9 USCS §§ 1* et seq.] shall not apply to contracts made prior to January 1, 1926.

History

HISTORY:

July 30, 1947, ch 392, § 1, *61 Stat. 674*.

End of Document

9 USCS § 15

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

§ 15. Inapplicability of the Act of State doctrine

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

History

HISTORY:

Added Nov. 16, 1988, *P. L. 100-669*, § 1, *102 Stat. 3969*.

End of Document

9 USCS § 16

Current through Public Law 118-34, approved December 26, 2023.

United States Code Service > TITLE 9. ARBITRATION (§§ 1 — 402) > CHAPTER 1. General provisions (§§ 1 — 16)

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title [*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.

History

HISTORY:

Added Nov. 19, 1988, *P. L. 100-702*, Title X, § 1019(a), *102 Stat. 4671*; Dec. 1, 1990, *P. L. 101-650*, Title III, § 325(a)(1), *104 Stat. 5120*.

JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases

Effective January 6, 2010

JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES

JAMS provides arbitration and mediation services worldwide. We resolve some of the world's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained, experienced ADR professionals are dedicated to the highest ethical standards of conduct.

Introduction

JAMS is committed to providing the most efficient, cost-effective arbitration process that is possible in the particular circumstances of each case. Its experienced, trained and highly qualified arbitrators are committed to: (1) being sufficiently assertive to ensure that an arbitration will be resolved much less expensively and in much less time than if it had been litigated in court; and (2) at the same time, being sufficiently patient and restrained to ensure that there is enough discovery and evidence to permit a fair result.

The JAMS Recommended Arbitration Discovery Protocols ("Protocols"), which are set forth below, provide JAMS arbitrators with an effective tool that will help them exercise their sound judgment in furtherance of achieving an efficient, cost-effective process that affords the parties a fair opportunity to be heard.

The Key Element: Good Judgment of the Arbitrator

- JAMS arbitrators understand that while some commercial arbitrations may have similarities, for the most part each case involves unique facts and circumstances. As a result, JAMS arbitrators adapt arbitration discovery to meet the unique characteristics of the particular case, understanding that there is no set of objective rules that, if followed, would result in one "correct" approach for all commercial cases.

- JAMS appreciates that the experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that the framework of arbitration discovery will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the applicable rules, the custom and practice for arbitrations in the industry in question and the expectations and preferences of the parties and their counsel.

- Attached as Exhibit A is a list of factors that JAMS arbitrators take into consideration when addressing the type and breadth of arbitration discovery.

Early Attention to Discovery by the Arbitrator

- JAMS understands the importance of establishing the ground rules governing an arbitration in the period immediately following the initiation of the arbitration.

Therefore, following appointment, JAMS arbitrators promptly study the facts and the issues and become prepared to preside effectively over the early stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.

- Depending upon the provisions of the parties' agreement, JAMS arbitrations may be governed by the JAMS Comprehensive Arbitration Rules and Procedures or by the arbitration rules of another provider organization. Such rules, for good reason, lack the specificity that one finds, for example, in the Federal Rules of Civil Procedure. That being so, JAMS arbitrators seek to avoid uncertainty and surprise by ensuring that the parties understand at an early stage the basic ground rules for discovery. This early attention to the scope of discovery increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in concrete discovery disputes.

- JAMS arbitrators place the type and breadth of arbitration discovery high on the agenda for the first pre-hearing conference at the start of the case. If at all possible, in-house counsel should attend the pre-hearing conference at which discovery will be discussed.

- JAMS arbitrators strive to enhance the chances for limited, efficient discovery by acting at the first pre-hearing conference to set hearing dates and interim deadlines that, the parties are told, will be strictly enforced and that, in fact, are thereafter strictly enforced.

- Where appropriate, JAMS arbitrators explain at the first pre-hearing conference that document requests:
  - should be limited to documents that are directly relevant to significant issues in the case or to the case's outcome;
  - should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and
  - should not include broad phraseology such as "all documents directly or indirectly related to."

Party Preferences

- Overly broad arbitration discovery can result when all of the parties seek discovery beyond what is needed. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in arbitration and simply conduct themselves in a fashion which is com-

monly accepted in court litigation. In any event, where all participants truly desire unlimited discovery, JAMS arbitrators will respect that decision, since arbitration is governed by the agreement of the parties.

- Where one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations.

E-Discovery

- The use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process.

- To be able to appropriately address issues pertaining to e-discovery, JAMS arbitrators are trained to deal with the technological issues that arise in connection with electronic data.

- While there can be no objective standard for the appropriate scope of e-discovery in all cases, JAMS arbitrators recognize that an early order containing language along the following lines can be an important first step in limiting such discovery in a large number of cases:

    - There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

    - Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.

- Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

Artfully Drafted Arbitration Clauses

- JAMS recognizes that there is significant potential for dealing with time and other limitations on discovery in the arbitration clauses of commercial contracts. An advantage of such drafting is that it is much easier for parties to agree on such limitations before a dispute has arisen. A drawback, however, is the difficulty of rationally providing for how best to arbitrate a dispute that has not yet surfaced. Thus, the use of such clauses may be most productive in circumstances in which parties have a good idea from the outset as to the nature and scope of disputes that might thereafter arise.

- JAMS understands that in order for rational time and other discovery limitations to be effectively included in an arbitration clause, it is necessary that an attorney with a good understanding of arbitration be involved in the drafting process.

Depositions

- Rule 17(c) of the JAMS Rules provides that in a domestic arbitration, each party is entitled to one deposition of an opposing party or an individual under the control of an opposing party and that each side may apply for the taking of additional depositions, if necessary.

- JAMS recognizes that the size and complexity of commercial arbitrations have now grown to a point where more than a single deposition can serve a useful purpose in certain instances. Depositions in a complex arbitration, for example, can significantly shorten the cross-examination of key witnesses and shorten the hearing on the merits.

- If not carefully regulated, however, deposition discovery in arbitration can become extremely expensive, wasteful and time-consuming. In determining what scope of depositions may be appropriate in a given case, a JAMS arbitrator balances these considerations, considers the factors set forth in Exhibit A and confers with counsel for the parties. If a JAMS arbitrator determines that it is appropriate to permit multiple depositions, he/she may attempt to solicit agreement at the first pre-hearing conference on language such as the following:

  > Each side may take 3* discovery depositions. Each side's depositions are to consume no more than a total of 15* hours. There are to be no speaking objections at the depositions, except to preserve

privilege. The total period for the taking of depositions shall not exceed 6* weeks.[1]

Discovery Disputes

- Discovery disputes must be resolved promptly and efficiently. In addressing discovery disputes, JAMS arbitrators consider use of the following practices, which can increase the speed and cost-effectiveness of the arbitration:
  - Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone.
  - Lengthy briefs on discovery matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.
  - The parties should negotiate discovery differences in good faith before presenting any remaining issues for the arbitrator's decision.
  - The existence of discovery issues should not impede the progress of discovery where there are no discovery differences.

Discovery and Other Procedural Aspects of Arbitration

Other aspects of arbitration have interplay with, and impact on, discovery in arbitration, as discussed below.

Requests for Adjournments

- Where parties encounter discovery difficulties, this circumstance often leads to a request for adjournment and the possible delay of the hearing. While the arbitrator may not reject a joint application of all parties to adjourn the hearing, the fact is that such adjournments can cause inordinate disruption and delay by needlessly extending unnecessary discovery and can substantially detract from the cost-effectiveness of the arbitration. If the request for adjournment is by all parties and is based on a perceived need for further discovery (as opposed to personal considerations), a JAMS arbitrator ensures that the parties understand the implications in time and cost of the adjournment they seek.

[1] *The asterisked numbers can of course be changed to comport with the particular circumstances of each case.*

- If one party seeks a continuance and another opposes it, then the arbitrator has discretion to grant or deny the request. Factors that affect the exercise of such discretion include the merits of the request and the legitimate needs of the parties, as well as the proximity of the request to the scheduled hearing and whether any earlier requests for adjournments have been made.

Discovery and Dispositive Motions

- In arbitration, "dispositive" motions can cause significant delay and unduly prolong the discovery period. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statute of limitations or defenses based on clear contractual provisions. In such circumstances, an appropriately framed dispositive motion can eliminate the need for expensive and time-consuming discovery. On balance, a JAMS arbitrator will consider the following procedure with regard to dispositive motions:
    - Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.
    - Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.
    - If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.
    - Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

Note: These Protocols are adapted from the April 4, 2009, Report on Arbitration Discovery by the New York Bar Association.

EXHIBIT A

Relevant Factors Considered by JAMS Arbitrators in Determining the Appropriate Scope of Domestic Arbitration Discovery

Nature of the Dispute

- The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about discovery.
- The amount in controversy.
- The complexity of the factual issues.
- The number of parties and diversity of their interests.
- Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.
- Whether there are public policy or ethical issues that give rise to the need for an in-depth probe through relatively comprehensive discovery.
- Whether it might be productive to initially address a potentially dispositive issue that does not require extensive discovery.

Agreement of the Parties

- Agreement of the parties, if any, with respect to the scope of discovery.
- Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration demand to the issuance of the final award.
- The parties' choice of substantive and procedural law and the expectations under that legal regime with respect to arbitration discovery.

Relevance and Reasonable Need for Requested Discovery

- Relevance of the requested discovery to the material issues in dispute or the outcome of the case.
- Whether the requested discovery appears to be sought in an excess of caution, or is duplicative or redundant.
- Whether there are necessary witnesses and/or documents that are beyond the tribunal's subpoena power.

- Whether denial of the requested discovery would, in the arbitrator's judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.
- Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the discovery is requested.
- To what extent the discovery sought is likely to lead, as a practical matter, to a case-changing "smoking gun" or to a fairer result.
- Whether broad discovery is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.
- The time and expense that would be required for a comprehensive discovery program.
- Whether all or most of the information relevant to the determination of the merits is in the possession of one side.
- Whether the party seeking expansive discovery is willing to advance the other side's reasonable costs and attorneys' fees in connection with furnishing the requested materials and information.
- Whether a limited deposition program would be likely to (i) streamline the hearing and make it more cost-effective, (ii) lead to the disclosure of important documents not otherwise available or (iii) result in expense and delay without assisting in the determination of the merits.

Privilege and Confidentiality

- Whether the requested discovery is likely to lead to extensive privilege disputes as to documents not likely to assist in the determination of the merits.
- Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys' eyes only, and the like) would be necessary to protect confidentiality in such circumstances.

Characteristics and Needs of the Parties

- The financial and human resources the parties have at their disposal to support discovery, viewed both in absolute terms and relative to one another.
- The financial burden that would be imposed by a broad discovery program and whether the extent of the burden outweighs the likely benefit of the discovery.
- Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.
- The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties.

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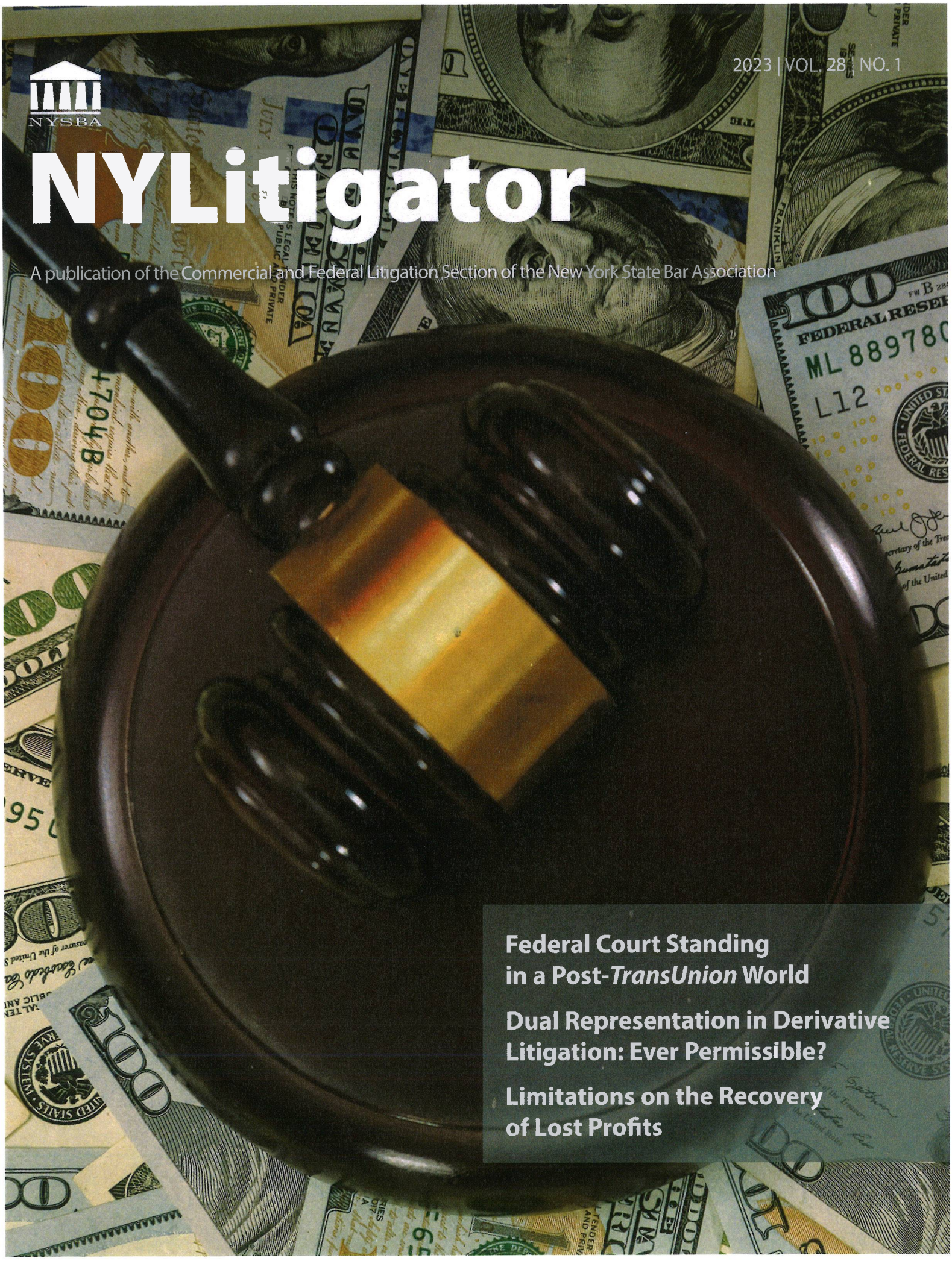

Federal Court Standing in a Post-*TransUnion* World

Dual Representation in Derivative Litigation: Ever Permissible?

Limitations on the Recovery of Lost Profits

The Impact of Fraud Claims on Contractual Arbitration and Jury Waiver Provisions

By Kevin Schlosser

It is fascinating how the roads we travel in life can lead us to intriguing intersections. Four of the varied professional paths I have navigated during my career inspired this article: (1) as a commercial litigator and commentator, studying and acquiring a wealth of knowledge regarding the law of fraud; (2) as an advocate and arbitrator, traversing the avenue of arbitration for dispute resolution; (3) as a trial lawyer, championing clients' causes before juries and judges; and finally, (4) as general corporate counsel, preparing and negotiating contractual dispute resolution provisions.

It is well known that one of the powerful remedies of establishing a claim for fraud is rescission, that is, wiping out an entire transaction, or contractual agreement.[1] When a party to a contract challenges the existence or validity of the contract based upon fraud, how does that impact provisions agreeing to arbitrate, or waiving a jury trial in connection with any disputes relating to the contract? Although the case law in New York is not a picture of clarity, this article will explain the various considerations the courts apply in an effort to crystalize the concepts.

As explained below, if the court finds the contract is "void" rather than "voidable," the consequences are rather definitive—the entire contract, including any provisions within it, are deemed never to have existed. On the other hand, if a contract is voidable, for example based upon a claim of fraudulent inducement, the court will consider an arbitration clause within the contract apart or "separable" from the rest of the contract (largely because courts favor and support arbitration as a means of resolving disputes)—thus the doctrine of so-called "separability." Yet, undoubtedly in view of the constitutional underpinnings of the right to a jury trial, courts are more inclined to reject jury waiver clauses even before the fraud claim is determined simply if a party seeks to rescind the contract by claiming it was fraudulently induced into signing it. Thus, courts reject the jury waiver provision based on an alleged although not yet established claim of fraudulent inducement.

The rationale for all this is enlightening.

Void and Voidable

First, it is important to understand the distinction between void and voidable contracts, as the means of proving each and the consequences flowing therefrom are different. If the signature on a legal document is a forgery, that document is void from the outset, as though it never existed. Similarly, if the signer executed it thinking it was something other than what it actually was (the rare instance of fraud in the factum), then the document that was so executed is also void. But if the person who executes the document knows what the document is, yet is induced to sign it based upon common law fraudulent misrepresentations, that document must be challenged in order to become ineffective, thus it is "voidable."

In the leading case of *Faison v. Lewis*,[2] the New York Court of Appeals explained these principles and the distinction between legal documents that are deemed to have never existed and those that do have legal effects but are subject to challenge. In *Faison*, the Court of Appeals addressed whether any statute of limitations applied to claims alleging that deeds were void by virtue of some form of fraud. The court explained the doctrines applicable to void and voidable documents as follows:

> A forged deed that contains a fraudulent signature is distinguished from a deed where the signature and authority for conveyance are acquired by fraudulent means. In such latter cases, the deed is voidable. The difference in the nature of the two justifies this different legal status. A deed containing the title holder's actual signature reflects "the assent of the will to the use of the paper or the transfer," although it is assent "induced by fraud, mistake or misplaced confidence". . . Unlike a forged deed, which is void initially, a voidable deed, "until set aside, . . . has the effect of transferring the title to the fraudulent grantee, and . . . being thus clothed with all the evidences of good title, may incumber the property to a party who becomes a purchaser in good faith."[3]

The Court of Appeals went on to hold that no statute of limitations applied to an action to challenge a void deed because "a forged deed is void, not merely voidable. That legal status cannot be changed, regardless of how long it may take for the forgery to be uncovered."[4]

As further explained in a very old, but cogent, decision of the New York Court of Appeals, a document executed by forgery or through false pretenses (fraud in the factum) is void from the outset. So a deed that was either forged, or signed thinking it was not a deed, is void because, as the Court of Appeals neatly observed: "Void things are as no things."[5]

Besides actual forgeries, however, trying to establish "fraud in the factum" by arguing that one did not know what one was signing is challenging. While fraud in the inducement involves some form of misrepresentation that causes one to enter into a contract while fully knowing what the contract is and says, fraud in the factum involves parties seeking to avoid the effect of documents they signed by claiming they were "misled by the defendants to sign certain documents which turned out to be of an entirely different nature and character from what they thought they were signing[.]"[6]

Since those who sign contracts are deemed to have read and understood them by operation of decisional law, this doctrine of fraud in the factum has limited viability today. That is, generally, once a legal document is signed, a party to it cannot avoid its effect by claiming they did not read it or understand the obligations contained in it. The doctrine of fraud in the factum and its limitations were explained by the court in *Ackerman v. Ackerman*,[7] as follows:

> The gravamen of the plaintiff's complaint is fraud in the factum, that the plaintiff was induced to sign something entirely different than what she thought she was signing. However, a party is under an obligation to read a document before signing it, and generally such a cause of action only arises if the signor is illiterate, blind, or not a speaker of the language in which the document is written[.][8]

As this all relates to contracts that contain arbitration provisions or jury waiver clauses, if it is established that the contract is "void" under the above principles, then the contract legally never existed. As such, no agreement was ever reached to subject any dispute relating to the contract to arbitration. The court has authority to decide whether an agreement to arbitrate existed in the first instance. The same is true of waiver of the right to trial by jury.

Rescission Based Upon Fraudulent Inducement

A different analysis is applied to "voidable" contracts. A party claiming it was fraudulently induced to sign a contract—which is thereby "voidable"—must of course establish the elements of the cause of action for fraud; albeit if rescission is sought, the party does not have to allege or prove scienter or intent to defraud.[9] Under traditional common law fraud principles, when a party is induced by fraud to enter into a contract, the fraud is deemed to have permeated the entire contract and subjects the contract as a whole to rescission. Courts do not typically slice and dice the contractual provisions to determine which may or may not have been agreed to in the absence of the fraud. Once fraud is established, rescission of the entire contract is a potential remedy. This is explained rather eloquently in an oldy-but-goody decision of the Court of Appeals:[10]

> The agreement was entire, made upon one occasion and upon a single consideration, so far as there was any. There was but one assent to all its terms, and the minds of the parties met at the same instant as to all its parts. It is impossible to say that the plaintiff would have assented to any part unless he assented to all. The parties did not make three independent agreements. They made but one which embraced three points, all relating to the same subject. If the false statement blotted out one, it blotted out all, for the whole arrangement was tainted with the vice of concealment and misrepresentation. An entire contract, although it may cover several different heads, must stand or fall as one indivisible thing . . . "The effect of partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely and to operate as a personal bar to the party who has practiced it." . . . "If a contract is obtained by fraud, it is for the party defrauded to elect whether he will be bound. He, perhaps, would not have entered into the contract at all if he had known the real facts; it is, therefore, impossible with any degree of justice to enforce the contract against him in any part. * * * It has, therefore, been rightly settled that the party deceived has a right to have the contract wholly set aside."

Enforcing Arbitration Provisions Challenged by Fraud Claims

• New York State Law

Yet, parting ways with this traditional approach of rescinding entire agreements based upon fraudulent inducement, courts now apply a special analysis when it comes to contractual arbitration provisions. Based upon the modern, firmly recognized public policy of encouraging alternative dispute resolution, courts favor preserving agreements to arbitrate even in the face of claims that the contract containing that arbitration clause was fraudulently induced. This is known as the doctrine of "separability" and is discussed more below.

The courts of New York did not always favor agreements to arbitrate disputes. At one time, agreements requiring arbitration of disputes were actually considered unenforceable and against the public policy of the state to provide exclusive jurisdiction to resolve disputes in our courts.[11] Based upon this generally accepted view, the New York Court of Appeals rejected the concept of separability when arbitration agreements were challenged based upon fraudulent inducement and rescission was sought. Thus, in *In re Wrap-Vertiser Corp. (Plotnick)*,[12] the court held that a claim of fraud in the inducement of a contract containing an arbitration provision was an issue for the court and not the arbitrators to decide, reading the arbitration agreement there narrowly. Under the then prevailing view, if a party to a contract containing an arbitration provision was seeking rescission instead of damages under the contract, the claim for rescission was thought to be triable in court and not by arbitration.

Then, in *Weinrott v. Carp*,[13] the Court of Appeals in effect overruled *Wrap* and held more broadly that where parties intend and thereby agree to resolve disputes by arbitration, even claims that the contract was fraudulently induced are to be determined by the arbitrator. The court explained:

> When the parties to a contract have reposed in arbitrators all questions concerning the 'validity, interpretation or enforcement' of their agreement, they have selected their tribunal and no doubt they intend it to determine the contract's 'validity' should the necessity arise. Judicial intervention, based upon a nonseparability contract theory in arbitration matters prolongs litigation, and defeats . . . two of arbitration's primary virtues, speed and finality.[14]

The court in *Weinrott* then laid out an analysis that courts have followed since in determining whether to defer the underlying dispute to arbitration or direct the courts to adjudicate it: If the alleged fraud targeted the arbitration provision itself, or "if the alleged fraud was part of a grand scheme that permeated the entire contract, including the arbitration provision, the arbitration provision should fall with the rest of the contract" and the fraud claim be decided by the court.[15]

The Appellate Division, Second Department, illustrated this analysis rather well in *Markowits v. Friedman*.[16] In Markowits, defendants entered into two agreements with the plaintiff whereby they agreed to sell an interest in the subject companies with an option to purchase the remainder interests. The parties then modified the agreements to provide supplemental payment terms. In connection with the modification, they executed related documents, including a promissory note from plaintiff for a portion of the purchase price, and a confession of judgment in the same sum. They also agreed "to submit to arbitration 'any disputes [which should] arise between them concerning the sale . . . relating directly or indirectly to the aforementioned transaction,'" except for filing and entering of the confession of judgment. Thereafter, plaintiff allegedly failed to make a payment due pursuant to the agreements. The defendants held him in default of the promissory note, accelerated the debt, and filed the confession of judgment.

Plaintiffs thereafter sued alleging, among other things, that the defendants "breached warranties in the contracts of sale by concealing civil actions and government investigations pending against the companies, and that the [defendants'] failure to disclose these actions and investigations fraudulently induced plaintiff to enter into the modification agreements."[17].

Defendants then moved "pursuant to CPLR 7503 to stay all . . . proceedings in the action [that were not subject to a substantive motion to dismiss] and compel arbitration"—relying upon the agreement to arbitrate their disputes regarding the subject transactions. The lower court granted the motion to compel arbitration and the Appellate Division, Second Department affirmed. The Second Department first acknowledged: "Arbitration is a favored method of dispute resolution in New York."[18] The court then instructed that the threshold issue of whether there is a valid agreement to arbitrate is for the court, and that once it determines the parties agreed to arbitrate, the court's role ends without addressing the merits of the particular claims.[19]

Although the plaintiffs contended that the arbitration agreement was invalid because it was fraudulently induced, the court noted that a "broad arbitration provision is separable from the substantive provisions of a contract such that the agreement to arbitrate is valid even if the substantive provisions of the contract were induced by fraud."[20] The court continued: "The issue of fraud in the inducement affects the validity of the arbitration clause only when the fraud relates

to the arbitration provision itself, or was part of a grand scheme that permeated the entire contract" for which the plaintiff "must . . . establish that the agreement was not the result of an arm's length negotiation, or the arbitration clause was inserted into the contract to accomplish a fraudulent scheme."[21]

The court then found that plaintiffs failed to make the required showing to nullify the arbitration provisions, ruling that "the arbitration agreement was not a free-standing contract which was fraudulently induced, but was one of numerous documents executed as part of the . . . modification agreement, which must be 'read together and interpreted as forming part of one and the same transaction.'"[22] The court concluded: "Since the plaintiffs' claim of fraudulent inducement relates to the . . . modification agreement, with all its related documents, and not the arbitration agreement itself, the arbitration agreement is valid and the claim of fraudulent inducement is for the arbitrator" to decide.[23]

Of course, the court must determine that the parties did indeed agree to resolve the dispute in question by arbitration because arbitration is a matter of contract and consent.[24] Courts have interpreted even the most basic arbitration provisions as broad enough to subject fraudulent inducement claims to arbitration. Examples of "broad" arbitration clauses for these purposes are found in *Zafar v. Fast Track Leasing, LLC*,[25]; *Anderson St. Realty Corp. v. New Rochelle Revitalization, LLC*,[26]; *Riverside Capital Advisors, Inc. v. Winchester Global Trust Co. Ltd.*,[27]; and *Ferrarella v. Godt*.[28]

The issue has been effectively eliminated when parties state explicitly in their agreement that the arbitrator has the power and authority to determine the validity of the agreement, including the arbitrability of the claim. This type of language is now commonly incorporated into the rules of the major arbitration forums such as JAMS[29] and the American Arbitration Association (AAA).[30]

Courts have specifically found that designating the AAA (and as such its rules) in the arbitration agreement does indeed signify the requisite intent to submit the issue of fraudulent inducement to the arbitrator.[31]

• Federal Approach to Separability

Since the New York courts generally derived their concepts from federal law, the approach taken by federal courts in New York is very similar. As the New York courts previously recognized (as noted above), courts viewed arbitration hostilely before the Federal Arbitration Act (FAA) was enacted.[32] The FAA thereby reversed "centuries of judicial hostility to arbitration agreements" and placed "arbitration agreements upon the same footing as other contracts."[33]

The Second Circuit explained the federal arbitration principles well in *Sphere Drake Ins. v. Clarendon Nat. Ins. Co.*[34] First, the Second Circuit explained that under the severability doctrine "'arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.'"[35] The court then elaborated on how the courts are to decide these issues, distinguishing between claims that a contract is void from those where it is alleged that the contract is voidable:

> If a party alleges that a contract is void and provides some evidence in support, then the party need not specifically allege that the arbitration clause in that contract is void, and the party is entitled to a trial on the arbitrability issue pursuant to [the Federal Arbitration Act] 9 U.S.C.A. § 4 and the rule of *Interocean [Shipping Co. v. Nat'l Shipping Trading Corp.*, 462 F.2d 673 (2d Cir. 1972)]. However, under the rule of *Prima Paint [Corp. v. Flood Conklin Mfg. Co.*, 388 U.S. 395 (1967)], if a party merely alleges that a contract is voidable, then, for the party to receive a trial on the validity of the arbitration clause, the party must specifically allege that the arbitration clause is itself voidable. Accordingly, to defeat the arbitration clauses in the contracts at issue, Sphere Drake must allege that the contracts as a whole are void or that the arbitration clauses in the contracts are voidable. Of course, it is not enough for Sphere Drake to make allegations — Sphere Drake must also produce some evidence substantiating its claim.[36]

Federal courts make these determinations by applying the same standard used for summary judgment. That is, the party resisting arbitration must submit evidence giving rise to material issues of fact to avoid the dispute from being sent directly to arbitration.[37]

The foregoing analysis does not apply to "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law" accruing after March 3, 2022, by virtue of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 135 Stat. 26, codified at 9 U.S.C. §§ 401-02, which amended the FAA for such claims (a discussion of that law is beyond the scope of this article).

Jury Waiver Challenges

While arbitration provisions are thus afforded a special analysis apart from the traditional rules underlying rescission of contracts as a whole, courts apply a different approach to challenges to jury trial waivers. With contractual jury waiver provisions, courts are willing to disregard the jury waiver based merely upon allegations of fraudulent inducement of the contract as a whole and not particularly concerning the jury waiver.

In fact, interestingly, this approach to disregarding jury waivers essentially originated from the older cases (subsequently overruled by *Weinrott* discussed above) holding that arbitration agreements could be rejected based simply upon a claim of fraudulent inducement. This is evidenced early on by the Appellate Term decision in *Fed. Housecraft, Inc. v. Faria*,[38] in which the court observed:

> [O]ne who disaffirms for fraud a writing which contains a jury waiver clause should not be required to proceed to trial without a jury until there has been a determination as to the validity of the disputed instrument.
>
> The same question frequently arises upon applications to compel arbitration. If an issue is raised as to the making of the contract which provides for arbitration, either party may demand a jury trial on such issue. Thus, where fraud in the inception of the contract is claimed, the court must try this issue or refer it to a jury trial, if one is demanded.
>
> In the instant case, and for the same reasons which obtain in arbitration, I am of the opinion that the defense of fraud in the inception of the contract should be tried on framed issues. Upon a finding that such fraud was practiced herein, the complaint should be dismissed; upon a contrary finding, there should be a trial without a jury on the remaining issues.

Thus, jury waiver provisions in a contract were not viewed separately from the rest of the contract. Even though the analysis changed for arbitration provisions, the courts have refused to apply the separability doctrine to contractual jury waivers.

Although this may seem inconsistent with the analysis applied to arbitration clauses, the different treatment could be explained based upon the courts' propensity to interpret and apply arbitration provisions liberally and broadly to encourage alternative dispute resolution (thus less willing to disregard arbitration provisions), while construing jury waivers strictly so as to avoid depriving a party of its right to trial by jury.

In fact, in *Ambac Assur. Corp. v. Countrywide Home Loans Inc.*,[39] the party seeking to enforce the jury waiver argued that the older arbitration cases should no longer be followed on the question of jury waivers because those old arbitration cases were later overruled, and that the courts should apply the same separability doctrine to jury waivers as they subsequently applied to arbitration clauses.[40] The Appellate Division, First Department, rejected that argument, however, and allowed a jury trial of certain claims there, refusing to apply the separability doctrine to jury waivers.

J.P. Morgan Sec. Inc. v. Ader[41] instructively illustrates how the courts approach the jury waiver question. In that case, the First Department explained that if rescission of the contract is sought rather than simply damages resulting from the alleged fraud, then the jury waiver provision in the contract does not bar a jury trial of all issues in the case, even before the merits of the fraud claim are determined. In effect, the sole allegation of fraudulent inducement seeking rescission renders the jury waiver in the contract ineffective.

The court in *Ader* noted:

> We have previously held that a contractual jury waiver provision is inapplicable to a fraudulent inducement cause of action that challenges the validity of the underlying agreement. Moreover, "[i]t is of no consequence that the [counterclaim] does not contain the word 'rescission' or expressly state that it challenges the validity of the . . . agreement." In cases where the fraudulent inducement allegations, if proved, would void the agreement, including the jury waiver clause, the party is entitled to a jury trial on the claim.[42]

In applying this law to the facts, the court continued:

> Thus, where, as here, a party sufficiently pleads that it was fraudulently induced to enter into a contract, and only relies on the agreement as a basis for its defense against breach of contract allegations and a claim for reformation to recover overpayments, it is not precluded from challenging the validity of the contract for purposes of avoiding the jury waiver clause with respect to the adjudication of its fraudulent inducement claim.[43]

The dissenting justice had an issue with the majority's reasoning when it rendered the jury waiver ineffective because he did not think the fraud claim sought to void the contract altogether, but rather only sought damages: "Here, defendants' primary claims are for reformation and monetary damages, and they did not raise fraudulent inducement as an affirmative defense to plaintiff's breach of contract claim . . . Although defendants do assert a counterclaim based on fraudulent inducement, they seek money damages, not rescission. Whereas rescission is based on a disaffirmance of the contract and seeks to place the parties in the status quo ante the transaction, an award of damages affirms the contract while penalizing the fraudulent party for his breach."[44]

The dissent did have a good point, since it does not appear rescission was sought as a remedy for the alleged fraud. In fact, the Appellate Division, First Department seemed to side with the dissent's reasoning in *Ader*, when it affirmed the Commercial Division's decision to strike the jury request and thereby enforce the contractual jury waiver in *Zohar CDO 2003-1 Ltd. v. Xinhua Sports & Entertainment Ltd.*:

> The court properly granted the motion to strike plaintiffs' demand for a jury trial. While a party alleging fraudulent inducement that elects to bring an action for damages, as opposed to opting for rescission, may, under certain circumstances, still challenge the validity of the underlying agreement in a way that renders the contractual jury waiver provision in that agreement inapplicable to the fraudulent inducement cause of action, such circumstances are not present in this case. Plaintiffs merely seek to enforce the underlying agreements by obtaining damages for fraudulent inducement, rather than rescind the agreements, and do not challenge the validity of the agreements in any manner other than by making factual allegations of fraud in the inducement.[45]

The debate over whether damages or rescission is sought also raises another interesting question. The First Department in *Ambac* was willing to deny a jury trial of a claim it considered equitable but did not consider the claim of fraudulent inducement challenging the contract to raise equitable relief. That is a bit odd. Although there is nondescript case law indicating the claim of fraudulent inducement can be tried by a jury,[46] logic and case law are to the contrary.[47] Even if the jury waiver was ineffective based upon a claim of rescission arising from fraudulent inducement, query whether that claim seeks equitable relief for which no jury is allowed in any event. The courts have not addressed that issue.

Conclusion

The powerful remedy of rescission for fraud has potentially drastic consequences. An entire agreement can be eradicated if the elements of fraud are proven and the court finds it is feasible to "undo" the transaction. When it comes to transactions in which arbitration agreements are entered into, however, courts apply a more restrained approach. Under the separability doctrine, the arbitration provisions themselves are treated separately and can still indeed survive even in the face of a fraudulent inducement claim. On the other hand, contractual agreements to waive a jury trial are not given the same special protection as arbitration provisions, and are usually ineffective in the face of fraud allegations where rescission of the entire agreement is sought.

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Endnotes

1. *Butler v. Prentiss*, 158 N.Y. 49, 62-63, 52 N.E. 652 (1899); *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 70-71, 747 N.Y.S.2d 441 (1st Dep't 2002).
2. 25 N.Y.3d 220, 10 N.Y.S.2d 185 (2015).
3. 25 N.Y.3d at 225 (internal citations omitted).
4. *Id.* at 226.
5. *Marden v. Dorthy*, 160 N.Y. 39, 56, 54 N.E. 726 (1899).
6. *Cash v. Titan Financial Services, Inc.*, 58 A.D.3d 785, 873 N.Y.S.2d 642 (2d Dep't 2009).
7. 120 A.D.3d 1279, 993 N.Y.S.2d 53 (2d Dep't 2014).
8. 120 A.D.3d at 1281.
9. *Bd. of Managers of Soundings Condominium v. Foerster*, 138 A.D.3d 160, 164, 25 N.Y.S.3d 202 (1st Dep't 2016) ("Fraud sufficient to support the rescission requires only a misrepresentation that induces a party to enter into a contract resulting in some detriment, and 'unlike a cause of action in damages on the same ground, proof of scienter and pecuniary loss is not needed.' Even an innocent misrepresentation will support rescission.") (citations omitted). *See also* http://nyfraudclaims.com/intent-to-defraud-not-necessary-to-obtain-rescission-of-contract.
10. *Butler*, 158 N.Y. at 62-63 (citations omitted).
11. *See Meacham v. Jamestown, Franklin & Clearfield R.R. Co.*, 211 N.Y. 346, 351-52, 105 N.E. 653 (1914).
12. 3 N.Y.2d 17, 163 N.Y.S.2d 639 (1957).

13. 32 N.Y.2d 190, 344 N.Y.S.2d 848 (1973).
14. 32 N.Y.2d at 198 (citations omitted).
15. 32 N.Y.2d at 197.
16. 144 A.D.3d 993, 42 N.Y.S.3d 218 (2d Dep't 2016).
17. 144 A.D.3d at 994.
18. 144 A.D.3d at 996.
19. 144 A.D.3d at 996-997.
20. 144 A.D.3d at 997.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Matter of Belzberg v. Verus Investments Holdings Inc.*, 21 N.Y.3d 626, 630, 977 N.Y.S.2d 685 (2013) ("Arbitration is a matter of contract, 'grounded in agreement of the parties.'") (citations omitted); *Inland Shoe Mfg. Co., Inc. v. Pervel Indus., Inc.*, 81 A.D.2d 505, 505, 437 N.Y.S.2d 330 (1st Dep't 1981) ("It is hornbook law that no one may be compelled to arbitrate unless he has agreed to do so. This is true under the Federal Arbitration Law . . . , as it is under the law of this State.").
25. 162 A.D.3d 1100, 79 N.Y.S.3d 280 (2d Dep't 2018) ("any dispute, controversy or claim arising out of or relating to [contract] shall be settled promptly by arbitration").
26. 78 A.D.3d 972, 913 N.Y.S.2d 114 (2d Dep't 2010) ("the arbitration clause was broad, since it applied if 'any disagreement, deadlock, interpretation or dispute shall arise' under the . . . agreement").
27. 21 A.D.3d 887, 800 N.Y.S.2d 754 (2d Dep't 2005) ("An arbitration clause in the severance agreement stated that 'any controversy or claim arising out of or in relation to this Agreement or the breach thereof will, to the fullest extent permitted by law, be settled by arbitration.'").
28. 131 A.D.3d 563, 15 N.Y.S.3d 180 (2d Dep't 2015) ("Stock Purchase Agreement contained an arbitration clause which provided, in pertinent part: 'In the event any dispute shall arise pursuant to any term or provision of this Agreement, the same shall be settled by arbitration in accordance with the rules and regulations of the American Arbitration Association (hereinafter 'AAA') within the County of Queens.'").
29. JAMS Rule 11(b) states: "Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." *See* https://www.jamsadr.com/rules-comprehensive-arbitration/.
30. AAA Commercial Arbitration Rule 7 provides:

    (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim. (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause. *See* https://adr.org/sites/default/files/Commercial%20Rules.pdf.
31. *Gol v. TNJ Holdings, Inc.*, 68 Misc.3d 1216(A), 130 N.Y.S.3d 260 (Sup. Ct. N.Y. Cnty. 2020) ("Where there is a broad arbitration clause and the parties' agreement specifically incorporates by reference the AAA rules providing that the arbitration panel shall have the power to rule on its own jurisdiction, courts will leave the question of arbitrability to the arbitrators.") (internal quotation marks and citations omitted).
32. The FAA was enacted to reverse "centuries of judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts." *Scherk v. Alberto- Culver Co.*, 417 U.S. 506, 510-11 (1974) (internal quotation marks omitted).
33. *Id.*
34. 263 F.3d 26 (2d Cir. 2001).
35. *Id.* at 31.
36. *Sphere*, 263 F.3d at 32 (citation omitted).
37. "Under the FAA, '[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.'" *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 118 (2d Cir. 2012) (citing 9 U.S.C. § 4). "But a trial is warranted only if there exists one or more genuine issues of material fact regarding whether the parties have entered into such an agreement." *Schnabel*, 697 F.3d at 118. "Petitions to compel arbitration under the FAA are made and heard in the manner provided by law for the making and hearing of motions. When evaluating a petition to compel, the Court applies a standard similar to that applicable for a motion for summary judgment. The Court must grant the petition if there is no genuine issue of material fact regarding the requirements to compel arbitration." *Natl. Union Fire Ins. Co. of Pittsburg v. Beelman Truck Co.*, 203 F. Supp. 3d 312, 317 (S.D.N.Y. 2016) (internal citations and quotation omitted).
38. 28 Misc.2d 155, 156-57, 216 N.Y.S.2d 113 (2d Dep't App. Term 1961) (citation omitted).
39. 179 A.D.3d 518, 118 N.Y.S.3d 13 (1st Dep't 2020).
40. See my commentary in *Jury Waiver Issues Concerning Fraudulent Inducement Claims*, http://nyfraudclaims.com/jury-waiver-issues-concerning-fraudulent-inducement-claims.
41. 127 A.D.3d 506, 9 N.Y.S.3d 181 (1st Dep't 2015).
42. 127 A.D.3d at 507-508 (internal citations omitted).
43. 127 A.D.3d at 508 (citation omitted).
44. 127 A.D.3d at 511-12.
45. 158 A.D.3d 594, 594-95, 68 N.Y.S.3d 880 (1st Dep't 2018) (citations omitted).
46. *See Poley v. Rochester Community Sav. Bank*, 184 A.D.2d 1027, 1027 (4th Dep't 1992) ("the essence of that cause of action is that plaintiffs were fraudulently induced into making the contract, an issue that is triable by jury.").
47. *See New Media Holding Co., LLC v. Kagalovsky*, 118 A.D.3d 68, 985 N.Y.S.2d 216 (1st Dep't 2014) (defendant waived right to jury trial by joining counterclaims for rescission with those for legal relief).

ARBITRATION RULES OF THE NASSAU COUNTY BAR ASSOCIATION

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MEDIATION AND ARBITRATION PANELS

The Mediation and Arbitration Panels

The Nassau County Bar Association (the "Association") has established the Nassau County Bar Association Mediation and Arbitration Panels (the "Panels") comprised of qualified members of the Association who are available to State, Federal, and local courts, litigants, parties to contracts, and the general public to arbitrate a dispute. The Panels' Administrator (the "Administrator") will, upon request, provide a neutral Arbitrator or Arbitrators (the "Arbitrator") for the resolution of a dispute. The Arbitrator shall be selected from a list of attorneys admitted to practice law in the State of New York for a minimum of ten (10) years, each of whom has been screened by the Judiciary Committee of the Association to serve on the Arbitration Panel as an Arbitrator. Requests for arbitration by the Association's Arbitration Panel shall be on form(s) provided by the Association or the equivalent.

ARB-I Certain Terms:

(a) "Advisory Council" The Program is supervised by the Mediation and Arbitration Panels Advisory Council (the "Advisory Council"), whose members manage and direct all procedural and substantive matters directed to the Administrator for referral to the Advisory Council including, without limitation, arbitrator conflict and disclosure issues, case management requiring discretionary review and response, setting policy, rule review and amendment, and the performance of such other duties and functions as may be necessary or appropriate in the execution of its supervisory duties. The Advisory Council shall consist of the Chair and seven (7) additional members, each of whom shall be a member of the Association's Alternative Dispute Resolution Committee (the "ADR Committee") and a member of either or both of the Panels. In addition, the then current Chair(s) and Vice-Chair(s) of the Alternative Dispute Resolution Committee and the Executive Director of the Association shall serve ex officio. Members of the Advisory Council shall be selected by the ADR Committee Chair(s) and shall serve two-year terms, the first day of which shall be January 1 of the year of their selection and the last day of which shall be December 31 of the second year of their term. The Advisory Council Chair shall be selected annually by the members of the Advisory Council and shall serve a one-year term, the first day of which shall be January 1 of the year of the Chair's selection and the last day of which shall be December 31 of that year.

(b) "Arbitration" Arbitration is a voluntary, private process that affords parties an expeditious, time-saving and cost-effective means to resolve disputes that otherwise might be litigated in the courts. Parties agree by contract or submission to be bound by the decision of the Arbitrator. The arbitration proceeding is private.

(c) "Arbitrator" The Arbitrator is neutral and impartial. Notwithstanding the fact that the person assigned as Arbitrator is a member of the Association and may be a practicing attorney, no attorney-client privilege attaches to communications between the Arbitrator and a Party or the Party's representative, if any. The Arbitrator does not serve as an attorney or advocate for any Party.

(d) "Award" The Parties submit their dispute to the Arbitrator, who hears the evidence and arguments presented, and issues a final and binding written decision known as an "Award", which resolves the dispute.

(e) "Program" The Arbitration program (the "Program") is administered by the Administrator who maintains a current list of Arbitrators from which an Arbitrator or Arbitrators may be selected as provided in ARB-8. The Administrator will notify counsel for the Parties, or in the absence of counsel, the Party or Parties directly, of the identity of the Arbitrator and shall carry out such other functions as are required under these Rules.

(f) "Party" or "Parties" Each of the Parties and their respective counsel, if any, in a representative capacity, may be referred to in these Rules as a "Party" or "Parties," as the case may be.

"Rules" The Arbitration rules set forth herein are hereinafter referred to as "the Rules," or "these Rules."

ARB-2 Consent to Association Rules:

By submitting any case to Arbitration before the Arbitration Panel, the Parties are deemed to have consented and agreed to these Rules for the conduct of the Arbitration proceeding. Any questions, concerns or disputes ("Question") raised by any Arbitration participant regarding the application or interpretation of these Rules and/or any amendments thereto shall be submitted first to the Arbitrator for determination, and if the Arbitrator does not make a determination, the Question shall be submitted to the Administrator and resolved by the Advisory Council, whose decision shall be final and binding.

ARB-3 Arbitration Fees and Expenses:

All administrative and other fees established by the Association, if any, and all Arbitrator compensation and reimbursable expenses, shall be paid by the Parties in equal shares unless agreed otherwise by them or as provided by applicable law. Notwithstanding the foregoing, the Arbitrator shall have discretion to apportion any and all administrative fees, Arbitrator compensation, and reimbursable expenses in other than equal shares or as otherwise agreed to by the Parties. Travel expenses of the Arbitrator, including but not limited to, mileage and parking costs, shall not be reimbursable if the Arbitration is conducted in Nassau County.

ARB-4 Confidentiality:

Unless the Parties agree otherwise, the Arbitration, although private, is not confidential. The Parties may, however, enter into an agreement to make the proceeding confidential.

ARB-5 Matters for Submission:

Except as otherwise precluded by statute, rule, regulation or other applicable law, Arbitration under these Rules may be used for any matters that are justiciable or capable of being decided by a court or in arbitration. The scope of arbitrable matters, cases, disputes and claims is broad. Such matters may include, but are not limited to matters: (a) in litigation in any court; (b) required by statute to be determined by arbitration; (c) required by agreement to be determined by, or submitted to, arbitration; or (d) voluntarily submitted by the Parties.

ARB-6 Request for Arbitration; Voluntary Submission:

(a) Any Party, or the Parties jointly or collectively, may submit a dispute to Arbitration by filing with the Administrator a demand for, or a request for or consent to, Arbitration or equivalent (the "Demand").

(b) If the Demand is not filed by all Parties, the initiating Party or Parties shall serve the Demand on all other Parties. The Demand shall identify the Parties and set forth the nature of the dispute, the amount involved, if any, and any other remedies sought. The Demand shall be accompanied by a copy of the provisions of any applicable agreement where the Arbitration is pursuant to a written agreement to arbitrate between the Parties. If the matter has been, or is, in litigation, a complete set of relevant documents (i.e., pleadings, bills of particulars, and court orders and decisions) shall be provided by the initiating Party.

(c) Following any submission of a Demand, the responding Party shall serve and file an Answer and may file a counterclaim within ten (10) days after service of the Demand. Failure to serve and file the Answer shall be deemed a denial of the claim(s) in the Demand. A Reply to a Counterclaim may be served and filed within ten (10) days after it is served, or on such other schedule as the Arbitrator sets (or before appointment, as the parties agree). Failure to serve and file a Reply to a Counterclaim shall be deemed a denial of the Counterclaim. Where the Demand, Answer or Reply has been served by mail, an additional three (3) days shall be added to the time period in which to respond. Copies of the Demand, Answer and any Reply shall be filed with the Administrator.

ARB-7 Counterclaims and Changes in Claims:

(a) A responding Party may serve a Counterclaim in the Party's Answer, as provided in ARB-6, together with an additional administrative fee as set forth in ARB-24, setting forth the nature of the dispute, the amount of the counterclaim, if any, and any other remedies sought. If no counterclaim and/or Answer has been served and filed prior to the appointment of the Arbitrator, such may be filed with leave of the Arbitrator and on such schedule as is set (together with the filing fee).

(b) In addition, at any time prior to the appointment of the Arbitrator, any Party may change the Party's Demand or Counterclaim. After the Arbitrator has been appointed, a Party may assert an amended Answer and Counterclaim or make changes to a Demand or Counterclaim (or serve a Counterclaim if not previously served) only with the Arbitrator's consent, and on such schedule as is set by the Arbitrator.

(c) No Counterclaim will be considered unless the filing fee (see ARB-24) has been paid.

ARB-8 Selection of Arbitrator:

(a)Upon receipt of a Demand, the Administrator shall provide the Parties, by electronic (e-mail) or first class mail, with a list of five (5) names from which to select the Arbitrator. Preferences for an Arbitrator who has identified him/herself as having subject matter experience may be requested and will be considered, subject to availability. Subject to the foregoing, proposed Arbitrators shall be taken in rotation from the panel of Arbitrators maintained by the Administrator. The list of Arbitrators shall be accompanied by such biographical information concerning each of the Arbitrators as shall, from time to time, be on file with the Association. Within seven (7) business days after receipt of the list, the Parties (or their counsel) may confer to select a mutually acceptable Arbitrator, and shall then return to the Administrator, within ten (10) business days after receipt of the list of Arbitrators, the name(s) of the Arbitrator agreed upon by the Parties. In the absence of an agreement on an Arbitrator, each side to the dispute shall return to the Administrator, within ten (10) business days after receipt of the list of Arbitrators, a separate list of Arbitrators, identifying by ranking the Party's preference for an Arbitrator by number (with number 1 being the first choice, number 2 being the second choice, and so on) their respective preferences for the Arbitrator. Any Party may strike one or more names on the list. The Administrator shall compare the Parties' rankings and identify the Arbitrator. In determining the single Arbitrator or the composition of a three (3) Arbitrator panel, the lowest numerical combined rankings shall be used; provided, however, that where there are multiple respondents who cannot agree upon a single ranking sheet, each shall submit their own rankings and the same shall be submitted by the Administrator to the Advisory Council which shall thereupon determine who shall serve as Arbitrator.

(b) If the Parties' rankings result in a tie, then the Advisory Council shall thereupon determine who shall serve as Arbitrator.

(c) If, for any reason, the Administrator is unable to identify the Arbitrator from the initial list of proposed Arbitrators, a second list of up to five (5) names of Arbitrators shall be forwarded to the Parties or their counsel, which names have not previously been submitted to the Parties. The Parties and the Administrator shall thereupon follow the same procedure as set forth above with respect to identifying the Arbitrator from the first list.

(d) If the Administrator is unable to identify the Arbitrator from the second list of proposed Arbitrators, then the Advisory Council shall select from the list of Arbitrators the Arbitrator whose name(s) was (were) not previously submitted to the Parties.

e Notwithstanding the foregoing, the Parties may select who, from the Panel, they wish to have serve as Arbitrator in their case.

(If, after appointment to act, an Arbitrator is unable to perform his/her duties, the Administrator shall declare a vacancy in the appointment, and unless the parties otherwise agree, appoint another Arbitrator. Where a vacancy occurs on a three (3) Arbitrator panel, the Parties may stipulate that the remaining Arbitrators shall continue with the hearing and reach a determination of the dispute or, if the Parties do not so stipulate within seven (7) days following the vacancy declaration, then the vacancy shall be filled with an Arbitrator selected by the Advisory Council.

(g) Upon notice of appointment, the Arbitrator shall make disclosures as required by ARB-12. The Arbitrator shall execute an oath or affirmation to faithfully perform the duties of the Office of Arbitrator and render an Award based upon the evidence.

The list will contain from eight (8) to ten (10) names if the Parties have agreed upon a panel of three (3) arbitrators.

(h) Any challenge to, or request for disqualification of, an Arbitrator who has been appointed shall be filed with the Administrator, with notice to the other Party(ies) within five (5) business days of (i) objectant's receipt of the Administrator's notice of appointment, or (ii) receipt of the Arbitrator's disclosures pursuant to ARB 12. Challenges or requests for disqualification shall be made only for cause. The Administrator shall forward all challenges or requests to the Advisory Council upon receipt. The Advisory Council shall determine whether the Arbitrator shall continue to serve, and the determination shall be final and binding.

ARB-9 Selection of a Three Person Panel:

(a) If all parties agree or, if pursuant to a separate agreement between or amongst the parties, the parties choose to proceed with a three-person panel, the panel administrator will endeavor to send a list of 8-10 names from which the parties may select the panel members. The selection process will proceed as set forth in ARB-8.

(b) Once the three arbitrators are selected they will choose a chair. Said selection shall take place within five days of the final panelist selection.

(c) If the arbitrators are unable to agree upon a chair, the ADR Advisory Council shall select a chair for the panel from the three panelists.

ARB-IO Discovery:

Subject to the Arbitrator's powers as set forth in ARB„II, the Parties may request production of documents and other information.

ARB-II Arbitrator's Powers; Enforcement:

Without limiting any other powers conferred upon arbitrators by law,

(a) The Arbitrator shall have the power to:

• rule on his or her own jurisdiction to hear and determine the dispute; • determine applications for the production of documents and other information; • subpoena witnesses, books, papers, documents, and other items; • administer oaths and affirmations; • determine the admissibility in evidence of offers of proof;

• require the submission of briefs, including copies of cases and other authorities to be relied upon; • determine issues of law and fact; • determine requests for declaratory and/or injunctive relief;

- determine the form of the Award in the absence of an agreement between or among the Parties as to the form;
- permit site inspections; and
- take such other actions as the Arbitrator determines to be necessary to bring the proceedings to an expeditious and appropriate conclusion.

(b) The Arbitrator may enforce any orders issued by the Arbitrator or any of the provisions of these Rules in order to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

- requiring that any exchange or production of confidential documents and/or information be treated by the Parties and their counsel as confidential;
- imposing conditions or limitations on discovery and disclosure of electronic and other documents;
- allocating the costs of document production, including electronically stored information; and
- issuing any other enforcement orders which the Arbitrator is empowered to issue under applicable law.

ARB-12 Disclosures:

(a) Any prospective or appointed Arbitrator shall promptly disclose to the Administrator if s/he has any current or prior direct or indirect personal, professional or financial interests or relationships in or with the matter to be submitted to Arbitration and/or any of the Parties, their attorneys or known witnesses or prospective witnesses associated with the matter.

The duty of the prospective or appointed Arbitrator to disclose hereunder shall be a continuing obligation throughout the entire Arbitration process.

(b) Any Party or attorney involved in the Arbitration shall promptly disclose to the Administrator any current or prior direct or indirect personal, professional or financial relationship with a prospective or appointed Arbitrator.

(c) The Administrator shall forward all such disclosures to the Parties, who shall have a period of five (5) business days to file with the Administrator any objection in writing to the service of the Arbitrator, specifying the reasons for the objection. If any Party files an objection to the Arbitrator, the matter shall be submitted to the Advisory Council for determination as to whether the Arbitrator shall continue to serve, and such determination of the Advisory Council shall be final and binding,

ARB„13 Pre-Hearing Conference:

(a) The Arbitrator shall fix the date and time for a pre-hearing conference which shall be conducted not less than five (5) business days, nor more than thirty (30) business days, after the Arbitrator has received notice of appointment. The pre-hearing conference may be conducted by telephone conference call.

(b) At the pre-hearing conference, the topics to be considered may include, but shall not be limited to, (1) jurisdiction, (2) discussion of claims, counterclaims and issues, (3) existence of related entities and addition of other parties, (4) exchanges of information and scheduling therefor, (5) mutual exchange, and provision, of documentary hearing exhibits to the Arbitrator, (6) witness lists, (7) stipulations of uncontested facts, (8) service and filing of prehearing briefs, (9) use of stenographic reporter, (10) form of the Award, and (1 1) scheduling date(s) and location for the hearing.

ARB-14 Arbitration Hearing:

(a) The Arbitration hearing shall be held in Nassau County at a location designated by the Arbitrator or at such other place as shall have been designated by the parties in their agreement to arbitrate.

(b) The Arbitrator shall fix a hearing date and time which is not sooner than fifteen (15) days from the conclusion of the pre-hearing conference. With the consent of the Arbitrator, the Parties may agree to another date and time for the hearing. The Arbitrator shall give written notice to the Parties of the time and date for the hearing at least ten (10) days prior to the scheduled hearing date unless all Parties agree to a shorter time in which to give such notice.

(c) The Arbitrator may adjourn the hearing date and other deadlines upon application of any Party for good cause shown; provided, however, that recognizing that the Arbitrator will set aside the specified time for the conduct of the hearing, if a request is made for an adjournment or cancellation on less than three business days' notice before the scheduled

hearing and granted by the Arbitrator, the requesting Party shall pay a cancellation fee as provided in the Association's then applicable Schedule of Arbitration Fees.

ARB-15 Evidence:

The Arbitrator shall not be bound by rules of evidence unless otherwise agreed by the Parties.

ARB-16 Stenographic Record:

(a) Any Party may make arrangements for a stenographic record of the hearing. The requesting Party shall make arrangements directly with a certified stenographer and shall notify all other Parties and the Arbitrator of the arrangements not less than ten (10) calendar days prior to the hearing, unless the Arbitrator directs a different time period for the giving of such notice. The requesting Party or Parties shall pay the cost of the record, subject, however, to the provisions of ARB-24(b).

(b) No other means of recording the proceedings will be permitted absent the agreement of the Parties and the Arbitrator.

(c) If the transcript or any other recording is agreed by or among the Parties, or designated by the Arbitrator, to be the official record of the proceeding, an electronic or hard copy, as may be requested by the Arbitrator, must be provided to the Arbitrator and made available to the other Parties for inspection as determined by the Arbitrator.

ARB-17 Closing the Hearing; Issuance of Award:

(a) The Arbitrator shall declare when the hearing is closed. The Arbitrator shall execute an Award within thirty (30) days after the hearing has been declared closed by the Arbitrator. Where the Arbitration panel consists of more than one (1) Arbitrator, a majority of the panel shall be required to make an Award. The Parties may consent in writing to a longer period in which the Arbitrator may execute the Award.

(b) At any time before an Award is issued, the hearing may be reconvened by the Arbitrator on the Arbitrator's own motion, or upon the application of a Party for good cause shown, and the decision of the Arbitrator with regard thereto shall be final.

(c) The Award of the Arbitrator shall be final and binding and may be confirmed by a court as provided by law. The Award shall be signed by the Arbitrator and may, where appropriate, contain a dissent. The Award may include a provision awarding costs, Arbitrator's fees and/or expenses to a Party or Parties, as permitted under these Rules, including ARB-2, ARB-3, ARB-5, ARB-I I(b), ARB-14(c), ARB-23 and ARB-24(b), or pursuant to the Parties' agreement. The Parties, and not the Association or the Arbitrator, are responsible for enforcing the Award. The Arbitrator shall file the Award with the Administrator and the Arbitrator shall transmit copies to the Parties within thirty-five (35) days after the close of the hearing, or such later time if the

Parties have consented to an extension of time in which the Arbitrator may execute, file and transmit the Award.

ARB-18 Default:

Upon default of a Party in appearing at the hearing, evidence shall be taken and an Award shall be issued as may be deemed by the Arbitrator to be appropriate. Should all Parties fail to appear at the Hearing, the Arbitrator may issue an Award dismissing the matter, without prejudice.

ARB-19 Parties' Obligations:

All Parties shall cooperate with the Arbitrator, and with each other. The Parties are prohibited from having ex parte communications with the Arbitrator.

ARB-20 Settlement:

If the Parties settle or compromise all or any part of their dispute during the course of the Arbitration, the Arbitrator may, at the request of the Parties, set forth the terms of such settlement or compromise in a Consent Award signed by the Parties and the Arbitrator. The Parties shall promptly advise the Arbitrator of any settlement and remain responsible for the payment of Arbitrator compensation for all services rendered by the Arbitrator prior to the Arbitrator's receipt of the notice of settlement; provided, however, that any additional services rendered by the Arbitrator at the request of the Parties shall entitle the Arbitrator to compensation for the same.

ARB-21 Mediation:

(a) Whenever the Parties to a dispute desire to engage in "Mediation," as distinguished from "Arbitration," they may do so by selecting a Mediator from the Association's Mediation Panel who will conduct the Mediation pursuant to the Mediation Rules of the Association. If the Parties have paid an administrative fee or fees for the Arbitration, no additional filing fee shall be required for the Mediation.

(b) The Parties' desire to engage in Mediation shall be made upon the unanimous written consent of all Parties, which consent shall be filed with the Administrator. With the consent of the Arbitrator, the Arbitration hearing may be suspended pending the Mediation. The Parties may, by unanimous written consent and the consent of the Arbitrator, elect to have the Arbitrator serve as the Mediator.

(c) One who serves as a "Mediator" shall not thereafter serve as an "Arbitrator" in a subsequent or further Arbitration proceeding involving the same Parties and some or all of the same issue(s), unless the Parties thereto request that s/he do so, and they sign a written waiver of any objections thereto, which shall be filed with the Administrator prior to the commencement of any subsequent or further hearings.

ARB-22 Suspension/Termination of Proceedings:

(a)At the option of the Arbitrator, the Parties may be required to deposit with the Arbitrator advances of additional Arbitrator compensation anticipated by the Arbitrator to further conduct the proceedings. At the conclusion of the Arbitration, any portion of the advance Arbitrator compensation so deposited which is not used in the proceedings shall be promptly returned to the Parties in proportion to the deposits made by them. If full payments of the additional Arbitrator compensation requested by the Arbitrator have not been made, the Arbitrator may suspend the Arbitration. A Party may elect to avoid suspension of the Arbitration by advancing the unpaid portion of the additional Arbitrator compensation. If a non-paying Party has asserted a claim or counter-claim, the non-paying Party shall not be entitled to an Award upon such claim or counterclaim; provided, however, that evidence on the claim or counterclaim shall nevertheless be permitted, but only to the extent that it is entertained for the purpose of establishing a defense to such claim or counterclaim.

(b) If the Arbitration has been suspended by the Arbitrator and the Parties have failed to make the full deposits requested within the time designated by the Arbitrator, which shall not be less than fifteen (15) calendar days after the Arbitration has been suspended, the Arbitrator may terminate the proceedings without prejudice.

ARB-23 Arbitrator's Authority to Allocate Legal Fees and Expenses:

If the Parties' agreement to arbitrate contains a provision allowing the Arbitrator to allocate or assess legal fees and expenses, or all of the Parties request legal fees and expenses incurred in the Arbitration as a measure of damages, the Arbitrator may award such fees and expenses.

ARB-24 Costs/Fees:

(a)At the time the Demand commencing Arbitration is submitted to the Association, the submitting Party or Parties shall pay, in accordance with the Association's then applicable Schedule of Arbitration Fees: (i) the Association's administrative fee; and (ii) a required deposit toward the Arbitrator's compensation and reimbursable expenses (the "Arbitrator Deposit"), except as otherwise provided below in subparagraph (b) of this ARB-24. The administrative fee shall be nonrefundable. A respondent interposing a counter-claim shall pay to the Association an additional filing fee in accordance with the Association's then applicable Schedule of Arbitration Fees. A Counterclaim will not be considered unless and until the additional filing fee is paid nor shall failure to pay delay hearing on the claim.

(b) All charges, compensation and expenses of the Arbitration shall be borne equally by the Parties, or as they otherwise agree or as provided by applicable law, or as

directed by the Arbitrator, and are payable upon receipt of an invoice. The Arbitrator's rate (for each Arbitrator) shall be the rate provided for in the Association's Schedule of Arbitration Fees as in effect at the time of filing the Demand for Arbitration, which rate shall apply to all time spent on the matter by the Arbitrator including, but not limited to, preArbitration conferences, hearings, study time, communication with Parties and/or counsel, review of motions, and writing an Award. The Arbitrator Deposit shall be applied against the first six (6) hours expended by the Arbitrator and shall be credited to the account of the Party or Parties who submitted the payment. The Arbitrator shall arrange directly with the Parties for the payment of any anticipated

additional Arbitrator Deposits, At the conclusion of the proceeding, unearned Arbitrator Deposits shall be refunded to said Party or Parties.

ARB-25 Non-Liability:

Neither the Association, the Administrator, members of the Advisory Council, nor any Arbitrator shall be liable to any Party or Parties to the Arbitration for any act, omission or conduct in connection with any Arbitration.

ARB-26 Immunity:

An Arbitrator, the Association and its employees, and the Advisory Council and/or its members, shall be immune from suit or other legal process, and none shall be made a party or witness in any arbitration or judicial proceeding arising from, or related to, the dispute submitted to Arbitration under these Rules. The Parties shall be deemed to have agreed that none of the foregoing persons is competent to testify as a witness in any action, suit or proceeding.

ARB-27 Waiver:

(a) Any Party or attorney who proceeds with the Arbitration with actual or constructive knowledge that any provision or requirement of these Rules has not been complied with, and who fails to promptly file an objection in writing with the Administrator or the Arbitrator, shall be deemed to have waived the right to object.

(b) In requesting Arbitration, the Parties agree and acknowledge that the Arbitrator shall not be made a party or witness in any subsequent arbitration, mediation or judicial proceeding arising from, or related to, the dispute submitted for arbitration.

ARB-28 Additional Time for Mailing:

Where any paper, document or notice required or permitted to be served or filed hereunder has been transmitted by mail, an additional three (3) days shall be added to the time period in which to respond.

ARB.29 Communications with the Arbitrator:

Communications between or among any Party or Parties and the Arbitrator via email are preferred and encouraged, although not required; provided, however, that communications via e-mail exceeding twenty-five (25) pages shall, in each case, require an additional transmission to the Arbitrator of a hard copy of the entire communication. Any communication between a Party and the Arbitrator shall be simultaneously sent to opposing Parties by the same means. There shall be no ex parte communications with the Arbitrator.

ARB-30 Corrections to Award

Within thirty (30) calendar days after the transmittal of the Award, upon application of a Party, or sua sponte, the Arbitrator may correct any computational, typographical or clerical

errors in the Award. Corrections may only be made to matters which are ministerial, and no changes or amendments may be made on the merits of the case.

ARB-31 Headings:

The headings used in these Rules are made for convenience and are used for general reference purposes only and shall not be construed to describe, define or limit the scope of, or otherwise affect, the interpretation or meaning of these Rules or any of their provisions.

(Revised February, 2019)

NASSAU COUNTY BAR ASSOCIATION

SCHEDULE OF ARBITRATION FEES

Administrative Filing Fee for filing Demand for Arbitration.....	$500.00
Advance deposit (per arbitrator) for Arbitrator's fees and reimbursable expenses	$1 ,800.00[1]
Administrative Filing Fee for filing Counter-claim	$500.00
Cancellation Fee (single Arbitrator)	$900.00
Cancellation Fee per Arbitrator (multi-Arbitrator panel).....	$600.00

Room rental fee: Contact Nassau County Bar Association for availability and rates.

Each Arbitrator shall be compensated at the rate of $300.00 per hour.

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New York Law Journal

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Supreme Court's Trend in Ruling in Arbitration Topics Should Have Litigators Reflecting on Strategy

By Leslie A. Berkoff

March 15, 2024

Over the past several years, the Supreme Court has issued numerous decisions interpreting and enforcing various provisions of the Federal Arbitration Act (FAA). Whether the FAA has come before the court due to an ongoing rise and recognition of arbitration as an accepted clause in the underlying agreements or as an increasing form of dispute resolution adopted voluntarily by the parties is unclear, but certainly the use of dispute resolution as a tool in a litigator's toolbox is expanding at a great enough pace that splits in the circuits continue to arise with some degree of frequency and at a level to warrant the attention of our highest court.

This article touches on several decisions and the potential impact they have on the trajectory of a litigation and/or strategy of litigators.

In a unanimous decision in *Morgan v. Sundance,* 596 U.S. 411 (2022), the Supreme Court held that employers who do not act promptly to invoke an arbitration clause may be held to have waived the right to compel arbitration. This decision resolved a split in the circuits as to whether a party opposing a delayed motion to compel arbitration had to show that it had been prejudiced by such delay to support an argument of waiver.

Photo: Diego M. Radzinschi/ALM

The U.S. Supreme Court.

This decision is a significant departure from the pro-arbitration rulings issued by the court over recent years and has important implications for those who might have relied upon precedent in determining when to advance their contractual rights in this regard. In issuing this decision, the court specifically recognized that despite the clear policy underpinning the FAA favoring arbitration, federal courts may not simply interpret arbitration agreements with an unfettered bias towards arbitration.

As a general matter, when an action is commenced in state or federal court, a defendant has the right to file a motion to stay the litigation and seek to compel arbitration if the underlying dispute is governed by a contractual arbitration provision pursuant to Sections 3 and 4 of the FAA. Often, the question arises as to when to bring that motion and until this decision, even if there had been a significant delay in filing this motion, the majority of the circuits had often granted the motion as long as there has been no prejudice to the nonmoving party. However, outside of the arbitration context, prejudice is not typically considered when determining whether a party has waived its right.

While the Supreme Court recognized that an overarching federal policy favoring arbitration was intended to combat the judicial history of refusing to enforce arbitration agreements, it noted that this policy was only intended to "make arbitration agreements as enforceable as other contracts, but not more so." *Morgan*, 596 U.S. at 417 (quoting *Prima Paint v. Flood & Conklin Manufacturing*, 388 U.S. 395, 404, n. 12 (1967)). As such, the court determined that federal courts could not use this policy in a carte blanche fashion to create "special, arbitration-preferring procedural rules."

The takeaway from this decision is clear: parties should not wait to file motions to compel arbitration; rather it should be advanced as early as practicable to avoid having that motion denied based upon an argument of waiver.

The impact of a decision denying that motion could be on the trajectory of a litigation was further illuminated by another more recent decision. On June 23, 2023, in *Coinbase v. Bielski*, the court found that a litigation pending in the district court is automatically stayed pending an appeal of a decision by that court denying a motion to compel arbitration. 599 U.S. 736, 747 (2023). This decision resolved a circuit split between the U.S. Courts of Appeals for the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits, which held that the denial of a motion to compel divested the district court of jurisdiction thereby automatically staying proceedings, and the U.S. Courts of Appeals for the Second, Fifth and Ninth Circuits, which had left the decision to stay to the discretion of the district court judge.

The court determined that Section 16(a) of the FAA, which provides that a party seeking arbitration may file an immediate interlocutory appeal when a district court denies a motion to compel arbitration, had been enacted against "a clear background principle" that an appeal "divests the district court of its control over those aspects of the case involved in the appeal." The court did not find it to be persuasive that the absence of an explicit stay requirement in the FAA indicated other Congressional intent or that ordinary discretionary stay factors would adequately protect parties' rights. It reasoned that if the underlying proceedings were not stayed, certain benefits of arbitration, *i.e.* efficiency and cost reduction, would be lost.

The decision impacts those practicing in the minority courts whereas the litigants might have presumed they could move on parallel paths pending resolution of an appeal (which could take years). There is clearly an economic and strategic impact for those determining whether to appeal the denial of a motion as they are no longer spending dollars in both courts.

Of course, not all matters concerning arbitration belong in federal court just because the question is touching upon arbitration. In *Badgerow v. Walters et al.*, 596 U.S. 1 (2022), the Supreme Court restricted the ability of the federal courts to confirm or vacate arbitral awards under Sections 9 and 10 of the FAA. It determined that the "look through" approach previously endorsed by the court concerning Section 4 of the FAA does not apply for petitions to confirm or vacate an award under Sections 9 or 10 of the FAA. (The "look through" approach was developed in the case of *Vaden v. Discover Bank et al.*, 556 U.S. 49 (2009) and generally directs a court to look past the existence of an arbitration agreement and examine

the facts of an underlying dispute when determining whether it has jurisdiction to hear a motion to compel arbitration).

Specifically, Section 4 of the FAA only allows a party to compel arbitration in a "United States district court which, save for such [arbitration] agreement, would have jurisdiction." This has been interpreted to mean that if the facts and nature of the dispute would give rise to either a federal question or diversity jurisdiction, then a federal court could rule on a motion to compel.

By contrast, in this decision, the court recognized that Sections 9 and 10 of the FAA do not contain the same aforementioned textual language as Section 4 and there was no statutory basis to "look through" to the facts of the underlying dispute. As such, the court held that absent specific text, a federal court could not simply assume jurisdiction over such actions and instead a state court would need to rule on the award as the FAA does not in and of itself create subject matter jurisdiction.

The impact of this decision is clear: a party seeking to confirm, vacate or modify an award will now have to identify a separate grant of federal jurisdiction in its petition and not rely upon the FAA in order to seek relief from a federal court. In turn, courts will have to independently assess the existence of the same without relying on the "look through approach." Absent success in such an approach, parties will have to rely upon the state courts for the confirmation of arbitral awards in what may otherwise be potential federal question cases.

Recently, the Supreme Court granted a petition for certiorari in *Coinbase v. Suski* to review the question of whether the court or the arbitrator should determine whether an arbitration agreement containing a delegation clause can be narrowed by a subsequent agreement that does not contain clauses addressing arbitration or delegation. *Suski v. Coinbase*, 55 F.4th 1227, 1228 (9th Cir. 2022), *cert. granted*, *Coinbase v. Suski*, No. 23-3, 2023 WL 7266998 (U.S. Nov. 3, 2023).

There is currently a circuit split as to the enforceability of delegation clauses (clauses that dictate the arbitrator is authorized to determine threshold issues regarding the arbitration agreement). Currently, the First and Fifth Circuits recognize the enforceability of delegation clauses and would allow an arbitrator to decide whether a subsequent agreement narrows the arbitration agreement in a prior agreement, while the Third and Ninth Circuits refuse to enforce delegation clauses where a second agreement narrows an earlier arbitration agreement.

In denying the motion to compel arbitration, both lower courts determined that the question concerning the "scope of the arbitration agreement" referred to how widely it could be applied, and as such it was an issue for the court to decide unless the parties clearly and unmistakably provided otherwise.

In its petition for a writ of certiorari, petitioner *Coinbase* pointed to Supreme Court precedent requiring the enforcement of delegation clauses in arbitration agreements and argued that absent a meritorious challenge to these provisions, they must be enforced if the subsequent agreement does not other alter that provision and it was left for the arbitrator to determine this issue.

The case is scheduled for argument during the court's current term. Depending upon how the Supreme Court rules, corporate attorneys may need to reevaluate how supplemental agreements are drafted to ensure an intent to arbitrate/or delegate decisions is not lost down the line.

Leslie A. Berkoff *is a partner at Moritt Hock & Hamroff and chair of the Dispute Resolution Practice Group.* **Nicole Case**, *an associate at the firm, assisted in the preparation of this article.*

New York State
Fee Dispute Resolution Program

Part 137 of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York

Website: www.nycourts.gov/feedispute • E-mail: feedispute@nycourts.gov

Toll-free phone: 1-877-FEES-137 (1-877-333-7137)

§137.0 Scope of Program

This Part establishes the New York State Fee Dispute Resolution Program, which provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation. In accordance with the procedures for arbitration, arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances. Mediation of fee disputes, where available, is strongly encouraged.

§137.1 Application

(a) This Part shall apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter.

(b) This Part shall not apply to any of the following:

(1) representation in criminal matters;

(2) amounts in dispute involving a sum of less than $1000 or more than $50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented;

(3) claims involving substantial legal questions, including professional malpractice or misconduct;

(4) claims against an attorney for damages or affirmative relief other than adjustment of the fee;

(5) disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;

(6) disputes where no attorney's services have been rendered for more than two years;

(7) disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York;

(8) disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.

§137.2 General

(a) In the event of a fee dispute between attorney and client, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under this Part. Arbitration under this Part shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8.

(b) The client may consent in advance to submit fee disputes to arbitration under this Part. Such consent shall be stated in a retainer agreement or other writing that specifies that the client has read the official written instructions and procedures for Part 137, and that the client agrees to resolve fee disputes under this Part.

(c) The attorney and client may consent in advance to arbitration pursuant to this Part that is final and binding upon the parties and not subject to de novo review. Such consent shall be in writing in a form prescribed by the Board of Governors.

(d) The attorney and client may consent in advance to submit fee disputes for final and binding arbitration to an arbitral forum other than an arbitral body created by this Part. Such consent shall be in writing in a form prescribed by the Board of Governors. Arbitration in that arbitral forum shall be governed by the rules and procedures of that forum and shall not be subject to this Part.

§137.3 Board of Governors

(a) There shall be a Board of Governors of the New York State Fee Dispute Resolution Program.

(b) The Board of Governors shall consist of 18 members, to be designated from the following: 12 members of the bar of the State of New York and six members of the public who are not lawyers. Members of the bar may include judges and justices of the New York State Unified Court System.

(1) The members from the bar shall be appointed as follows: four by the Chief Judge from the membership of statewide bar associations and two each by the Presiding Justices of the Appellate Divisions.

(2) The public members shall be appointed as follows: two by the Chief Judge and one each by the Presiding Justices of the Appellate Divisions.

Appointing officials shall give consideration to appointees who have some background in alternative dispute resolution.

(c) The Chief Judge shall

designate the chairperson.

(d) Board members shall serve for terms of three years and shall be eligible for reappointment. The initial terms of service shall be designated by the Chief Judge such that six members serve one-year terms, six members serve two-year terms, and six members serve three-year terms. A person appointed to fill a vacancy occurring other than by expiration of a term of office shall be appointed for the unexpired term of the member he or she succeeds.

(e) A majority of current members of the board of governors shall constitute a quorum.

(f) Members of the Board of Governors shall serve without compensation but shall be reimbursed for their reasonable, actual and direct expenses incurred in furtherance of their official duties.

(g) The Board of Governors, with the approval of the four Presiding Justices of the Appellate Divisions, shall adopt such guidelines and standards as may be necessary and appropriate for the operation of programs under this Part, including, but not limited to: accrediting arbitral bodies to provide fee dispute resolution services under this Part; prescribing standards regarding the training and qualifications of arbitrators; monitoring the operation and performance of arbitration programs to insure their conformance with the guidelines and standards established by this Part and by the Board of Governors; and submission by arbitral bodies of annual reports in writing to the Board of Governors.

(h) The Board of Governors shall submit to the Administrative Board of the Courts an annual report in such form as the Administrative Board shall require.

§137.4 Arbitral Bodies

(a) A fee dispute resolution program recommended by the Board of Governors, and approved by the Presiding Justice of the Appellate Division in the judicial department where the program is established, shall be established and administered in each county or in a combination of counties. Each program shall be established and administered by a local bar association (the "arbitral body") to the extent practicable. The New York State Bar Association, the Unified Court System through the District Administrative Judges, or such other entity as the Board of Governors may recommend also may be designated as an arbitral body in a fee dispute resolution program approved pursuant to this Part.

(b) Each arbitral body shall:

(1) establish written instructions and procedures for administering the program, subject to the approval of the Board of Governors and consistent with this Part. The procedures shall include a process for selecting and assigning arbitrators to hear and determine the fee disputes covered by this Part. Arbitral bodies are strongly encouraged to include nonlawyer members of the public in any pool of arbitrators that will be used for the designation of multi-member arbitrator panels.

(2) require that arbitrators file a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them.

(3) be responsible for the daily administration of the arbitration program and maintain all necessary files, records, information and documentation required for purposes of the operation of the program, in accordance with directives and procedures established by the Board of Governors.

(4) prepare an annual report for the Board of Governors containing a statistical synopsis of fee dispute resolution activity and such other data as the Board shall prescribe.

(5) designate one or more persons to administer the program and serve as a liaison to the public, the bar, the Board of Governors and the grievance committees of the Appellate Division.

§137.5 Venue

A fee dispute shall be heard by the arbitral body handling disputes in the county in which the majority of the legal services were performed. For good cause shown, a dispute may be transferred from one arbitral body to another. The Board of Governors shall resolve any disputes between arbitral bodies over venue.

§137.6 Arbitration Procedure

(a)(1) Except as set forth in paragraph (2), where the attorney and client cannot agree as to the attorney's fee or where the attorney seeks to commence an action against the client for attorney's fees, the attorney shall forward a written notice to the client, entitled "Notice of Client's Right to Arbitrate," by certified mail or by personal service. The notice (i) shall be in a form approved by the Board of Governors; (ii) shall contain a statement of the client's right to arbitrate; (iii) shall advise that the client has 30 days from receipt of the notice in which to elect to resolve the dispute under this Part; (iv) shall be accompanied by the written instructions and procedures for the arbitral body having jurisdiction over the fee dispute, which explain how to commence a fee arbitration proceeding; and (v) shall be accompanied by a copy of the "request for arbitration" form necessary to commence the arbitration proceeding.

(2) Where the client has consented in advance to submit fee disputes to arbitration as set forth in subdivisions (b) and (c) of section

137.2 of this Part, and where the attorney and client cannot agree as to the attorney's fee, the attorney shall forward to the client, by certified mail or by personal service, a copy of the "request for arbitration" form necessary to commence the arbitration proceeding along with such notice and instructions as shall be required by the rules and guidelines of the Board of Governors, and the provisions of subdivision (b) of this section shall not apply.

(b) If the attorney forwards to the client by certified mail or personal service a notice of the client's right to arbitrate, and the client does not file a request for arbitration within 30 days after the notice was received or served, the attorney may commence an action in a court of competent jurisdiction to recover the fee and the client no longer shall have the right to request arbitration pursuant to this Part with respect to the fee dispute at issue. An attorney who institutes an action to recover a fee must allege in the complaint (i) that the client received notice under this Part of the client's right to pursue arbitration and did not file a timely request for arbitration or (ii) that the dispute is not otherwise covered by this Part.

(c) In the event the client determines to pursue arbitration on the client's own initiative, the client may directly contact the arbitral body having jurisdiction over the fee dispute. Alternatively, the client may contact the attorney, who shall be under an obligation to refer the client to the arbitral body having jurisdiction over the dispute. The arbitral body then shall forward to the client the appropriate papers set forth in subdivision (a) necessary for commencement of the arbitration.

(d) If the client elects to submit the dispute to arbitration, the client shall file the "request for arbitration form" with the appropriate arbitral body, and the arbitral body shall mail a copy of the "request for arbitration" to the named attorney together with an "attorney fee response" to be completed by the attorney and returned to the arbitral body within 15 days of mailing. The attorney shall include with the "attorney fee response" a certification that a copy of the response was served upon the client.

(e) Upon receipt of the attorney's response, the arbitral body shall designate the arbitrator or arbitrators who will hear the dispute and shall expeditiously schedule a hearing. The parties must receive at least 15 days notice in writing of the time and place of the hearing and of the identity of the arbitrator or arbitrators.

(f) Either party may request the removal of an arbitrator based upon the arbitrator's personal or professional relationship to a party or counsel. A request for removal must be made to the arbitral body no later than five days prior to the scheduled date of the hearing. The arbitral body shall have the final decision concerning the removal of an arbitrator.

(g) The client may not withdraw from the process after the arbitral body has received the "attorney fee response." If the client seeks to withdraw at any time thereafter, the arbitration will proceed as scheduled whether or not the client appears, and a decision will be made on the basis of the evidence presented.

(h) If the attorney without good cause fails to respond to a request for arbitration or otherwise does not participate in the arbitration, the arbitration will proceed as scheduled and a decision will be made on the basis of the evidence presented.

(i) Any party may participate in the arbitration hearing without a personal appearance by submitting to the arbitrator testimony and exhibits by written declaration under penalty of perjury.

§137.7 Arbitration Hearing

(a) Arbitrators shall have the power to:

(1) take and hear evidence pertaining to the proceeding;

(2) administer oaths and affirmations; and

(3) compel, by subpoena, the attendance of witnesses and the production of books, papers and documents pertaining to the proceeding.

(b) The rules of evidence need not be observed at the hearing.

(c) Either party, at his or her own expense, may be represented by counsel.

(d) The burden shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history. The client may then present his or her account of the services rendered and time expended. Witnesses may be called by the parties. The client shall have the right of final reply.

(e) Any party may provide for a stenographic or other record at the party's expense. Any other party to the arbitration shall be entitled to a copy of said record upon written request and payment of the expense thereof.

(f) The arbitration award shall be issued no later than 30 days after the date of the hearing. Arbitration awards shall be in writing and shall specify the bases for the determination. Except as set forth in section 137.8, all arbitration awards shall be final and binding.

(g) Should the arbitrator or arbitral body become aware of evidence of professional misconduct as a result of the fee dispute resolution process, that arbitrator or body shall refer such evidence to the appropriate grievance

committee of the Appellate Division for appropriate action.

(h) In any arbitration conducted under this Part, an arbitrator shall have the same immunity that attaches in judicial proceedings.

§137.8 De Novo Review

(a) A party aggrieved by the arbitration award may commence an action on the merits of the fee dispute in a court of competent jurisdiction within 30 days after the arbitration award has been mailed. If no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding.

(b) Any party who fails to participate in the hearing shall not be entitled to seek de novo review absent good cause for such failure to participate.

(c) Arbitrators shall not be called as witnesses nor shall the arbitration award be admitted in evidence at the trial de novo.

§137.9 Filing Fees

Upon application to the Board of Governors, and approval by the Presiding Justice of the Appellate Division in the judicial department where the arbitral program is established, an arbitral body may require payment by the parties of a filing fee. The filing fee shall be reasonably related to the cost of providing the service and shall not be in such an amount as to discourage use of the program.

§137.10 Confidentiality

All proceedings and hearings commenced and conducted in accordance with this Part, including all papers in the arbitration case file, shall be confidential, except to the extent necessary to take ancillary legal action with respect to a fee matter.

§137.11 Failure to Participate in Arbitration

All attorneys are required to participate in the arbitration program established by this Part upon the filing of a request for arbitration by a client in conformance with these rules. An attorney who without good cause fails to participate in the arbitration process shall be referred to the appropriate grievance committee of the Appellate Division for appropriate action.

§137.12 Mediation

(a) Arbitral bodies are strongly encouraged to offer mediation services as part of a mediation program approved by the Board of Governors. The mediation program shall permit arbitration pursuant to this Part in the event the mediation does not resolve the fee dispute.

(b) All mediation proceedings and all settlement discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration.

22 NYCRR § 1215.1

This document reflects those changes received from the NY Bill Drafting Commission through February 16, 2024

NY - New York Codes, Rules and Regulations > TITLE 22. JUDICIARY > SUBTITLE B. COURTS > CHAPTER IV. SUPREME COURT > SUBCHAPTER E. ALL DEPARTMENTS > PART 1215. WRITTEN LETTER OF ENGAGEMENT

§ § *1215.1* Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:

(1) if otherwise impracticable; or

(2) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term client shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

History

Added ***1215.1*** on 2/06/02; amended ***1215.1*** on 4/03/02.

SAMPLE DISPUTE RESOLUTION CONTRACT PROVISION
(COMMERCIAL)

ARBITRATION

The parties agree that any claim, dispute or controversy arising out of, or relating to, this agreement, or the breach thereof, shall be resolved through final and binding Arbitration to be administrated by ("NAM") National Arbitration and Mediation and governed by NAM's Comprehensive Dispute Resolution Rules and Procedures in effect at the time such claim is filed. Any award of the Arbitrator is final and binding and may be entered as a judgment in any court having jurisdiction.

If you have a question about the arbitration process or to obtain a current copy of the Comprehensive Dispute Resolution Rules and Procedures and/or fee schedule, NAM's Commercial Dept. can be contacted at (800) 358-2550 or by NAM's website at www.namadr.com.

MEDIATION

The parties agree that any dispute or controversy, arising out of or in connection with this Agreement or any alleged breach thereof, shall be subject to mediation if all parties agree thereto. If the parties mutually agree to submit to Mediation, any such Mediation shall be administrated by NAM (National Arbitration and Mediation) ("NAM") and governed by their Comprehensive Dispute Resolution Rules and Procedures and the Fee Schedule in effect at the time such claim is filed with NAM.

If you have a question about the mediation process or to obtain a current copy of the Comprehensive Dispute Resolution Rules and Procedures and/or fee schedule, NAM's Commercial Dept. can be contacted at (800) 358-2550 or by NAM's website at www.namadr.com.