10 MAJOR ARBITRATION ISSUES

Recently Addressed By Courts

Practical Tips for the Arbitrator, Practitioner and Contract Drafter

Arbitration is a creature of contract, making it prone to change. The touchstone for a successful arbitration is careful drafting of the arbitration clause, according to authors Scott Marrs and Sean Milligan. They pose 10 critical questions that will help drafters of arbitration agreements, parties counsel and arbitrators understand recent developments in arbitration.

Parties increasingly turn to arbitration for the resolution of business disputes—with positive results, including less adversarial relationships, faster decisions and lower dispute resolution costs. But because arbitration is a creature of contract, the process the disputants get, and their satisfaction with it, turn largely on the arbitration clause itself. Whether their pursuit of an efficient and cost-effective

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arbitration is successful will depend in part on how carefully the arbitration agreement is negotiated and drafted, and on the arbitration experience and managerial abilities of the arbitrator the parties select to decide their case. Using a "form" arbitration clause borrowed from another contract may not be as safe as you thought. The appropriate arbitration language will often depend on the circumstances and how the courts have recently interpreted and applied arbitration provisions, laws and rules. This article summarizes recent court decisions on 10 important arbitration issues, including:

(1) Whether parties can expand the grounds to appeal an award;
(2) Whether parties can restrict the statutory grounds to appeal an award;
(3) Whether arbitrators can award attorney fees when a court cannot;
(4) Whether parties can waive their right to attorney fees;
(5) When a party waives its right to arbitrate;
(6) The effect an unconscionable provision has on an arbitration clause;
(7) Whether arbitrators can compel discovery from a non- signatory to an arbitration agreement;
(8) Whether parties who are unaware of the arbitration agreement can be required to arbitrate;
(9) Whether an arbitration agreement signed by only one party is enforceable; and
(10) Whether heirs and beneficiaries of a decedent will be bound by the decedent's arbitration agreement?

The cases discussed here will help contract negotiators and drafters devise a better arbitration agreement, help practitioners better advise their clients, and update arbitrators on what courts are thinking and doing.

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1. Can Parties to an Arbitration Agreement Expand the Grounds to Appeal an Award?

The advent of modern arbitration arose largely to offer an alternative to the time-consuming and costly nature of traditional litigation. Two characteristics of arbitration that distinguishes it from litigation are finality and a limited right to appeal. Allowing broad judicial review is generally at odds with the primary goal of obtaining a relatively swift, cost effective and final resolution of disputes, since such review opens the door to expensive litigation, including judicial proceedings to test the validity of an award.

The Federal Arbitration Act (FAA), which governs arbitration agreements that involve or affect interstate commerce,[1] provides in Section 10 that a court may vacate an award in extremely limited circumstances. These circumstances are when the evidence shows:

(1) corruption, fraud, or undue means in the procurement of the award;
(2) the arbitrator was partial or corrupt;
(3) the arbitrator refused to postpone the hearing despite a showing of sufficient cause, or refused to hear pertinent and material evidence, or otherwise denied a party due process and prejudiced its rights; or
(4) the arbitrator exceeded his or her powers, or failed to issue a mutual, final, and definite award.

The grounds to vacate an award are the grounds on which judicial review may be sought. Judicial review of the award by a district or trial court is the first level of appeal. If the court vacates or confirms the award, the court's decision may be appealed. In FAA cases, Section 16 of the FAA establishes the court's jurisdiction to hear such appeals.

Since the FAA severely limits the right of a party to seek judicial review of an arbitrator's award, the question of whether the parties can agree to expand the right to obtain judicial review has been a subject of disagreement in the federal courts. The U.S. Supreme Court finally addressed this issue in 2008 in *Hall Street Associates, Inc. v. Mattel, Inc.*,[2] a case governed by the FAA. *Hall Street* involved an arbitration clause providing for judicial review of arbitrator errors of fact and law. The Supreme Court ruled that parties do not have the right to expand the grounds for judicial review because the FAA's grounds to vacate or modify an award "are exclusive." It also stated that manifest disregard of the law is no longer a recognized ground for review of an award.[3] The Court observed that the national policy favoring arbitration with limited review furthers the goal of resolving disputes in a timely manner. Thus, an alleged misinterpretation or misapplication of the

law will never be a sufficient ground on which to vacate an arbitration award under the FAA.

Hall Street appeared to resolve the split in the circuits on the ability of the parties to expand judicial review. However, it soon became clear that this was not the case. The reason is that *Hall Street* specifically left open the possibility that authority outside the FAA, including "state statutory or common law," might provide a basis for expanding judicial review.

The Supreme Court of California took advantage of this opening. Six months after the *Hall Street* decision, it decided *Cable Connection, Inc. v. DIRECTV, Inc.*[4] The arbitration agreement provided that "[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error." California's highest court held that parties to arbitration agreements have the contractual right to expand judicial review of arbitration awards governed by the California Arbitration Act. The court explained that although this statute sets out certain grounds on which a court may vacate an award, it does not limit the parties' right to expand review by contract. Moreover, the court held that the above-quoted language was enforceable. In so holding, it stressed that freedom of contract is fundamental to arbitration.

To date, California is the only state to address whether one can expand the ground for judicial review by contract. California often dances to a different drummer, so it is possible that other states will not permit judicial review to be expanded beyond the provisions in state arbitration statutes.

Several federal and state courts have not followed *Hall Street's* statement that manifest disregard of the law is no longer a viable ground to vacate an award. These courts have concluded that the statement was not definitive because the Supreme Court in *Hall Street* listed several possible readings of the doctrine, including the view that manifest disregard could be shorthand for an existing ground in FAA Section 10.[5]

TIP: Consider the law governing arbitration before trying to expand judicial review to cover errors of fact and law. If California law governs, *Cable Connections* will allow you to do it. If the FAA governs, you will have to find state law authority for expanding judicial review by contract.

In the 2nd and 9th Circuits, you could expressly provide in the arbitration agreement that awards are reviewable on the ground of manifest disregard of the law. However, other circuits may follow the statement in *Hall Street* that manifest disregard is dead.

TIP: There is a way to avoid judicial scrutiny of contract provisions that alter the grounds for judicial review, while also protecting parties against anomalous awards: provide for review of errors of law by an "appellate" arbitration panel.[6] To prevent a cycle of appeals, the provision should state that the appellate panel's decision is final and binding, and that no further appeal is allowed. The American Arbitration Association (AAA)[7] recently suggested language to effectuate this private—and final—appellate process:

> Within 30 days of receipt of any award (which shall not be binding if an appeal is taken), any party may notify the AAA of an intention to appeal to a second arbitral tribunal, constituted in the same manner as the initial tribunal. The appeal tribunal shall be entitled to adopt the initial award, modify the initial award or substitute its own award for the initial award. The appeal tribunal has no authority to modify or replace any part of the award that does not relate to the manifest disregard of the law claim. The award of the appeal tribunal shall be final and binding, and judgment may be entered by a court having jurisdiction thereof.[8]

This solution would afford meaningful appellate review for manifest disregard of the law, since there is ample case law to guide appellate arbitrators on this standard. This approach also would give appropriate deference to the arbitrator's award.

Having broader appeal rights may be extremely important to parties involved in large cases that involve significant sums of money or extremely onerous consequences. The manifest disregard standard, while not perfect, is better than a total inability to appeal an error of law.

The time and cost involved in an appeal to a second panel of arbitrators could be ameliorated by providing for a "short fuse" appeal (meaning one with very limited or no briefing and a short hearing). If briefs are to be allowed, the parties should agree to limit their number (for example: only initial briefs from each party), and their length (for example, a maximum of 50 double-spaced pages, using 13-point type for text and 10 point type for footnotes, and one-inch margins all around). Providing that an appeal can lie only for manifest disregard of the law prevents abuse of the appellate review process. Requiring the appellate arbitrator or panel to be specialists in appeals in federal or state appellate courts should give the parties confidence in the process.

TIP: In order to make the appeal provision

meaningful, the parties should provide for a transcript or recording of the arbitration hearing.

Giving the parties an option to appeal means that an appeal will likely occur in most cases.

2. Can Parties Restrict Judicial Review?

Many lawyers criticize arbitration because appeal rights are severely limited. So of course, no one would advocate that the ability to appeal should be even more restricted than the narrow grounds set forth in the FAA—right? Wrong. Existing case law on this issue indicates a split, with the 2nd Circuit holding that parties to cases governed by the FAA may not undermine the FAA's specifically enumerated grounds for review, and the 10th Circuit allowing parties to narrow the grounds for review.[9]

TIP: Parties should consider the pros and cons of restricting the grounds for judicial review in the location where they intend to arbitrate, as well as the locales where they might decide to enforce the award.[10] They should also consider what could happen if the court were to sever the contracted judicial review provision and enforce the award.[11]

3. Can Arbitrators Award Attorney Fees When a Court Cannot?

Under the American Rule, prevailing parties do not recover their attorney fees unless authorized by contract or statute. Many statutes for the protection of the public authorize recovery of attorney fees by the winning party (for example, antitrust, civil rights and consumer protection laws). In addition, state legislatures have also made attorney fee relief available by statute for certain types of contract and declaratory judgment claims.

Neither the FAA nor the original Uniform Arbitration Act (1955), which has been enacted in many states, addresses the issue of attorney fees in arbitration. Therefore, in arbitration cases subject to the FAA or UAA, arbitrators generally may award any form of relief they believe is appropriate if not in conflict with the arbitration agreement. If the parties are arbitrating under the AAA Commercial Arbitration Rules, Rule 43(a) provides that an "arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties...."

The Revised 2000 Uniform Arbitration Act (RUAA)[12] specifically addresses attorney fees in Section 21(b). This provision authorizes arbitrators to award reasonable attorney fees and costs in their discretion in two situations. The first is if the law authorizes such an award in a civil action involving the same claim. The second situation is if the arbitration agreement authorizes such fees and costs. (The commentary notes that Section 21(b) does not require the arbitrator to apply any particular legal or evidentiary standard when addressing a claim for attorney fees under a statute.) However, RUAA Section 4(a) allows the parties to an arbitration agreement to waive the right to recover attorney fees "to the extent permitted by law." These provisions apply in Alaska, Colorado, District of Columbia, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington, all of which have enacted the RUAA.[13]

Some states that have not enacted the UAA or the RUAA have arbitration statutes that provide for the recovery of attorney fees in arbitration when the law or the parties' agreement would allow them to be recovered.[14]

Thus, the availability of attorney fees depends on the contract or the law in the relevant jurisdiction.

What if the contract does not specifically authorize attorney fee awards but incorporates arbitration rules into the agreement that give arbitrators authority to grant any relief they believe to be just and equitable? The court addressed this in *Providian Bancorp Services v. Thomas*, where an employee initiated arbitration against his employer for assault and battery.[15] The agreement to arbitrate called for the Texas Arbitration Mediation Services (TAMS) rules to apply and to supersede any conflicting rules in the employee's employment agreement. A TAMS rule states that arbitrators may grant any relief deemed just and equitable. The arbitrator awarded the employee $1 in compensatory damages and $24,500 in attorney fees. Providian challenged the attorney fee award on the ground that it was not authorized by law or contract. The court ruled against Providian and confirmed the award.

On appeal, the Texas Court of Appeals upheld the award. It concluded that the award fell within "just and equitable" relief allowed by the TAMS rule. The court noted that other jurisdictions, such as New York and Illinois, have also held that "just and equitable" relief can include attorney fees.

4. Can Parties Waive the Right to Recover Attorney Fees?

Drafters of arbitration agreements in employment and other contracts sometimes put a clause in the arbitration agreement prohibiting arbitrators from making attorney fee awards to a prevailing party. For example, in *Security Service Federal Credit Union v. Sanders*,[16] the contract limited the consumer's right to recover attorney fees and costs and dictated that the consumer was responsible for the other party's attorney fees, contrary to the Texas Deceptive Trade Practices Act (DTPA). The court held that this provision was unconscionable and unenforceable.[17]

TIP: If you seek to limit recovery of attorney fees permitted by the substantive law of the state governing the dispute, this intent should be expressly stated in the arbitration agreement.

5. What Circumstances Constitute a Waiver of the Right to Arbitrate?

A party may unwittingly waive its right to enforce an arbitration clause. Generally, a waiver occurs when the party substantially invokes the judicial process and the other party can show that it suffered prejudice as a result. A waiver can also occur by making statements or taking actions that are inconsistent with the right to seek arbitration. However, courts strongly favor arbitration and waiver is difficult to establish.

A recent case out of Texas gives a good summary of the circumstances in which a waiver could be found. In *Perry Homes v. Cull*,[18] the plaintiffs sued the builder of their home in court, rather than invoking the arbitration clause in the purchase agreement. The home builder cried foul when the plaintiffs took depositions, opposed the builder's request for arbitration, then attempted to invoke arbitration themselves late in the case. The Supreme Court of Texas stressed the strong presumption in favor of arbitration and against waiver (noting it had never found such a waiver). It concluded that the following actions alone were insufficient to constitute a waiver of the arbitration clause: filing a lawsuit; moving to dismiss a claim for lack of standing; moving to set aside a default judgment and requesting a new trial; opposing a trial and seeking to move the litigation to federal court; moving to strike an intervention and opposing discovery; serving written discovery; noticing (but not taking) a single deposition, and agreeing to a trial resetting; or taking four depositions, and moving for dismissal based on standing.

The court used the "totality of circumstances" test to decide whether a waiver occurred, considering the following factors:

- which party invoked arbitration (the plaintiff who chose to initially file in court, or the defendant who merely responded);
- the length of time the moving party delayed before seeking arbitration;
- whether that party was previously aware of the arbitration clause;
- the amount of pre-trial activity that took place relating to the merits, rather than arbitrability or jurisdiction;
- the amount of time and expense incurred in litigation;
- whether the moving party opposed arbitration earlier in the case;
- whether that party filed affirmative claims or dispositive motions;
- whether important discovery would be unavailable in arbitration;
- the extent to which activity in court would be duplicated in arbitration; and
- when the case was to be tried.

Like 10 federal circuit courts, the Supreme Court of Texas adopted the rule requiring the party arguing that there has been a waiver to show that the moving party's delay in seeking arbitration caused *prejudice*. It defined that term to mean inherent unfairness (for example, a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage).

Next, the court, after examining the circumstances, concluded that the plaintiffs substantially invoked the litigation process by taking 10 depositions, filing a 79-page document stating objections to the defendant's request for arbitration,

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filing five motions to compel document production, serving numerous deposition notices, and waiting late in the trial process to invoke arbitration. The court also found that the plaintiffs' actions in initially objecting to arbitration and later insisting on it after the defendant acquiesced to the litigation unfairly prejudiced the defendant.

TIP: The question of waiver is fact intensive, and not all cases are as cut and dried as *Perry Homes*. Because of the risk of waiver, parties to the agreement should not ignore the arbitration clause.

Perry Homes *represents a relatively clear case of waiver by substantially invoking the litigation process to the prejudice of opposing parties.*

6. What Effect Does an Unconscionable Contract Have on an Arbitration Clause?

Drafters should avoid drafting an unconscionable contract. The risk is that the arbitration clause will survive but the contract will not. In *Security Service Federal Credit Union*,[19] the court found unconscionable a limitation on the consumer's statutory right to recover its attorney fees and costs, and the requirement that the consumer pay the other party's attorney fees. However, it also found that the parties intended illegal or unenforceable provisions to be severed from the contract, leaving the remainder enforceable. This intent was evidenced by the arbitration clause, which expressly provided for severability. Therefore, the court severed the unconscionable provisions from the rest of the agreement and held that the arbitration clause was enforceable.

Would the decision be the same if the agreement did not have a severability clause? A court would look at the facts and circumstances to determine whether the parties intended unconscionable or unenforceable provisions to be severed.

TIP: To avoid any problem, drafters should always include a severability clause in the contract.

7. Can Arbitrators Compel Discovery from Non-Parties?

There is a split in the federal circuit courts on this issue.[20] Most recently, the 2nd Circuit held in *Life Receivables Trust v. Syndicate 102 at Lloyds' of London*[21] that arbitrators have no authority under Section 7 of the FAA to order third parties to produce documents for discovery purposes (i.e., before the hearing). Accordingly, the court refused to give effect to an arbitration panel's order compelling discovery of documents from a third party.

To date, the Supreme Court has not weighed in on the extent to which an arbitrator may compel pre-hearing testimony and documents from a non-party. However, buckle up, because this split of authority will likely culminate in the Supreme Court considering the issue sooner, rather than later. It should be noted that the 3rd Circuit opinion[22] on which the 2nd Circuit relied was written by the Hon. Samuel A. Alito Jr. before his appointment as Associate Justice on the Supreme Court.

As the 2nd Circuit noted in *Life Receivables Trust*, arbitrators are not powerless to order the production of documents from non-parties; they can order non-parties to bring documents with them to the hearing when they are called to testify.

TIP: If the non-party resides outside the jurisdiction of the district court in which the hearing is located, the arbitrator could, it has been suggested, move the hearing to the state where the witness lives.[23]

8. Can You Require a Party Who Is Unaware of the Arbitration Clause to Arbitrate?

In *Connectu, Inc. v. Quinn Emanuel Urquhart Oliver & Hedges, LLP*,[24] a law firm client signed an engagement letter containing an arbitration clause. During a subsequent dispute, the client contended it was unaware of the clause and challenged the arbitrability of the dispute. The court enforced the agreement, holding that arbitration clauses will be enforced absent a showing that the clause was obtained without consent, or as a result of fraud, misrepresentation, or duress. This is consistent with common law, which applies the rule that failing to read a contract provision is no defense to its enforcement.

But what about circumstances where an agent, rather than the principal, signed the agreement? Will the principal be bound? The answer is obviously yes. Courts apply a variety of common law doctrines (e.g., assumption of the agreement, piercing the corporate veil, equitable estoppel and incorporation by reference) to prevent a non-signatory from avoiding the consequences of an arbitration agreement. S*outhern Illinois Beverage, Inc.*

v. Hansen Beverage Co.[25] is an example of an unusual application of the estoppel doctrine. In this case Hansen, a beverage manufacturer, had a contract containing an arbitration clause with a distributor. The subdistributor sued Hanson, who responded with a motion to compel arbitration even though the subdistributor was a non-signatory. The trial court held that under the estoppel doctrine, the subdistributor must arbitrate because it sued a party to the contract and made claims premised on the contract in order to enforce subdistribution rights that arose from that contract. The court said the subdistributor's claims were "fundamentally rooted in and dependent on rights and conditions defined in the agreement between Hansen and its distributor."

When an arbitration agreement is subject to the FAA, state substantive law is still likely to apply in determining whether a non-signatory may be required to arbitrate. One court recently addressing the issue held, "Pending an answer from the United States Supreme Court, we have determined to apply state substantive law and endeavor to keep it consistent with federal law."[26]

9. Is an Arbitration Agreement Enforceable If Only One Party Signs It?

In general, under federal and state arbitration statutes, an arbitration agreement must be in writing to be enforceable. There is no requirement that it be signed. However, the parties may provide that the signatures of both parties are required to make the agreement effective. If such a provision is included in the parties' agreement, courts will enforce it, as happened in a recent case decided by a Maryland appeals court.[27]

10. Will Heirs and Beneficiaries Be Bound by a Decedent's Agreement to Arbitrate?

Most states addressing this issue, including Texas, Mississippi, Alabama and Michigan, have resolved it based on whether the wrongful death action is an independent or derivative cause of action under state law. If the beneficiaries' right to sue is based solely on the decedent's right to sue for negligence, the claim is derivative of the decedent's rights. In that situation, the beneficiaries will be bound by the decedent's agreement to arbitrate. The Supreme Court of Texas so held in *In Re Labatt Food Service*[28] because the Texas Wrongful Death Act expressly conditions the beneficiaries' wrongful death claims on the decedent's right to sue for the injuries if he had lived.

Other states, such as Utah and Missouri, have held to the contrary. In *Bybee v. Abdulla*,[29] the court held that beneficiaries were not bound to arbitrate because wrongful death is an independent cause of action under Utah law. In *Lawrence v. Manor*,[30] the court also held that beneficiaries were not required to arbitrate because under Missouri law, the wrongful death act creates a new cause of action belonging to beneficiaries.

TIP: Practitioners representing beneficiaries of a decedent who was a party to an arbitration agreement should become familiar with the wrongful death law of the state in which the decedent resided, because how that law treats wrongful death actions will determine whether the beneficiaries will have to arbitrate those claims.

Conclusion

The cases discussed here show that arbitration is a continually evolving process. Drafters of dispute resolution clauses should keep abreast of the latest court decisions affecting arbitration. This will help them craft arbitration provisions that benefit their clients when a dispute arises. It will also help arbitrators and practitioners do their job better. ■

ENDNOTES

[1] The Federal Arbitration Act (FAA) applies to diverse parties and any "maritime transaction or ... contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The term "commerce" is defined in Section 1 to mean "commerce among the several States or with foreign nations...." The reach of the FAA has been broadly construed to coincide with the reach of the "Commerce Clause." *Allied Bruce Terminix v. Dobson*, 513 U.S. 265 (1995), quoting *Perry v. Thomas*, 482 U.S. 483 (1987)." The FAA ensures the validity and enforcement of arbitration agreements and furthers the national policy favoring binding arbitration. The FAA preempts state laws that conflict with the FAA. Since there is no congressional intent to occupy the field, state arbitration statutes may govern arbitration agreements that involve interstate commerce, to the extent that they are not in conflict with the FAA. See *Volt Info. Sciences v. Board of Trustees of Leland Stanford Univ.*, 489 U.S. 468, 477 (1989).

[2] 128 S. Ct. 1396 (2008).

[3] The phrase "manifest disregard" was used by the Supreme Court in *dicta* in *Wilco v. Swan*, 346 U.S. 427 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 485 (1989). The *Wilco* Court stated:

> "While it may be true that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would 'constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act,' that failure would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to *manifest disregard* are not subject, in the federal courts, to judicial review for error in

interpretation." (Emphasis added).

The Supreme Court in *Hall Street* rejected the argument that the existence of the manifest disregard review standard supported the expansion of judicial review. It indicated that manifest disregard may refer to the Section 10 grounds "collectively, rather than adding to them." Moreover, it said that manifest disregard may just be a shorthand for the grounds identified in Sections 10(a)(3) and 10(a)(4), the "subsections authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'"

[4] 190 P.3d 586 (Cal. 2008).

[5] *Comedy Club, Inc. v. Imrpov W. Assoc.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (on remand from the U.S. Supreme Court); *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94-95 (2d Cir. 2008), cert granted, __ U.S. __ (2009). See also *Citigroup Global Markets v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

[6] See Paul Bennett Marrow, "A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator," 60(3) *Disp. Resol. J.* 10 (Aug.-Oct. 2005).

[7] The American Arbitration Association rules neither authorize nor prohibit appeals to an appellate panel of arbitrators. Indeed, they give parties the freedom to contract for procedures that work best in their situation. AAA Commercial Arbitration Rule 101(a) ("The parties, by written agreement, may vary the procedures set forth in these Rules.").

[8] In Drafting Dispute Resolution Clauses: A Practical Guide, effective Sept. 1, 2007, available at www.adr.org/si.asp?id=4125.

[9] Teresa Snider, "Enforceability of Agreements to Expand or Restrict the Scope of Judicial Review of Arbitration Awards," *Corp. Counsel Mag.* A6, A7 (Jan. 2006), citing *Hoeft v. MLV Group*. 343 F.3d 57 (2d Cir. 2003), and *Bowen v. Amoco Pipeline*, 254 F.3d 925 (10th Cir. 2001).

[10] Cf. Peter Michaelson, "In International Arbitration Disclosure Rules at the Place of Enforcement Matter Too, 62(4) *Disp. Resol. J.* 82 (Nov. 2007-Jan. 2008).

[11] Snider, *supra* n. 9.

[12] Available at www.nccusl.org (final acts and legislation).

[13] www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp.

[14] 12 Vt. Stat., ch 191, § 5665; Tex. Civ. Prac. & Rem. Code, ch. 171 § 048(c).

[15] No. 04-07-00540-CV, 2008 WL 2038826 (Tex. Ct. App. May 14, 2008). The employee sued in court, but the employer won a motion to compel arbitration. The parties entered into an arbitration agreement after the employer won this motion.

[16] No. 04-07-00540-CV, 2008 WL 2038826 (Tex. Ct. App. May 14, 2008).

[17] See also, In *re Poly-America, L.P.*, 262 S.W.3d 337 (Tex. 2008) (holding that a remedy-limiting clause in an arbitration agreement was unenforceable); *Chalk v. T-Mobile U.S.A.*, 560 F.3d 1087 (9th Cir. Mar. 27, 2009) (noting that a class action waiver and a waiver of attorney fees in an arbitration provision are unconscionable).

[18] 258 S.W.3d 580 (Tex. 2008).

[19] See n. 16 *supra.*

[20] Allowing pre-hearing document discovery from third parties: *Security Life Ins. Co. of Am. v. Duncanson & Holt*, 228 F.3d 865 (8th Cir. 2000) (holding that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing"). See also *Comsat Corp. v. National Sci. Found.*, 190 F.3d 269 (4th Cir. 1999) (stating in *dicta* that the FAA may give arbitrators authority to issue pre-hearing document subpoenas to non-parties, but only if there is a special need for such documents). Not allowing such discovery: *Life Receivables Trust v. Syndicate 102 at Lloyds' of London*, 549 F.3d 210 (2d Cir. 2008); *Matria Healthcare, LLC v. Duthie*, 2008 WL 4500173 (N.D. Ill. Oct. 6, 2008) (an arbitrator's subpoena power over non-parties under Section 7 of the FAA is limited to compelling them to testify or produce documents at the hearing). In *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005), the 2nd Circuit declined to decide this issue because the subpoenas sought to compel testimony of non-parties and document production at the hearing.

[21] Cited *supra n. 20.*

[22] *Hay Group v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004).

[23] Leslie Trager, 'The Use of Subpoenas in Arbitration," 62(4) *Disp. Resol. J.* 14 (Nov. 2007-Jan. 2008). Lowell Pearson, "The Case for Non-Party Discovery Under the Federal Arbitration Act," 60(3) *Disp. Resol. J.* 46 (Aug.-Oct. 2004). See also Timothy V. Krusl, "The Limits on Enforcement of Arbitral Third-Party Subpoenas: Should They Be Loosened?" 59(4) *Disp. Resol. J.* 30 (Nov. 2002-Jan. 2003) (discussing territorial limitation).

[24] 873 N.Y.S.2d 510 (N.Y. Sup. Ct. 2008).

[25] No. 07-CV-391, 2007 WL 3046273 (S.D. Ill. Oct. 15, 2007).

[26] *In Re Labatt Food Servs.*, 2009 WL 353524 (Tex. Feb. 13, 2009).

[27] *All State Home Mortgage v. Daniel*, No. 579, 2009 WL 1617092 (Md. Ct. App. June 9, 2009).

[28] Cited in n. 26 *supra.*

[29] 189 P.3d 40, 43 (Utah 2008).

[30] No. SC89291, 2009 WL 77897 (Mo. Jan. 13, 2009).

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