Chapter 6

Arbitration

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 Arbitration or Litigation

 Arbitration in the Reinsurance Industry

One popular method of resolving disputes in the reinsurance industry is arbitration. Arbitration is defined as “a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.”\(^1\) Arbitration in the reinsurance context allows parties to a reinsurance contract to have their disputes resolved by an impartial third party who is versed in the intricacies of reinsurance.

While some may believe that arbitration is a relatively new alternative to litigation, it is quite the opposite. In fact, arbitration has been a method of resolving disputes since ancient Greek times when “traveling wise men, for a fee, would act as ad hoc arbitrators.”\(^2\) In medieval times, arbitration was used to settle business disputes between merchants.\(^3\) In early England, however, arbitration was disfavored by the English courts, since the judges, who were paid based upon the number of cases they decided, likely felt that arbitration infringed on their livelihood.\(^4\) This contempt toward arbitration

\(^1\) BLACK’S LAW DICTIONARY 105 (6th ed. 1990).
\(^4\) Id.
eventually carried over to the U.S. judicial system. However, such animosity has lessened, and U.S. courts now look favorably upon arbitration as an alternative method of dispute resolution.

In fact, courts now lean defer to arbitration awards. In a 1997 decision, the U.S. District Court for the Southern District of New York adopted the high standard recognized by the Second Circuit—“manifest disregard of the law”—as the standard by which to vacate an arbitral award.\(^5\) The court further supported the common practice of not providing reasons for an arbitral decision, and held that for an award to be overturned, the arbitrators must disregard a law that is “well defined, explicit, and clearly applicable.” This high standard clearly demonstrates the trend toward judicial deference to arbitral awards.

Of course, there is no requirement that reinsurance disputes be arbitrated. In fact, certain reinsurers, particularly facultative reinsurers, often prefer to litigate. If the reinsurance contract contains an arbitration clause, however, it is likely to be found valid and enforceable if it was consented to by the cedent and the reinsurer. In most cases, U.S. courts strongly favor enforcement of arbitration clauses. In other words, in the absence of an arbitration clause, U.S. courts will not go so far as to order arbitration, but a cedent and a reinsurer may agree to arbitrate and need not fear “interference” from the court.

Today, most reinsurance contracts contain arbitration agreements intended to steer the parties toward this type of dispute resolution. Even though a contract contains an arbitration agreement, however, the parties are free to later agree not to arbitrate and can then resolve their dispute in another manner, including litigation.\(^6\) Of course, if one party to the agreement wants to arbitrate, then the parties must arbitrate the dispute.

There is no standard arbitration agreement currently being used in the reinsurance industry. However, by way of example, following is a portion of an agreement taken from the Brokers & Reinsurance Markets Association’s *Contract Wording Reference Book*:

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5. Colonial Penn Ins. Co. v. Am. Centennial Ins. Co., 1997 WL 10004 [S.D.N.Y. Jan. 10, 1997]. Significantly, however, in Halligan v. Piper Jaffray, 148 F.3d 197 (2d Cir. 1998), the Second Circuit held that where a reviewing court is inclined to hold that the arbitration panel “manifestly disregarded” the law and that an explanation would have “strained credulity,” the absence of a written decision can be considered by the reviewing court.

Any dispute or other matter in question between the Company and the Reinsurer arising out of, or relating to, the formation, interpretation, performance, or breach of this Contract, whether such dispute arises before or after termination of the Contract, shall be settled by arbitration. Arbitration shall be initiated by the delivery of a written notice of demand for arbitration by one party to the other within a reasonable time after the dispute has arisen.

If more than one reinsurer is involved in the same dispute, all such reinsurers shall constitute and act as one party for the purposes of this Article, provided, however, that nothing herein shall impair the rights of such reinsurers to assert several, rather than joint, defenses or claims, nor be construed as changing the liability of the Reinsurer under the terms of this Contract from several to joint.

Each party shall appoint an individual as arbitrator and the two so appointed shall then appoint a third arbitrator. If either party refuses or neglects to appoint an arbitrator within sixty (60) days, the other party may appoint the second arbitrator. If the two arbitrators do not agree on a third arbitrator within sixty (60) days of their appointment, each of the arbitrators shall nominate three individuals. Each arbitrator shall then decline two of the nominations presented by the other arbitrator. The third arbitrator shall then be chosen from the remaining two nominations by drawing lots. The arbitrators shall be active or retired officers of insurance or reinsurance companies or Lloyd’s London Underwriters; the arbitrators shall not have a personal or financial interest in the result of the arbitration.

The arbitration shall be held in [City, State], or such other place as may be mutually agreed. Each party shall submit its case to the arbitrators within sixty (60) days of the selection of the third arbitrator or within such longer period as may be agreed by the arbitrators. The arbitrators shall not be obliged to follow judicial formalities or the rules of evidence except to the extent required by governing law, that is, the state law of the situs of the arbitration as herein agreed; they shall make their decisions according to the practice of the reinsurance business. The decision rendered by a majority of the arbitrators shall be final and binding on both parties. Such decision shall be a condition precedent to any right of legal action arising out of the arbitrated dispute which either party may have against the other. Judgment upon the award rendered may be entered in any court having jurisdiction thereof.

Each party shall pay the fee and expenses of its own arbitrator and one-half of the fee and expenses of the third arbitrator. All other expenses of the arbitration shall be equally divided between the parties.
Except as provided above, arbitration shall be based, insofar as applicable, upon the procedures of the American Arbitration Association. 7

§ 6:1.2 Advantages and Disadvantages

When deciding whether to arbitrate or litigate, the parties must consider the benefits and the disadvantages of each method of dispute resolution.

The points of comparison discussed below should be analyzed by a party before deciding whether arbitration or litigation is the best method to resolve a dispute. In general, if the parties have an expectation of a continued business relationship, and expect disputes to arise in the course of their routine business, arbitration may be the preferred method to resolve the dispute rather than the adversarial arena of litigation. On the other hand, those looking for a noncompromising legal decision, such as rescission of a contract or a large monetary award, may find litigation more conducive to their goals.

[A] Formality

The differences in the formality of the processes are an important consideration in deciding whether to litigate or arbitrate a pending dispute. The atmosphere in arbitration is often less rigid and formal, allowing a more candid and open resolution of the dispute than litigation offers. In a dispute involving a very complicated legal matter, parties may prefer the more formalized setting offered in a courtroom. However, if the dispute involves a technical reinsurance issue, the parties may elect to involve an arbitrator in the decision-making process, since the arbitrator will have an extensive background in the reinsurance industry.

Traditionally, the reinsurance industry has handled arbitrations outside of the auspices of a formal arbitration tribunal. 8 Although the trend is toward more formality, it is still up to the parties drafting the agreement to determine whether or not such formality is desired, and to draft the policy accordingly.

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8. Larry P. Schiffer, An Overview of Reinsurance Arbitration, ARIAS U.S.Q. at 3 (1st Quarter 1995). In the mid-1990s, the AIDA Reinsurance and Insurance Arbitration Society, ARIAS U.S., a not-for-profit corporation, was formed for the purpose of promoting the improvement of the insurance and reinsurance arbitral process. In that regard, the Society has conducted training and certification programs and has developed model arbitration clauses and guidelines for arbitration. This information can be obtained through the Society’s website, available at www.arias-us.org.
[B] Location

Arbitration panels are much more portable than the typical judicial proceeding, which can also make them much more adaptable to the idiosyncrasies involved in a particular dispute. Fairly easily, an arbitration panel can meet in more than one location in order to accommodate witnesses or the panel itself.

[C] Discovery

One significant difference between arbitration and litigation is the existence and scope of discovery. While it would not be accurate to say that discovery is nonexistent in arbitration, it is not required and it is not nearly as extensive as discovery in a litigation context. While the four typical methods of discovery are document production, depositions, interrogatories and requests to admit, usually only the first two are used in arbitration, and even then depositions are used to a much lesser extent than in typical litigation situations. Arbitration also differs dramatically from litigation in that it does not involve the plethora of remedies available in terms of motions used to halt the further development of a case. For example, motions to dismiss, summary judgment motions and motions related to discovery are not available in arbitration settings. This is one difference that helps to explain why arbitration sometimes achieves more efficient and less costly results.9

[D] Motions

Another difference between arbitration and litigation is the existence of dispositive motions. In litigation, a dispositive motion may resolve the dispute long before an actual trial. However, when arbitration is used, the dispute is not usually resolved until discovery is exchanged and an actual hearing is held. Since there are no dispositive motions in an arbitration setting, there is usually no chance to settle the matter without the use of a hearing. The chances of settlement are also greater in litigation—since dispositive motions and settlement conferences often allow both sides to present their positions without the need for a formal hearing, parties may be able to agree to a compromise earlier in the process. Parties to an arbitration, however, will likely allow the proceeding to progress through the hearing stage, giving the arbitrators the opportunity to decide the matter. In addition, settlement in litigation usually happens only after extensive discovery

and motion practice has occurred, thereby increasing out-of-pocket expenses prior to resolution.

[E] Joinder of Parties

An important distinction between arbitration and litigation is arbitration’s limited reach to third party participants, discussed more fully below. For example, arbitration does not offer the opportunity to join necessary third parties who are not parties to the contract. Their absence may result in a piecemeal resolution of the dispute and, likely, contradictory rulings. Thus, arbitration may not be the correct vehicle for a dispute that involves parties who were not parties to the arbitration agreement.

[F] Publicity

Another difference between litigation and arbitration involves considerations of publicity and confidentiality. Litigation is a public endeavor, and in most situations a complaint is a public document unless the court has imposed a protective order. Arbitration, however, can be much more discreet. The parties do not have to publicly air their positions, which helps to avoid bad public relations in the industry. This is especially beneficial if financial issues, such as possible insolvency, are involved. Not only does the private nature of arbitration benefit the individual parties, but it also helps avoid negative publicity for the reinsurance industry as a whole. On the other hand, if a party is taking a politically unpopular position in the industry, it may prefer to have a judge decide the matter, rather than using industry executives who might be unwilling to disturb the compromised position they have previously espoused.

[G] Appeal

Yet another difference between arbitration and litigation is the parties’ right to an appeal. In litigation, this right is widely available and a party may appeal any part of or all of a court’s order, decision, or judgment. In arbitration, the parties are very limited in their appeal rights. For example, under the Federal Arbitration Act (FAA), if a party is dissatisfied with the arbitrator’s decision, it can only seek to have the arbitration award set aside on the following grounds: fraud or corruption involving the proceeding; bias or evident partiality of the arbitrators; or gross irregularities in the proceeding amounting to arbitrator misconduct. Arguably, these grounds are not easy to prove;

therefore, parties may feel “safer” in a courtroom where they often have the right to an appeal.

[H] Predictability

Predictability is another difference. In a court proceeding, the result may be relatively predictable, at least if there is controlling authority in the jurisdiction. But there is no stare decisis in arbitration, which thus offers less predictability than litigation. This freedom from precedent can be seen as a benefit of arbitration, however, especially where unusual fact situations may lead to judicial rulings that follow the “rule of the law” but do not result in the “best” decision for these particular facts and parties.

The procedural rules involved in litigation can also offer more predictability on the how the court will proceed to resolve the matter than the rules in arbitration. In arbitration, unless the parties agree to be governed by a trade association’s rules, such as the rules established by the American Arbitration Association, the procedural rules are usually left to the parties and the arbitrators. In addition, in litigation, the power of the court is not limited by the contractual agreement of the parties, as it is an arbitration setting, where the arbitrators are typically bound by the terms set forth in the arbitration agreement. Thus, the courts may have more freedom to resolve an entire dispute, whereas an arbitrator can only resolve those issues that fall under the terms of the arbitration agreement.

[I] Speed

Some perceived differences between arbitration and litigation may or may not also be real differences. For example, despite the general perception, arbitration is not necessarily the quicker way to resolve a dispute. Even though court dockets are usually backlogged, arbitration proceedings are often stalled by problems selecting arbitrators, or when one party is forced to go to court to compel the other party to arbitrate. While arbitration may avoid time-consuming discovery, it can easily involve extra time for the arbitrator selection process, discussed later in this chapter. In addition, the actual process of arbitration is not always quicker, particularly if the arbitrators selected have full-time jobs and busy schedules of their own which must be accommodated. Also, parties may have to wait for those industry-seasoned and savvy reinsurance arbitrators who are involved in other arbitrations.

[J] Cost

Another perceived difference is cost. Contrary to what one may believe, arbitration is not always less expensive than litigation. For example, the parties have to pay the arbitrator’s fees, and they must sometimes also pay for the space in which the arbitration hearing is
held. If satellite court proceedings are necessary to compel arbitration or vacate an arbitration award, one also has those additional court expenses to consider.

§ 6:1.3 Inability to Join Third Party

Reinsurance disputes often involve parties other than the original parties to the arbitration agreement. In addition to the ceding company and the reinsurer, parties to the dispute may include brokers, agents, liquidators, and others. The involvement of these extrinsic parties complicates the arbitration process, especially where they have not agreed or do not intend to agree to arbitration of the dispute. Under the FAA, “an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.”¹² Moreover, given the contractual nature of an arbitration agreement, the arbitration process binds only those who were parties to the agreement. Those who have not agreed to arbitrate their disputes cannot be compelled to agree to that form of dispute resolution.¹³ Thus, one of the most compelling reasons weighing in favor of litigation over arbitration arises when a dispute between the ceding company and reinsurer involves a third party. By litigating the dispute, in contrast to arbitrating, the noncontracting parties can be brought into the controversy and eventually compelled to contribute to the settlement or judgment.

The problem can be averted if the parties to the arbitration agreement choose to waive their right to arbitration. As contract rights, rights under an arbitration agreement are waivable.¹⁴ Another possible solution to this problem is to have the arbitration clause provide that the third party, such as the broker, intermediary, or agent, will consent to being joined in any arbitration between the ceding company and the reinsurer. However, an intermediary or agent is unlikely to look favorably upon arbitration, unless it is given a voice in, for example, selecting the arbitration panel.

Lastly, the ceding company and reinsurer can always choose to arbitrate their dispute without initially involving the noncontracting party, and the loser can subsequently pursue the noncontracting party in court.

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§ 6:2 Federal Law

§ 6:2.1 U.N. Convention

The Convention on Recognition and Enforcement of Foreign Arbitral Awards [Convention] governs arbitration in international transactions and is implemented in the United States under section 2 of the FAA. Actions governed by the Convention are deemed to arise under the laws and treaties of the United States and the federal district courts are deemed to have original jurisdiction over such proceedings without regard to the amount in controversy. Simply put, Article II of the Convention requires signatory countries to recognize arbitration agreements and to compel the parties to that agreement to arbitrate. Article III compels signatory countries to recognize arbitration awards as binding and to uphold them. And Article IV specifies procedures for implementing the enforcement of these recognized awards, while Article V sets forth the available defenses to enforcement.

One court, in reviewing the terms of the Convention and section 2 of the FAA, stated:

There is nothing discretionary about article II(3) of the [Convention]. It states that district courts shall at the request of any party to an arbitration agreement refer the parties to arbitration. The enactment of . . . a federal remedy for the enforcement of the [Convention], including removal jurisdiction without regard to diversity or amount in controversy, demonstrates the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context.¹⁵

Thus, it appears that the historic ambivalence toward arbitration has indeed given way to a view that arbitration is a valid, and sometimes preferable, means of resolving disputes.

The Convention does not govern any disputes that arise between U.S. citizens; such disputes would be governed by the FAA, the subject of the next section of this chapter. Also, unlike disputes between citizens of the United States, disputes involving foreign arbitration awards must generally be brought in the federal court otherwise having jurisdiction over the dispute. Again, this is discussed more fully in the following section.

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§ 6:2.2  Federal Arbitration Act

Since reinsurance contracts will almost always involve interstate commerce, they fall under the governance of the FAA.\(^{16}\) The FAA was enacted for the purpose of ending judicial hostility to arbitration, giving arbitration agreements an equal status with other contracts, and giving parties a mechanism for enforcing private agreements to arbitrate.\(^{17}\) Section 2 of the FAA establishes that agreements to arbitrate contract disputes shall be “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”\(^{18}\) Congress intended the FAA to be a “simple method by which an opportunity would be given to enforce written arbitration agreements.”\(^{19}\) Unfortunately, the intent to create a “simple method” backfired, because Congress failed to define the scope and applicability of the Act, thereby giving rise to confusion regarding its purpose and the breadth of its reach, and forcing the courts to assess congressional intent.

The FAA vests federal courts with the power to compel arbitration, to stay pending proceedings, to appoint arbitrators if the parties fail to agree, and to vacate, modify, or confirm arbitral awards. However, the FAA does not create an independent basis for subject matter jurisdiction in federal court. The matter must meet the statutory requirements for diversity jurisdiction\(^{20}\) or federal question jurisdiction.\(^{21}\) The U.S. Supreme Court clarified these requirements in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*\(^{22}\)

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[T]he [Federal] Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal question jurisdiction under 28 U.S.C. § 1331 or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit in the underlying dispute; hence there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue.
Through a series of decisions, the courts have determined that the FAA applies to contracts relating to interstate commerce, that the substantive provisions of the FAA apply to state court proceedings, and that the FAA preempts state law to the contrary or state legislative attempts to undercut the enforceability of arbitration agreements. Also, it has been held that federal courts do not have sole jurisdiction over actions brought pursuant to the FAA; such actions may also be filed in state court.

The FAA contains various procedural directives, including the stay of litigation pending arbitrations; the compelling of a party to submit to arbitration; the appointment of an arbitrator where the arbitration agreement does not provide for arbitrator appointment; motions before courts; the subpoena of witnesses; grounds for confirmation, vacatur, and modification of arbitration awards; and procedures for confirmation, vacatur, and modification. The FAA does not, however, comment on the process of the arbitration hearing itself.

§ 6:3 State Law

The majority of states have procedural directives and substantive law governing the arbitrability of disputes. Many states have adopted the Uniform Arbitration Act (UAA) or a substantially similar statute. The UAA is similar to the FAA, but it contains additional provisions governing procedures for the arbitration hearing, the nature and scope of arbitration awards, representation by attorneys, court jurisdiction and venue, and the right to appeal, as well as other issues, most of which are not addressed in the FAA. The UAA also includes a provision that it applies only when the arbitration agreement is silent.

However, since the substantive provisions of the FAA apply in both federal and state court proceedings, a particular state’s arbitration law is limited in scope, unless the parties mutually agree to be governed by a state’s arbitration statute. Typically the state statutes govern disputes arising from intrastate commerce.

25. 9 U.S.C. § 3.
26. Id. § 4.
27. Id. § 5.
28. Id. § 6.
29. Id. § 7.
30. Id. § 9.
31. Id. § 10.
32. Id. § 11.
33. Id. §§ 12, 13, 16.
§ 6:4 Arbitration Agreements

Because arbitration finds its validity in contract, there can be no arbitration without an arbitration clause unless the parties subsequently agree to submit their dispute to arbitration. An arbitration clause is a clause in a contract that establishes an agreement to arbitrate a contract dispute. Accordingly, the right and duty to arbitrate is strictly dependent upon the agreement between the parties to do so.

In 2010, the U.S. Supreme Court further commented on the contractual basis for arbitration. In *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, AnimalFeeds brought a class action lawsuit against the petitioner for price fixing.\(^{33.1}\) The charter party agreement between the petitioner and respondent had an arbitration clause within it, but was silent as to whether a class action could be arbitrated. In order to clarify the issue, the parties decided to submit the question to an arbitration panel.\(^{33.2}\) The arbitration panel decided that class action suits could be arbitrated, but the district court vacated the award of the arbitrators. The court held that the panel acted with "manifest disregard" of Federal Maritime Law.\(^{33.3}\) The Second Circuit reversed and allowed the class action to remain in arbitration.\(^{33.4}\) The Supreme Court stated:

> It follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Here the arbitration panel imposed class arbitration despite the parties' stipulation that they had reached no agreement on that issue. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.\(^{33.5}\)

There is no standard reinsurance arbitration clause. Rather, parties tend to use various arbitration clauses depending upon their prior experiences and practice. Given the potential variance in arbitration clauses, the FAA was enacted in 1925 to ensure the validity and enforcement of arbitration agreements and establishes a strong federal policy favoring arbitration.\(^{34}\) Section 2 of the FAA defines an arbitration agreement as:

> 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

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33.2. *Id.*
33.3. *Id.* at 2.
33.4. *Id.*
33.5. *Id.* at 4.
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. 35

Most reinsurance agreements contain an arbitration clause that provides that disputes between the reinsurer and the reinsured be settled through arbitration. Because most reinsurance matters are interstate or international in character, the FAA usually governs reinsurance arbitration.

There are common elements usually incorporated into a typical reinsurance arbitration clause. Arbitration clauses typically provide for the appointment of three arbitrators. Specifically, each party appoints its own arbitrator. The two party-appointed arbitrators then select an umpire, a neutral arbitrator.

Other typical provisions in a reinsurance arbitration clause will address the following:

1. the award will be binding in nature;
2. the right to appoint the opposing party’s arbitrator if the opposing party fails to do so;
3. the arbitrators must have reinsurance industry experience;
4. the arbitrators can decide case based on equities and not by reference to strict legal principles; and
5. a division of cost responsibilities. 36

Because states’ substantive laws vary, a choice of law provision can play a critical role in the arbitration process. Consequently, parties to a reinsurance treaty should consider the incorporation of a choice of law provision in arbitration clauses. Choice of law provisions are typically upheld so long as there is a reasonable basis for the parties’ choice. 37 Parties to a reinsurance dispute frequently involve multinational companies, thus, the choice of law issue is particularly important in determining which law applies to the dispute and enforceability of the

37. See, e.g., Potomac Leasing Co. v. Chuck’s Pub, Inc., 156 Ill. App. 3d 755, 509 N.E.2d 751 [1987] [holding that parties’ choice of Michigan law as forum to resolve disputes under contract would be upheld because Illinois public policy was not offended by applying Michigan law].
award. Along these lines, it is prudent for parties to an arbitration clause to stipulate to the location of the arbitration hearing. As a general rule, a forum selection clause will be upheld so long as it bears a reasonable relationship to the chosen forum.  

Issues regarding the standard of review and appeals of an arbitration award should also be addressed in an arbitration clause. Covering this subject is important because, although the FAA states the grounds for vacating, modifying, or correcting arbitration awards, it does not address the right to an appeal. A limitation on the right to appeal will further the goals of arbitration by reducing delay and costs.

Finally, the consolidation of arbitration proceedings is another matter that might be addressed in a reinsurance arbitration clause. Reinsurance disputes may involve parties in addition to the ceding company and the reinsurer, and it might not be possible to fully resolve a dispute without including these parties. However, the arbitration process binds only those parties who have agreed to submit to arbitration pursuant to the arbitration clause.

An arbitration clause may be characterized as either “broad” or “narrow.” The arbitration clause recommended by the American Arbitration Association (AAA) is an example of a broad arbitration clause. It provides that

any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator[s] may be entered in any Court having jurisdiction thereof.

The phrase “arising out of or relating to this contract” implies that virtually all disputes are arbitrable. Reinsurance arbitration clauses are usually broad. Because the quoted clause is merely recommended by the AAA, there are several variations on the broad arbitration clauses. Because of the broad, sweeping language typically used in these clauses, virtually all disputes fall within their ambit. This

38. See Global Reinsurance v. Argonaut, 634 F. Supp. 2d 342, 350 (S.D.N.Y. 2009) (absent a choice of law provision, the court found that New York had a substantial interest in the outcome of arbitration and therefore awarded prejudgment interest under New York law).


41. See, e.g., Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co., 706 F.2d 155, 160 [6th Cir. 1980] (clause requiring arbitration of “[a]ny controversy or claim arising out of this Agreement or the refusal of either party to perform the whole or any part thereof” is considered to be “extremely broad”).
can become problematic, particularly where the arbitration of certain disputes was never intended by the contracting parties.\footnote{See, e.g., United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 564, 584–85 [1960] (holding that in absence of express provision excluding a particular grievance from arbitration only the most forceful evidence of a purpose to exclude claim from arbitration can prevail particularly where exclusion clause is vague and arbitration clause is broad).}

In contrast to the broad arbitration clause, a narrow arbitration clause typically provides that any claim or dispute “arising under” a contract is arbitrable.\footnote{See, e.g., Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1463–64 [9th Cir. 1983].} Narrow arbitration clauses have been interpreted as limiting arbitration to disputes relating to the formation, interpretation, validity, or performance of the contract. Where the arbitration clause is narrowly drawn, only those issues falling within the scope of the arbitration clause are arbitrable.\footnote{See McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co., 858 F.2d 825 [2d Cir. 1988].} However, when a court is confronted with a question as to the arbitrability of a dispute, there is a strong presumption in favor of arbitration agreements.\footnote{See AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 106 S. Ct. 1415, 1419 [1986].} Courts have suggested that in order to give force to any “words of limitation” in an arbitration agreement, and thereby defeat the presumption of arbitration, contracting parties must use “arising under” or its equivalent in the clause.\footnote{See, e.g., S.A. Mineracao da Trinidade-Samitri v. Utah Int'l, Inc., 745 F.2d 190, 194 [2d Cir. 1984].} Under these clauses, claims such as fraud in the inducement and unconscionability might not be arbitrable, because such issues arguably do not involve disputes about the actual transactions under the contract.\footnote{See Bristol-Myers Squibb Co. v. SR Int'l Bus. Ins. Co., 354 F. Supp. 2d 499 [S.D.N.Y. 2005] (an arbitration clause that applies solely to “any dispute arising under” a contract does not extend to a claim of fraudulent inducement); Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 479 [9th Cir. 1991], cert. denied, 503 U.S. 919 [1992]; Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 [9th Cir. 1983]. These cases appear to represent the minority view with respect to this issue. Most circuits recognize that this view contradicts federal policy favoring arbitration.}

§ 6:5 Arbitrability

According to the FAA, written provisions for arbitration of future disputes in commercial contracts or maritime transactions are to be treated as “valid, irrevocable, and enforceable.”\footnote{9 U.S.C. § 2.} In order to achieve
the FAA’s objective of enforcing private arbitration agreements, federal courts must either stay court proceedings pending arbitration or compel arbitration upon a party’s refusal or failure to arbitrate where the dispute arises under the arbitration agreement. As a mechanism for achieving this objective, the FAA gives federal courts the power to enforce arbitration agreements by either compelling arbitration or staying proceedings pending arbitration.  

§ 6:5.1 Actions to Compel Arbitration

If one of the parties to an arbitration agreement refuses to arbitrate, the demanding party may seek relief in federal court by invoking the provisions of section 4 of the FAA. Section 4 empowers a party to petition the district court otherwise having jurisdiction over the matter to compel the other party to arbitrate. It is important to note, however, that a court’s power is limited in that it can compel arbitration only between those parties who are parties to the arbitration agreement. The FAA does not empower a court to compel a third party, such as a managing agent, to arbitrate, even though the managing agent may have played a significant role in the reinsurance contract or dispute.

Under section 4, a federal court must order arbitration once it is satisfied as a threshold matter that “the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.” However, if the claim challenges the validity of the arbitration clause itself, as opposed to the contract in general, the court may proceed to adjudicate it.

51. 9 U.S.C. § 4. See also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967); Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 589 [7th Cir. 2001] (“[C]ourts, rather than arbitrators, usually determine whether the parties have agreed to arbitrate.”); cf. Contec Corp. v. Remote Solution Co., Ltd., 398 F.3d 205, 208 [2d Cir. 2005] [the court referred the issue of arbitrability to the arbitrator where there was “clear and unmistakable evidence from the arbitration agreement . . . that the parties intended that the question of arbitrability shall be decided by the arbitrator”].
52. Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 1209 (2006). Prima Paint established the doctrine of separability whereby claims of fraudulent of the contract are arbitrable but claims of fraudulent inducement of the arbitration clause itself are not, as the agreements are deemed “separate.” 388 U.S. at 403–04. Buckeye reaffirmed and expanded this doctrine of separability, holding that under broad arbitration clauses, challenges “to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.” Buckeye, 126 S. Ct. at 1210.
In 2010, the U.S. Supreme Court reversed the Ninth Circuit in *Rent-A-Center, West, Inc. v. Jackson.*\(^{52.1}\) At issue was whether a district court or an arbitrator should decide the enforceability of an agreement to arbitrate. The respondent, Jackson, had signed an employment agreement with the petitioner that provided arbitration for all "past, present or future" disputes arising out of Jackson's employment.\(^{52.2}\) In 2007, Jackson filed an employment-discrimination suit against the petitioner in the District Court for the District of Nevada. The District Court granted the petitioner’s motion to compel arbitration, stating that, because Jackson was challenging the agreement as a whole, the issue was for the arbitrator.\(^{52.3}\) The Ninth Circuit reversed and stated that the conscionability of the arbitration agreement was for the court to determine.\(^{52.4}\)

The Supreme Court, in a 5-4 decision, reversed on the grounds that section 2 of the FAA allows for challenging either the "validity of the agreement to arbitrate," or "the contract as a whole."\(^{52.5}\) However, Jackson in this case, was not challenging what the Court deemed the "delegation provision."\(^{52.6}\) The Court found that Jackson was instead challenging the enforceability of the entire agreement, not a specific provision of the agreement. Furthermore, the Court held that because section 2 states that an agreement to settle a controversy through arbitration is "valid, irrevocable, and enforceable" regardless of the validity of the contract in question, a court must uphold the provision to arbitrate unless specifically challenged.\(^{52.7}\) Because case law firmly holds that a challenge to an entire contract or agreement is an issue to be resolved by an arbitrator, Jackson’s failure to sever his delegation provision complaint from the entire agreement called for arbitration over the issue.\(^{52.8}\)

When faced with the decision of whether or not to stay a pending proceeding and/or compel arbitration under the FAA, the court must analyze the following factors:

1. whether the subject matter of the arbitration involves either a maritime transaction or a transaction in interstate commerce;

2. whether a valid agreement to arbitrate exists; and


\(^{52.2}\) *Id.*

\(^{52.3}\) *Id.* at 2.

\(^{52.4}\) *Id.*

\(^{52.5}\) *Id.* at 6 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 [2006]).

\(^{52.6}\) The delegation provision gave the arbitrator exclusive authority to resolve disputes relating to the enforceability of the Agreement. *Id.* at 8.

\(^{52.7}\) *Id.* at 7.

\(^{52.8}\) *Id.* at 8.
(3) whether the particular dispute falls within the scope of the arbitration clause (that is, whether the parties intended this type of dispute to be arbitrated).

If “the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability.”53 In determining whether the parties intended to arbitrate the particular dispute, courts will look at the nature of the arbitration clause—is it broad or is it narrow? For example, in one case the court presumed that the parties intended to arbitrate all future disputes when they included a broad arbitration clause in their agreement.54 Thus, clauses stating that “any claim or controversy arising out of or relating to the agreement” will be deemed broad and claims will thus be presumptively arbitrable.55 Further, a clause stating that any dispute “with reference to the interpretation of this Agreement or their rights with respect to any transaction involved” is deemed broad.56 Conversely, courts have also held that by incorporating a narrow arbitration clause, the parties only intended to arbitrate a narrow range of issues.57 The more narrow arbitration clauses usually define as arbitrable any claim “arising under” the contract (or similar language) and omit the words “or relating to.” Courts have traditionally construed this kind of narrow clause to indicate that the parties intended to arbitrate only matters concerning the interpretation and performance of the contract.58 The standard practice of the reinsurance industry can also define the scope of both a narrow and a broad arbitration agreement,58.1 but there is always a strong presumption, which the moving party must overcome, that a disputed issue falls within the arbitration agreement.58.2

56. Id.
57. See Twin City Monorail, Inc. v. Robbins Myers, Inc., 728 F.2d 1069 [8th Cir. 1984].
58. See Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458 [9th Cir. 1983].
Broad arbitration clauses usually expand the definition of arbitrability to encompass disputes sounding in contract and disputes sounding in tort. For example, the plaintiffs in *Buckeye Check Cashing, Inc. v. Cardegna* alleged that the company, which lent cash in exchange for personal checks in the amount of the cash plus a finance charge, “charged usurious interest rates” and that the agreement the plaintiffs had signed, which contained an arbitration clause, “violated various Florida lending and consumer-protection laws, rendering it criminal on its face.” The trial court granted, and the appeals court affirmed, Buckeye’s motion to compel arbitration; however, the Florida Supreme Court reversed based on “Florida public policy and contract law.” The U.S. Supreme Court reversed the Florida Supreme Court’s judgment, reaffirmed *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, and held that a claim challenging the validity of a contract as a whole is arbitrable, as long as the claim does not specifically challenge the validity of the agreement to arbitrate. In most instances, if there is any doubt as to whether the issues are arbitrable or whether the parties intended to arbitrate, courts will compel arbitration. This approach follows the current overall federal policy favoring arbitration.

The petitioning process for compelling arbitration can differ from state to state if the matter is brought in state court. The procedures are generally set forth in a particular state’s arbitration statute. For example, some states such as New York have procedural rules that explicitly authorize petitions to compel arbitration. The New York Civil Practice Law and Rules allow for a special proceeding requiring a petition and notice of petition, if there is no action pending, which can be used to bring before a court the first application arising out of controversy over arbitration. If the matter is brought in federal court, the proper procedure is less certain. One must read the FAA and the Federal Rules together to determine the proper procedure to compel arbitration.

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59. See Collins, 58 F.3d at 20; Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334 (7th Cir. 1984); *but see* Fuller v. Guthrie, 565 F.2d 259 (2d Cir. 1977) (“wholly unexpected tortious behavior” found nonarbitrable).

60. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 [2006].

60.1. *Id.* at 1207.

60.2. *Id.* at 1209 [quoting Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 864 (Fla. 2005)].

60.3. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 [1967] (a claim that a contract was procured by fraudulent inducement was arbitrable under a broad arbitration clause, as long as the arbitration clause itself was not procured by fraudulent inducement).

60.4. *Buckeye*, 126 S. Ct. at 1210–11 [2006].

61. N.Y. C.P.L.R. § 7503 provides that “[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration.”
According to section 4 of the FAA, an application for an Order to Compel should be in the form of a petition, and must set forth the basis for federal subject-matter jurisdiction and venue and describe the petitioner’s claim. The petition should contain information about the existence of a written arbitration agreement and that the respondent has failed to arbitrate a dispute according to the terms of the agreement. The petition and a notice of petition must be filed with the court and served upon the other party not less than five days before the hearing date. Actual service of the documents is governed by the Federal Rules of Civil Procedure.

If the respondent contests the petition, a hearing is held, much like that on a motion for summary judgment. The main issue at the hearing will typically be whether there is a genuine issue of material fact as to whether the parties agreed to arbitrate. If the court finds that there is a genuine issue of fact, then it must hold a trial. Under section 4 of the FAA, it appears the trial must occur quickly, and in fact, one court ordered a trial within five days of determining one was necessary. 62 Since the FAA is silent on the issue of pre-trial procedures, the Federal Rules of Civil Procedure govern. Courts have been known to allow a limited amount of pre-trial discovery.

Finally, the FAA specifically limits the trial to the issues of arbitrability, including whether the parties agreed to be bound by the arbitration agreement, whether the agreement was procured by fraud, whether the agreement was entered into by proper authority, and whether the dispute is within the scope of the agreement. There is no trial on the merits, and the arbitrator has the sole power to judge all other “procedural” issues, including determining whether a condition precedent to arbitration has been satisfied by a party; 62.1 deciding what procedure is demanded by the arbitration agreement; 62.2 and deciding whether there is a right to claims consolidation. 62.3 An order compelling or denying arbitration is a final appealable order.

62.2. Certain Underwriters at Lloyds v. Cravens Dargan & Co., 197 F. App’x 645, 647 [9th Cir. 2006].
62.3. See, e.g., Employer’s Ins. Co. of Wassau v. Century Indem. Co., 443 F.3d 573, 577 [7th Cir. 2006]; Allstate Ins. Co. v. Global Reinsurance Corp., 2006 U.S. Dist. LEXIS 56701 [S.D.N.Y. 2006] [where there was no sitting original arbitration panel, a question of consolidation still could not be decided by a court, but a new arbitration panel had to be convened to decide the question].
§ 6:5.2 Motion to Stay Arbitration

Naturally, arbitration proceedings are challenged when a party would rather litigate. The party that refuses to arbitrate may file a motion for an order to stay a threatened arbitration proceeding on the grounds that the arbitration has been improperly demanded because there was no agreement to arbitrate. Because the obligation to arbitrate arises from an agreement to do so, a court may enjoin arbitration upon a showing that no enforceable agreement exists.

There are several grounds on which an arbitration proceeding may be challenged. First, the party resisting arbitration may claim that the contract containing the arbitration agreement is an illegal contract, and thus not enforceable. Second, the party may claim that a condition precedent to arbitration has not been met, such as a provision requiring that a dispute be submitted to a third party before arbitration can be demanded. Some courts, however, have held that whether a condition precedent to arbitration has been met is an issue for an arbitrator to decide. Third, where the arbitration agreement covers some but not all of the claims in dispute, or where all of the parties are not signatories to the arbitration agreement, a party may argue that arbitration is not appropriate because of the need to proceed in two forums. However, in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., the Supreme Court held that even though ordering arbitration may result in dual proceedings, the FAA requires piecemeal litigation when necessary to give effect to an arbitration agreement. Fourth, a party may try to avoid arbitration on the grounds that all necessary third parties cannot be joined in the arbitration because they are not parties to the arbitration agreement. However, rather than find that arbitration is not permissible, multiple arbitration proceedings may be necessary and may be consolidated with the consent of the parties or court order.

64. See Kahn v. Smith Barney Shearson, Inc., 115 F.3d 930 (11th Cir. 1997) (under New York law, when ruling on motion to stay arbitration, court addresses whether the parties made a valid agreement to arbitrate). A court trial on arbitrability will be required where a party alleges and provides some evidence that the contract is void as opposed to merely voidable. ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co., 307 F.3d 24 (2d Cir. 2002).
A party might also argue that arbitration has been waived by actions inconsistent with the right to arbitrate. The right to arbitrate is waivable just like any other contract right. However, the U.S. Supreme Court has held that there is a strong presumption against waiver.  

Courts have established a three-part test to determine if there has been waiver. Generally, in order to establish waiver, it must be shown that the waiving party

(1) had knowledge of the right to arbitrate;
(2) acted inconsistently with that right; and
(3) prejudiced the party opposing arbitration by such inconsistent acts.

§ 6:5.3 Arbitration of Claims in Liquidation

An increase in arbitration, coupled with an increase in insolvencies, raised the issue of whether a liquidator is bound by the insolvent company’s agreement to arbitrate. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”) was initiated in 1958 in order to encourage the recognition of international arbitration agreements and awards. However, by enacting the McCarran-Ferguson Act, Congress gave the states broad powers to regulate the business of insurance. In response to this grant of power, states have enacted legislation that attempts to provide a comprehensive method for liquidating an insurance company. As a result, state law often vests exclusive jurisdiction over liquidations in a state court proceeding as opposed to arbitration. The conflict generally arises where the reinsurer prefers to arbitrate a dispute in contravention of the state liquidator’s right to undertake an insurance company’s insolvency in state court.

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67. Id.
68. See, e.g., Stifel, Nicolaus & Co. v. Freeman, 924 F.2d 157, 158 [8th Cir. 1991].
69. However, it was not until December 29, 1970 that the Convention became law in the United States.
Case law reveals a split of authority as to how to resolve this issue. A seminal case dealing with the arbitrability of claims in liquidation is *Corcoran v. Ardra Ins. Co.* In *Corcoran*, the New York Court of Appeals held that a dispute between a liquidator and a foreign reinsurance corporation was to be resolved by the state liquidation court and not subject to arbitration. The court deferred to the state interest in maintaining control over liquidation proceedings by holding that the arbitration clause was incapable of being performed due to the insolvency; and that the dispute was thereby within an exception to the Convention. In *Corcoran*, pursuant to a reinsurance agreement, Nassau Insurance Company ceded to Ardra Insurance Co. a portion of risks under each policy issued by Nassau. The reinsurance agreements contained broad arbitration clauses, which compelled arbitration of any dispute between Ardra and Nassau. Nassau subsequently experienced severe financial difficulties and, pursuant to Article 74 of the New York Insurance Law, Corcoran was appointed as liquidator. The liquidator brought an action seeking reinsurance recoverables alleged to be due from Ardra. Ardra moved for dismissal and to compel arbitration under the Convention. The Appellate Division held that the arbitration agreement was “null and void” under Article II(3) of the Convention. Therefore, the court found, Article 74 of the

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74. See, e.g., *Bennett v. Liberty Nat’l Fire Ins. Co.*, 968 F.2d 969 (9th Cir. 1992) (insurer’s liquidator was bound by the insurer’s pre-insolvency agreement to arbitrate all disputes arising out of its contractual relationship); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381 (9th Cir. 1997) (where no law exists prohibiting arbitration of disputes involving an insolvent insurer, the liquidator’s claims that are pursued outside of the state’s statutory insolvency proceedings are subject to arbitration); but see, e.g., *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) (anti-arbitration provision of the Kentucky Liquidation Act was exempt from preemption by the Federal Arbitration Act under the McCarran-Ferguson Act); *Wagner v. Swiss Reinsurance Am. Corp.*, 2004 U.S. Dist. LEXIS 5245 (D. Neb. 2004) (Nebraska’s Liquidation Act, which designates the state forum for adjudication of claims filed under the Act, reverse-preempts application of diversity jurisdiction and thereby frustrates removal to district court); *Koken v. Reliance Ins. Co.*, 846 A.2d 778, 781 (Pa. Commw. Ct. 2004) (liquidator may decline to pursue arbitration by asserting a compelling reason to revoke the applicable contractual provision); *Benjamin v. Pipoly*, 155 Ohio App. 3d 171 (2003) (absent express consent to do so, liquidator is not compelled to arbitrate claims arising from contracts that the liquidator has disavowed under Ohio’s liquidation statutes).


76. *Id.*, 567 N.E.2d at 970.

77. Article II of the Convention enumerates certain grounds on which the court may base a refusal to recognize or enforce an arbitration agreement.
New York Insurance Law vested “exclusive jurisdiction” over affairs of an insolvent insurer in the Supreme Court of New York, thereby rendering arbitration clauses inoperative. The Court of Appeals subsequently affirmed the decision, and likewise concluded that the arbitration clause was not capable of being performed.

The decision promoted New York’s strong public policy of preserving the New York Supreme Court’s jurisdiction over liquidation proceedings. The court recognized that there were countervailing policy concerns of international comity that militate in favor of arbitration. However, the court found that the underlying concerns of the Convention were not implicated, because the case did not “present an international merchant subjected to unfamiliar judicial proceedings and vagaries of foreign law.” Thus, the court concluded that even though the reinsurance agreements fell within the broad terms of the Convention, the liquidator was excepted from its terms.

In contrast, the court in Bennett v. Liberty National Fire Insurance Co. found it appropriate to enforce an insurer’s arbitration agreement against the state liquidator because the liquidator’s rights were derived primarily from the insolvent insurer’s contracts rather than Montana’s insolvency statute. The court reached its conclusion even though state law conferred on the liquidator broad jurisdiction over insurance insolvency proceedings and complete control and authority over the insolvent’s assets. The court reasoned that until the underlying contractual dispute has been resolved, the authority that the state law grants the liquidator does not vest.

At least three other courts interpreting arbitration clauses similar to those in Bennett have permitted arbitration against a liquidator.

Similarly, in In re Liquidation of Integrity Insurance Co., a court in New Jersey found that a state insurance liquidation statute did not preempt an arbitration agreement, because there was no conflict between the arbitration agreement—which determined the amount of damages on a claim—and the liquidation statute, which simply enforced that determination. Because there was no conflict, McCarran-Ferguson

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79. Corcoran, 567 N.E.2d at 973.
82. Id. at 970.
83. Id. at 972.
did not apply, and state law did not preempt the duty to mandate arbitration in the Federal Arbitration Act.\textsuperscript{84.1} 

In \textit{Mid-Continent Casualty Co. v. Gen. Reinsurance Corp.}, the defendant moved to compel arbitration over a dispute related to two reinsurance contracts.\textsuperscript{84.2} However, at the time the contracts were signed, the Oklahoma legislature had enacted the Oklahoma Uniform Arbitration Act (OUAA). The OUAA excluded from arbitration disputes arising out of insurance contracts unless the contracts were between two insurance companies.\textsuperscript{84.3} The OUAA was eventually amended to validate all arbitration agreements whenever made, regardless of the content of the dispute. The Tenth Circuit held that the legislative amendment to the OUAA would apply retroactively to the contracts between the parties and the motion to compel arbitration was granted.\textsuperscript{84.4} 

Courts have also compelled arbitration in situations where a state liquidator has assigned contracts containing arbitration clauses to third parties. In \textit{B.D. Cooke & Partners Ltd. v. Certain Underwriters at Lloyd’s, London}, the New York Superintendent of Insurance, in an effort to close the estate of an insolvent corporation, had assigned contracts to B.D. Cooke. In exchange for the assignment, Cooke was to surrender its remaining claims against the estate.\textsuperscript{84.5} Some time after the assignment, a dispute arose between Cooke and underwriters at Lloyd’s, which was an assignee under one of the assignments. Lloyd’s moved to compel arbitration under the contract.\textsuperscript{84.6} In an effort to avoid arbitration, Cooke argued that because they were assigned the contracts by the liquidator (who was exempt from arbitration under New York law), Cooke too should be exempt. In dicta, the court agreed that had a dispute arisen between Lloyd’s and the liquidator, presumably the motion to compel arbitration would have been denied. However, because Cooke was assigned the contract by the state liquidator, Cooke no longer stood in place of the liquidator and therefore was not exempt from the agreement to arbitrate contained in the assigned contract.\textsuperscript{84.7}

\begin{itemize}
\item\textsuperscript{84.2} \textit{Mid-Continent Cas. Co. v. Gen. Reinsurance Corp.}, No. 07-5050, 2009 WL 1426779, at *1 [C.A. 10 (Okla.) May 22, 2009].
\item\textsuperscript{84.3} \textit{Id.}
\item\textsuperscript{84.4} \textit{Id. at 3}.
\item\textsuperscript{84.5} \textit{B.D. Cooke & Partners Ltd. v. Certain Underwriters at Lloyd’s, London}, 606 F. Supp. 2d 420, 421 [S.D.N.Y. 2009].
\item\textsuperscript{84.6} \textit{Id. at 422}.
\item\textsuperscript{84.7} \textit{Id. at 425}.
\end{itemize}
§ 6:6  Initiating Arbitration

§ 6:6.1  Arbitration Demand

The typical arbitration demand is made in accordance with the terms of the arbitration agreement; therefore, once it has been determined that the dispute is one that is provided for in the agreement, the party wishing to pursue arbitration should review the agreement to see if it contains any requirements pertaining to demand. The FAA does not direct a specific form of method for arbitration demand, but demand usually involves a letter to an officer of the other party, generally setting forth facts of the claim that give rise to a right to arbitrate. The demand letter also usually identifies the reinsurance contract at issue and requests explicit relief.

In addition, the demand letter routinely contains the name of the petitioner’s party-appointed arbitrator. Therefore, if the agreement has set a specific time limit in which the other side must name an arbitrator, the clock starts running against the other side to do so. The demand should be sent registered mail or by telephone facsimile transmission. If there are any noncontracting parties involved in the reinsurance transaction, including intermediaries, a copy of the demand should be sent to them as well.

§ 6:6.2  Appointment of Arbitrators

Like an arbitration demand, the appointment of arbitrators is governed by the arbitration agreement. Most agreements specify how many arbitrators will be used and the method by which they will be chosen. Typically, the arbitration agreement allows each party to select one arbitrator; however, the agreement is usually silent as to the obligations of this arbitrator. Since the agreement is usually silent, it is and has been a common perception and practice in the reinsurance industry for a party to appoint an arbitrator who will serve as their advocate. There is now disagreement in the industry as to the role of party-appointed arbitrators. Some people feel arbitrators should be advocates, while others feel that arbitrators should play a neutral role in the arbitration process. Guidelines promulgated by the Reinsurance Association of American (RAA) had recognized the role of party-appointed arbitrators as advocates, but suggested restrictions on

communications between the arbitrator and the party. In April 2004, Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes were promulgated by the Insurance and Reinsurance Dispute Resolution Task Force and endorsed by the RAA. Significantly, two versions were adopted: one for traditional, party-appointed arbitrators, and one for neutral panels.  

On March 1, 2004, AAA adopted a newly revised Code of Ethics for Arbitrators in Commercial Disputes. The most important changes to the Revised Code of Ethics is that a presumption of neutrality is applied to all arbitrators, even if they are party-appointed. The presumption applies unless otherwise agreed by the parties or provided for in applicable rules. This is a change from the prior 1977 Code, which presumed non-neutrality. The 2004 Code requires all party-appointed arbitrators to learn as soon as practicable whether the party appointing them intends for them to be neutral or not. The 2004 Code provides exemptions for so-called Canon X arbitrators, which are those arbitrators that are understood not to be subject to the rules of neutrality.

Finally, ARIAS U.S. has adopted Guidelines for Arbitrator Conduct. These guidelines set out standards of conduct to guide arbitrations. ARIAS U.S. has also recently offered a “Neutral Selection Procedure,” which is a method for selecting a panel through a neutral selection process.

The FAA does not address the issue of what role party-appointed arbitrators should play. However, section 10 of the FAA does provide relief from an arbitration award if bias or misconduct of an arbitrator is established. Commercial Arbitration Rule 19 of the American Arbitration Association specifies the obligations of the neutral arbitrator, or umpire, selected by the two party-appointed arbitrators (discussed later in this chapter), to disclose circumstances that might affect impartiality. However, the AAA’s rules do not provide a clear picture of the role of party-appointed arbitrators.

The next step in selecting an arbitrator is determining what qualifications are required in the arbitration agreement and what qualifications, not specified in the agreement, are important to look for.

Many reinsurance arbitration agreements require arbitrators to be an officer of a reinsurance or insurance company. Some clauses require the officers to be active and others allow either active or retired officers. Parties should be careful in drafting the arbitration agreement, since requiring only active officers could substantially limit the pool of available arbitrators, who may not always be available due to their


88. The AAA’s Code of Conduct is available at www.adr.org.
own busy work schedules. In addition, parties should be careful when requiring “officers” of an insurance or reinsurance company, since at least one court has disqualified a proposed arbitrator on the grounds that he was a “director” of an insurance company, but not an “officer.” 89

There are other qualities to look for in an arbitrator that are generally not set forth in the arbitration agreement. These include:

• considerable insurance or reinsurance experience, including substantive knowledge of facultative and/or treaty reinsurance;
• experience in claims, underwriting, and contract interpretation;
• the ability to clearly convey the opinions and ruling of the arbitration panel to promote confidence in the eventual award (an especially important quality for the umpire, whose selection is discussed later in this chapter);
• some familiarity with procedures involved in the arbitration process;
• a judicial temperament—the ability to offer each side an equal opportunity to present its position, while still conducting an efficient hearing; and
• the ability to both recognize and reduce or prevent extraneous discussion of irrelevant issues.

To assist in the selection process, several professional associations, like the Reinsurance Association of America, the Association of Independent Reinsurance Consultants, and the AIDA Reinsurance and Insurance Arbitration Society (ARIAS), maintain lists of potential arbitrators.

Once the arbitration panel is in place, panel members will usually request that both parties sign a stipulation agreeing to the selected panel and ask the parties to execute an indemnity and hold harmless agreement. As discussed later in this chapter, if a party opposes an arbitrator due to a perceived bias, that party should politely decline the stipulation and note objections on the record.

Another factor to consider in arbitrator selection is what to do if an arbitrator resigns, is removed, or dies. The Rules of the AAA state that if an arbitrator is unable to perform the duties of the office, the office is declared vacant. If the vacancy occurs after the hearing has commenced, the remaining arbitrators may continue with the hearing and final determination, unless the parties agree otherwise. The FAA handles vacancies by allowing either party to petition the court to appoint a replacement arbitrator. At least one court has found that, in

89. Employers Ins. of Wausau v. Jackson, 527 N.W.2d 681 (Wis. 1995).
the event of resignation of an arbitrator, where the agreement is silent on what to do in such a situation, the court has the power to appoint an arbitrator.\textsuperscript{89.1}

In general, where AAA Rules are not being used, if one member of a three-person panel dies before rendering an award, and the arbitration agreement is silent as to this occurrence, the authority of the panel is terminated and the arbitration must recommence with a full panel.\textsuperscript{90}

In terms of compensation, each party pays its own arbitrator and both parties usually negotiate compensation directly with the umpire.

The parties must be careful to adhere closely to the terms of the arbitration agreement regarding the timing of arbitrator selection. In one case, the court strictly construed the parties’ arbitration agreement, which required arbitrator selection within one month of the demand. One party was late in its selection and the court held that, under the arbitration agreement, the other party was entitled to select the first party’s arbitrator, as well as its own. The first party argued that the delay in selecting an arbitrator should be excused for equitable reasons, but the court did not agree.\textsuperscript{91}

While arbitration agreements typically allow the demanding party to choose the defaulting party’s arbitrator, this is not always the wisest approach, since any ultimate award may be overturned based on arbitrator partiality. A better approach, at least under the FAA, may be to request the court to enforce the arbitration agreement by its terms, forcing the defaulting party to choose its arbitrator.

\section*{§ 6:6.3 \textbf{Selection of Umpire}}

Arbitration agreements vary when it comes to selecting an umpire. In some instances, each party consults with its own arbitrator and proposes at least three names. If both parties name the same person, that person is selected as umpire. If there are no matching names, each side strikes two names from the other side’s list and a coin toss determines which of the two remaining people will serve as umpire. An alternative method allows the party-appointed arbitrators to select the umpire.

Two other alternatives would be to allow the court to select an umpire or to request the AAA to designate one. These two strategies are not favored, however, because the area of reinsurance is very

\begin{enumerate}
\item[89.1.] See AIG Global Trade & Political Risk Ins. Co. v. Odyssey Am. Reinsurance Co., 2006 U.S. Dist. LEXIS 73258 (S.D.N.Y. 2006) [when arbitration agreement did not specify what to do when an arbitrator resigned, court was mandated to appoint an arbitrator].
\end{enumerate}
specialized and such court-appointed or AAA-appointed umpires may not have the specific knowledge necessary to make them effective arbitrators in the reinsurance context. Like party-appointed arbitrators, an umpire selected for a reinsurance case should have extensive industry experience and a solid understanding of the unique legal principles and business practices underlying complex reinsurance disputes. Also, at this stage the dispute might not be pending before any court; therefore, it would be very difficult to seek a court’s help. And the help would be limited in any case, since the court probably would not have access to the specialized arbitrators needed for productive reinsurance arbitration.\(^\text{92}\)

It should be noted that even if the agreement specifies the manner in which an umpire will be selected, if one of the parties later refuses to observe that method, it cannot be imposed on them. For example, in *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*,\(^\text{93}\) the contract between the two parties specified that the umpire would be selected by drawing lots. The court held, however, that if one of the parties later refused to use this method, 9 U.S.C. § 5 authorized the court to select an umpire. Courts may, however, mandate that parties go through the arbitration agreement’s selection procedure one last time, before the court intervenes by selecting an umpire.\(^\text{93.1}\)

In general, the umpire’s integrity, experience, and temperament will set the tone for the conduct of the hearing. There should be no issue of the advocacy of the umpire, since he is chosen to be a purely neutral participant in the arbitration. Because of this required neutrality, umpires are usually required to complete disclosure forms. The disclosure forms are typically submitted jointly by the parties to the umpire, and require the umpire to reveal any prior dealings, professional or social, with either of the parties, their counsel, or their respective arbitrators, and also provide for continued disclosure throughout the arbitration.

Commercial Arbitration Rule 19 states that a “person appointed as neutral arbitrator [shall] disclose to the AAA any circumstance likely to affect impartiality, 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 counsel.”

The AAA provides standard disclosure forms to be completed by neutral arbitrators. Such disclosure forms contain the following statement:

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\(^{92}\) Charles W. Havens & Elizabeth B. Sandza, *supra* note 86.


It is important that the parties have complete confidence in the arbitrator’s impartiality. Therefore, please disclose any past or present relationship with the parties or their counsel, direct or indirect, whether financial, professional, social or of any other kind. If any relationship arises during the course of the arbitration or if there is any change at any time in the biographical information that you have provided to the AAA, it must also be disclosed. Any doubt should be resolved in favor of disclosure. If you are aware of such a relationship, please describe it below. The AAA will call the facts to the attention of the parties’ counsel.

An interesting umpire selection issue arose in a dispute involving twelve different reinsurance contracts, seven of which allowed for selection of the umpire by drawing lots. In that case, one party suggested two possible umpires but the other party would not accept either. Thereafter, the first party refused to suggest any more umpires, and insisted on the lot-drawing method of selection found in the seven contracts. The parties petitioned the trial court, which selected the umpire. One of the parties disagreed with the selection and appealed. The appellate court analyzed whether the trial court had exceeded its authority in selecting an umpire if seven of the twelve contracts specified the method for umpire selection. The appellate court upheld the trial court’s selection of the umpire on the basis that it was Congress’s intent, in implementing the FAA, to allow courts to facilitate the arbitrator selection process when the parties are at an impasse.

Many cases have discussed whether an umpire has made sufficient and appropriate disclosure. Some of these cases have arisen in the context of setting aside an award based on arbitrator bias, and some have arisen when a party seeks pre-award disqualification, which is discussed later in this chapter. It should be noted that, in a specialized arena such as the reinsurance industry, it would be nearly impossible to find a panel of arbitrators who had absolutely no prior contacts with anyone involved in the arbitration. Thus, the case law recognizes that minimal contact is sometimes unavoidable and, therefore, permissible. For example, in Transit Casualty Co. v. Trenwick Reinsurance Co., the court disregarded factors including:

1. the umpire’s ownership of stock in a subsidiary company related to the prevailing party;
2. his attempts to appoint that party’s arbitrator in another proceeding; and

94. Id.
95. Charles W. Havens & Elizabeth B. Sandza, supra note 86.
his insulting remarks about the losing company’s president.\textsuperscript{96}

This case demonstrates that, at least in the world of reinsurance, courts recognize that complete neutrality may often be an impossibility.

As mentioned elsewhere in this chapter, section 10 of the FAA allows a court to vacate an arbitration award if there is “evident partiality” of an arbitrator or if there is corruption on the part of an arbitrator. The seminal ruling on “evident partiality” is the United States Supreme Court ruling in \textit{Commonwealth Coating Corp. v. Continental Casualty Co.}\textsuperscript{97} In \textit{Commonwealth}, the umpire failed to disclose a regular business relationship between himself and one of the parties. The court held that the award should be vacated even though there was no actual bias, and despite the fact that the panel conducted a fair and impartial hearing and reached a proper result on the issues. The concurring opinion of Justice White (joined by Justice Marshall) is the most often-cited part of the opinion. Justice White recognized that “it is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function.” Nonetheless in support of the decision, Justice White wrote, “it is enough for present purposes . . . that where the arbitrator has substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed.” Thus, it appears that an ongoing business relationship is enough to destroy neutrality.

In a different case, the court did not vacate an award even though the umpire failed to disclose certain information.\textsuperscript{98} The opposing party argued that the umpire was partial because he failed to disclose an interview he had before the arbitration took place to serve as an arbitrator in a separate dispute, similar to the one at issue. The opposing party argued unsuccessfully that the umpire had an interest in the outcome of the current arbitration which, if decided a certain way, could enhance his reputation in the industry. The court found the benefit so minor to the umpire that it did not rise to the level of “evident partiality.” The court ultimately held that the umpire was not required to disclose prior or current relationships with nonparties. Thus, the line seems to be drawn at the party/nonparty distinction. Finally, the court recognized that the parties chose arbitration because they wanted their dispute resolved by industry experts, and that that expertise comes, somewhat, at the expense of complete partiality.

But even where the arbitrator has had a relationship with a party, time factors also seem to play a role. Thus, another court found no


\textsuperscript{97.} Commonwealth Coating Corp. v. Cont’l Cas. Co., 393 U.S. 145 [1968].

“evident partiality” even though the umpire did not disclose that he had worked for the president of one of the parties fourteen years earlier.\footnote{99}{Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983).}

\section*{§ 6:6.4 Pre-Award Disqualification}

The courts are divided on whether a court can disqualify an arbitrator before an arbitration award is ordered or whether a court’s review of arbitrator disqualification is limited to vacating an award already entered. The U.S. District Court for the Northern District of Illinois, for example, held that courts may disqualify an arbitrator found to be biased before an arbitration begins only if the arbitration agreement speaks to the issue of bias and would preclude appointment of that arbitrator.\footnote{100}{In re Arbitration Between Certain Underwriters at Lloyd’s, London & Cont’l Cas. Co., 1997 WL 461035 (N.D. Ill. Aug. 7, 1997).}

The FAA does not expressly empower courts to disqualify an arbitrator before the arbitration is concluded, but it does allow an award to be vacated for “evident partiality” of an arbitrator or corruption on the part of an arbitrator in the arbitration process. Some state statutes, however, specifically allow pre-award disqualification and some judicial decisions have supported such action.\footnote{101}{Astoria Med. Group v. Health Ins. Plan, 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962).}

One court held that it had no jurisdiction to review an arbitrator’s qualification prior to the entry of the arbitration award. In Old Republic Insurance Co. v. Meadows Indemnity Co., Old Republic attempted to have Meadows’ arbitrator disqualified for bias, based on two unrelated lawsuits in which the two current arbitrators were opponents. The court refused to review the arbitrator’s qualification, stating that Old Republic had an adequate remedy in section 10 of the FAA if appeared to them that the arbitration had been conducted unfairly. The court also implied that even if it had jurisdiction to determine pre-award disqualification, it would only do so in “extreme circumstances” and only if “the bias is more real than potential.”\footnote{102}{Old Republic Ins. Co. v. Meadows Indem. Co., 870 F. Supp. 210 (N.D. Ill. 1994).} In fact, a court in the Southern District of New York found that the only time to fight an arbitrator’s bias, where the arbitrator had been selected in conformity with an arbitration agreement, was after arbitration had concluded. In Global Reinsurance Corp.—U.S. Branch v. Certain Underwriters at Lloyd’s London, the court held that the failure to nominate an unbiased arbitrator was not a “lapse” under section 5 of the Federal Arbitration Act, in that the word “lapse” referred only to...
a long duration of time during which the selection procedure had stalled, not a failure to nominate an unbiased arbitrator.\textsuperscript{102.1}

Some creative parties have used section 4 of the FAA to petition the court to disqualify an arbitrator. Section 4 requires all arbitrations to proceed in the manner as set forth in the arbitration agreement. If the agreement calls for a “disinterested” arbitrator, and the selected arbitrator is perceived as biased, one can argue the arbitration agreement is violated and petition the court to disqualify the arbitrator.

In one case, the court agreed with this argument and ruled that it had authority to disqualify the arbitrator before the award was entered.\textsuperscript{103} The court reasoned that if it has the authority to make a qualification/bias inquiry after the award, it must be able to make the inquiry before the award. The court expressed a concern that if a biased arbitrator is left in place, any award would likely be vacated on appeal. In this particular case, the arbitrator in question was an officer of a co-reinsurer under the same contracts in which one of the parties participated and which participated in denying the other party’s claim. The arbitrator had personally reviewed confidential reports of the other party regarding the contracts. The objecting party relied on language in the arbitration agreement calling for “disinterested” arbitrators in arguing to disqualify the arbitrator. The court did not address the meaning of disinterested, but ruled that it did have authority to disqualify the arbitrator as part of its ability to enforce the arbitration agreement under section 4 of the FAA. As an aside, the arbitrator in question admitted that he was predisposed to his party’s view of the dispute, but claimed that he was disinterested and that he had no personal or financial interest in the outcome.

In another case where the court agreed to intervene, the reinsurer successfully moved to remove an arbitrator who was already serving as the other party’s arbitrator in a similar dispute with a different reinsurer. Both of the arbitrations involved allegations of negligent and improper claims handling by the reinsurers under the same program, only involving different contracts and time periods. The court viewed the similarities between the two arbitrations as significant enough to disqualify the arbitrator, reasoning that there was a risk that the arbitrator might be influenced by evidence in the other arbitration and the complaining party in the present arbitration would not be able to rebut that evidence.

In another case, the court, in finding no bias, did not address the issue of whether it had authority to disqualify the arbitrator prior to

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the award, but found that the facts presented fell short of establishing a reasonable impression of partiality. 104 In that case, the party seeking to disqualify the arbitrator claimed that the arbitrator had “irreconcilable conflicts of interest.” However, the purported “conflicts” were with a nonparty law firm involved in the arbitration and the objecting party claimed that the arbitrator was adverse to the law firm in one matter, but supportive of the same law firm in another matter. Therefore, none of the conflicts were with the parties involved in the arbitration; they were only with the defendant’s law firm, and the court felt that this was a case of mere appearance of bias, in which it would not get involved, and not a case where the possibility of bias rose to the level necessary for the court to get involved on a prejudgment basis.

The case law seems to suggest that instances of “potential bias,” “institutional bias,” or the “appearance of bias” are not likely to be viewed as warranting prejudgment judicial involvement. However, if there is strong evidence of bias on the part of an arbitrator, at least some courts will consider the case before a judgment has been made. Obviously, the stronger the evidence of bias, the more likely a court would be to intervene. 105

In any event, if a party feels that an arbitrator is biased and there is not enough evidence to move for disqualification prior to the award, an objection to that arbitrator should be noted on the record. In addition, if a party feels that an arbitrator is not qualified due to bias, that party should decline to sign a stipulation as to the challenged arbitrator and put the declination and the reason on the record. At least one court has supported this practice stating, “it is fundamental that to preserve a claim involving alleged bias or misconduct of an arbitrator the alleged misconduct must be raised when it comes to the attention of the party making the claim.” 106

§ 6:7 Interim Relief

Like the issue of pre-award disqualification, courts are divided on whether an arbitration panel has authority to order interim relief. Pre-award security, such as attachment, or other interim relief, such as a preliminary injunction, may be critical to protect a party’s interests pending the arbitration and to protect the enforceability and value of an eventual arbitration award.

105. Thomas N. Tartaro, Pre-Award Challenges Based on Arbitrator Bias: Not Necessarily a Lost Cause, MEALEY’S LITIGATION REPORTS, REINSURANCE, Vol. 6, No. 2 [May 24, 1995].
The FAA addresses the issue of pre-award security, but only in the context of a maritime transaction. \(^{107}\) However, the Second Circuit Court of Appeals held that section 8 of the FAA also applies to nonmaritime transactions. Judge Learned Hand, in dismissing the argument that allowing attachments in arbitration proceedings is contrary to the federal policy to promote arbitration, wrote:

> The most common reason for arbitration is to substitute the speedy decision of specialists in the field for that of juries and judges; and that is entirely consistent with a desire to make effective as possible recovery upon awards, after they have been made, which is what provisional remedies do. \(^{108}\)

Other court decisions also support the proposition that the FAA authorizes an arbitration panel to order interim relief. \(^{109}\)

Courts look at various factors to determine whether a particular arbitration panel has properly authorized interim relief, including first and foremost whether the arbitration agreement addresses the issue. Courts are also guided by section 10(a) of the FAA to determine whether “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.”

One court, in particular, has set forth an analysis to determine whether an arbitration panel’s award (in this context the award of interim relief) exceeded their powers. \(^{110}\) The analysis includes a review of the relief granted to determine if it can be rationally derived either from the agreement between the parties or from the parties’ submission to the arbitrators. The analysis also includes a review of whether the terms of the award are rational. If terms are “completely irrational” or if the panel’s decision summarily disregards the parties’ agreement, the court should vacate the interim relief award on the grounds that it exceeds the panel’s authority.

In a Pennsylvania case, the court found that the panel had acted within the scope of its authority when it required one of the parties to obtain a $1.5 million letter of credit in favor of the other party as

pre-award security. The court reasoned that the panel’s decision was not a manifest disregard of the treaty, nor completely irrational. The court concluded that the panel was acting within its authority since it correctly derived the award (ordering the letter of credit security) from the “essence” of the treaty and the parties’ submissions to the panel.

Another case addressed the issue of whether a trial court has discretion to order a preliminary injunction. The appellate court held that the trial court did have the discretion to order a preliminary injunction to preserve the status quo pending the parties’ arbitration of the dispute. The court reasoned that the failure to enjoin the questionable behavior (in this case soliciting customers) would render the arbitration a “hollow formality,” and any subsequent arbitration award could therefore not return the parties to the status quo ante.

On the other hand there is case law which holds that pre-award security and interim relief is not available in the context of arbitration. These cases generally hold that the grant of such interim or preliminary relief is inconsistent with the overall purpose of arbitration. In short, since the case law regarding pre-award security in arbitration is unsettled, parties should consider addressing provisional remedies in their arbitration agreement.

§ 6:8  The Hearing

§ 6:8.1  Organizational Meeting

Following the selection of the panel, the next step is to conduct an organizational meeting. At the organizational meeting, the arbitrators will disclose their relationships with the parties, their counsel, other panel members, and potential witnesses. The arbitrators will usually complete and sign disclosure statements, which they have received before the meeting. The panel will then usually have the parties execute a stipulation setting forth their acceptance of the panel. As discussed earlier in this chapter, it is usually at the organizational meeting or shortly thereafter that the parties may seek interim relief before the hearing.

§ 6:8.2 Location and Atmosphere

Regarding the actual hearing itself, panels seldom care where the hearing takes place, but typically the parties do. The parties must understand that the arbitrators are not going to be influenced by the location of the hearing room, even if it happens to be one of the parties’ conference rooms. In fact, parties should keep in mind a conference room is less expensive than conducting an arbitration at a hotel. Nonetheless, many parties will insist on a neutral location and the neutral atmosphere of a hotel.

In general, most panels appreciate and probably function better in an informal atmosphere. Panels also like informality with regard to record keeping during a hearing. On the other hand, if the disputed issue is complex, the panel will be more likely to grant a party’s request for a more stringent procedure in identifying documents during the hearing. Actually, however, a hearing is not always even necessary. Many times, single-issue contract disputes can be resolved without a hearing, simply by the panel reviewing all of the relevant documents and then issuing a written decision.\(^\text{114}\)

§ 6:8.3 Gathering Evidence

The parties can agree to conduct discovery by agreement. Where there is no agreement on discovery, it has been generally accepted that discovery is not favored in arbitration.\(^\text{115}\) This is particularly so in New York. The general rule that a request for discovery in aid of arbitration will not be permitted was enunciated in *In re Katz (Burkin).*\(^\text{116}\) There, the lower court directed examinations before trial in aid of arbitration. In reversing the grant of discovery, the Appellate Division, First Department, stated that discovery should not be permitted except under “extraordinary circumstances.”

Discovery in aid of arbitration was also held inappropriate in *Commercial Solvents v. Louisiana Liquid Fertilizer Co.*,\(^\text{117}\) where a party demanded arbitration in accordance with the terms of a contract. In determining that it was inappropriate to compel discovery, the court stated that a party choosing to arbitrate cannot then seek burdensome discovery from his adversary. Similarly, in *Mississippi Power Co. v.*

\(^{114}\) Schiffer, *supra* note 8.


\(^{116}\) *In re Katz (Burkin)*, 3 A.D.2d 238, 160 N.Y.S.2d 159 [1st Dep’t 1957]; *see also* DeSapio v. Kohlmeyer, 35 N.Y.2d 402, 406, 362 N.Y.S.2d 843, 847 [1974] [if they desire availability of court procedures, parties should not agree to arbitration].

Peabody Coal Co.,\textsuperscript{118} the plaintiff power company brought an action against the defendant coal company for breach of contract. The defendant sought a stay pending arbitration, which was granted; however, the court directed that discovery could proceed simultaneously with the arbitration. After the initial judge recused himself, the defendant refused certain discovery requests, and the plaintiff moved to compel discovery. In rejecting the request to compel discovery, the new judge stated that allowing discovery in aid of arbitration was inconsistent with the goal of arbitration.\textsuperscript{119}

However, there have been cases where discovery in aid of arbitration has been permitted. In Bergen Shipping Co. v. Japan Marine Services, Ltd.,\textsuperscript{120} the court permitted the depositions of New York members of a vessel to aid arbitration proceedings scheduled to commence in Tokyo. The basis for the ruling was that the crew was about to depart for reassignment and, therefore, would be unavailable at the arbitration. However, the court noted that this was clearly a case of extraordinary circumstances. Similarly, in Bigge Crane & Rigging v. Docutel Corp.,\textsuperscript{121} the court permitted discovery in aid of arbitration and stated that the arbitrators “may be able to devise sanctions if they find [defendant] has impeded or complicated their task by refusing to cooperate in pre-trial disclosure of relevant material.”

Notwithstanding the general rule against discovery, the parties may agree to it, or ask the arbitration panel for certain forms of discovery. Some attorneys feel that the use of discovery is the best way to keep the parties “honest” and to develop the facts of their respective cases. However, it is in the arbitrators’ discretion to order the production of documents or appearance of persons relevant to the proceedings. Also, the arbitrators are able to control the proceedings to the extent that they can limit the testimony of witnesses and even eliminate direct testimony of a witness and allow only cross-examination. The subpoena power of arbitration panels is discussed later in this chapter.

Unfortunately, most arbitration agreements do not address the permissibility or scope of discovery, which is why the parties must turn to the panel for permission and guidance. This also gives the arbitrators great control as to what discovery, if any, will be allowed. Therefore, it is very important that such issues be discussed and reduced to writing in the arbitration agreement.

The issue of discovery is usually addressed at the organizational meeting and is typically one of the most difficult procedural issues to

\textsuperscript{119} Id. at 567.
resolve. Generally, the panel will permit the parties to set their own discovery schedule; however, problems can and will occur. Problems typically arise when one party wants extensive discovery and the other does not. The panel presiding in these situations will have to analyze the fairness and practicality of the request, and also consider the time factors involved. One way for the panel to resolve such a dispute is that arbitrators can influence an otherwise disgruntled party to comply with a discovery order simply by their ability to draw a negative inference from a party’s failure to produce a document or supply a witness. However, the parties should always keep in mind that the more limited the discovery, the less expensive the arbitration proceedings will ultimately be.

If the panel is amenable to discovery, typically a confidentiality agreement will be drafted and signed by the parties. This agreement usually states that any documents or information discovered during the arbitration cannot be used for any reason other than the arbitration itself, settlement negotiations or any related court proceedings. The purpose of the confidentiality agreement is to advance the traditional notion that reinsurance arbitration is a private dispute resolution mechanism. The theory is that if the parties did not desire privacy, they would not have entered into an agreement calling for arbitration of disputes in the first place.

In general, there are four ways to gather evidence. First, the arbitrators may order the production of relevant documents. Second, the parties may conduct depositions. Third, the parties could issue interrogatories. Fourth, the parties could issue requests to admit. In most arbitrations, only document production requests and depositions are used. In fact, documents are usually the most persuasive evidence of the transaction and as such, there should be open access between the parties to relevant documents. While depositions are the exception and not the rule, some arbitrators or parties may agree to conduct depositions. However, if the arbitrators decide that live testimony would be more effective and useful, they will order or permit necessary depositions.

§ 6:8.4 Subpoenas

The FAA provides that arbitral tribunals have the power to subpoena persons and documents, including nonparty persons and their documents. Specifically, section 7 of the FAA states:


123. Id.
The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.\footnote{124} It further states that the procedures for enforcing arbitral subpoenas are equivalent to those that govern other judicial bodies.\footnote{125} Thus, if the FAA is applicable to the arbitration, section 7 provides that a petition to enforce the subpoena is brought in the “United States district court for the district in which such arbitrators, or a majority of them are sitting.” This language impliedly creates federal court jurisdiction to enforce subpoenas in arbitrations governed by the FAA.\footnote{126}

The arbitral subpoenas are in the name of the arbitrators, not the arbitrating parties, signed by them and then served on the named individual much like a subpoena issued by a court. Under the FAA, the subpoena power is limited to the range of the federal court in the jurisdiction where the arbitration is conducted.\footnote{127} Therefore, the subpoena is limited to within the district or 100 miles from where the arbitration is taking place.\footnote{128} Similarly, an order to compel enforcement of an arbitrator’s section 7 subpoena may also be limited by the scope of the federal court’s personal jurisdiction. In the Second Circuit, such orders are limited to an area 100 miles outside the district court’s jurisdiction.\footnote{128.1} Other courts, however, have found that there can be nationwide service of process for such orders, as long as a party seeking enforcement of a section 7 subpoena petitions the district court where the distant party resides.\footnote{128.2}

\footnote{124} 9 U.S.C. § 7.\footnote{125} Id.\footnote{126} However, no case has considered whether a party can petition a federal court to enforce a subpoena without an independent jurisdictional basis such as diversity of citizenship or a federal question (other than the FAA).\footnote{127} 9 U.S.C. § 7.\footnote{128} Id.; Fed. R. Civ. P. 45(e); see Legion Ins. Co. v. John Hancock Mut. Life Ins. Co., 33 F. App’x 26 [3d Cir. 2002]; but see Trammochem v. A.P. Moller, 2005 U.S. Dist. LEXIS 11544 [S.D.N.Y. 2005] (the court held that section 7 of the FAA “implicitly grants arbitrators greater authority to issue subpoenas” than federal district courts and enforced a subpoena issued by an arbitral panel, sitting in New York, upon a nonparty, located in Texas, for the production of documents located in Texas).\footnote{128.1} Fed. R. Civ. P. 45(b)(2); Dynegy Mid-Stream Servs., LP v. Trammochem, 451 F.3d 89, 96 [2d Cir. 2006].\footnote{128.2} Amgen, Inc. v. Kidney Ctr. of Del. Cnty., Ltd., 879 F. Supp. 878, 882–83 [N.D. Ill. 1995].
A court’s order compelling performance with an arbitrator’s subpoena under section 7 of the Federal Arbitration Act is a final decision fit for judicial and appellate review only when the parties have taken steps to ensure that litigation over the subpoena does not encumber or delay the arbitration proceeding. Such steps must include proceeding with arbitration during litigation over the subpoena, to satisfy the federal goal of speedy arbitration proceedings.

The question of whether discovery may be obtained from nonparties by virtue of section 7 has been the subject of recent litigation. In 1999, the Second Circuit determined this to be an open question. In National Broadcasting Co. v. Bear Stearns & Co., the court commented that

the express language of section 7 refers only to testimony before the arbitrators and to material physical evidence, such as books and documents, brought before them by a witness; open questions remain as to whether section 7 may be invoked as authority for compelling pre-hearing depositions and pre-hearing document discovery, especially where such evidence is sought from non-parties.

The availability of such discovery has been addressed by other courts, both within and outside of New York, with divergent interpretations.

In In re Security Life Insurance Co. of America, the Eighth Circuit held that the power to compel document production and testimony at the hearing implies power to compel pre-hearing document production. While recognizing that arbitration entails limited discovery, the court found that “this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing.”

Relying on Mississippi Power, the Court in Stanton v. Paine Webber Jackson & Curtis found that “under the Arbitration Act, the arbitrators may order and conduct such discovery as they find necessary.” The court permitted pre-hearing discovery from third parties. In doing so, it rejected the argument that “§ 7 of

128.3. Dynegy Mid-Stream Servs., LP, 451 F.3d at 94.
128.4. Id.
130. Id. at 187–88.
131. In re Sec. Life Ins. Co. of Am., 228 F.3d 865 (8th Cir. 2000).
132. Id. at 870.
135. Id. at 1242.
the Arbitration Act only permits the arbitrators to compel witnesses at the hearing, and prohibits pre-hearing appearances.” Similarly, in *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, the Court permitted pre-hearing discovery in the form of document production and deposition testimony under section 7 of the FAA. In construing section 7, the court stated that

> [w]hile the statute appears to allow an arbitrator to summon a third person only to testify at trial, as opposed to a pre-trial discovery deposition, courts have held . . . that implicit in the power to compel testimony and documents for purpose of a hearing is the lessor [sic] power to compel such testimony and documents for purposes prior to hearing.

Some courts that have permitted discovery have done so with respect to documents, but not depositions. In *In re Arbitration Between Hawaiian Electric Industries, Inc. v. Hei Power Corp.*, the court stated as follows:

> A distinction . . . must be drawn between an arbitrator’s power to compel document production before an arbitration hearing, and her power to compel appearances at depositions before an arbitration hearing. An arbitrator’s power to compel documents places little additional burden on the non-party, because the FAA explicitly grants the arbitrator authority to demand documents at the hearing, and the documents need be produced only once. A pre-hearing deposition, in contrast, requires a non-party to devote additional time to the arbitration process—assuming that the non-party will be called before the arbitrator at the actual hearing itself as well—and thus is likely to entail a greater burden on the non-party.

Still other Courts have declined to permit the arbitrators to issue subpoenas for discovery of non-parties. In *Hay Group, Inc. v. E.B.S.*
Acquisition Corp., the Third Circuit rejected the power-by-implication analysis and held that section 7 of the FAA “unambiguously restricts an arbitrator’s subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.”

The Second Circuit in Life Settlements v. Syndicate 102 agreed with the Third Circuit’s decision in Hay. In Life Settlements, the Second Circuit held that the language of section 7 cannot be “interpreted” to include prehearing document discovery from third-parties not signatories to the arbitration agreement. According to the court, the language of section 7 is straightforward. Documents are only subject to discovery when brought before the panel by testifying witnesses. The FAA was enacted when pre-hearing discovery was generally not permitted. Thus, since the FAA has been broadened subsequently, Congress would have also expanded the panel’s authority if it wished to do so.

§ 6:8.5 Presenting Evidence

At the onset of the hearing, the panel should know only those facts and issues presented in the parties’ pre-hearing briefs. Those briefs may come simultaneously from the two sides, or alternatively the party demanding the arbitration may submit a preliminary brief and the other party a reply brief. There should be little or no ex parte communication after the organizational meeting and during the course of the hearing.

Presentation during the arbitration may be critical to a party’s success. For example, many arbitrators have commented that the attorney that uses theatrics to sell his case will not win any points with the panel. Once again, this supports the concept that arbitrators like informal settings, not courtroom-like drama. Parties should always bear in mind that their counsel can damage their position by provoking the panel.

Procedurally, the hearing will begin with counsel for each party making an opening statement, setting forth their client’s position, including all relevant facts. Thereafter, the panel may hear testimony from live witnesses whom the parties disclosed at the organizational meeting. These witnesses can usually stay in the hearing room after


141.1. Life Settlements v. Syndicate 102, 549 F.2d 210 [2d Cir. 2008].

(Reinsurance Law, Rel. #5, 10/10) 6–45
testifying. If the parties and the panel agree, they may have a court reporter transcribe the hearing. However, once again, this may be contrary to the panel’s preference for an informal setting.

After a witness has testified, counsel for the other party is given the opportunity to cross-examine the witness. Documentary evidence is also introduced at this phase of the hearing.

In the interest of time, parties may prefer to have the witnesses submit in advance of the hearing, or at the hearing, a written statement under oath. At the actual hearing, the witness could then be cross-examined on the statement. An arbitrator may even examine or cross-examine a witness if the evidence presented is unclear or requires further clarification.

Arbitrators may exclude live testimony if they feel the evidence can be presented accurately through affidavits. The denial of live testimony is not necessarily unfair.\textsuperscript{142}

The majority of cases that have examined the issue have held that arbitrators are not governed by the Federal Rules of Evidence.\textsuperscript{143} Thus, it appears that relevant circumstantial, hearsay, or opinion evidence may therefore be admissible. Nonetheless, despite not having to follow the rules of evidence, the arbitrators must still act fairly in ruling on an offer of evidence.\textsuperscript{144}

On the other hand, section 10 of the FAA authorizes a court to vacate an arbitration award if the panel refuses to hear evidence pertinent and material to the controversy, such as a panel’s refusal to subpoena a witness to attend a hearing.

Nonetheless, in the reinsurance context, interpreting the reinsurance contract may be a question of law that can be resolved with no live testimony. In fact, in many cases there are no witnesses available to testify as to the intent of the parties in making the contract.

When all of the evidence has been presented by the parties, counsel will make closing statements and the hearing will be closed. If the arbitration is governed by American Arbitration Association rules, the arbitrators will have thirty days to render an award. Otherwise, the time frame set for rendering a decision is set by agreement of the parties.

It is important to note that arbitrators should act not as mediators, but rather as judges. The arbitrators must issue their decision based

\textsuperscript{142}. \textit{In re Arbitration Between Intercarbon Bermuda Ltd. & Caltex Trading & Transp. Corp.}, 146 F.R.D. 64, 72 (S.D.N.Y. 1993).


only on what is presented at the hearing in the presence of both parties and any pre-hearing briefs.

As an aside, a hearing may be governed by AAA rules, which provide more guidance on substantive and procedural matters. For example, the rules provide guidance on oaths, the reception of evidence, the order of presentation of proof, extensions of time, ex parte communications with the arbitrators, adjournments, the record of the proceedings, and various other matters.\textsuperscript{145}

\textbf{§ 6:9 The Award}

In practice, an arbitration award must be in writing, signed by the arbitration panel and delivered to the parties.\textsuperscript{146} “A typical arbitration award will state that the arbitration panel met at a specific time and place and, after hearing the evidence and reading the briefs, decided the issues as indicated.”\textsuperscript{147}

\textbf{§ 6:9.1 Validity and Confirmation}

Pursuant to section 9 of the FAA, an award is deemed valid unless it is vacated.\textsuperscript{148} The burden to vacate the award is on the party opposing its confirmation.\textsuperscript{149} However, enforcement of an arbitration award does not automatically ensue from mere validity of the award. The award should be final in order to effectuate its enforcement. Thus, as a preliminary matter, any arbitration award that lacks finality is not subject to enforcement and is subject to collateral attack.\textsuperscript{150} Because arbitration awards are not self-enforcing, the successful party should have the award confirmed under the applicable statutory law. The arbitration award is, in essence, converted into a judgment that is then enforceable in the United States.

The parties can specify in their arbitration agreement that within one year after an arbitration award is made, any party to the arbitration may apply to the court for an order confirming the award and that the court must confirm the award unless the award is vacated, modified, or corrected in conformance with sections 10 and 11 of the FAA. If no court is specified in the arbitration agreement, then the application can be made to the federal district court of the district in

\begin{footnotes}
\footnote{145. Wilker & Lenci, supra note 119.}
\footnote{146. E.g., N.Y. C.P.L.R. § 7507.}
\footnote{147. Schiffer, supra note 8.}
\footnote{148. 9 U.S.C. § 9.}
\footnote{149. Id.}
\end{footnotes}
which the arbitration was held. The proceeding to confirm an arbitration award is meant to be summary, and the arbitrators have no obligation to give the court the reasons for their award. The arbitrator’s decision is not open to judicial review unless the arbitrator has exceeded his power by deciding a matter not arbitrable.

Section 13 of the FAA provides that a “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.” However, in order to achieve the same effectiveness as a civil judgment, an arbitration award must first be confirmed as a judgment within one year after the award is made. State arbitration acts allow a party to confirm an arbitration award, and the FAA similarly provides a confirmation process to be followed in federal court. Generally, a party must follow the applicable procedures in the court that has proper jurisdiction, and the confirmed award then carries the weight of an enforceable judgment.

Arbitration awards can be confirmed in either state or federal courts. The United States Supreme Court held in Doctor’s Associates, Inc. v. Casarotto that a court must confirm an arbitration award rendered pursuant to the FAA because the FAA supersedes contrary state acts. Accordingly, a state court judge must enforce an arbitration award issued by an arbitrator in another state even if he or she disagrees with the award. States typically have their own arbitration acts that govern in the rare circumstances where no interstate commerce is involved. However, the state acts typically adopt the provisions of the Uniform Arbitration Act and mandate enforcement of arbitration awards by an arbitrator in other states.

152. McKesson Corp. v. Local 150, Int’l Bhd. of Teamsters, 969 F.2d 831 (9th Cir. 1992); Taylor v. Nelson, 788 F.2d 220 (4th Cir. 1986).
156. “[A]ny 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 U.S.C. § 9 (emphasis added); see Denver & Rio Grande W.R.R. Co. v. Union Pac. R.R. Co., 868 F. Supp. 1244 (D. Kan. 1994), aff’d, 119 F.3d 847 (10th Cir. 1997).
As for federal courts, they will confirm arbitration awards only if they have federal subject matter jurisdiction over the confirmation process. Therefore, an arbitration case must result in an award that meets the diversity of citizenship requirements or involve a federal question.\textsuperscript{158}

Typical arbitration agreements contain provisions that allow a party to seek confirmation of an award in any state or federal court that has jurisdiction over the other party. Venue to confirm an award will be proper in those jurisdictions where the hearing was conducted, where the award was issued by the arbitration organization, where the award was signed, where the losing party resides or conducts business, where a forum has minimum contacts with a party, or where a statute otherwise authorizes a court to enter judgment.

The confirmation process involves a court action initiated by a motion or petition to the court. The process is a formal request to the court for the entry of a judgment based upon the award of the arbitrator. Typical documents that may be needed in confirming the award are:

- motion or petition establishing the identity of the parties, arbitration agreement, arbitration award, and relief sought;
- copy of the arbitration award;
- affidavit setting forth the facts of the arbitration agreement;
- proposed order to be signed by the judge; and
- memorandum of law in support of the request for confirmation.

Lastly, an arbitration award that is properly decided after a proper hearing and notice is typically not subject to any defenses. The U.S. Supreme Court requires an award to be confirmed unless there is a statutory challenge under the FAA or an applicable state arbitration act.\textsuperscript{159}

§ 6:9.2  Vacating or Modifying the Award

Section 10 of the FAA allows for an arbitration award to be vacated. The award can be vacated upon application to the district court in which the award was made by any party to the arbitration. The award may be vacated where:

\begin{itemize}
  \item [1] it was procured by corruption or fraud;
  \item [2] there was evident corruption or partiality in the arbitrators;
\end{itemize}

\textsuperscript{158}  See 28 U.S.C. § 1332.
\textsuperscript{159}  See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (finding that Congress intended the courts to “enforce [arbitration] agreements into which parties had entered”).
the arbitrators were guilty of misconduct in refusing to postpone the hearing, or in refusing to hear material evidence, or for other prejudicial misbehavior; or

the arbitrators exceeded their powers or failed to execute their powers so that a mutual, final and definite award was not made.\textsuperscript{160}

If an award is vacated before the expiration of the time within which the agreement required the award to be made, the court may direct a rehearing by the arbitrators.\textsuperscript{161} However, a federal court essentially will not entertain any challenge to an arbitration award that is based on the merits rather than one of the aforementioned grounds. Typically, state courts that are enforcing state statutes follow a similar approach.

Section 10 contemplates limited judicial intervention when the arbitration is tainted in specific instances. The U.S. Supreme Court stated in \textit{United Paperworkers International Union v. Misco, Inc.} that as long as the “arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”\textsuperscript{162} Moreover, courts have been reluctant to vacate arbitration awards. For instance, in \textit{Merit Insurance Co. v. Leatherby Insurance Co.},\textsuperscript{163} the Seventh Circuit stated that the “standards for judicial intervention are therefore narrowly drawn to assure the basic integrity of the arbitration process without meddling in it.”

In 2008, the Supreme Court decision in \textit{Hall Street Associates, Inc. v. Mattel}\textsuperscript{163.1} held that sections 10 and 11 of the FAA are the exclusive grounds for vacatur and modification of an arbitral award, thus preventing the expansion of review for legal error that the parties provided for in their arbitration agreement. The dispute arose between landlord Hall Street and tenant Mattel over an indemnification clause in their lease agreement. Costs were incured by Hall Street when Mattel’s manufacturing discharge contaminated well water and, hence, violated the Oregon Drinking Water Quality Act. The arbitration agreement allowed the District Court of Oregon to vacate, modify or correct the award in a de novo review where it was either not supported by substantial evidence or where conclusions of law were

\textsuperscript{160} See Wilker & Lenci, \textit{supra} note 122.

\textsuperscript{161} 9 U.S.C. § 10.


\textsuperscript{163.1} \textit{Hall St. Assocs., Inc. v. Mattel}, 128 S. Ct. 1396 (2005).
clearly erroneous. Neither of these are grounds for vacating an award under the FAA. The arbitrator found for Mattel on the ground that the Oregon Drinking Water Quality Act was not an environmental law to which compliance was required under the lease agreement, but instead only a health issue. The district court granted Hall Street's motion and vacated the award on the ground that it was based on an erroneous conclusion of law, the standard agreed to by the parties in their arbitration agreement. The district court was of the view that the violation by Mattel was indeed one of the law and not purely a health issue as the arbitrator had found. The matter was thus sent back to the arbitrator.

Following a remand, in which the district court once again found for Hall Street, and a reversal by the Ninth Circuit, the Supreme Court agreed to hear the case on a petition for certiorari. The Court held that the grounds for vacatur set out in the FAA are exclusive. Delivering the opinion of the Court, Justice Souter stated as follows:

. . . it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally. Sections 10 and 11, after all, address egregious departures from the parties’ agreed-upon arbitration: “corruption,” “fraud,” “evident partiality,” “misconduct,” “misbehavior,” “exceed[ing] . . . powers,” “evident material miscalculation,” “evident material mistake,” “award[s] upon a matter not submitted,” the only ground with any softer focus is “imperfect[ions],” and a court may correct those only if they go to “[a] matter of form not affecting the merits.” Given this emphasis on extreme arbitral conduct, the old rule of ejusdem generis has an implicit lesson to teach here.163.2

Courts further retain limited power to review awards outside of section 10.164 Generally speaking, the arbitral award is subject to review “where it is clear from the arbitrator record that the arbitrator recognized the applicable law—and then ignored it.”165 These exceptions have been construed to mean that an award may be vacated if made in “manifest disregard” of the law. Thus, under the standard, the award will be vacated only when the arbitrator “‘understand[s] and correctly states the law but proceeds to disregard the same.’”166

163.2. Id. at 1405.
164. Advest, Inc. v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990).
165. Id. at 9.
166. Upshur Coals Corp. v. United Mine Workers, Dist. 31, 933 F.2d 225, 229 (quoting San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 801 (8th Cir. 1961)).
Thus, the Second Circuit in Wallace v. Butler,\(^{167}\) has held as follows:

Our circuit has long held that “an arbitration award may be vacated if it exhibits ‘a manifest disregard of the law [citations omitted].’” But we have also been quick to add that “manifest disregard of law” as applied to review of an arbitral award is a “severely limited” doctrine [citation omitted]. Indeed, we have recently described it as “a doctrine of last resort—its use is limited only to those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply.”\(^{168}\)

Following the rationale of the Wallace court, and in the aftermath of Hall Street Associates, the Second Circuit in Stolt-Nielsen Transportation Group v. AnimalFeeds Int’l Corp. again held that “manifest disregard of the evidence is proper ground for vacating an award,”\(^{168.1}\) but nevertheless denied a petition to vacate because the arbitration panel’s decision to construe the contract at issue to permit class action arbitration was not in manifest disregard of the law. Recognizing that the scope of review is “severely limited,” the Second Circuit held manifest disregard permits a vacatur only in those exceedingly rare instances where some egregious impropriety is apparent. The court delineated three components to satisfying this burden for vacatur:

1. The law is found to be clearly applicable to the issue;
2. The law has been improperly applied leading to an erroneous outcome; and
3. The arbitrators had actual knowledge\(^{168.2}\) of the law’s applicability, a subjective evaluation.\(^{168.3}\)

\(^{167}\) Wallace v. Butler, 378 F.3d 182, 189 (2d Cir. 2004).

\(^{168}\) Id.

\(^{168.1}\) Stolt-Nielsen Transp. Grp. v. AnimalFeeds Int’l Corp., 548 F.3d 85 (2d Cir. 2008) (reversing district court’s vacatur for manifest disregard of the law and reinstating award despite arbitrator’s failure to apply the relevant law because the parties did not adequately identify the appropriate choice of law).

\(^{168.2}\) Id. at 93 (imputing to the arbitrator only the knowledge of the governing law identified by the parties to the arbitration).

\(^{168.3}\) Id. The Second Circuit in Stolt-Nielsen had an interesting discussion on the effect of Hall Street on the manifest disregard standard. It noted that the Supreme Court had declined to resolve the precise basis, meaning and scope of the manifest intent doctrine. Some courts have concluded that manifest disregard does not survive as a basis to vacate; other courts think it remains a valid ground for vacatur, “reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA.” The Second Circuit was of the view that the latter interpretation was more cogent.
Courts frequently have declined to overturn awards in reinsurance arbitrations, even when the awards have been subject to serious challenges.\textsuperscript{169}

Normally, an arbitrator’s procedural decisions are not grounds for vacation or modification. An arbitrator’s procedural decisions are given great weight: not only does the moving party have the burden of overcoming the decision to show the need for vacation, but the decision cannot be overcome unless there was misconduct or manifest prejudice by the arbitrator against one party, or unless the procedural decision has no colorable basis.\textsuperscript{169.1}

Notwithstanding these considerations, courts today still struggle when having to determine whether a ruling of an arbitrator should be categorized as procedural or substantive law. In \textit{National Union Fire Insurance Co. of Pitt. v. Odyssey America Reinsurance Corp.}, the arbitrator allowed the prevailing party, Odyssey, to recover legal fees.\textsuperscript{169.2} However, both parties had waived their right to recover punitive damages at arbitration through their arbitration agreement. When National Union sought to vacate the award, the court held that the award of legal fees was compensatory, rather than punitive in nature.\textsuperscript{169.3} The court further held that an arbitrator’s decision to award fees was procedural, not substantive, and therefore even if the parties had stipulated the application of New York law under a choice of law provision, the arbitrator would still only be bound by New York substantive law; not procedure.\textsuperscript{169.4}

Nevertheless, despite general judicial deference to arbitral awards, recent courts have vacated under section 10 of the FAA. In \textit{KX Reinsurance Co. v. General Reinsurance Co.},\textsuperscript{169.5} the Southern District of New York found that an arbitration panel exceeded its authority by retaining jurisdiction until full compliance with the award was met. Authority to compel compliance was not included

\textsuperscript{169.} See, e.g., Nw. Nat’l Ins. Co. v. Allstate Ins. Co., 832 F. Supp. 1280 (E.D. Wis. 1993) [rejecting a claim that a neutral arbitrator had an undisclosed “reputational” interest in the outcome because he had established a reinsurance program similar to the one at issue for his former employer].

\textsuperscript{169.1} Kober v. Kelley, 2006 U.S. Dist. LEXIS 48275 [S.D.N.Y. 2006]. \textit{See also} Global Int’l Reinsurance Co. v. TIG Ins. Co., No. 08 Civ. 7338[JSR], 2009 WL 161086, at *4 [S.D.N.Y. Jan. 21, 2009] [The court stated “... the arbitrator acted well within his discretion when choosing to entertain TIG’s summary judgment motion, interpreting the relevant contracts, and granting partial summary judgment on the basis of that interpretation.”].

\textsuperscript{169.2} Nat’l Union Fire Ins. Co. of Pitt. v. Odyssey Am. Reinsurance Corp., No. 05 Civ. 7539[DAB], 2009 WL 4059183, at *3 [S.D.N.Y. Nov. 18, 2009].

\textsuperscript{169.3} \textit{Id.} at 3.

\textsuperscript{169.4} \textit{Id.} at 7.


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in the arbitration agreement and all issues submitted to the panel had been resolved. The court deemed the panel should have terminated, since it no longer had authority to act. Although the award was not explicitly labeled as a “final” one, the court implied finality from the resolution of all submitted issues. The California Court of Appeals in Advantage Medical Services v. Hoffman\footnote{Advantage Med. Servs. v. Hoffman, 72 Cal. Rptr. 935 (Cal. Ct. App. 2001).} also vacated an award due to arbitrator bias, finding the failure on the part of the arbitrator to make a sufficient inquiry into, and disclosure of, a conflict of interest satisfied grounds for vacatur. In that case, the arbitrator and his law firm represented several protection and indemnity clubs, which provided coverage and services to the maritime industry. The clubs were reinsured through Lloyd’s and Lloyd’s happened to insure one of the parties to the arbitration. According to the court, the arbitration should have disclosed this relationship because it raised reasonable doubts about impartiality. Similarly, in Uhl v. Komatsu Forklift Co.,\footnote{Uhl v. Komatsu Forklift Co., 512 F.3d 294, 307 (6th Cir. 2008).} the court held that a challenging party must show that a reasonable person would need to conclude an arbitration was not impartial. In order to sustain the burden, the challenging party must establish specific facts to indicate an improper motive. The court in Uhl denied the motion to vacate, despite the existence of an undisclosed prior relationship between one of the arbitrators and counsel to one of the parties because the relationship was deemed to be inconsequential.

Recently, in Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., a federal judge vacated an arbitration award because two of the arbitrators exhibited evident partiality through their lack of disclosure.\footnote{Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., No. 09 Civ. 9531(SAS), 2010 WL 653481, at *2 (S.D.N.Y. Feb. 23, 2010).} The two arbitrators in question were both ARIAS certified, which required them to disclose any direct or indirect interests in the outcome of the hearing. The arbitrators were also required to disclose any past or previous relationships with individuals they were told might be potential witnesses.\footnote{Id.} Although the arbitrators in question disclosed their relationships with one another, with other affiliate companies, and their dealings in similar controversies, they both failed to disclose their roles as arbitrators in a separate hearing involving Platinum Bda, the alleged successor company of St. Paul.\footnote{Id. at 4.} Furthermore, the two arbitrators had previously heard testimony from a material witness in the Platinum matter and did not disclose it when the same witness testified before them again in the Scandinavian v. St. Paul hearing.\footnote{Id. at 8.}
Another intrusion into the arbitrator’s power is Trustmark Insurance Co. v. John Hancock Life Insurance Co. Thus, Trustmark and Hancock had entered into a confidentiality agreement securing all documents and dispositions of their first arbitration hearing.\textsuperscript{169.12} However, when further arbitration hearings were initiated between the parties, Hancock asked the arbitration panel to decide whether or not the confidential materials could be used to give preclusive effect to issues already decided.\textsuperscript{169.13} In a 2-1 decision, the panel allowed the use of the confidential materials in the second hearing. Trustmark sought an injunction to prevent Hancock’s arbitrator, who had served on the first arbitration panel from serving on the second panel. The court granted the injunction, finding that Hancock’s arbitrator was not “disinterested.” The court reasoned that Hancock’s arbitrator had breached the confidentiality agreement. The decision is on appeal.

Even though the FAA establishes strict guidelines for district courts’ review of arbitration awards,\textsuperscript{170} it does not specify the standard of review an appellate court should use to review a district court decision concerning arbitration awards. In First Options of Chicago, Inc. v. Kaplan,\textsuperscript{171} the Supreme Court determined what standard of review should be used by an appellate court reviewing a district court decision vacating, confirming or modifying an arbitrator’s order. The Court rejected an “abuse of discretion” standard, and instead, held that appellate courts should apply “ordinary” standards when reviewing district court decisions upholding arbitration awards.\textsuperscript{172}

Section 11 of the FAA provides that federal district court for the district where an arbitration award was made may make an order modifying or correcting the award upon application of any party to the arbitration. The court may modify or correct an award 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, or where the arbitrators have awarded upon a matter not submitted to them, or where the award is imperfect in a matter of form not affecting the merits of the controversy.\textsuperscript{173} When an arbitration agreement is vague in that it is open to multiple reasonable interpretations, courts remand to the arbitrator for further clarification, rather than deciding on the one interpretation itself.\textsuperscript{173.1}

\textsuperscript{169.13} Id. at 946.
\textsuperscript{170} 9 U.S.C. §§ 10–11.
\textsuperscript{172} Id. at 948.
\textsuperscript{173} 9 U.S.C. § 11.
Finally, section 12 of the FAA provides that a motion to vacate, modify, or correct an arbitration ruling must be served within three months after the award is filed or delivered. An issue that has arisen regarding section 12 is whether a party is allowed to raise a defense, based upon section 10 or 11, to a motion for confirmation after the three-month period has expired. Federal circuits have held that a defense to a motion to confirm is also subject to the three-month time limitation of section 12.

§ 6:9.3 Punitive Damages

While the FAA declares a federal policy supporting arbitration, it does not address the propriety of granting punitive damages in arbitral awards. Thus, while it is well established that courts may award punitive damages when the circumstances permit, there is an unresolved dispute as to whether arbitrators are empowered to make such awards. In resolving this issue, courts must consider the FAA, which encourages the enforcement of arbitration agreements, but also neglects to address the availability of punitive damages. A majority of federal circuits refuse to enforce choice-of-law provisions adopting state law that prohibits arbitral awards of punitive damages. Such courts reason that when parties arbitrate under the rules of an arbitration organization, the FAA preempts state law banning such awards.

In an effort to resolve the circuit split, the Supreme Court addressed this issue in Mastrobuono v. Shearson Lehman Hutton, Inc. but provided a ruling which has been somewhat limited to its facts. In Mastrobuono, the court held that an award of punitive damages by an arbitration panel was not invalid under New York law, which prohibits awards of punitive damages in arbitration proceedings. The underlying customer agreement contained a choice-of-law provision stating that the entire agreement would be governed by New York law and an

177. See, e.g., Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (holding that the FAA was motivated by a congressional desire to enforce agreements into which parties entered).
180. Id. at 63–64.
arbitration clause stating that any controversy was to be settled by arbitration in accordance with the rules of the National Association of Securities Dealers [NASD]. Under NASD rules, arbiters may award damages and other relief. The NASD arbiter’s manual authorizes consideration of punitive damages. The Court avoided the conflict between the choice-of-law provision and the arbitration clause by reading the choice-of-law clause as merely encompassing New York’s substantive law, and not the allocation of power between alternative tribunals.

As a result of Mastrobuono, the wording of the pre-dispute arbitration clause is of great importance when assessing the availability of punitive damages. Notwithstanding the lack of clarity in the law, it appears that punitive damages are now an available remedy for arbitrators to award, depending on the interpretation and wording of the agreement to arbitrate.

The Mastrobuono holding leaves open to debate whether a state court would have to interpret a customer agreement the same way as the Supreme Court did. After all, the Supreme Court acknowledged that contract interpretation is a matter of state law. Accordingly, it is likely that claims brought under various federal statutes will allow arbitrators to award punitive damages, but it is not guaranteed that purely state claim arbitrations may include awards for punitive damages.

Consequently, state law does not provide a unified answer on whether punitive damages should be available in arbitral awards. For instance, the New York Court of Appeals held in the landmark case of Garrity v. Lyle Stuart, Inc. that arbitrators do not have the power to award punitive damages even if agreed upon by the arbitrating parties. Other states have elected to follow the Garrity rule. It should be noted that although the Garrity rule has not been overruled, it has come under increasing criticism. Consequently, other states

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181. Id. at 52.
182. Id. at 63–64.
183. Id. at 60 n.4.
will allow arbitrators to award punitive damages only if the arbitration agreement expressly grants them such authority. 188 Lastly, some states choose to permit awards of punitive damages unless the arbitration agreement expressly prohibits them. 189

Finally, the American Arbitration Association has adopted Commercial Arbitration Rules to establish uniform procedures. Although no AAA rule expressly empowers arbitrators to award punitive damages, Rule 43, entitled “Scope of Award,” grants them broad authority to fashion remedies. Rule 43 states that “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.” The Ninth Circuit has interpreted this rule to mean that, unless an arbitration agreement states otherwise, an arbitrator is entitled to award punitive damages. 190

190.  Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1063 [9th Cir. 1991].