An Update on the Law of Arbitration

by

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Alternative Dispute Resolution Committee

Arbitration

A. (§15.96) Scope of Discussion

The United States Supreme Court continues to support and even encourage arbitration. During an oral argument in 2004, the Court seized the opportunity to quiz counsel on whether their clients would be willing to resolve their dispute through arbitration rather than a decision from the Supreme Court. *Kan. v. Colo.*, 543 U.S. 86 (2004). The Supreme Court followed up its desire that the parties turn their attention to arbitration by expressing "hope" in its written opinion that they would agree to binding arbitration for all remaining issues. *Id.* at 106.

The Eighth Circuit strongly supports arbitration as well. In *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003), the Eighth Circuit responded harshly to a trial court's decision to apply a broad standard on when parties are not subject to arbitration. "In our view, the [trial] court's analysis reflects an outmoded judicial hostility to arbitration that the [United States] Supreme Court has consistently rejected in construing the [Federal Arbitration Act]." *Id.* at 823. The Eighth Circuit noted that the United States Supreme Court "has evidenced its confidence that arbitrators are perfectly capable of protecting statutory rights when the parties have conferred the authority to decide statutory claims." *Id.*

Sections 15.97–15.138 below discuss the expansive statutory law and appellate caselaw addressing the scope and breadth of arbitration. Sections 15.105 and 15.106 focus on drafting considerations to customize an arbitration provision. Arbitration continues to be a quicker and more cost-effective forum for dispute resolution than the courthouse. But in some cases, the distinction is blurred. Disputes over significant sums of money tend to cause arbitration in those cases to look more like traditional litigation. Attorneys want the discovery phase in high-stakes arbitration to mimic traditional litigation with substantial discovery. Arbitrators try, when appropriate, to steer the attorneys toward less discovery and more simplicity in the process. Their efforts are often met with resistance, at least from one side, and sometimes from both sides.

Arbitration has matured rapidly from the shadowed notions of some in the 1980s and early 1990s that arbitration was merely a form of "rough justice," a phrase even uttered by a few arbitrators participating in the process back then. Today, its perception and reality are quite different. Arbitrators with established tribunals,

such as the American Arbitration Association (AAA), receive considerable initial and ongoing training to ensure that they remain current given how complicated some arbitrations have become. For example, in *DTV Network Systems, Inc. v. Skywalker Communications*, No. 406MC87 SNL, 2006 WL 2987040 (E.D. Mo. Oct. 17, 2006), the Eastern District considered issues on an arbitration that lasted more than three years. In *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), the Eastern District discussed an arbitrator's report that consisted of 2,075 pages.

B. (§15.97) Barriers

Arbitration is the creature of a private agreement between two or more parties. The process will not work at maximum efficiency and effectiveness unless there is cooperation between the parties and their counsel. Recalcitrant litigants sometimes try to take advantage of the system by engaging in delay tactics. They bank on the fact that the arbitrator or panel of arbitrators does not always have at its disposal the same arsenal of measures enjoyed by judges, including the power to sanction, to keep everyone in line and to keep everything moving forward on schedule. But as experienced counsel knows, the arbitration award is the ultimate goal. Sooner or later, the parties are going to get there. Given the wide discretion that arbitrators enjoy in making the award, few parties or counsel are willing to risk obstructionist behavior that could impact the final result.

Another barrier is that the enforceability of subpoenas in arbitration is limited. Accordingly, it may be more difficult to subpoena a witness for a deposition or to produce documents, or to compel a witness to appear at the hearing.

In addition, because there is limited court review of the arbitrator's award, as discussed in §15.125 below, the decision of the arbitrator is essentially final. This offers both the advantage of closure and the disadvantage that a seemingly meritorious claim cannot proceed further if there is an adverse award.

Parties typically find that fewer substantive prehearing motions will be filed or granted in arbitration. Litigants who enjoy a robust motion practice in court will view arbitration to be more restrictive in this regard. This is not to say that an arbitrator will never grant a prehearing motion because, in certain instances, such as an argument over the statute of limitations, such a motion may be favorably received. In *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496 (8th Cir.

2007), the Eighth Circuit reinforced the power of an arbitrator to decide substantive matters prehearing. This includes an arbitrator's power to grant a motion to dismiss without fear that precluding a party from presenting evidence will allow that party to successfully attack the award on the basis that the arbitrator refused to hear pertinent and material evidence. See §15.125 below for a fuller discussion on this point.

Binding arbitration agreements do not facilitate emergency relief as easily and quickly as being in court, such as when a party needs a temporary restraining order (TRO) or a preliminary injunction. The courthouse is definitely equipped, available, and far better at handling emergencies. Should a dispute ensue that requires immediate relief but is subject to binding arbitration, the preferred course of action would be as follows:

- File appropriate pleadings in the first instance with the court.
- State that the matter is subject to a binding arbitration agreement.
- Obtain the necessary emergency relief in court.

After the emergency relief is granted, the court can refer the dispute to arbitration for further disposition. This allows for immediate court action while preserving, without waiver, a party's right to proceed further in arbitration.

Expedited relief may be available through an arbitration tribunal, but this is less predictable to timely put in place when every second counts. Further, a judge's decision is immediately enforceable by law. An arbitrator's decision must be filed in court for enforcement, a process that slows immediate relief.

C. Agreements to Arbitrate

1. (§15.98) Predispute Agreements

Arbitration starts when one or more parties submit a dispute to one or more arbitrators or an arbitration tribunal—such as the American Arbitration Association (AAA)—for resolution. The dispute is already covered by a written agreement to arbitrate, which may include a specific arbitration tribunal. Many different arbitration provisions can start this process. For example, the AAA recommends drafting the following predispute provision:

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

COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (INCLUDING PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES) (2007) (AAA Commercial Rules), *available at* www.adr.org/sp.asp?id=28749. This provision is simple, broad in its scope, and, of course, engages AAA. Provisions using other tribunals are equally available.

2. (§15.99) Postdispute Agreements

More commonly than before, parties are turning, after a dispute ensues, to resolve their disagreement through binding arbitration rather than court, even though no arbitration agreement was in place. While such an agreement must be put in writing, the exact form is less important than the intent of the parties to submit their dispute to binding arbitration. The AAA suggests in the Introduction of the AAA Commercial Rules the following language to memorialize a postdispute agreement to arbitrate:

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

An unclearly worded or agreed-on postdispute agreement to arbitrate invites court intervention for resolution. The court in *Arrowhead Contracting, Inc. v. M.H. Washington, LLC*, 243 S.W.3d 532 (Mo. App. W.D. 2008), faced this issue. The Western District considered whether parties who, through counsel, discussed the possibility of entering into arbitration after the dispute arose had sufficiently agreed to binding arbitration. The attorney for one party sent a letter to the attorney for the other party stating that he "is open to negotiating the latitude provided" to the arbitrator, *id.* at 534—for example, will the arbitrator's decision be limited to affirming the position of one party or will it provide additional reasoning? In response, the other attorney stated: "I believe your

letter of October 23 does correctly outline the type of arbitration we had agreed upon." *Id*. at 535. The court concluded that the attorneys were merely engaged in negotiations. The attorney for one of the parties had reserved an essential element of the purported contract by not having reached a defined agreement on the type of award to be provided by the arbitrator. Thus, there was no binding agreement to arbitrate.

D. Procedural Considerations

1. (§15.100) In General

Who decides whether a dispute is subject to arbitration? The court does. Courts resolve doubts about whether a dispute is subject to arbitration in favor of arbitration. For example, in *Haberberger, Inc. v. Teamsters Local 682*, No. 4:05-CV-492 (CEJ), 2007 WL 29669 (E.D. Mo. Jan. 3, 2007), the appellate court affirmed a trial court's decision to grant a motion for summary judgment. The motion asked the trial court to enforce an arbitrator's award. The award came after the arbitrator determined that the arbitrator had jurisdiction over the dispute based on an oral notice by one of the parties of an intent to arbitrate. The arbitration provision stated that either party "may submit it to arbitration by notifying the other party in writing within ten (10) days after the company's decision." *Id*. at *3. The court concluded that the word "may" was permissive and that oral notice was sufficient.

2. (§15.101) Court Jurisdiction

The courts have jurisdiction to decide the "gateway question" of arbitrability—namely, whether the parties have entered into a valid and binding agreement to arbitrate. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003). But the court's role in deciding this issue is limited to this one determination. *Id.* at 406–07. If the court decides in favor of arbitration, the matter proceeds in arbitration without further court involvement.

Arbitrators decide all other issues. The United States Supreme Court, in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), held that a challenge to the validity of a contract as a whole, and not specifically to an arbitration clause in the contract, must go to the arbitrator and not the court for resolution. This decision provides yet another major vote of confidence for arbitration and the ability of arbitrators to decide and determine how to enforce contracts. This result supports the continuation of a trend by the United States Supreme Court over a number of years that has expanded and widely endorsed arbitrator authority in matters of contract interpretation and enforcement. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

Accordingly, Missouri's appellate courts have responded to the direction provided by the United States Supreme Court. In *Kirby v. Grand Crowne Travel Network, LLC*, 229 S.W.3d 253 (Mo. App. E.D. 2007), the court held that a dispute over the purchase of a membership to a vacation club was subject to arbitration, but with this decision the court's role had concluded. The plaintiffs had challenged in court the contract itself, rather than the arbitration clause. The courts do not have jurisdiction to decide such a challenge.

Consequently, an arbitrator and not the court will decide the legality and enforceability of an arbitration agreement that prohibits punitive and exemplary damages. *Howsam v. Dean Witter Reynolds, Inc.* 537 U.S. 79 (2002). The United States Supreme Court defers to the expertise of arbitrators even over its own federal judges to resolve issues on statutes of limitations, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate. *Id.* Also, questions regarding the unconscionability of an arbitration provision can rest with the arbitrator and not the court. *Madol v. Dan Nelson Auto. Group*, 372 F.3d 997 (8th Cir. 2004). See §15.112 below for a more complete discussion of unconscionable arbitration provisions. The arbitrator

can even decide the application of federal statutory claims. *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003).

In deciding the gateway question of arbitrability, the court may be asked to consider jurisdictional challenges—procedural or substantive—to the arbitrability of a claim or challenges that relate to the merits of the arbitrator's decision. *Int'l Bhd. of Elec. Workers, Local Union No. 454 v. Hope Elec. Corp.*, 380 F.3d 1084 (8th Cir. 2004). Courts decline to address issues regarding procedural arbitrability. Substantive jurisdictional challenges involve the gateway question of whether the parties agreed to arbitrate. The courts have jurisdiction to decide this issue. By contrast, the courts "refuse" to exercise jurisdiction to review and reconsider on the merits an arbitrator's award. *Id.* at 1101. Applying this test, a dispute about whether an employee complied with prearbitration provisions in a grievance procedure as a prerequisite to pursuing arbitration is a matter of procedure to be decided by the arbitrator rather than the court. *Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Shopman's Local 493 v. EFCO Corp. & Constr. Prods., Inc.*, 359 F.3d 954 (8th Cir. 2004).

3. (§15.102) Motion to Compel

The preferred method to advance an arbitration when one party resists is to file a motion to compel arbitration in the appropriate court. *See Hershewe v. Alexander*, 264 S.W.3d 717 (Mo. App. S.D. 2008). In *Workman v. Orkin Exterminating Co*., 66 S.W.3d 743 (Mo. App. S.D. 2001), the Southern District reversed the trial court's order denying, without explanation, a motion to compel arbitration. The appellate court applied the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, because employees for Orkin had to cross state lines and the material Orkin used came from another state. The appellate court agreed with Orkin that the FAA mandated enforcement of the arbitration provision. In doing so, the court rejected the plaintiffs' argument that, because the treatment "had not been performed," the arbitration agreement had no effect. *Workman*, 66 S.W.3d at 745.

The Supreme Court of Missouri held in a matter of first impression that § 435.355.1, RSMo 2000, precludes a party opposing a motion to compel arbitration from having a jury trial

on that issue. *Netco, Inc. v. Dunn*, 194 S.W.3d 353 (Mo. banc 2006). Section 435.355.1 provides:

> On application of a party showing an agreement described in section 435.350, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

Netco concluded that the language "proceed summarily" eliminates the requirement of a jury trial over the existence of an arbitration agreement. The Court further characterized a proceeding on a motion to compel arbitration as an "equitable remedy designed to compel specific performance of a term in a contract." *Id*. at 362. Courts sitting in equity typically wield much broader power to fashion expedient relief.

4. (§15.103) Motion to Stay

A party receiving a demand for arbitration may move in court for a stay of the arbitration on the ground that there is no valid arbitration agreement. *Creech v. MBNA Am. Bank, N.A.*, 250 S.W.3d 715, 716 (Mo. App. S.D. 2008). Raising this issue requires the court to "summarily" try the dispute to determine if the motion for stay should be granted. *Id*. The trial will be over the single question of whether the parties entered into a valid arbitration agreement—the "gateway" question of arbitrability. *Id*.

Once a party files a lawsuit that is subject to binding arbitration, the responding party, if it wishes to invoke arbitration, should move to stay the court proceeding and have the dispute resolved through binding arbitration. According to some courts, an order staying the action rather than dismissing it is the correct order from the court if there is a binding arbitration provision. *JBS Farms, Inc. v. Fireman's Fund Agribusiness, Inc*., 205 S.W.3d 910 (Mo. App. S.D. 2006). The court decides if the dispute is subject to binding arbitration. The stay remains in place until the arbitration proceeding is concluded. At that point, the parties may return to the court for any further action, principally including the potential confirmation, enforcement, or challenge of the award.

When the court determines that all of a plaintiff's claims are subject to arbitration, the court may choose to dismiss the case in its entirety rather than stay it and compel arbitration. *Alford v.*

Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992). The Eastern District recently decided to dismiss a case when all counts were subject to arbitration rather than stay it and compel arbitration. *Medscript PBM, Inc. v. Procare PBM, Inc.*, No. 4:08CV0293 AGF, 2008 WL 4941002 (E.D. Mo. Nov. 17, 2008). The court concluded that dismissal appears to be the preferable procedural treatment when all of a plaintiff's claims are subject to arbitration.

Asking for a court stay does not guarantee that the court will grant it. In *Metro Demolition & Excavating Co. v. H.B.D. Contracting*, *Inc.*, 37 S.W.3d 843 (Mo. App. E.D. 2001), the appellate court agreed that a trial court correctly denied a motion to stay litigation pending arbitration with regard to one particular subcontract. The subcontract incorporated by reference the provisions of the prime contract between the owner and the contractor, and this contract included binding arbitration. The problem was that the prime contract was not in existence at the time of the incorporation; thus, the incorporation was not valid.

The court set out the elements to consider in deciding whether an arbitration agreement warrants an order staying litigation. They are as follows:

- Whether the parties agreed to arbitrate
- The scope of the agreement
- If federal statutory claims are asserted, whether Congress intended those claims to be arbitrable
- If the court concludes that some but not all claims are arbitrable, whether to stay the balance of the proceeding pending arbitration

Id. at 846.

5. (§15.104) Nonsignator to Arbitration Agreement

Arbitration requires an express agreement in writing signed by two or more parties. Thus, a nonsignator to a contract containing an arbitration provision generally is not bound to arbitrate. But there are exceptions, as noted by Missouri's appellate court and the Eighth Circuit. For example, a nonsignatory party to an arbitration agreement can be bound to the arbitration provision if

that person is an agent of one of the signing parties or is a third-party beneficiary to the contract. *Greenpoint Credit, L.L.C. v. Reynolds*, 151 S.W.3d 868 (Mo. App. S.D. 2004). A third-party beneficiary to a contract is someone who did not expressly execute the agreement but benefits from one or more of its terms. *Azbill v. UMB Scout Brokerage Servs., Inc.*, 129 S.W.3d 480 (Mo. App. W.D. 2004). By contrast, the Southern District held that a daughter who is a nonparty to a contract for nursing home services was not bound by the contract's arbitration agreement. *Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393 (Mo. App. S.D. 2006).

A nonsignator can enforce an arbitration clause against a signator when:

- the relationship between [them] is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided; [or]
- the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims' against the nonsignatory.

CD Partners, LLC v. Grizzle, 424 F.3d 795, 798 (8th Cir. 2005) (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)). The test for determining whether a nonsignator can force a signator into arbitration is different from the test for determining whether a signator can force a nonsignator into arbitration. *Id.*

In *Nichelson v. Soeder, III*, No. 4:06CV1403, 2006 WL 3079109 (E.D. Mo. Oct. 27, 2006), the Eastern District similarly concluded, consistent with the Third Circuit, that an arbitration agreement can bind agents of the signatory parties. It further found that a nonsignatory can enforce an arbitration clause against a signatory to the agreement in several circumstances, including those set out above from *CD Partners*, 424 F.3d at 798 (quoting *MS Dealer*, 177 F.3d at 947).

In *Senda v. Xspedius Communications, LLC*, No. 4:06CV1626-DJS, 2007 WL 781786 (E.D. Mo. Mar. 13, 2007), the district court decided that a court can compel arbitration involving an agreement that does not have an arbitration clause if that agreement cross-references another agreement that contains a broadly worded arbitration clause. Also, a court can compel

parties to an agreement with a broadly worded arbitration clause to arbitrate an issue concerning whether a letter sent between the parties amended the agreement. "Extrapolated one step further, the court can even compel the parties to arbitrate the question of whether a controversy relates to an agreement with a broad arbitration clause." *Id*. at *2 (citing *Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co.*, 118 F.3d 619 (8th Cir. 1997)). Thus, a nonsignatory can enforce an arbitration clause against a signatory to the agreement when the signatory to the written agreement that contains the arbitration clause must rely on the terms of that written agreement in asserting its own claims. The court concluded that the plaintiff's claims against the nonsignatory defendants relied on and arose out of the employment agreement that contained an arbitration clause. Accordingly, the nonsignatories were bound to arbitrate.

A third-party beneficiary to a contract—namely, one who did not expressly execute the agreement—is still bound by its terms, including a provision on binding arbitration. *Azbill*, 129 S.W.3d 480. The court noted that whether a dispute is covered by an arbitration clause is a matter of law and that the appellate court's review of such a dispute is de novo. *Id*. at 483. Azbill claimed that, because she was a third-party beneficiary of an individual retirement account contract, she could enjoy the benefits of the contract but was not subject to its arbitration provision. The court concluded otherwise: "She cannot base her status to sue on the contract, then attempt to avoid the arbitrability requirement contained in the contract." *Id*.

In *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339 (Mo. banc 2006), the Supreme Court decided as follows:

> It would be manifestly inequitable to permit [plaintiff] to both claim that [the non-signatory party] is liable to [plaintiff] for its failure to perform the contractual duties described in the agreement and at the same time deny that [the nonsignatory] is a party to that agreement in order to avoid arbitration of claims clearly within the ambit of the arbitration clause.

The Supreme Court of Missouri held that an arbitration agreement signed by or on behalf of a nursing home resident did not bind plaintiffs in a wrongful death action against the nursing home for the resident's death. *Lawrence v. Manor*, No. SC 89291,

2009 WL 77897 (Mo. banc Jan. 13, 2009). The Court noted that the parties bringing the wrongful death action were different from the resident and any action that he may have been able to pursue. Further, the measure of damages was also different. *Id.* at *3. Thus, the arbitration agreement applied only to those persons who derived their claim through or on behalf of the deceased. The wrongful death claim was not derivative of any claims that the deceased could have brought. Therefore, the arbitration provision did not constrict the parties from bringing their wrongful death lawsuit. Another case involving very similar facts and reaching the same conclusion is *Ward v. National Health Care Corp.*, No. SC 89392, 2009 WL 77981 (Mo. banc Jan. 13, 2009).

E. Drafting Considerations

1. (§15.105) In General

Caselaw and creative counsel spawn numerous items for drafters to consider in potential arbitration provisions. Appellate decisions teach the following lessons.

An arbitration clause only produces binding arbitration if it so states. *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003).

Arbitration provisions frequently specify where the arbitration will occur. The court may strike a venue provision if the location places an undue burden on a party, particularly when the agreement is between a business and a consumer. *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103 (Mo. App. E.D. 2003). In *Swain*, the Eastern District struck down the venue portion of an arbitration provision requiring the purchaser of an automobile in Missouri to arbitrate the dispute in Arkansas, finding it to be a contract of adhesion and unconscionable.

A frequent challenge is that the arbitration provision does not allow the arbitrator the authority to award all relief that would be available in a court of law. Issues relating to any potential limitation on recovery go to the merits of the dispute rather than whether the arbitration provision is enforceable. Thus, those decisions are for the arbitrator and not the court. *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002).

2. (§15.106) Specific Arbitration Provisions

When drafting an arbitration provision, the following are items to consider in customizing the alternative dispute resolution provision to suit specific needs:

- The parties should select a forum for resolution of their dispute. The choices include the following:
  - The AAA
  - United States Arbitration & Mediation (USA&M)
  - Pinnacle Arbitration and Mediation Services
  - Other professional groups
  - Private arbitration services
- A critical item to consider is the scope of dispute or potential dispute that the parties wish to be subject to arbitration. The parties may decide that the agreement should be to arbitrate everything, no matter what the dispute. Or they may want to limit the arbitration in one or more ways, including:
  - minimum or maximum dollar amount of dispute; and
  - specific type of claims (fraud, tort, personal injury).

  Claims involving nonparties to the arbitration agreement and claims for emergency relief (TROs, injunctive relief) may be excluded.
- The agreement may include some provision on the applicable arbitration law that the parties wish to be in effect. Possible choices are as follows:
  - To specify the law or leave silent

- Federal law (the FAA)
- Local law, such as the Missouri Uniform Arbitration Act (MUAA), §§ 435.350–435.470, RSMo 2000 (modeled after the Uniform Arbitration Act (2000), 7 U.L.A. pt. I (2005))

If Missouri law applies, the drafter needs to place the following language adjacent to or above the space provided for signature, in ten-point capital letters, in accordance with § 435.460, RSMo 2000:

"THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."

- A determination of the applicable substantive law may be specified. The choices include the following:
  - Federal
  - State
  - Silent (nothing is specified)
- The arbitration provision can include specific procedural rules on how the arbitration will take place. Items to consider are as follows:
  - Incorporation of the rules of a specific forum, such as AAA
  - Incorporation of rules of civil procedure of state or federal court
  - No rules (usually by being silent on this point)
  - Rules other than those specified above
- Perhaps the most important decision in an arbitration agreement is the selection of the arbitrator. Just like no attorney actually "picks a jury," arbitrators, while seemingly "selected" by the parties, are sometimes the product of elimination of potential arbitrators not acceptable to one of the parties, rather than the product of consensual choice and agreement. Even in those instances

when the parties agree on an arbitrator and the arbitrator is truly "selected," the parties' decision may be based more on culling out those rejected as unacceptable choices than on finding the one truly chosen by all concerned to be acceptable to all. Regardless, the opportunity is there to truly play a key role in finding the right arbitrator for everyone involved. Qualifications of the arbitrator that should be considered are as follows:

- Specific industry experience or license, such as attorney, professional engineer, or architect
- Number of years of experience
- Geographic location
- Nationality (for international disputes)

- Generally, the number of arbitrators is determined by the parties' agreement and their predetermined choice on the financial threshold levels in moving from one to more than one arbitrator. The general choices in number of arbitrators are:
  - One
  - Three

  Consider addressing the following questions:
  - If there is more than one arbitrator, are any party-appointed arbitrators to be treated as independent, neutral arbitrators?
  - Is a two-out-of-three decision enough or must there be a unanimous decision?
- There are many methods of selecting an arbitrator, and to the extent possible, the agreement should specify the method to avoid later disagreement and possible stalemate. Possible choices include the following:
  - Mutual agreement

- Ranking by parties with strikes from a pool of potential arbitrators
- Selection by a court
- Selection by the forum
- Selection by the president of the state or local bar association

- The location of the hearing is critical in many instances. Location can impact costs and logistical considerations, including compelling witnesses to testify by subpoena. Advocates should always designate in the agreement a specific location where the arbitration will take place. This reduces, if not eliminates, later disputes over where the hearing will be.

  In reality, venue may be more important at a trial than at a hearing in arbitration. Arbitrators often travel from different states to hear cases, and they have more of a national than local perspective, thus reducing the perception that the "locals" will win or that the out-of-towners will be "home-towned." National arbitrators tend to be less focused on the place where the arbitration is occurring and more concentrated on deciding which party is entitled to a ruling in its favor. Regardless, location is still important and can be provided in the agreement as follows:

  - Specified in the agreement
  - Put into the demand for arbitration
  - Provided by default as the location of the project

- Discovery can be spelled out in the agreement. Attorneys often give insufficient thought to addressing discovery. Possible options to consider include the following:

  - None allowed
  - No provision made
  - As allowed by the forum

- As allowed by federal or state rules
- Specific, defined discovery only, such as five depositions with no deposition longer than eight hours

- An arbitration agreement can address who will be the parties to the arbitration agreement. This sounds so simple, yet when it is not followed, it leads to many problems. Possible parties to the agreement include the following:
  - Corporations
  - Individuals
  - Incorporation by reference from another contract
  - Third parties
  - Assigns
  - Successors

- An arbitration agreement can include specific requirements on prehearing motions. This is not a typical provision, but under the right conditions it may be a very important item to include in the agreement.

- Invariably, one side wants the hearing to take place soon, and the other side prefers a later date. The time for the hearing is seldom set out in the agreement, but it can be, or the agreement can provide that this decision is left up to the arbitrators.

- What evidence should the arbitrator consider in reaching a decision? Unlike a traditional court of law, in which the rules of evidence and the practices of the judge will dictate what goes into evidence, the parties to an arbitration agreement can make their own binding decisions about what evidence will be received. The agreement may include the following:
  - No provision made

- All evidence allowed under the federal or state rules of evidence, or both
- As allowed by the rules of the forum, such as AAA
- Limited as decided by the arbitrators
- Use of subpoenas for evidence depositions of witnesses outside locale of hearing
- Hearsay considerations
- Affidavits and declarations of witnesses

- Although not regularly an issue in a Missouri arbitration, some arbitration agreements spell out the language to be used at the hearing, including the following:
  - English
  - Translators
- The parties to the arbitration agreement should give consideration to the type of award they wish the arbitrator to render with the decision. There are several options from no explanation at all to a very detailed written opinion. Forms of the award can be as follows:
  - Standard (no reasons are provided in the decision)
  - Some reasoning provided in the written decision
  - Detailed findings of fact and conclusions of law
- The agreement may also provide the time within which the arbitrator must render the written award after the evidence has been presented. A typical time period is 30 days. In addition, some parties wish to limit the arbitrator's decision to preset ranges, for example:
  - Baseball (each side presents a number, and the arbitrator must select one of the two numbers)

- High/low agreement (the parties agree but do not tell the arbitrators that, no matter what the decision, it will fit within the parties' preset range)

- The arbitration agreement may cover the powers of the arbitrators. Possible considerations of what powers the arbitrator may have are as follows:
  - Same as judge
  - "Just and equitable" result, per AAA Commercial Rule R-43(a)
  - Specifically limited, such as no sanction power
  - Interim relief, such as an accounting, TRO, or preliminary injunction
  - Specific performance
  - Other nonmonetary relief
- The agreement may contain limitations on what can and cannot be awarded. Some parties wish to limit the scope of the award in one or more of the following ways:
  - No punitive damages (except as allowed by statute)
  - No consequential damages
  - No attorney fees
- There are three ways that attorney fees can be awarded in an arbitration:
  - By arbitration agreement
  - By statute
  - By request of all parties during arbitration per Rule R-43(d)(ii) of the AAA Commercial Rules

The parties should consider whether a specific provision should be included in the agreement to cover when and how the arbitrator can award attorney fees.

- The parties may want to enter into an express confidentiality agreement to ensure that the arbitration will not be shared with those not participating in the process. See the discussion in §15.120 below.

- The parties may want to place a statute of limitations provision in the agreement.

F. Specific Issues in Arbitration Provisions

1. (§15.107) Arbitration Provisions Are Liberally Construed

It is axiomatic that binding arbitration requires a written agreement to arbitrate. Absent such an agreement, disputes are resolved in a court of law or equity. The courts liberally construe an arbitration agreement and resolve all doubts in favor of arbitration. *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 945 (8th Cir. 2001). A motion compelling arbitration will be granted unless it may be said with "positive assurance" that the arbitration provision is not susceptible of an interpretation that covers the asserted dispute. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960).

A letter from counsel responding to a request for arbitration that stated that arbitration was a "workable process for resolving this dispute" and that requested a discussion of the ground rules for arbitration was sufficiently binding to create an agreement to arbitrate. *Asia Pac. Indus. Corp. v. Rainforest Café, Inc.*, 380 F.3d 383, 386 (8th Cir. 2004). An arbitration provision survives an employee's termination even after the other provisions in the employment agreement no longer apply. *Lyster*, 239 F.3d 943. Unless a contract expressly negates the presumption that an arbitration provision survives termination of the contract and will remain in full force and effect, the arbitration provision remains enforceable after termination of the contract. *Medscript PBM, Inc. v. Procare PBM, Inc.*, No. 4:08CV0293 AGF, 2008 WL 4941002 (E.D. Mo. Nov. 17, 2008).

2. (§15.108) Narrow or Broad Arbitration Provisions

A number of recent cases address whether a particular dispute is covered by the arbitration provision in question. In deciding the answer to this question, "the circuit court first must decide whether the arbitration clause is narrow or broad. A broad arbitration clause covers all disputes arising out of the arbitration agreement. A narrow clause limits arbitration to specific types of disputes." *Kansas City Urology, P.A. v. United Healthcare Servs.*, 261 S.W.3d 7, 11 (Mo. App. W.D. 2008) (citing *Estate of Athon v. Conseco Fin. Servicing Corp.*, 88 S.W.3d 26, 30 (Mo. App. W.D. 2002)).

Typically, broadly worded arbitration provisions cover all or nearly all anticipated disputes at the time of contract inception. Courts enforce these provisions. An example is a clause that applies to "all disputes, controversies or differences arising out of or in connection with this [a]greement or the making thereof." *MedCam, Inc. v. MCNC*, 414 F.3d 972, 972 (8th Cir. 2005). Another broadly worded provision is one calling for arbitration of all disputes "arising hereunder." *CD Partners, LLC v. Grizzle*, 424 F.3d 795 (8th Cir. 2005). When dealing with broadly worded arbitration provisions, the court analyzes whether the dispute relates to the subject matter of the agreement. If so, the court will send the dispute to arbitration. *United Steel Workers of Am. AFL-CIO-CLC v. Duluth Clinic, Ltd.*, 413 F.3d 786 (8th Cir. 2005).

By contrast, courts will not compel arbitration if the arbitration provision fails to cover the claim in dispute. If the clause is narrowly worded, the court determines whether the dispute involves an agreement that is collateral to the arbitration clause. *Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997). For example, a letter of understanding that is separate from the main contract and its arbitration provision does not bind the parties to arbitration absent a provision on incorporation by reference. *Id.* Similarly, if the dispute involves a narrow arbitration provision and the claims do not raise any issue requiring reference to or construction of the agreement containing the arbitration provision, the dispute is not subject to binding arbitration. *Nw. Chrysler-Plymouth, Inc. v. DaimlerChrysler Corp.*, 168 S.W.3d 693 (Mo. App. E.D. 2005).

Some arbitration provisions are too narrow to embrace the dispute in question. For example, an arbitration provision in a collective bargaining agreement that provided for arbitration of any matter that relates to an interpretation of the agreement did

not cover a former employee's allegations that a resignation was a result of some irrational behavior caused by an unspecified illness. *Bakery, Confectionary, Tobacco Workers & Grain Millers, Local 100G v. Penford Prods. Co.*, 106 Fed. Appx. 525 (8th Cir. 2004). Tort claims often involve issues that can be resolved without reference to or construction of the agreement containing the arbitration provision. Thus, they are generally not covered under a narrow provision. *Id.*

Construction claims often involve both allegations of breach of contract and tort claims. Frequently, this invokes a dispute over whether the tort claim is subject to arbitration. The Western District considered this issue in *Rhodes v. Amega Mobile Home Sales, Inc. v. S. Energy Homes, Inc*., 186 S.W.3d 793 (Mo. App. W.D. 2006). Purchasers of a mobile home were in a dispute with the manufacturer of the mobile home. The purchasers alleged a number of defects. The mobile home manufacturer argued that a binding arbitration provision in the warranty stated that all disputes between them "resulting from or arising out of the design, manufacture, warranty or repair of the manufactured home" must be submitted to binding arbitration. *Id.* at 796. But the sale contract did not contain any provision on arbitration. The Western District concluded that the purchaser's claim in tort for product liability was independent of and different from the purchaser's warranty claim and, thus, was not covered by the arbitration provision. The court further held:

> At the very least, for a tort claim to be subject to arbitration under a broad arbitration clause, it must raise some issue the resolution of which requires reference to or construction of some portion of the parties' contract. Where, however, a tort claim is independent of the contract terms and does not require reference to the underlying contract, arbitration is not compelled.

Id. at 798.

Similarly, the Western District concluded in *Seaboard Corp. v. Grindrod Ltd.*, 248 S.W.3d 27, 33 (Mo. App. W.D. 2008), that various claims brought by the plaintiffs against the corporate defendants did not arise out of or relate to and were not connected to an asset purchase agreement that contained a binding arbitration provision. Therefore, the claims were not subject to arbitration.

3. (§15.109) Incorporation by Reference

When the arbitration clause resides in a document other than the disputed contract—i.e., a document that is specifically incorporated by reference—the incorporation of the arbitration provision must be very specific before it will apply. In *Dunn Industrial Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003), the Supreme Court concluded that a mere reference to another contract that contained a binding agreement to arbitrate was not enough to create binding arbitration. Of import, the party resisting arbitration had been consistently resolute in its opposition throughout the process of litigation and arbitration. The Supreme Court did recognize and reinforce, nonetheless, that the majority of state courts, including Missouri, have a strong preference toward the federal policy in favor of arbitration including arbitration agreements involving guarantors or sureties when the arbitration agreement is incorporated by reference into the guaranty or performance bond. *Id.* at 435.

In *United States of America for Use of Lighting & Power Services, Inc. v. Interface Construction Corp.*, 553 F.3d 1150 (8th Cir. 2009), the Eighth Circuit concluded that, for a sub-subcontractor's claim to be subject to arbitration when it incorporated in its contract proposal the contract of another contractor that contained a binding arbitration provision, that other contract had to be already in place at the time of incorporation. A contract that does not yet exist cannot be incorporated by reference. Accordingly, the Eighth Circuit concluded that the parties were not subject to binding arbitration, and they could proceed instead in a court of law.

4. (§15.110) Nondelegation

Parties may agree to arbitrate virtually any dispute. But there are limits, and there are certain disputes that cannot be delegated to arbitration. One such example is a labor agreement involving a public entity. Per Missouri law, wages and hours for public employment in Missouri must be established by statute or ordinance. They cannot be the subject of bargaining or arbitration. *Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084 (8th Cir. 2004). Further, if there is no valid public contract because of lack of authority to enter into a contract, any arbitration clause contained in drafts is unenforceable. *Orf Constr., Inc. v. Black Jack Fire Prot. Dist.*, 239 S.W.3d 685, 687 (Mo. App. E.D. 2007).

5. (§15.111) One-Sided Arbitration Provisions

Courts are reluctant to enforce an arbitration provision when one side can invoke arbitration but the other side does not have that option. *Wiser v. Wayne Farms*, 411 F.3d 923 (8th Cir. 2005). Lack of mutuality can even expose the clause to a finding of unconscionability. See the discussion in §15.112 below. In *Morrow v. Hallmark Cards, Inc*., 273 S.W.3d 15 (Mo. App. W.D. 2008), the Western District held that an arbitration program that was unilaterally imposed by an employer on at-will employees lacked consideration and was unenforceable. The court emphasized that lack of bargaining position or mutuality does not necessarily, by itself, mean that an arbitration provision is unenforceable. But it is something that must be "considered in determining whether there is an enforceable agreement, particularly if it is adhesive in nature." *Id*. at 24.

6. (§15.112) Unconscionable Arbitration Provisions

The Supreme Court of Missouri addressed whether a one-sided arbitration provision was unconscionable in *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006). The arbitration provision allowed just one side to select the arbitrator. It also provided that the attorney fees and costs for the arbitration must be paid by the purchaser of the home and not the builder. The Supreme Court concluded as follows:

> It is unconscionable to have a provision in an arbitration clause that puts all fees for arbitration on the consumer. This is particularly true when the cost-shifting terms could work to grant one party immunity from legitimate claims on the contract. At the time this contract was created, the arbitration provision that shifts all arbitration fees to [the homeowners] was unconscionable and unenforceable.

Id. at 860–61.

In *Doerhoff v. General Growth Properties, Inc*., No. 06-04099-CV-C-SOW, 2006 WL 3210502 (W.D. Mo. Nov. 6, 2006), the Western District considered a nationwide lawsuit involving charges of $2 per month as a service fee on mall gift cards. The provider of the card, American Express, received approximately $7 million in revenue from the program, which provided for binding arbitration. The plaintiffs argued that this provision was unconscionable. The court agreed, in part, by citing from a previous case, stating: "Standing alone, a public policy favoring arbitration is not enough to extend the application to an

arbitration clause far beyond its intended scope." *Id*. at *7 (quoting *Greenwood v. Sherfield*, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995)). The court decided that the case could proceed as a class action in court.

In *Equal Employment Opportunity Commission v. Woodmen of World Life Insurance Society*, 479 F.3d 561 (8th Cir. 2007), the Eighth Circuit considered an employment agreement arbitration provision that required the parties to share the cost of arbitration. The employee introduced evidence at the trial court level that the costs associated with a private arbitrator chosen to handle the arbitration proceeding were high, and the district court accordingly determined that the "spiraling costs, coupled with [the employee]'s financial condition relieved her of the obligation to continue in arbitration." *Id.* at 565–66. The Eighth Circuit concluded otherwise, finding that "[c]onsidering the circumstances that existed at the time the two arbitration agreements were entered, we conclude that neither arbitration agreement is unconscionable under Nebraska law." *Id*. at 566.

Missouri courts consider two forms of potential unconscionability: procedural and substantive. *Kansas City Urology, P.A. v. United Healthcare Servs.*, 261 S.W.3d 7 (Mo. App. W.D. 2008). Procedural unconscionability relates to the formalities of making the contract, e.g., whether one of the parties:

- exerted high pressure on the other party during the negotiations;
- misrepresented material facts to the other party; or
- had significantly unequal bargaining power over the other.

Id. Substantive unconscionability focuses on the contract's terms—whether they are unduly harsh. *Id*. For a contract to be void on the basis that it is unconscionable, the Western District held that it must be procedurally and substantively unconscionable, although not in equal amounts. *Id*. For example, a contract can be void because of a substantial amount of procedural unconscionability but only a small amount of substantive unconscionability, or vice versa. *Id*. at 14–15.

By contrast, the Eastern District, in *Woods v. QC Financial*

Services, Inc., No. ED 90949, 2008 WL 5454124, at *3 (Mo. App. E.D. Dec. 23, 2008) (citing, with approval, *Vincent*, 194 S.W.3d 853), stated that the Supreme Court actually ruled in *Vincent* that substantive unconscionability alone may be enough to invalidate the contract. *Woods* further concluded that a class action waiver in a mandatory arbitration clause on the plaintiff's form loan contract was a contract of adhesion and, thus, unconscionable. *Id*. at *7. The Eastern District stated that the loan contract:

> is formed in a setting of procedural unconscionability, as set forth above, and in repeated situations in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of customers out of individually small sums of money.

Id.

Unconscionability may be decided by the arbitrator in some cases and by the court in other cases. In *Madol v. Dan Nelson Automotive Group*, 372 F.3d 997 (8th Cir. 2004), the Eighth Circuit reversed the district court's order allowing for more discovery in a dispute about whether the parties were subject to arbitration. One of the parties had argued that the arbitration agreement was unconscionable. The Eighth Circuit concluded that arguments about unconscionability should be presented to the arbitrator and not the court.

By contrast, the Eighth Circuit, in *Faber v. Menard, Inc*., 367 F.3d 1048 (8th Cir. 2004), considered whether an arbitration agreement providing that the employer and the employee each bear personal costs and attorney fees was unconscionable under Iowa law. The Eighth Circuit reversed the federal district court's decision denying the employer's motion to compel arbitration. The Eighth Circuit remanded the case to the district court to determine whether the agreement requiring a splitting of the fees unconscionably prevented the employees' resolution in arbitration. "If found to be unconscionable, the offending clause should be severed and arbitration compelled." *Id*. at 1055. Thus, the court decided unconscionability in *Menard*.

The Eastern District decided that a contract requiring the purchaser of an automobile in Missouri to arbitrate disputes over car repairs (under the AAA Commercial Rules) in Baxter County,

Arkansas, was a contract of adhesion and unconscionable. *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103 (Mo. App. E.D. 2003). The plaintiff had purchased, through the automotive dealer, a vehicle service plan from Auto Services, an Arkansas corporation. The venue provision in the agreement stood apart from the rest of the arbitration agreement; thus, the court decided that it would not follow, in this instance, the liberal federal policy favoring arbitration agreements. Of note, the appellate court also stated that the trial court should consider whether the existence of large arbitration costs, half of which are to be paid by the consumer, effectively precluded the consumer from pursuing consumer claims and, thus, rendered the agreement to arbitrate invalid under *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90–92 (2000).

The Western District decided that enforcement of an arbitration provision was not procedurally unconscionable when the plaintiff buyer of an automobile had only 15 minutes to review all the contracts and documents, including the provision on binding arbitration, and the contract was a form document presented on a "take it or leave it" basis. *Kates v. Chad Franklin Nat'l Auto Sales N., LLC*, No. 08-0384-CV-W-FJG, 2008 WL 5145942 (W.D. Mo. Dec. 1, 2008). The district court concluded that the plaintiff was not obligated to buy the car from this defendant. The district court further concluded that the arbitration agreement was not substantively unconscionable, even though it prohibited a class-action lawsuit. The court held that the mere existence of a class-action waiver within an arbitration agreement does not render the agreement substantively unconscionable, absent limitations on the remedies available to the claimants. *Id.* at *5.

Swaim noted that: "Some federal circuit courts have held that whether remedial limits in an arbitration clause are invalid or unconscionable is a question for the arbitrator, while others have found that a court may determine the enforceability of an arbitration clause with remedial limitations." *Swain*, 128 S.W.3d at 109. The Eastern District observed that the United States Supreme Court had this issue before it in *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003), but the United States Supreme Court did not reach any conclusion.

7. (§15.113) Financial Considerations

Financial considerations can impact arbitration. The courts

continue to examine carefully how an arbitration provision addresses the payment of an arbitrator's fees, and on occasion, courts will strike such a provision. The Eighth Circuit decided that a pension plan that required that arbitrator fees be split equally between the parties was not in accord with the statutory framework of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, and that the fee-splitting provision discouraged the pursuit of many legitimate claims by those who cannot afford such costs. *Bond v. Twin Cities Carpenters Pension Fund*, 307 F.3d 704 (8th Cir. 2002).

Courts will also deny a motion to compel arbitration when the amount in dispute is below the threshold amount specified in the agreement. *G&S Masonry, Inc. v. MJC Constructors, Inc.*, 167 S.W.3d 813 (Mo. App. S.D. 2005). This protects those who only agreed to arbitration if the amount in dispute is more than some previously agreed amount. In other cases, parties may agree to arbitration only if the amount in dispute is less than some specified amount.

8. (§15.114) Smaller Transactions

For smaller transactions, some arbitration tribunals alter the method of payment for arbitration costs, including arbitrator fees, to provide greater financial assistance to the consumer or claimant when the costs could outweigh the amount in dispute. For example, the AAA Commercial Rules provide that disputes up to $75,000 will be administered under Expedited Rules. Rule E-10 states that arbitrators will receive compensation at a rate to be suggested by the AAA regional office. This could mean a capped fee of $750–850 for a one-day hearing. If the dispute does not exceed $10,000, the consumer is responsible for one-half of the arbitrator fee up to a maximum of $125. *See* AAA CONSUMER-RELATED DISPUTES SUPPLEMENTARY PROCEDURES, RESOLUTION C-8 (2005).

9. (§15.115) Choice of Law

The FAA controls all arbitrations that involve interstate commerce, which the courts have broadly construed to include a wide range of activities. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003). The phrase "involving commerce" is broad and is the functional equivalent of the phrase "affecting commerce," a

phrase that signals Congress's intent to exercise considerable control. *Paetzold v. Am. Sterling Corp*., 247 S.W.3d 69, 72 (Mo. App. W.D. 2008).

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

9 U.S.C. § 2.

When both the FAA and the MUAA are applicable, the courts will apply the FAA. But a Missouri court is not bound by the procedural provisions of the FAA and can apply Missouri's procedures to the extent that they do not defeat the rights granted by Congress through the FAA. *Clayco Constr. Co. v. THF Carondelet Dev., L.L.C.*, 105 S.W.3d 518 (Mo. App. E.D. 2003). The FAA, while expansively applied, does not provide an independent jurisdictional basis for filing a suit in federal court. *Pinnavaia v. Nat'l Arbitration Forum, Inc.*, 122 Fed. Appx. 862 (8th Cir. 2004); *see Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300 (Mo. App. W.D. 2005); *Netco, Inc. v. Dunn*, No. 26064, 2005 WL 858031 (Mo. App. S.D. Apr. 15, 2005). The parties still must have diversity or a federal question.

In *Preston v. Ferrer*, 128 S. Ct. 978 (2008), the Supreme Court held that, when parties agree to arbitrate all questions arising under a contract involving state law, the FAA supersedes state laws that place jurisdiction elsewhere. The court noted that the FAA creates a national policy in favor of arbitration. This policy applies in state courts as well as federal courts. Accordingly, the FAA forecloses any state legislative attempts to undercut the enforceability of arbitration agreements. The Supreme Court reiterated that the FAA trumps conflicting state law; thus, the Court reinforced its previous decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). The FAA does not require that contracts contain Missouri's "notice of arbitration" provision discussed in §15.106 above.

The FAA does not always apply, despite its broad reach. In *Fiordelisi v. Mt. Pleasant, LLC*, 254 S.W.3d 120 (Mo. App. E.D.

2008), the Eastern District held that the MUAA, rather than the FAA, applied to a residential construction contract for remodeling a homeowner's house, even though the contract in question involved commerce. The court discussed that the FAA creates substantive law that may be enforced by state courts and that state courts must apply this federal law in cases in which the arbitration clause falls within the FAA. *Id*. at 125. The court noted that the record was silent concerning the possible application of the FAA and that the parties agreed in oral argument that the MUAA applies. The court decided that, even if the parties' contract involved commerce, the arbitration clause states that "the parties shall proceed with arbitration in accordance with the rules and procedures of the American Arbitration Association and the provisions of the Missouri Uniform Arbitration Act." *Id.* Accordingly, the court decided that, while the FAA preempts contrary provisions of state law in cases involving interstate commerce, the FAA does not preempt state law in cases in which the parties have expressly agreed that state law will govern arbitration proceedings. *Id*. Thus, the court concluded: "In view of the parties' express agreement requiring that arbitration proceed in accordance with Missouri law, we hold that the Missouri Arbitration Act applies, regardless of whether or not the parties' contract 'involves commerce.'" *Id*. at 125–26.

G. (§15.116) Choice of Arbitration Forum

Participants in the arbitration process have a variety of choices of which arbitration tribunal should administer the arbitration. Typically, the arbitration provision will designate one tribunal that will be charged with administering the arbitration. Some tribunals are local, while others are regional, national, or even international in scope. For example, the AAA has approximately 30 offices located around the United States and has a European operation in Dublin, Ireland, known as the International Centre for Dispute Resolution. Another national tribunal with many local offices is the USA&M. Some tribunals are not for profit (such as AAA), while others are set up as for-profit entities.

In selecting a tribunal, it is important to know what procedural and substantive rules that particular tribunal has that both the arbitrators and the parties to the arbitration must follow. These procedures may include designated costs for administering the arbitration as well as detailed or not-so-detailed rules regarding discovery, motions, the extent of hearing requirements, and related

items necessary for dispute resolution. There are also specialized arbitration tribunals, such as the National Association of Securities Dealers, that handle more narrowly defined disputes regarding stocks and related security items.

In addition, parties to a dispute may retain one or more arbitrators privately and not go through any particular designated tribunal. While this may save some costs and administrative fees, parties should understand that, without an administrator to handle various procedural matters, the arbitrator or arbitrators must themselves carry this burden.

H. (§15.117) Qualification and Number of Arbitrators

Typically, one arbitrator presides over an arbitration. In larger matters, three arbitrators may form a panel. For example, under the AAA Rules, any dispute of $1 million or more requires a panel of three arbitrators to hear and decide the arbitration. AAA COMMERCIAL RULE L-2(a).

An arbitrator does not have to be an attorney. Rather, an arbitrator can be:

- a contractor;
- an engineer;
- an architect;
- a banker;
- an accountant;
- an education professor;
- a doctor; or
- somebody else.

This allows the parties to draw from broad experience when deciding who is most appropriate to hear and render an award on their dispute. With a panel of three, there is a chair, who is typically an attorney.

Selecting an arbitrator is an important decision. Parties try, with great effort, to obtain the best, most fair-minded arbitrator to decide their dispute. Sometimes, parties will only agree to arbitration if the hearing can be in front of one specified person. For example, in *Jackson County v. McClain Enterprises, Inc*., 190 S.W.3d 633 (Mo. App. W.D. 2006), Jackson County brought a lawsuit against an excavating company. In an exchange of letters between counsel, counsel for Jackson County stated that it was offering to enter into an agreement to submit the dispute to binding arbitration "before retired

Circuit Judge John Moran." *Id*. at 635. Counsel for the defendants accepted the offer, but both parties learned that the judge would not hear the case. The question on appeal became whether:

- the parties had entered into a binding agreement to arbitrate; or
- the arbitration was only agreed to if this particular judge would be the arbitrator.

The Western District decided that the terms of the agreement to arbitrate were ambiguous enough that evidence should have been presented to the trial court to ascertain the parties' intentions. Thus, it was up to the trial court to resolve the ambiguity and determine whether the parties had indeed agreed to arbitration.

Arbitrators are required by the rules of the various tribunals (such as the AAA) and by common law to provide rather significant disclosures about their actual and perceived conflicts of interest in presiding over the matter as an arbitrator. Disclosures now typically include:

- financial;
- personal;
- family; and
- relationships or potential relationships between the arbitrator and one or more of the parties, their counsel, witnesses, or others who may be involved with or affected by the arbitration.

These disclosures provide the basis for one or more of the parties to object that the arbitrator is not appropriately suited to decide the arbitration. Not many cases in Missouri address attacks of an arbitrator's award based on the arbitrator's failure to disclose a significant matter.

In *Dow Corning Corp. v. Safety National Casualty Corp.*, 335 F.3d 742 (8th Cir. 2003), the Eighth Circuit rejected arguments that an award should be overturned because of certain nondisclosures by one of the arbitrators, some *ex parte* contacts with counsel, and a decision limiting cross-examination of one of the parties' experts. The court provided some broad, helpful comments on these issues:

- Nondisclosure:

  - "When the parties agree to arbitration before disinterested persons who have experience in a specialized business or type of problem, the relatively small number of qualified arbitrators may make it common, if not inevitable, that parties will nominate the same arbitrators repeatedly." *Id.* at 750 (quoting *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 151–52 (1968)).

  - "At the outset of the arbitration process, arbitrators must disclose 'a substantial interest in a firm which has done more than trivial business with a party.'" *Id.* at 750.

- *Ex Parte* Contacts: "[T]he ex-parte contacts, even if arguably improper, simply do not demonstrate evident partiality. Umpire Lyon had an 'administrative' reason for contacting counsel (to discuss scheduling) and a basis for deciding that he needed to contact them one at a time." *Id.* at 751.

- Limiting Cross-Examination: "Arbitrators have broad discretion to limit the cross-examination of witnesses at arbitration hearings." *Id.* at 752. There is no showing that this procedural ruling demonstrated the "arbitrator's 'evident partiality' within the meaning of [9 U.S.C. §]10(a)(2)." *Id.* at 750.

While unusual, on occasion an arbitrator must be replaced because of illness, conflict, or other unavailability. The Eighth Circuit, departing from several other federal circuits, has concluded that, when the arbitration provision is silent about what to do in this instance, the court is to designate a replacement arbitrator. *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8th Cir. 2003). Some other federal circuit courts have taken a different approach and concluded that, if an arbitrator needs to be replaced, the entire panel must be replaced and the arbitration start anew. *Id.* This result would certainly add to the costs and timeliness of the arbitration.

I. (§15.118) Discovery

Discovery is a controversial topic in arbitration. Often, the parties agree on how much discovery and how soon it must be completed. This is when arbitration works seamlessly and efficiently. But there are times when the parties cannot agree on the scope or the timing of discovery. The arbitration agreement may address the type of

discovery and is a good start for the arbitrator when considering how to handle disputes over discovery. But it is just a start and not necessarily the whole answer.

The courts allow arbitrators sole discretion to interpret an arbitration provision and determine what discovery will be permitted in advance of the arbitration hearing. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Thus, an arbitrator will decide discovery issues such as whether depositions will be taken and, if so, the number of depositions. Courts will not review an arbitrator's decision on discovery matters. *CPK/Kupper Parker Commc'ns, Inc. v. HGL/L*, 51 S.W.3d 881 (Mo. App. E.D. 2001).

Under the AAA Employment Rules, arbitrators have "the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." AAA EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES § 9 (AAA Employment Rules) (2006), *available at* www.adr.org/sp.asp?id=28749. Thus, discovery requests within an arbitration proceeding can supersede an individual employee's privacy interests and can require that information contained on the employee's computer be part of the documents to be produced to the opposing party. *Biby v. Bd. of Regents, Univ. of Neb.-Lincoln*, 419 F.3d 845 (8th Cir. 2005).

Rule L-4(d) of the AAA Commercial Rules (cases involving at least $1 million) expressly allows the arbitrators the discretion "upon good cause shown and consistent with the expedited nature of arbitration" to order depositions, interrogatories, and the exchange of documents. Rule R-21 of the AAA Commercial Rules (cases less than $1 million) expressly allows the arbitrator discretion to direct the production of documents and other information and the identification of witnesses to be called at the hearing. The AAA Commercial Rules are silent on depositions, but arbitrators may allow them anyway under the arbitrators' power to use discretion in ordering discovery and in conducting procedural matters in an arbitration.

J. (§15.119) Punitive Damages

Arbitrators decide issues concerning punitive damages, including whether an agreement prohibiting the award of punitive damages is enforceable. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003). *PacifiCare* involved four arbitration agreements:

- Two prohibited any award of punitive damages.
- One prohibited an award of exemplary damages.
- One prohibited an award of extra-contractual damages of any kind, including punitive and exemplary.

Part of the debate was over whether the potential for triple damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*, was similar to punitive damages or was a form of remedial damage. Rather than sort out this critical question in a court of law, the Supreme Court held as follows:

> In short, since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for the courts or arbitrators to decide enforceability in the first instance are unusually abstract. As in *Vimar* [*Sequros y Reasequros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995)], the proper course is to compel arbitration.

PacifiCare, 538 U.S. at 407.

Arbitrators can and do award punitive damages. The Eighth Circuit affirmed an arbitrator's award of $6 million in punitive damages, even though the nonpunitive damages were only $1,000 in statutory damages, $1,000 in actual damages, $22,780 in attorney fees, and $9,300 for the cost of the arbitration. *Stark v. Sandberg, Phoenix & von Gontard, PC*, 381 F.3d 793 (8th Cir. 2004). The Eighth Circuit considered an argument that the award of punitive damages was excessive, in light of recent cases, including the United States Supreme Court case of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 583 (1996) (describing a 500-to-1 ratio of punitive to compensatory damages as "breathtaking" and suspicious). The court noted that there was no or insufficient evidence that the arbitrator clearly understood the law and chose to disregard it. *Stark*, 381 F.3d at 803.

Missouri's Western District upheld an arbitrator's award of punitive damages of $50,000 in addition to $50,000 in actual damages in a construction dispute over a house. *Groceman v. Pulte Homes Corp.*, 53 S.W.3d 599 (Mo. App. W.D. 2001). In *Hoskins v. Businessmen's Assurance*, 79 S.W.3d 901 (Mo. banc 2002), the Supreme Court upheld the constitutionality of § 537.675, now RSMo Supp. 2008, dealing with the state of Missouri's lien of 50% on any final judgment

for punitive damages. While the case did not involve arbitration, it is noteworthy because the statute in question includes this provision: "Cases resolved by arbitration, mediation or compromise settlement prior to a punitive damage final judgment are exempt from the provisions of this section." Section 533.675.3.

K. (§15.120) Confidentiality

An arbitrator is bound by confidentiality not to reveal what happened during the arbitration process. While the AAA Commercial Rules do not expressly address whether the parties are subject to similar confidentiality, for those proceedings that take place in the state of Missouri, § 435.014, RSMo 2000, offers some compelling support that anything that occurs during the arbitration process is confidential:

> 1. If all the parties to a dispute agree in writing to submit their dispute to any forum for arbitration, conciliation or mediation, then no person who serves as arbitrator, conciliator or mediator, nor any agent or employee of that person, shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the arbitration, conciliation or mediation.
> 2. Arbitration, conciliation and mediation proceedings shall be regarded as settlement negotiations. Any communication relating to the subject matter of such disputes made during the resolution process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

The best practice for parties who truly desire that the proceedings in arbitration be confidential is to provide for this in the initial arbitration agreement. Absent a predispute contractual provision, the parties can also agree to such a provision after the dispute ensues. Confidentiality is one of the most important benefits for many parties in seeking arbitration over traditional litigation. Many litigants who have ongoing relationships with each other can enjoy the candor of an open exchange on the dispute without the concern that their differences will be revealed to the public or their competitors.

L. (§15.121) Limitations—Time for Filing Arbitration Claim

In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the United States Supreme Court held that it is up to the arbitrator to determine the timeliness of the filing of the arbitration. This decision reversed the Tenth Circuit's ruling in *Howsam v. Dean Witter*

Reynolds, Inc., 261 F.3d 956 (10th Cir. 2001). The Supreme Court stated that whether the parties have submitted a particular dispute to arbitration is the "gateway" question of arbitrability to be decided by the courts unless the parties clearly and unmistakably provide otherwise in the arbitration agreement. But the timeliness of filing is not a question of arbitrability; rather, it is a prerequisite, such as notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate, and as such, it is a matter for the arbitrator to decide. *Howsam*, 537 U.S. at 85.

An untimely request to arbitrate can preclude a party from arbitration and allow a judgment in a court of law to stand. In *Sitelines, L.L.C. v. Pentstar Corp.,* 213 S.W.3d 703 (Mo. App. E.D. 2007), the lawsuit was for breach of contract. The appellate court decided that a motion to dismiss or compel arbitration violated Rule 44.01(d), which requires at least five days' notice before hearing. Thus, the trial court properly denied the motion. In so finding, the appellate court noted: "We are aware that the trial court's order has the effect of precluding defendant from ever asserting a right to arbitrate the dispute, because a judgment on the merits of this dispute was entered on the same day. However, this situation was created by defendant." *Id*. at 707.

M. (§15.122) Attorney Fees

Attorney fees can be awarded:

- if covered in the agreement between the parties—in either the arbitration provision or some other part of the agreement;
- if allowed by common law or statute; or
- according to the AAA Commercial Rules, if the parties to the arbitration each request such relief from the arbitrator or panel.

See AAA COMMERCIAL RULE R-43; AAA CONSTRUCTION INDUSTRY ARBITRATION RULES AND MEDIATION PROCEDURES, RULE 44 (2007) (AAA Construction Rules), *available at* www.adr.org/sp.asp?id=28749 (click on Commercial Rules).

In Missouri, many of the state's premier courtroom trial attorneys turned to binding arbitration to resolve a dispute over how much they should receive in attorney fees for their representation in the

highly publicized tobacco litigation. *Neel v. Strong*, 114 S.W.3d 272 (Mo. App. E.D. 2003). The arbitrator awarded attorney fees of $111,250,000, a result meriting attention from even the most skeptical as to whether "big awards" are possible in arbitration, especially an award of attorney fees to otherwise already successful plaintiffs' attorneys.

The Eighth Circuit upheld an arbitrator's award of attorney fees based on a breach of contract in the amount of $215,480.82 for fees paid to a major law firm for services before the breach and an additional $359,861.55 for fees paid to that same firm for services after the breach. *St. John's Mercy Med. Ctr. v. Delfino*, 414 F.3d 882 (8th Cir. 2005). As the Eighth Circuit noted, "The district court erred in substituting its remedial judgment for that of the arbitrator." *Id.* at 885.

The Eighth Circuit also upheld a district court's decision to confirm an arbitrator's award denying attorney fees. *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721 (8th Cir. 2003). The dealership agreement had provided that the prevailing party could recover all costs and attorney fees. The Eighth Circuit found this provision to be a contract of adhesion and unconscionable. Thus, Kawasaki, even though victorious in arbitration, could not recover costs and attorney fees of $1.7 million.

The Eighth Circuit overturned an arbitrator's award of attorney fees based on manifest disregard of the law (a rare finding) in *Gas Aggregation Services, Inc. v. Howard Avista Energy*, *LLC*, 319 F.3d 1060 (8th Cir. 2003). The Eighth Circuit affirmed the district court's decision to vacate an arbitrator award of attorney fees because the panel expressly recognized that the law did not support such a recovery but awarded the attorney fees anyway. Manifest disregard of the law does exist when an arbitration panel cites relevant law but then proceeds to ignore it. *Delfino*, 414 F.3d 882. An arbitrator's award of attorney fees may also be vacated when the awarded fees relate to fees generated in a prior lawsuit rather than fees incurred in the arbitration. *Strain-Japan R-16 Sch. Dist. v. Landmark Sys., Inc.*, 51 S.W.3d 916 (Mo. App. E.D. 2001).

N. (§15.123) Form of Award

The MUAA addresses the form of the award and its timeliness as follows:

1. The award shall be in writing and signed by the arbitrators joining in

the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

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

Section 435.385, RSMo 2000.

An arbitrator's award can take one of several forms, including:

- a "standard award"—a simple finding in favor of a party but with no explanation;
- a "reasoned award"—some explanation is provided for the result; or
- detailed findings of fact and conclusions of law—much more similar to what might be expected from a judge in court.

While each award will vary based on its own circumstances, there are certain characteristics that the good awards seem to have in common. A good award should:

- be in writing;
- be clear and definite and leave no doubt as to what the parties must do to comply;
- decide every issue submitted in the arbitration; and
- not rule on anything outside the scope of the arbitrator's authority.

According to Rule R-43 of the AAA Commercial Rules and R-44 of the AAA Construction Rules, the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the parties' agreement, including, but not limited to, specific performance of a contract. According to Rule 39(d) of the AAA Employment Rules, the arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court, including awards of attorney fees and costs, in accordance with applicable law.

Arbitrators sometimes enter partial relief before the final award. In *Crawford Group, Inc. v. Holekamp*, No. 4:06-CV-1274 CAS, 2007 WL 844819 (E.D. Mo. Mar. 19, 2007), the Eastern District decided in a matter of first impression that an arbitrator's interim award can be treated as a final award as to those matters that "finally determine the substantive issues on the merits." *Id*. at *5. The court emphasized that the parties had agreed to a bifurcated arbitration process in which certain decisions would be made in an interim award and, ultimately, other decisions would be made in the final award. *Holekamp* provides a good study on the importance of correctly wording interim and final awards.

Arbitrators should exercise extreme caution and reluctance to continue to assume jurisdiction after they have entered their final award. The AAA strongly discourages an arbitrator from retaining any jurisdiction after the final award. In *Communication Workers of America, AFL-CIO v. Southwestern Bell Telephone Co.*, No. 05-01220-CV-W-HFS, 2006 WL 3408409 (W.D. Mo. Nov. 27, 2006), the appellate court concluded that, because the arbitrator left open an issue to be presented to him later, the ultimate procedural question became whether an issue should be resolved by a new grievance in arbitration or by the original arbitrator. The court concluded that the arbitrator's award did not clearly allow for determination on this point. Thus, the court stated that the arbitrator's award did not address a dispute of fact that should have been included. Accordingly, the court remanded the case to the original arbitrator with the direction that he resolve the disputed issues. This raises a question of whether the arbitrator is entitled to additional compensation for the continued service.

O. (§15.124) Confirmation of Award

Both the FAA and the MUAA cover confirmation of the arbitrator's award. Section 9 of the FAA states:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application

> shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Section 435.400, RSMo 2000, of the MUAA states that, "Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 435.405 and 435.410."

Under § 9 of the FAA, the court "must" confirm an award "unless" it is vacated, modified, or corrected as prescribed in §§ 10–11 of the FAA. Section 10(a) lists the grounds for vacating an award, which include the following:

- The award was procured by corruption, fraud, or undue means.

- The arbitrator was guilty of misconduct or exceeded the arbitrator's powers.

Under § 11(a), the grounds for modifying or correcting an award are "evident material miscalculation," "evident material mistake," and imperfections in a "matter of form not affecting the merits."

The only requirement of a party who seeks confirmation of an award is that the party apply or move for confirmation in a court of law. *Parks v. MBNA Am. Bank*, 204 S.W.3d 305, 310 (Mo. App. W.D. 2006). "Upon application of a party to confirm the arbitration award as judgment, the court must confirm the award, unless the opposing party moves to vacate or modify the award. 9 U.S.C. § 9; § 435.400." *Id*.

The importance of the confirmation proceeding is that, once an award is confirmed, it becomes a judgment. As a judgment, it can be enforced like all other judgments from that same court. An award by itself is not enforceable until it is confirmed as a judgment. *See MBNA Am. Bank v. Montgomery*, 269 S.W.3d 536 (Mo. App. S.D. 2008).

In *Welch v. Davis*, 114 S.W.3d 285 (Mo. App. W.D. 2003), the Western

District stated that its review of a circuit court's decision to confirm an arbitration award is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Thus, the Western District will affirm an award unless:

- it is not supported by substantial evidence;
- it is against the weight of the evidence; or
- in some instances, it erroneously declares or applies the law.

Ingram v. Mo. Highways & Transp. Comm'n, 243 S.W.3d 504, 506–07 (Mo. App. W.D. 2008). In *Ingram*, the Western District noted that the Eastern District applies a different standard of review, as follows:

> While we apply the *Murphy v. Carron* standard in this case, see *Maxwell-Gabel Contracting Co. v. City of Milan*, 147 S.W.3d 93, 96 (Mo. App. W.D. 2004), we note that the Eastern District has applied a different standard of review to a judgment confirming an arbitration award. That court has stated that it "will accept the trial court's findings of fact unless they are clearly erroneous, and . . . will decide questions of law *de novo*." *Decker v. Kamil*, 100 S.W.3d 115, 117 (Mo. App. E.D. 2003). To support that proposition, the Eastern District cites to a Western District case, involving the Federal Arbitration Act, which is interpreted differently than the Missouri act. *Groceman v. Pulty Homes Corp*., 53 S.W.3d 599, 601 (Mo. App. W.D. 2001).

Id. at 507 n.2.

P. (§15.125) Vacating Arbitration Awards

Both the FAA and the MUAA set forth the precise and limited grounds on when an arbitrator's award can be challenged in court and vacated. 9 U.S.C. § 10(a), § 435.405, RSMo 2000. The FAA provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Section 435.405 of the MUAA similarly provides:

> 1. Upon application of a party, the court shall vacate an award where:
>
> (1) The award was procured by corruption, fraud or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers;
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 435.370, as to prejudice substantially the rights of a party; or
>
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings pursuant to section 435.355 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

In addition to the statutorily prescribed reasons, the federal courts have engrafted, by caselaw, two additional grounds on which an award can be vacated: an award that is "completely irrational" or "evidence[s] a manifest disregard for the law" may be vacated. *McGrann v. First Albany Corp.*, 424 F.3d 743, 749 (8th Cir. 2005)

(quoting *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003)). But the decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), casts considerable doubt on the viability of manifest disregard of the law as a legal basis to attack an arbitrator's award. The Supreme Court stated that "'manifest disregard' can be read as merely referring to the § 10 grounds collectively rather than adding to them." *Id.* at 1399.

Otherwise, the courts will confirm an arbitrator's award even when the arbitrator committed serious error as long as the arbitrator arguably construed or applied the contract or acted within the scope of the arbitrator's authority. *Id.* Given the limited grounds to challenge an award, a court's scope of review "is among the narrowest known to the law." *Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Ry. Co.*, 312 F.3d 943, 946 (8th Cir. 2002) (quoting *Bhd. of Maint. of Way Employees v. Terminal R.R. Ass'n*, 307 F.3d 737, 739 (8th Cir. 2002)).

Consequently, the courts have considered and mostly rejected in the past several years vast challenges to an arbitrator's award. *See*:

- *McGrann*, 424 F.3d 743
- *Electrolux Home Prods. v. United Auto. Aerospace & Agric. Implement Workers of Am.*, 416 F.3d 848 (8th Cir. 2005)
- *Manion v. Nagin*, 392 F.3d 294, 298 (8th Cir. 2004)
- *Lincoln Nat'l Life Ins. Co. v. Payne*, 374 F.3d 672 (8th Cir. 2004)
- *United Steelworkers of Am., AFL-CIO, Local 9452 v. MacSteel, Ark. Div. of Quanex Corp.*, 68 Fed. Appx. 750 (8th Cir. 2003)
- *MidAmerican Energy Co. v. Int'l Bhd. of Elec. Workers Local 499*, 345 F.3d 616 (8th Cir. 2003)
- *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003)
- *Finley Lines*, 312 F.3d 943
- *Bhd. of Maint. of Way Employees*, 307 F.3d 737

- *Maxwell-Gabel Contracting Co. v. City of Milan*, 147 S.W.3d 93 (Mo. App. W.D. 2004)

- *Decker v. Kamil*, 100 S.W.3d 115 (Mo. App. E.D. 2003)

An arbitrator's award is virtually never overturned. *Id.* The courts' enormous deference to an arbitrator's decision is part of the process and "exactly what" the parties agreed to by electing to arbitrate. *Electrolux Home Prods.*, 416 F.3d at 853.

Overturning the award only requires a showing of one statutory ground. In *Parks v. MBNA America Bank*, 204 S.W.3d 305 (Mo. App. W.D. 2006), the petition alleged all four statutory grounds for vacating the award. Nevertheless, the court concluded: "no evidence was adduced to support those allegations. Conclusory allegations are insufficient to establish the invalidity of an award." *Id*. at 311.

A party that challenges an arbitration award is not entitled to reconsideration on the merits of the dispute. *Freeman Contracting Co. v. Williamsburg Vill. Condo. Ass'n*, 206 S.W.3d 398 (Mo. App. E.D. 2006).

Collusion is one of the bases to vacate an arbitration award. In deciding whether to support a contention of collusion in a California arbitration award, the Eastern District defined collusion as a secret concert of action between two or more for the promotion of some fraudulent purpose. *Start Liquidation Co. v. Florists' Mut. Ins. Co.*, 243 S.W.3d 385, 400 (Mo. App. E.D. 2007) (citing, with approval, *Vaughan v. United Fire & Cas. Co.*, 90 S.W.3d 220, 224–25 (Mo. App. S.D. 2002)). To prove collusion, a party must show that there was an actual conspiracy to promote a fraudulent agreement. Collusion is difficult to prove.

Arbitrator bias is one of the grounds to overturn an arbitrator's award. The FAA allows for vacatur of an arbitration award when there was "evident partiality . . . in the arbitrators." 9 U.S.C. § 10(a)(2). Accordingly, to avoid arbitrator bias or the appearance of arbitrator bias, the law requires an arbitrator to disclose at the earliest opportunity possible—preferably before being finally selected as an arbitrator—any "substantial interest in a firm which has done more than trivial business with a party." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 151–52 (1968).

In *Mead v. Moloney Securities Co.*, No. ED 91061, 2008 WL 5263996 (Mo. App. E.D. Dec. 9, 2008), the Eastern District considered whether a trial court erred in refusing to vacate an arbitration award given an allegation that the arbitrator "deliberately failed to disclose a business interest that rendered him partial to Moloney Securities." *Id*. at *4. The Eastern District noted that the arbitrator disclosed that he was a registered representative employed by Royal Alliance Associates, Inc., but that he did not disclose that Royal Alliance was a subsidiary of AIG Group, Inc. The court concluded that the plaintiffs did not establish the exact nature of the financial relationship, if any, between Royal Alliance and AIG. To show evident partiality justifying vacatur of an arbitration award, the "'interest or bias of the arbitrator must be direct, definite and capable of demonstration, rather than remote, uncertain or speculative.'" *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 796 (Mo. App. W.D. 1998) (quoting *Nat'l Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 343 (Mo. App. S.D. 1995)). Accordingly, the court in *Mead* determined that there was insufficient evidence to establish arbitrator bias. See §15.118 above for additional discussion on disclosure requirements.

An arbitrator's exclusion of evidence can be a ground to vacate the award. Exclusion of evidence may be easer to prove than collusion but will not necessarily yield a vacating of the award. In *DTV Network Systems, Inc. v. Skywalker Communications*, No. 406MC87 SNL, 2006 WL 2987040 (E.D. Mo. Oct. 17, 2006), the Eastern District stated that the procedure employed by the arbitrator at the hearing is within the parlance and providence of the arbitrator. This providence can include an arbitrator's decision to elect, during the hearing, to allow a "surprise rebuttal expert report" and to exclude "pivotal impeachment evidence." *Id*. at *5.

Q. (§15.126) Expanding Grounds to Vacate Award

Some wish to expand, through an arbitration provision, a court's jurisdiction and basis to consider and affirm or overturn an award in arbitration. The United States Supreme Court has held that parties may not privately agree to expand the scope of judicial review of an arbitrator's award. *Hall Street Assocs. v. Mattel, Inc*., 128 S. Ct. 1396 (2008). The FAA provides expedited judicial review to confirm, vacate, or modify arbitration awards. In *Hall Street*, the arbitrator invoked a provision in the arbitration agreement by which the parties agreed that legal error review by a court was a standard of review permissible from the arbitration award. Such a standard clearly exceeded the statutory grounds set out by the FAA. The Supreme

Court concluded that the parties could not extend the court's grounds for review beyond the express and limited items set out in the FAA.

R. (§15.127) High/Low Arbitration and Baseball Arbitration

In some tort cases, counsel may decide to enter into an agreement in advance of the arbitration setting a range or limit of what the ultimate award will be. This is known as high/low arbitration. One side picks a high number. The other side picks a low number. The picks are not disclosed to the arbitrator. If the award exceeds the high number, the award is reduced to the amount of the high number. If the award is less than the low number, the award is increased to the amount of the low number. If the award is between the high and the low numbers, the actual amount of the award will stay in place and is binding.

Some litigants in the past have found this procedure to provide comforting limitations that will marginalize potentially unanticipated extremely high or extremely low awards. On the other hand, many litigants find this process to be too restricting. They prefer that the arbitrator simply enter an award, which is the final result.

Another form of potential compromise arbitration is known as "final offer arbitration" or "baseball arbitration." As discussed in *Cagan v. Master Home Products Ltd*, 193 S.W.3d 401 (Mo. App. E.D. 2006), final-offer arbitration "restricts the arbitrator to choosing the final offer made by one of the parties." *Id*. at 406. The arbitrator selects one side's number as the award. This is sometimes called baseball arbitration because it is frequently used in major league baseball arbitrations. This form of arbitration is designed to motivate each party to negotiate in good faith and attempt to compromise to create a final offer that the arbitrator will select as more reasonable. In conventional arbitration, the arbitrator can select either party's position or arrive at a different number. "In contrast, final offer arbitration limits the arbitrator to picking only one of the final offers as an award." *Id*.

S. Practice Suggestions

1. (§15.128) Place for Arbitration Hearing

One of the benefits of arbitration is that many locations may be available for the hearing. Typically, the hearing is less formal and can take place in an office or conference facility. Counsel need to

be careful in designating in the arbitration provision the location for the hearing. Missouri's courts are not available to review a dispute on a matter that is being arbitrated outside the state of Missouri, provided that the arbitration agreement specifies arbitration in a state other than Missouri. *Gov't e-Mgmt. Solutions, Inc. v. Am. Arbitration Ass'n*, 142 S.W.3d 857 (Mo. App. E.D. 2004). Thus, only those hearings that take place within the state of Missouri will allow for enforcement and redress in a Missouri state court. *See Teltech, Inc. v. Teltech Commc'ns, Inc.*, 115 S.W.3d 441 (Mo. App. W.D. 2003).

In *PerfectStop Partners, L.P. v. U.S. Bank*, 231 S.W.3d 260 (Mo. App. W.D. 2007), the Western District held that a Missouri trial court lacked subject matter jurisdiction under the MUAA to stay an arbitration in another state. The Western District stated that, because the trial court lacked jurisdiction to stay a Texas arbitration, a Missouri appellate court also lacks jurisdiction on that same issue. *PerfectStop Partners*, 231 S.W.3d at 268 (citing *Gov't e-Mgmt. Solutions*, 142 S.W.3d 857).

2. (§15.129) Preparing for Arbitration

Shortly after being appointed, arbitrators almost invariably hold a preliminary hearing and scheduling conference with counsel (and sometimes the parties as well) to discuss a variety of matters to prepare the case for hearing. It is at this point that counsel should consider their own checklist of items to see that they are either covered or unnecessary. Items to consider discussing at the preliminary hearing and scheduling conference include the following:

- The need for an additional preliminary hearing
- Amendment of any claims or counterclaims
- Joinder of any additional parties
- Motions to dismiss and other preliminary motions
- Discovery, including exchange of documents and depositions
- Retained experts, use of expert witnesses, and potential expert reports and depositions

- Prehearing disclosures, including witness lists and exhibit lists
- Potential stipulation of uncontested facts
- Date and time of hearing
- Form of the award
- Stenographic record

Rule R-26 of AAA Commercial Rules covers a stenographic record as follows:

> Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

In addition, many arbitrators find it helpful in commercial and construction cases to have counsel arrange exhibits for the hearing in chronologic order in three-ring binders. Arbitrators also emphasize that it is not important which party marks or designates an exhibit. Therefore, the vast majority of arbitrators encourage the parties to agree on virtually all exhibits and submit them as joint exhibits, leaving a few exhibits to be separately designated by the claimant and the respondent. Many arbitrators admit virtually all exhibits, into evidence at the hearing absent an arbitration agreement requiring strict adherence to formalized court rules of procedure and evidence.

Arbitrators typically request two witness lists. The first is a preliminary list of all potential witnesses to be exchanged between counsel and with the arbitrator or panel of arbitrators as soon as possible. This allows the arbitrators to review and determine if there are any potential conflicts or items that need to be disclosed. The final witness list must be prepared and submitted in advance of the hearing. Sometimes a party wishes to call as a rebuttal witness someone not on any witness list. This generally leads to the issue of whether the witness should be

allowed, and if so, what remedy, if any, should be provided to the opposing side. There is no litmus test to guide arbitrators and parties when this happens. Many arbitrators decide to allow the witness because one of the reasons to attack an arbitrator's award is the exclusion of evidence. But having said that, the courts, as discussed in §15.125 above, strongly support the decisions of arbitrators, and if the arbitrator has in place a sufficiently detailed scheduling order with specific deadlines for the disclosure of witnesses, it seems unlikely that a court would overturn an arbitrator's decision to exclude a witness not disclosed in compliance with the arbitrator's order absent other circumstances and good cause.

In preparing the matter for arbitration, the parties and counsel should also consider occasional status report conference calls with the arbitrator to verify that they are on track in having the case prepared for hearing. Attorneys are used to working with deadlines and seem to respond quite well when they are periodically responsible for reporting to the arbitrator the status of discovery.

3. (§15.130) Presentation at Arbitration Hearing

Arbitration hearings are less formal than court proceedings. Counsel should address in advance any specific concerns or considerations, including appropriate dress, time periods for the hearing, and witness attendance. At the hearing, the arbitrator is in charge. Among other items, the arbitrator and counsel should consider a number of items to facilitate the hearing, including the following:

- Managing the process
- Examination of witnesses
- Use of experts
- Objections
- Exclusion of evidence
- Attendees at hearing
- Dress/attire
- Staying on schedule
- Arbitrator questions
- Use of affidavits
- Calling an unlisted witness
- Closing arguments

It is not unusual for the arbitrator to ask one or more witnesses questions during the hearing. This serves to clarify testimony and, sometimes, to crystallize issues for counsel to consider.

Arbitrators need to exercise caution in not trying the case or launching into areas not covered by counsel.

T. (§15.131) Posthearing Briefs

Posthearing briefs are discretionary and best utilized when there is a particular factual point or legal point needing further clarification. Arbitrators are generally aware of the law, but posthearing briefs serve to provide specific legal information on very narrow topics that may not be generally known to the arbitrator or panel of arbitrators. Counsel should request posthearing briefs whenever they feel that there is a specific point to be made in a brief. Because posthearing briefs delay the ultimate award and add to the overall expense, specific deadlines need to be set for posthearing briefs, and in many instances, serious consideration should be given to imposing page limitations on the briefs.

Because arbitration is more flexible than traditional court, proposed findings of fact and conclusions of law may become part of a posthearing brief or submittal, but this is the exception rather than the rule. In addition, however, it is not entirely unusual for the arbitrator or panel of arbitrators to ask specific questions of counsel at the conclusion of live testimony to be answered in posthearing submittals. Occasionally, additional evidence or information is needed, and this, too, can be supplied in posthearing materials. "Flexibility" should be the watchword in utilizing posthearing briefs, along with common sense and specific goals in mind as to the purpose and benefit of the briefs.

U. (§15.132) Appeals

Both the FAA and the MUAA cover appeals. The FAA states the following:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award;
(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16.

The MUAA provides the following:

1. An appeal may be taken from:
(1) An order denying an application to compel arbitration made under section 435.355;
(2) An order granting an application to stay arbitration made under subsection 2 of section 435.355;
(3) An order confirming or denying confirmation of an award;
(4) An order modifying or correcting an award;
(5) An order vacating an award without directing a rehearing; or
(6) A judgment or decree entered pursuant to the provisions of sections 435.350 to 435.470.
2. The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

Section 435.440, RSMo 2000.

An appellate court's review of a trial court's decision on whether a matter is subject to arbitration, on what happened during arbitration, and on the award itself is de novo. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003). The courts apply the usual rules of contract interpretation. But given an arbitrator's expertise and the process of arbitration itself, the courts extend "an extraordinary level of deference" to an arbitrator's decision. *Electrolux Home Prods. v. United Auto. Aerospace & Agric. Implement Workers of Am.*, 416 F.3d 848, 853 (8th Cir. 2005) (citing *Boise Cascade Corp. v. PACE Local 7-0159*, 309 F.3d 1075, 1080 (8th Cir. 2002)). In *Brotherhood of Maintenance of Way Employees v. Terminal Railroad Ass'n of St. Louis*, 307 F.3d 737 (8th Cir. 2002), the Eighth Circuit stated that "our . . . review of the arbitration award itself is among the narrowest known to the law." *Id*. at 740. Notwithstanding,

the court further noted that an "arbitrator's procedural determinations should be set aside by a court when the arbitrator is guilty of misconduct or bad faith." *Id*.

In *Deiab v. Shaw*, 138 S.W.3d 741 (Mo. App. E.D. 2003), the Eastern District held that, before a party can appeal a trial court's decision to compel arbitration and stay further court proceedings, there must be nothing further pending before the trial court. In *Shaw*, the parties had filed a lawsuit and a counterclaim, which were both stayed. Because the stayed actions were still pending with the trial court, there was not a final, appealable order on the issue of arbitration.

The Eighth Circuit decided that an appeal of a denial of a motion to stay divests the district court of jurisdiction under § 16 of the FAA. *Express Scripts, Inc. v. Aegon Direct Mktg. Servs., Inc*., No. 4:06-CV-1410, 2007 WL 1040938 (E.D. Mo. Apr. 3, 2007). The Eighth Circuit concluded that it agreed with the reasoning of the Seventh and Eleventh Circuits and found the better rule to be that a notice of appeal under § 16 divests the district court of jurisdiction during the period of the appeal. In *Burris v. American Heritage Homes, LLC*, 197 S.W.3d 613 (Mo. App. E.D. 2006), the court noted that once the trial court decides that the matter is subject to arbitration, it is not then ripe for appeal. "Appellants may raise these issues later in a proper appeal or an extraordinary writ proceeding. Moreover, it is judicially economical to prohibit an appeal from an order compelling arbitration, because the results of arbitration could render an appeal moot." *Id*. at 615 (citation omitted).

The denial of a motion to dismiss has been held to be appealable when, in substance, it was a motion to compel arbitration. *Clayco Constr. Co. v. THF Carondelet Dev., L.L.C.*, 105 S.W.3d 518, 523 (Mo. App. E.D. 2003). Further, a "motion to dismiss is treated as a motion to compel arbitration where it sufficiently raises the arbitration issue before the trial court." *Fleming & Hall Adm'rs, Inc. v. Response Ins. Co*., 195 S.W.3d 458, 460 (Mo. App. W.D. 2006).

A good discussion of the mechanics of attacking an award by motion and appeal can be found in *Doyle v. Thomas*, 109 S.W.3d 215 (Mo. App. E.D. 2003). *Doyle* also discusses the correlation between the MUAA and the FAA.

V. (§15.133) Waiver of Arbitration Rights

One or more parties to an arbitration agreement can waive the right to arbitrate. Waiver occurs when a party:

- knew of an existing right to arbitrate;
- acted inconsistently with that right; and
- prejudiced the other party by that party's inconsistent acts.

JBS Farms, Inc. v. Fireman's Fund Agribusiness, Inc., 205 S.W.3d 910, 913 (Mo. App. S.D. 2006); *Kelly v. Golden*, 352 F.3d 344 (8th Cir. 2003). The courts often focus on the prejudice component in determining whether a waiver exists. *Triarch Indus., Inc. v. Crabtree*, No. WD 61578, 2004 WL 941218 (Mo. App. W.D. May 4, 2004).

The courts have found that the following periods of time between filing a lawsuit and filing a motion to compel arbitration were not of sufficient duration, absent other factors, to constitute a waiver:

- Four months, *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224 (Mo. App. W.D. 2002)

- Seven months, *Mueller v. Hopkins & Howard, P.C.*, 5 S.W.3d 182 (Mo. App. E.D. 1999)

- Nine months, *Nettleton v. Edward D. Jones & Co.*, 904 S.W.2d 409, 410-11 (Mo. App. E.D. 1995)

But in *Kelly*, the Eighth Circuit found a waiver of a party's right to arbitration when that party initiated a lawsuit and failed to object and to move to compel arbitration throughout a year of court proceedings. The court determined that the other party had incurred expense and experienced a substantial delay as a result of the extensive litigation and would be required to extensively duplicate efforts if the case then went to arbitration. *Kelly*, 352 F.3d at 349.

The Eighth Circuit held that it was for the arbitrator or panel of arbitrators, not the court, to determine if a party to the arbitration has waived its right to proceed in arbitration. *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8th Cir. 2003); *see Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). The arbitrator is the one who decides allegations of waiver, delay, and similar defenses to arbitrability.

W. (§15.134) Class Actions

The United States Supreme Court has held that an arbitrator can decide whether to certify a proceeding for class action. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–92 (2000). This affords an arbitrator considerable authority and responsibility in determining what previously was thought to be within the exclusive parlance of the courts.

X. (§15.135) Suits Against Tribunals and Arbitrators

Disputes in arbitration occasionally prompt a party to file a collateral lawsuit naming the arbitration tribunal or the arbitrator or both as defendants. Consistently, courts around the country have taken the position that arbitration tribunals and arbitrators are immune from these lawsuits, at least to the extent covered by the administrative actions that they perform. *Ozark Air Lines, Inc. v. Nat'l Med. Bd.*, 797 F.2d 557 (8th Cir. 1986). *Ozark Air Lines* quoted with approval *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1211 (6th Cir. 1982), in which the Sixth Circuit stated: "Extension of arbitral immunity to encompass boards that sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusory." *Id*.

In *Olson v. National Ass'n of Securities Dealers*, 85 F.3d 381 (8th Cir. 1996), the Eighth Circuit affirmed the district court's order granting summary judgment in favor of an arbitration association and the arbitrator based on arbitral immunity. The Eighth Circuit held that, because an arbitrator's role is functionally equivalent to a judge's role, courts of appeals have uniformly extended judicial and quasi-judicial immunity to arbitrators. *Id*. at 382. In *Honn v. National Ass'n of Securities Dealers, Inc.*, 182 F.3d 1014 (8th Cir. 1999), the Eighth Circuit concluded that the National Association of Securities Dealers (NASD) was performing functions that were necessary to arbitration administration, and therefore, its actions were within the scope of the arbitral process. Thus, even if the NASD carried out those functions improperly, it was protected by arbitral immunity. *Id*. at 1018. Missouri's appellate courts have not yet expressly ruled on this issue.

Y. (§15.136) *Res Judicata*

An arbitrator's findings can provide the defense of *res judicata* in a subsequent lawsuit. *Kitsmiller Constr. Co. v. Wynn Constr., Inc.*, 126 S.W.3d 795 (Mo. App. S.D. 2004). This requires a careful and

somewhat unusual preservation of the record at the arbitration stage. If counsel feels that this may become an issue, it may be advisable to have a stenographic record.

Z. (§15.137) Collateral Estoppel

An arbitration award also serves as a final judgment for collateral estoppel purposes. *Manion v. Nagin*, 394 F.3d 1062 (8th Cir. 2005). This can prevent a party from later advancing related allegations and causes of action in a court of law. For example, a former employee may be collaterally estopped from litigating claims against a union for alleged breach of the duty of fair representation by failing to take his termination grievance to arbitration when that employee's underlying claim against his employer was barred by *res judicata*. *Banks v. Int'l Union Elec., Elec., Tech., Salaried & Mach. Workers*, 390 F.3d 1049, 1054 (8th Cir. 2004). An arbitrator may also be required to give a related "judgment" collateral estoppel effect. *Cornerstone Propane, L.P. v. Precision Invs., L.L.C.*, 126 S.W.3d 419 (Mo. App. S.D. 2004). Findings in an arbitration proceeding may be presented to a jury in a subsequent lawsuit and collaterally estop a party from disputing those findings. *Jackson v. Flint Ink N. Am. Corp.*, 370 F.3d 791 (8th Cir. 2004).

AA. (§15.138) Conclusion

The previous, now-outdated notion that arbitrators split the baby and offer a compromised result has been dispelled in recent years by an advanced process for dispute resolution. The challenge is whether arbitration will remain true to its roots of being cost-effective and speedier than traditional court. Attorneys find comfort in taking considerable discovery. Arbitration will continue to be most effective when an appropriate balance can exist that affords parties sufficient time to prepare for a hearing while keeping in place the many benefits that arbitration offers. Arbitrators must be vigilant in exercising with great care and professionalism the vast power and discretion that the courts have afforded them. Otherwise, the process will break down and further court intervention and supervision as well as possible curtailing legislation may alter what arbitration is today.