ADR Webinar Series:
Legal Update on Arbitration

Presented by MoBar CLE and the ADR Committee
February 8, 2011

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These materials will be updated and further edited in the next few weeks and then go to publication by The Missouri Bar.

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Chapter 25

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ALTERNATIVE DISPUTE RESOLUTION

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I. Introduction

This chapter covers mediation and arbitration. Specific materials and cases involving real estate are separately identified in their own sections. *See* II. C. and III. B. The bulk of this chapter discusses more generally mediation and arbitration, including recent case development. The cited cases and materials apply equally to real estate as they do to other areas of the law. The cases are primarily from the Supreme Court, the Eighth Circuit, the federal District Courts in Missouri and the Missouri appellate courts. Appellate court decisions, particularly regarding arbitration, continue to occur at a rapid pace. By the time this chapter has gone to print and is available for you to read, there undoubtedly will be several new and significant cases addressing the vast body of law that has been created in the last several years on arbitration. There are fewer cases on mediation (probably in large part because mediation is such a private/confidential proceeding). Given continuing rapid case law developments, caution dictates that counsel update any case law contained herein for more recent developments.

II. Mediation

A. (§25.1) Procedure and Practice

The best reference on mediation for Missouri attorneys is contained at Mo. Litigation Settlements Chapter 15, Alternative Dispute Resolution (MoBar 2nd Ed. 2001, 2009). Chapter 15 contains a detailed discussion of the various facets of mediation and is an essential first source for inquiry on any specific topic.

An excellent comprehensive report on mediation exists through the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality Final Report February 2008 which can be found at http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf. This report provides analytical information on conducting mediations and is a useful tool both for neutrals and for users of mediation services.

B. General Law

1. Settlement Agreements

a. (§25.2) Oral Settlement Agreements

Mediation often results in an oral settlement agreement reached at the conclusion of the mediation. Is this enforceable? In *Black v. Sam's Club*, 267 Fed. Appx. 495, (8th Cir. February 29, 2008), the Eighth Circuit upheld the district court's finding that a valid and binding oral settlement agreement had been entered into as a result of the mediation of an employment-discrimination case. Plaintiff contended that she never signed a settlement agreement, that the mediator misled and intimidated her, and that counsel for her employer (Sam's Club) took advantage of her mental condition and pro se status. The Eighth Circuit stated this was not enough to set the settlement agreement aside. Instead, the challenging party needed to establish wrongful conduct. The record had shown that during the mediation, plaintiff agreed without equivocation to settle the case and similarly agreed to the terms of the settlement. The Eighth Circuit held that under Missouri contract law "settlement agreements need not be in writing, and courts may enforce an oral settlement agreement that contemplates a release being signed later." *Id.* at495.

b. (§25.3) Written Settlement Agreements

Rule 17.06(c) of the Missouri Court Rules provides that any court-ordered or sponsored mediation that results in a settlement requires that the settlement "shall be by a written document setting out the essential terms of the agreement executed after the termination of the alternative dispute resolution process."

In *Williams v. Kansas City Title Loan Co.*, 314 S.W.3d 868 (Mo. App. W.D. 2010), the Western District noted that oral settlement agreements have long been enforced under the common law of Missouri. *Id.* at 872. "We have not been directed, however, to a case enforcing an oral settlement agreement that was allegedly reached during the course of a mediation conducted pursuant to Rule 17. Such court-ordered mediation proceedings are importantly different from settlement discussions or alternative dispute resolution proceedings in which the parties voluntarily engage." *Id.* Accordingly, the court held that "Rule 17 means what it says: the essential terms of settlements reached during court-ordered mediation sessions must be reduced to a writing signed by the parties in order for such settlements to be enforced. Given that no such writing exists here, the trial court's enforcement of the purported settlement of Williams' claims must be reversed." *Id.* at 873. To enforce a settlement agreement in a court-ordered mediation, it needs to be in writing.

One of the questions to be asked in any mediation is whether the parties are attempting to settle any and all claims and potential claims they may have with each other. If so, this typically calls for a general release in the written settlement agreement. If not, the release needs to carefully define what claims are being released and what claims are not being released. For a discussion on this *see Lewis v. Lewis*, 434 B.R. 871 (E.D. Bankruptcy Ct. Mo. 2010).

2. (§25.4) Court-Ordered Mediation

Many cases are mediated because the court orders the parties to mediate. In *McClaskey v. LaPlata R-II School District*, No. 2:03CV00066 AGF, 2006 WL 3803686 (E.D. Mo. Nov. 7, 2006), the Eastern District affirmed a settlement agreement reached during a court-ordered mediation. One of the parties contended that additional signatures were added to the settlement agreement after the 5:00 p.m. deadline for the mediation to conclude and therefore the settlement was null and void. Upholding a motion to enforce the settlement agreement, the Eastern District noted that the mediation had been conducted by an experienced mediator and that she provided to the district court the ADR compliance report acknowledging: "All required individuals, parties, counsel of record, corporate representatives, and/or claims professionals attended and participated in the ADR conference in good faith, and each possessed the requisite settlement authority" and that the parties did achieve a settlement. *Id*. at *4.

Knowing that considerable discovery may lie ahead along with a firm trial setting, parties are often motivated through a court-ordered mediation to settle their case either during the mediation or at some point thereafter. For example, in *American Equity Mortgage v. First Option Mortgage LLC*, No. 4:06CV1167 CDP 2006 WL 3032417 (E.D. Mo. Oct. 23, 2006), the dispute was referred to mediation but did not settle at that time. Court records indicated it settled a few months thereafter, however. This is not unusual.

3. (§25.5) Complex Mediations

Typically, parties and counsel think of a mediation as a one-day in-person session preceded by a couple of phone calls and perhaps a confidential position paper provided to the mediator. There also may be some limited exchange of documents or other discovery, but it is certainly brief in nature. At the end of the one-day

session, the case either settles or if it does not settle. The parties proceed from there with litigation or arbitration.

Many cases now require a more sophisticated and complex approach in mediation to reach a settlement. It is not unusual for mediations to take many days and for them to go through numerous sessions over periods of time as progress dictates through the negotiating. In *Reed v. Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1242 (2010), the Supreme Court noted that because the lawsuit in question had been growing in size and complexity, the district court referred the parties to mediation. "For more than three years, the freelance authors, the publishers (and their insurers) and the electronic databases (and their insurers) negotiated. Finally, in March 2005, they reached a settlement agreement that the parties intended 'to achieve a global peace in the publishing industry.'" *Id.* at 1242. The district court then, over the objection of some class participants, certified a class settlement in accord with the result reached through mediation.

Many successful mediations now require extensive discovery before the first official mediation session begins. Lawyers realize that unknowns and surprises do not foster quick resolutions but rather generally lead to stalled or unproductive settlement negotiations. Their clients realize this too. Claims and counterclaims should be sufficiently detailed so that everyone involved understands the factual and legal bases that frame the dispute. This may require some time to flush out and vigilance on the mediator's part to ensure proper development of the claims.

4. (§25.6) Mediations Can Yield Significant Payouts

Mediations can yield significant payouts from one party to another pursuant to a settlement agreement reached through the mediation. For example, in *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009), the district court had issued a temporary restraining order which it extended repeatedly and referred the parties to mediation. This mediation led to settlements between an insurance company and three sets of plaintiffs and provided that the insurance company would pay more than $400,000,000 to settle parts of the claims.

In *Koehler v. Brody*, 483 F.3d 590 (8th Cir. 2007), after three years of discovery, the parties entered into a voluntary mediation with a former federal district judge serving as the mediator. After about three days of mediation, the parties reached an agreement

and executed a memorandum of understanding stating that the cases would settle for a cash payment by defendants of $490,000,000. The Eighth Circuit affirmed the district court's approval of settlement over the objection of some individuals who argued that the lead plaintiffs had not been present during the final day of mediation because they had been led to believe that the mediation was over and that the case would only settle for an amount exceeding $600,000,000, payable in stock. One party participant alleged that his attorneys had misled him and made false representations to the court. The Eighth Circuit concluded otherwise.

5. (§25.7) Selection of Mediator

Typically, the parties through counsel agree on a mediator. This is a mutual consensual choice. There are instances, however, where the parties simply cannot agree or where they want to employ another method to select the mediator. The Eastern District recognized one such example recently in *Brown v. Brown*, 310 S.W.3d 754 (Mo. App. E.D. 2010). This was a dissolution of marriage case. The court recognized that the parties were not able to communicate or to share in decision-making matters. The trial court ordered that any interpretation of the parenting plan shall be resolved through mediation and in the event the parties are unable to agree on a mediator, they shall each select a mediator from a list of approved mediators and the two mediators shall select a third mediator who will mediate the case.

6. (§25.8) Mediation Expense

Sometimes a scheduled mediation is canceled either because the parties are not ready to mediate or perhaps they have engaged in their own negotiations and wish to proceed without formal participation from the mediator. The question arises if the mediator has a cancellation fee whether that is an appropriate court expense and if so, how is it to be apportioned. In *Hilton v. Davita, Inc.*, 302 S.W.3d 157, 159 (Mo. App. E.D. 2009), the Western District held that a cancellation fee for mediation is a legitimate expense that can be assessed as a court cost. "The mediation session was scheduled to try to resolve the wrongful death claim . . . which is a normal expense. The mediation session was canceled, also in the course of trying to settle the claim. Public policy and the law favor the settlement of disputes. . . . the cost of the mediation scheduled to try to settle a claim, whether the mediation is held or canceled, is an appropriate expense to be

apportioned." *Id.* at 159.

7. (§25.9) Sanctions and Award of Attorney Fees in Mediation

A court-ordered mediation of a case pending in federal court requires the parties to engage in a good faith effort to try to settle the case. See Rule 16, Fed.R.Civ.P. Sanctions including the award of attorney fees can be imposed by those unwilling to participate in good faith. Rule 16(f). In *Nick v. Morgan's Foods, Inc*., 270 F.3d 590 (8th Cir. 2001) the court imposed sanctions against the party and its attorney for their failure to bring or send a corporate representative who had sufficient authority to negotiate at a court-ordered mediation. Similarly, in *Clark v. Hart's Auto Repair*, 274 S.W.3d 612 (Mo. App. W.D. 2009), the Western District affirmed the decision of the Labor and Industrial Relations Commission that found that an employer had stymied all efforts to settle the case. The employer's attorney admitted that the employer would not respond to his phone calls when he sought authority to make a settlement offer. "After the court directed the parties to mediate the case on the morning of the hearing, Employer prevented any meaningful mediation, refusing to accept Employer's attorney's phone calls." *Id.* at 618. The Labor and Industrial Relations Commission through the administrative law judge concluded that the refusal to provide any settlement authority amounted to an unreasonable defense and thereby awarded attorneys' fees and costs against the employer. The Western District affirmed this award.

In *Van Sillevoldt Rijst B.V. v. Bayer*, Nos. 4:06MD1811 CDP; 4:09CV941 CDP, 2010 WL 3522139 (E.D. Mo. Sept. 1, 2010), the district court for the Eastern District of Missouri ruled that Riceland participated in good faith at a settlement conference that was supervised by a special master. Riceland had its corporate representative available by telephone rather than in person. The district court denied a request for sanctions because even if the negotiations had not been in good faith, there was no violation of Rule 16 of the Federal Rules of Civil Procedure or Local Rule 6.02 since the mediation was not court ordered. The court also cited with approval the Advisory Committee Notes, Fed.R.Civ.P. 16(f) (1993 Amendments), which state that "the most that should be expected is access to a person who would have a major rule in submitting a recommendation to the body or board with ultimate decision-making responsibility." Riceland's corporate representative had knowledge of the case, the authority

to submit a recommendation to Riceland's board of directors and made himself available by phone.

By contrast, Rule 17 Alternative Dispute Resolution of the Missouri Rules does not expressly contain a provision that parties must negotiate in good faith in a court-ordered mediation. A court may include this requirement in any court-ordered mediation. Failure to negotiate in good faith could then subject the obstructive party and/or its counsel to sanctions.

C. (§25.10) Real Estate Case Law

There are virtually no reported decisions from the Eighth Circuit and Missouri's appellate courts regarding the mediation of a real estate dispute. One rare example is *Ferguson v. Strutton*, 302 S.W.3d 239 (Mo. App. S.D. 2010), a dispute over ownership of real property by the joint tenants who no longer wanted to cohabitate. This resulted in the filing of a petition for partition of the real estate. The parties thereafter attended mediation and reached a settlement. Pursuant to the settlement, the parties divided various parcels of property.

III. Arbitration

A. Procedure, Practice and General Law

1. (§25.11) Background and Development to Date

The Supreme Court continues to support and 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 expressed "hope" in its written opinion that the parties 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 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 25.11 to 25.62 below discuss the expansive statutory law and appellate case law addressing the scope and breadth of arbitration. Sections 25.22 to 25.23 focus on drafting considerations to customize an arbitration provision. Sections 25.63 to 25.74 discuss arbitration cases involving real estate matters. Generally speaking, 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 or does not exist. 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. An arbitrator's efforts are often met with resistance, at least from one side, and sometimes from both or all 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. The district court's decision was affirmed on appeal in *Southwestern Bell Telephone v. Missouri Public Service Commission,* 630 F.3d 676 (8th Cir. 2008).

2. Agreements to Arbitrate

a. Predispute Agreements

1. (§25.12) Form of the Agreement

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. This typically is called a demand for arbitration. 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 using 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) (2009) (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. (§25.13) Binding vs. Nonbinding Arbitration

An arbitration can be binding or nonbinding. A nonbinding arbitration in essence is an advisory decision that does not necessarily have to be followed and cannot be enforced. Binding arbitration reaches a conclusive and final award that absent a statutory challenge on narrowly prescribed grounds concludes the matter and the parties must live with the result. Parties need to be careful to understand whether the proceeding they are in will result in binding or nonbinding arbitration. Even though you will note above that the word "binding" is not in the paragraph recommended by AAA, the paragraph states the award is subject to entry in court as a judgment, thus making the arbitration a binding proceeding. Probably the best way to ensure that an arbitration will be binding is to state in the arbitration provision that the dispute is subject to "binding arbitration."

In *Hansen v. Qwest Communications*, 564 F.3d 919, 924 (8th Cir. 2009), the Eighth Circuit affirmed the district court's decision that a union did not act in bad faith or with dishonest purpose in agreeing to submit a member's grievance to non-binding

arbitration instead of binding arbitration. *Id*. at 924. The union had factored in that binding arbitration can take many months whereas the nonbinding process was much more expeditious and would allow the employee to be reinstated sooner and if the employee was dissatisfied with the result, he retained the option of pursuing full arbitration.

In *Kritzer v. Curators of the University of Mo*., 289 S.W.3d 727 (Mo. App. W.D. 2009), Kritzer, a terminated former employee of the University of Missouri, argued on appeal that the trial court erred in refusing to confirm the decision of a grievance committee as a binding arbitration award. The grievance committee consisted of three individuals, one selected by the university, one selected by the claimant, and a third a member, the chair, who was selected by the first two from a list of professional arbitrators supplied by the Federal Mediation and Conciliation Service.

Kritzer asserted that the proceeding was a "common law arbitration." She did not argue that the proceedings constituted an arbitration under the Federal Arbitration Act or the Missouri Arbitration Act. *Id*. at 731. While the Western District acknowledged that arbitrations are favored and encouraged by the courts since they result in the conclusive disposition of the dispute, the court concluded that this grievance proceeding was not an arbitration. The Western District rejected Kritzer's arguments that the proceeding was formal and had many of the trappings of a binding arbitration. The critical distinction, according to the Western District, was that this proceeding did not result in a final decision as there could be further proceedings. "The test, as set forth in *Masonic Temple* [*Masonic Temple Assoc. of St. Louis v. Farrar*, 422 S.W.2d 95 (Mo. App. 1967) (Mo. App. E.D. 1967)] is whether the parties *agreed* to submit the disagreement to a forum for a *final* resolution." *Id*. at 734.

b. (§25.14) Postdispute Agreements

It is not uncommon for parties, after a dispute ensues, to agree to resolve their disagreement through binding arbitration rather than court, even though no arbitration agreement was in place before the dispute. 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.

In *Liberty Mutual Insurance Co. v. Mandaree Public School Dist.* No. 36, 503 F.3d 709, 711 (8th Cir. 2007), the Eighth Circuit ruled that Liberty Mutual had not consented to arbitration when Liberty Mutual responded to a letter that stated Mandaree Public School District (a party to an arbitration) was going to amend its claim to assert claims against Liberty Mutual as a surety to Tooz Construction, the other party to the arbitration. Liberty Mutual responded that it would not join the arbitration. The arbitrator then denied the request of Mandaree to amend its claim to include Liberty Mutual. When Liberty Mutual subsequently provided notice to the American Arbitration Association (the administrating tribunal) that it consented to join the arbitration, the court ruled that this was not an acceptance of Mandaree's offer to arbitrate. "Rather, it was a voluntary act in the arbitration proceeding that Liberty Mutual could revoke (at least

if the AAA approved) without violating the provision of 9 U.S.C. § 2 that agreements to arbitrate are 'irrevocable.'" *Id*. at 713. Section 2 does modify irrevocability by adding "save upon such grounds as exist at law or in equity for the revocation of any contract."

c. (§25.15) 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 §25.46 to 25.48, the decision of the arbitrator essentially is 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, a motion to dismiss or summary judgment 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.

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.

Contracts that have arbitration provisions frequently contain an additional provision providing prerequisite steps that must be met before a demand for arbitration can be filed. One example is in A201, AIA Forms 2007. In the construction industry it is fairly typical that before a demand for arbitration can be filed, the matter must first be formally mediated. This presents a prerequisite to the filing of arbitration. Unless the provision is waived, an arbitrator or panel of arbitrators may determine that it does not have jurisdiction pursuant to the agreement to proceed with arbitration absent the disposition of a mediation prerequisite. *But see Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region*, 130 S. Ct, 584 (2009) (a procedural rule that required proof of conferencing prior to commencement of an arbitration of minor disputes before the National Railroad

Adjustment Board was not "jurisdictional" in nature as a necessary prerequisite to arbitration).

d. Procedural Considerations

1. (§25.16) In General

Who decides whether a dispute is subject to arbitration? If the arbitration provision is silent on this point, 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, that oral notice was sufficient and that the dispute was properly subject to arbitration. Despite the judicial preference toward arbitration, there must be some form of agreement to arbitrate or one of the many exceptions discussed herein or the court will not enforce arbitration. *See Bank of America, N.A. v. UMB Financial Services, Inc.*, Nos. 09-3173, 09-3393, 09-3449, 10-1041, 2010 WL 3341246 (8th Cir. August 26, 2010), a case where the Eighth Circuit considered several possible ways that arbitration may apply, but in the end ruled the dispute was not subject to arbitration.

2. (§25.17) Court Jurisdiction

The courts have jurisdiction to decide what the Supreme Court has characterized as 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 basically 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.

In *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S. Ct. 2847 (2010), the Supreme Court reaffirmed that the

question of whether the parties are subject to arbitration is an issue for judicial determination. *Id*. at 2855-56. "To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Id*. at 2856. The court held that a dispute over what was the ratification date of a collective bargaining agreement (CBA) where said agreement contained an arbitration clause was a matter to be resolved by the district court rather than the arbitrator.

Once referred to arbitration by a court, the arbitrator has the jurisdiction to decide the remainder of the dispute. The 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 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).

Missouri's appellate courts have responded to the direction provided by the 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 Supreme Court defers to the expertise of arbitrators even over its own federal judges to resolve issues over 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 §25.29 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).

In *M & I Marshall & Ilsley Bank v. Sader & Garvin, LLC,* 318 S.W.3d 772 (Mo. App. W.D. 2010), the Western District confirmed a trial court's decision that parties had not agreed to arbitrate simply because of alleged judicial admissions made during the discovery process in a court proceeding. In deciding this question of arbitrability, the Western District concluded that there was no documentary evidence submitted to the trial court that demonstrated that the party had expressly agreed to the terms of an arbitration provision or had notice of the alleged terms prior to the dispute. Thus, there was no evidence that the parties had expressly agreed to the purported contract of arbitration.

While the question of arbitrability is typically decided at the trial court level, there is at least one case where the appellate court decided the question of arbitrability. *Crown Cork & Seal Co., Inc. v. International Assoc. of Machinists and Aerospace Workers*, 501 F.3d 912, 916 (8th Cir. 2007). In this case the appellate court concluded that it was not efficient to remand this question to the trial court since the parties had already submitted a joint stipulation of material facts, the record was complete, and in any event the appellate court's review of legal conclusions is *de novo*.

Sometimes the parties expressly state in their arbitration provision that any question about arbitrability is to be decided by an arbitrator and not by the court. The Supreme Court opened this door by holding that the courts have exclusive jurisdiction to decide on whether a dispute is subject to arbitration "[u]nless the parties clearly and unmistakably provide otherwise in their agreement." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986). In *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), the Supreme Court held that a provision in an employment agreement that delegated to the arbitrator the exclusive authority to resolve any dispute relating to the agreement's enforceability was a valid delegation under the FAA. Accordingly, the Supreme Court held:

> The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. See, *e.g., Howsam*, 537 U.S., at 83-85, 123 S.Ct. 588; *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) (plurality opinion). This line of cases merely reflects the principle that arbitration is a matter of contract. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal *2778 court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under § 2 "save upon such grounds as exist at law or in equity for the revocation of any contract," and federal courts can enforce the agreement by staying federal litigation under § 3 and compelling arbitration under § 4. The question before us, then, is whether the delegation provision is valid under § 2.

Id. at 2777-78.

The Eighth Circuit in *Fallo v. High-Tech Institute*, 559 F.3d 874, 877 (8th Cir. 2009), held that if an arbitration provision states that disputes regarding the agreement "shall be settled by arbitration in accordance with the Commercial Rules of the American Arbitration Association" then that arbitration provision has incorporated AAA's rules. This means that the parties have "clearly and unmistakably" demonstrated an intent to arbitrate the question of arbitrability with an arbitrator since Rule 7(a) of the AAA rules provides that arbitrators determine their own jurisdiction. *Id*. at 877. "Consequently, we conclude that the arbitration provision's incorporation of the AAA Rules, like the incorporation of the NASD Code . . . constitutes a clear and unmistakable expression of the parties' intent to leave the

question of arbitrability to an arbitrator." *Id*. at 878.

3. (§25.18) 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.

When evaluating the merits of a motion to compel arbitration, the trial court must "necessarily determine whether the purported arbitration agreement is valid and whether the specific claims raised are within the scope of the arbitration agreement." *Sennett v. National Healthcare Corp*., 272 S.W.3d 237, 241 (Mo. App. S.D. 2008).

The Supreme Court of Missouri held in a matter of first impression that Section 435.355.1, RSMo 2010, 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.

When moving a court to compel arbitration, it is critical that the arbitration provision in question be introduced into evidence so that the court has a clear record of the arbitration agreement. In *Ryan v. Raytown Dodge Co*., 296 S.W.3d 471 (Mo. App. W.D. 2009), the Western District affirmed a trial court's decision to deny a motion to compel arbitration where the moving party alleged in its motion that there was a binding arbitration provision, but did not actually attach the agreement in question to its moving papers or otherwise have it properly introduced into evidence. "Raytown Dodge failed to establish that the 'Exhibit 1' was the parties' Retail Installment Contract and, thus, failed to prove that an arbitration agreement compelling participation in arbitration existed between the parties." *Id*. at 473.

When filing a motion to compel arbitration in federal court, the moving party cannot rely upon the Federal Arbitration Act to create independent federal question jurisdiction. *Advance America Servicing of Arkansas, Inc. v. McGinnis*, 526 F.3d 1170, 1173 (8th Cir. 2008). *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 to establish subject matter jurisdiction. In *McGinnis* the Eighth Circuit affirmed a district court's order granting a motion to dismiss and thereby rejecting a request to compel arbitration on the basis that the action did not meet the diversity jurisdiction requirement of $75,000. The underlying state court damage claim, the district court noted, was less than $1,000.

Diversity of citizenship is determined by the citizenship of the parties named in the proceedings before the district court plus any indispensable parties who must be joined pursuant to Rule 19. *North Fort Health Services of Arkansas v. Rutherford*, 605 F.3d 483, 491 (8th Cir. 2010).

In *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009), the Supreme Court held that a federal court may "look through" a petition to compel arbitration to determine whether it has subject matter jurisdiction over the underlying dispute. In reaching this result, the court decided that a litigant's motion to compel an arbitration pursuant to § 4 of the FAA requires the court to examine the underlying dispute to determine whether appropriate subject

matter jurisdiction exists as either a federal question or in diversity. This further requires that the entirety of the parties' actual controversy could have been litigated in federal court. If not, the district court is devoid of jurisdiction to entertain a § 4 FAA motion to compel arbitration and any such motion must be dismissed. *Id*. at 1275.

Federal law may apply in deciding a motion to compel arbitration. In *Finnie v. H&R Block Financial Advisors, Inc*., 307 Fed. Appx. 19 (8th Cir. 2009), an employee brought a discrimination action against her former employer and supervisor. The Western District partially denied the supervisor's motion to compel arbitration. On appeal, the Eighth Circuit concluded that the district court erred in applying Missouri law to determine whether the employer could enforce the arbitration agreement since the underlying dispute involved various employment matters including alleged discrimination arising under Title VII and thus was subject to the Federal Arbitration Act. 9 U.S.C. §§ 1-16. The court stated that the federal law in terms of the FAA governs the issue of arbitrability in either state or federal court and there is a clear congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any substantive or procedural policies to the contrary. "The effect of this section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA].", citing *Moses H. Cone Mem'l Hosp v. Mercury Constr. Corp*., 560 U.S. 1, 24 (1983).

4. (§25.19) 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*.

If 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.

A court will only grant a motion to stay if there is a valid agreement to arbitrate. 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.

The Eighth Circuit affirmed a district court's decision to enjoin an arbitration while the district court considered further if the dispute should more appropriately proceed in court rather than arbitration. *Bank of America, NA v. UMB Financial Services, Inc*., Nos. 09-3173, 09-3393, 09-3449, 10-1041, 2010 WL 3341246 (8th Cir., Aug. 26, 2010). "The district court did not err in temporarily enjoining the parties from participating in binding arbitration on a matter which UMB was attempting simultaneously to litigate in district court." The Eighth Circuit also rejected arguments that the dispute was subject to arbitration under theories of estoppel, third-party beneficiary and waiver.

In an unusual case on a motion to stay, the Western District held in *Dobson Brothers Construction Co. v. Ratliff, Inc.*, No. 10-00459-CV-W-DGK, 2010 WL 3613813 (W.D. Mo. Sept. 3, 2010), that defendants could not use a motion to stay as a means to halt the confirmation of an arbitration award. Defendants argued that pursuant to judicial economy and the "first-filed" rule another proceeding pending in Nebraska required a stay of the Missouri proceeding on confirmation of the award. The Western District concluded that if a court has the power to stay an action for arbitration it also has the power to confirm the arbitration award. The court noted that this award followed eleven days of hearing as well as post hearing briefs and proposed awards. It also noted that the issues in the Missouri case were not identical to the issues pending in Nebraska and thus, the first-filed rule was not applicable.

5. (§25.20) 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 courts 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 was 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).

The Supreme Court has held that a litigant who is not a party to an arbitration agreement may nevertheless invoke § 3 of the FAA to seek a stay of a lawsuit provided the relevant state contract law allows that litigant to enforce the agreement. *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1898 (2009). The high court determined that the Sixth Circuit had jurisdiction to review the denial of a petitioner's request for a § 3 stay and that a litigant who was a nonsignator to the relevant arbitration agreement could invoke § 3 if allowed under the applicable contract law for that state.

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.*

The Eighth Circuit has noted that a nonsignatory may compel a signatory to arbitrate claims in limited circumstances. *PRM Energy Systems, Inc. v. Primenergy, L.L.C.*, 592 F.3d 830, 835 (8th Cir. 2010). *See Donaldson Company, Inc. v. Burroughs Diesel, Inc.,*581 F.3d 726, 735 (8th Cir. 2009) (a supplier could not compel arbitration under Mississippi's "concerted misconduct" test for equitable estoppel). One example is an agency concept where there is a close relationship between the signators and the nonsignators and the failure to apply the agreement to the

nonsignator would eviscerate the arbitration agreement. *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798-99 (8th Cir. 2005). Another instance applies loosely the principles of equitable estoppel or sometimes referred to as "alternative estoppel." *Id.* at 799. "A willing nonsignatory seeking to arbitrate with a signatory that is unwilling may do so under what has been called an alternative estoppel theory which takes into consideration the relationships of persons, wrongs, and issues . . . ." *Id.* at 799, quoting *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d Cir. 2003). The Eighth Circuit in *PRM Energy* has held that "[a]lternative estoppel typically relies, at least in part, on the claims being so intertwined with the agreement containing the arbitration clause that it would be unfair to allow the signatory to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause of that same agreement." *PRM Energy* at 835.

In *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339 (Mo. banc 2006), the Supreme Court of Missouri 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.

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 Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999).

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 whose agreement contains 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.*

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. 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. Jan. 13, 2009).

6. (§25.21) Lawsuit to Enforce Settlement Reached During Arbitration

If a settlement is reached during a pending arbitration and there is no pending lawsuit, the procedure to enforce the settlement agreement is the filing of a new lawsuit seeking damages or equitable relief, rather than a motion to compel enforcement of the settlement agreement. *Residential & Resort Assoc., Inc. v. Wolfe*, 274 S.W.3d 566, 569 (Mo. App. W.D. 2009). In reaching this result, the Western District found that a trial court's judgment based on a motion to enforce a settlement agreement (rather than a lawsuit) was void as a nullity.

e. Drafting Considerations

1. (§25.22) In General

Case law 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. (§25.23) 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), Sections 435.350–435.470, RSMo 2010 (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 Section 435.460, RSMo 2010:

> **"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. Location of the hearing may determine which state has jurisdiction over the arbitration. See §25.53.

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

f. Specific Issues in Arbitration Provisions

1. (§25.24) 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. (§25.25) 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). *See also International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Rousselot, Inc.*, 334 Fed. Appx. 793 (8th Cir. 2009).

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.*

Disputes often involve both allegations of breach of contract and tort claims. Frequently, this sparks a disagreement 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. (§25.26) 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. 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 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.

The Eastern District in *Boulds v. Chase Auto Finance Corp*., 266 S.W.3d 847 (Mo. App. E.D. 2008) found that an arbitration provision contained in one of three agreements which were signed simultaneously applied to the overall transaction even in the absence of an explicit incorporation provision. The court concluded that "instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together." *Id.* at 851. In reaching this conclusion, the court noted that all three documents were signed by the party at the same time and that the arbitration provision contained within one of the documents stated that it is "part of your contract with the dealer." *Id.* Thus, the overall contract consisted of these three documents and it was clear to the court that the parties intended the arbitration agreement to cover all disputes except for those specifically excluded per the agreement itself. In addition, plaintiff knew when she signed these documents that if there was a problem, an arbitrator would resolve it.

4. (§25.27) 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).

By contrast, the Supreme Court in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), held that a provision in a collective bargaining agreement that clearly and unmistakably required union members to arbitrate claims pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq*., is enforceable and can be delegated to arbitration as a matter of federal law.

> Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this CBA [Collective Bargaining Agreement], which was freely negotiated by the Union and the RAB [Realty Advisory Board of Labor Relations, Inc.], and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. Congress has chosen to allow arbitration of ADEA claims. The judiciary must respect that choice.

Id. at 1466.

5. (§25.28) 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 §25.29 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.

The Western District in *Frye v. Speedway Chevrolet Cadillac*, No. WD 71757, 2010 WL 3118579 (Mo. App. W.D. Aug. 10, 2010), applied the holding in *Morrow* (which it described as a seminal case) to conclude that if the arbitration provision in question does not specifically obligate the employer to arbitrate all disputes the employer has, as it requires the employee to do, there is no mutuality of agreement when the employee is asked to agree to arbitrate after it is already an employee. Thus, there is no mutual promise. The arbitration provision lacks legal consideration and is not enforceable. *Id*. at *11.

6. (§25.29) Unconscionable Arbitration Provisions

Disputes over whether an arbitration provision is unconscionable and thus unenforceable are frequent. Thus, there is considerable case law in this area.

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 v. Schneider*, 194 S.W.3d 853 (Mo. 2006)), 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. It is not clear to this author how to reconcile this with the Supreme Court's rulings that the courts decide the question of arbitration and the arbitrator decides everything else. Is a determination about unconscionability subsumed within the gateway question or distinct from it?

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 fifteen 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 Supreme Court had this issue before it in *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003), but the Supreme Court did not reach any conclusion.

The Western District in *Grossman v. Thoroughbred Ford, Inc.*, 297 S.W.3d 918 (Mo. App. W.D. 2009), rejected an argument of unconscionability by concluding that there was insufficient evidence to establish that an arbitration provision would require claimants to pay more to arbitrate their claims than they could possibly recover in damages. The Grossmans had purchased their vehicle for more than $40,000, but they were not contractually limited in seeking incidental or consequential damages for any loss due to alleged fraud. The arbitration provision did limit the Grossmans to no more than $5,000 in punitive damages and provided that the parties would share in the costs of the arbitration as well as pay their own attorneys' fees with a reservation of power to the arbitrator to assess costs against any party who failed to cooperate in the proceedings. "Because the arbitration agreement was not unfairly oppressive and did not deprive the Grossmans of meaningful choices, it did not rise to the level of substantive unconscionability." *Id.* at 924.

7. (§25.30) Financial Considerations

Financial considerations can impact the court's enforcement of an arbitration provision. 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 specified amount. In other cases, parties may agree to arbitration only if the amount in dispute is less than some specified amount.

8. (§25.31) 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. (§25.32) Choice of Law

The FAA controls arbitrations that involve interstate commerce, which the courts have liberally 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' 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).

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 §25.23 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. Damages

1. (§25.33) Personal Injury Damages

Many attorneys consider arbitrations to only involve non personal injury disputes. In reality, personal injury cases are being decided in arbitration. For example, the Western District in *Spielvogel v. City of Kansas City*, 302 S.W.3d 108 (Mo. App. W.D. 2009), affirmed an arbitration panel's award in favor of a motorcycle driver who was seriously injured in a collision with a center median on a bridge complex and the driver's wife, who was his passenger and was killed in the accident. The driver and his children brought a personal injury and wrongful death action against the Missouri Highway and Transportation Commission and the City of Kansas City, asserting that the injuries and death were caused by defects on the bridge complex. The arbitration panel determined that the Highway Transportation Commission was responsible for the property and that the Commission had waived its right to sovereign immunity based upon the dangerous conditions to the property. The Western District affirmed the panel's award of $681,000 in personal injury damages to the driver subject to a 30% reduction for comparative fault and awarded $2,250,000 in damages for the wrongful death of the driver's wife.

2. (§25.34) 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 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 Section 537.675, now RSMo 2010, 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.

3. (§25.35) Interest

Interest may be awarded by an arbitrator pursuant to the contract, as required under the applicable law or if provided by the rules of the arbitration tribunal. For example, AAA's Rule R-42(d)(i) states that the arbitrator may award "interest at such rate and from such date as the arbitrator(s) may deem appropriate**."** In construction cases, interest can be a significant component of a damage award. For example, pursuant to the Public Works Prompt Payment Statute, RSMo Section 34.057 2010 and Missouri's Private Prompt Payment Statute, RSMo Section 431.160 2010, an arbitrator can within the arbitrator's discretion award up to 18% interest based upon a finding that a specified payment was not made as required under the contract.

What happens after the award is presented to the trial court for confirmation? Does the trial court have authority to award interest from that point forward, and if so, on what basis? In *Cannon General Contractors, Inc. v. Mock*, 302 S.W.3d 772 (Mo. App. S.D. 2010), the Southern District decided that a trial court erred when it omitted interest in a confirmation hearing on the arbitration award. The court had based this on the arbitrator's denial of pre-award interest based on a finding that the claims were unliquidated. "A denial of pre-award interest on unliquidated claims does not bar interest after the arbitrator's award liquidates the debt, nor does Contractor's acquiescence in the pre-award interest ruling preclude statutory interest after the award." *Id*. at 774. The court cited with approval *National Avenue Building Co. v. Stewart*, 972 S.W.2d 649 (Mo. App. S.D. 1998). In both cases, an appellate court concluded that a trial court should add post-award interest when it confirms an arbitration award and, absent any other compelling authority, that interest

typically will run at 9% per annum pursuant to Section 408.020 RSMo 2010.

4. (§25.36) 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 (2009) (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.

Attorney fees may be awarded in a court proceeding involving confirmation of an arbitration award even if attorney fees in the underlying arbitration were denied. *Mead v. Moloney Securities Co., Inc.*, 274 S.W.3d 537, 544 (Mo. App. E.D. 2008). The Eastern District determined that a contractual provision requiring a party to pay all attorney fees and other legal costs in a dispute involving that party required the trial court to determine and assess a reasonable award of attorney fees and costs incurred at the trial court level. In addition, the Eastern District further held that attorney fees and legal costs should be assessed at the appellate court level as well. The appellate court directed the trial court to determine a reasonable award of attorney fees and costs incurred in both the trial court level and in the appellate court.

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 $1,700,000.

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. The courts previously recognized manifest disregard of the law as a viable ground to vacate an arbitration award when an arbitration panel has cited relevant law but then proceeded to ignore it. *Delfino*, 414 F.3d 882. Note: this no longer applies since *Hall Street v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) has held that manifest disregard of the law is not a ground to vacate an award. An arbitrator's award of attorney fees also may 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).

h. (§ 25.37) Continued Employment

An arbitration provision requires consideration to be enforceable. The Eastern District has determined under Missouri law that continued employment by itself is not sufficient consideration to enforce a newly created arbitration policy in an already existing employer/employee relationship. *Kunzie v. Jack'-in-the-Box, Inc.*, No. ED 92974, 2010 WL 779367 (Mo. App. E.D. March 9, 2010).

By contrast, the Eighth Circuit, applying South Dakota law, has held that continued employment is sufficient consideration because the employee accepted the terms of the arbitration program by continuing to work there. *McNamara v. Yellow Transportation, Inc.*, 570 F.3d 950 (8th Cir. 2009). The Eighth Circuit stated that it is the "well-established law of contracts in several Eighth Circuit states, and we can discern no likelihood that South Dakota would deviate from this rule." *Id.* at 956. The court noted that the South Dakota Supreme Court had not yet directly addressed this issue.

i. (25.38) Collective Bargaining Agreement

In *United Steel Workers of America Local 884, AFL-CIO v. Laclede Gas Co.,* No. 4:09CV184 CDP, 2010 WL 3721512 (E.D. Mo. Sept. 15, 2010), the Eastern District of Missouri considered whether health benefits from a union-negotiated plan were vested. The plaintiff union had brought an action to compel arbitration of grievance. The dispute related to changes made in 2008 by the employer to health benefits that were provided to certain retirees. The District Court granted summary judgment, finding that the health benefits negotiated under the prior 2001 agreement (which was the basis for the grievance giving rise to the lawsuit) had not vested before the agreement expired. Since the benefits did not survive the expiration of the 2001 labor agreement, the employer could not be compelled to arbitrate the decision it made in 2008 to change certain medical benefits. Thus, the benefits did not vest or survive the creation of a new benefit plan.

Do retirees lose their ability to arbitrate a grievance once the agreement between their union and the employer expires? The Eastern District of Missouri decided their dispute continued to be subject to arbitration. *Newspaper Guild of St. Louis v. St. Louis Post-Dispatch, LLC*, No. 4:9CV412 RWS, 2010 WL 3908658 (E.D. Mo. Sept. 30, 2010). The dispute was whether the qualified retirees who retired when the arbitration agreement was in place were still entitled to have the *Post-Dispatch* pay their full medical insurance premiums for the remainder of their lives or did the obligation expire when the agreement was terminated.

j. (§25.39) Assignee to Arbitration Agreement

Contracts frequently state that the contract applies not only to

the contracting parties but in their absence to others as well. In *McCracken v. Green Tree Servicing, LLC*, 279 S.W.3d 226, 229 (Mo. App. W.D. 2009), the Western District found that an arbitration provision was binding on an assignee. The introductory language of the loan agreement in question clearly indicated that its terms were applicable to the contracting party and its "successors and assigns." Accordingly, a third party assignee was entitled to invoke the lender's right to arbitration as an assignee.

In *Koch v. Compucredit Corp.*, 543 F.3d 460, 465 (8th Cir. 2008), the Eighth Circuit held that it is for the court, not an arbitrator, to address initially whether there was a valid assignment of a contract that contained an arbitration provision such that the assignee could be a party to an arbitration. This case involved a credit card account which had been paid in full and closed. The holder of the account argued that there could not be a valid assignment because the arbitration provision contained in the account expired when the account was closed. The Eighth Circuit determined that the obligation to arbitrate given the terms of the account continued even after the expiration of the agreement and thus there could be a valid assignment of that account even after it was closed.

k. (§25.40) Severability Clause

Contracts frequently contain a severability clause which in essence states that if any provision in the overall contract is found to be unenforceable, it does not affect the rest of the contract which still can be enforced. Parties frequently desire to have such a provision in a contract to prevent a court from voiding an entire contract due to one offensive provision. In *Franke v. Poly-America Medical and Dental Benefits Plan*, 555 F.3d 656 (8th Cir. 2009), the Eighth Circuit noted that properly worded severability clauses such as ones that "specifically state the intent of the parties in the event a provision within the agreement is found invalid" are enforceable and can preserve the integrity of the arbitration to go forward once the invalid provisions are removed. *Id*. at 658. Those who draft arbitration provisions should strongly consider the merits of including a carefully worded severability clause.

l. (§25.41) 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 regional 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 Financial Industry Regulatory Authority (FINRA), that handle more narrowly defined disputes regarding stocks and related security issues.

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.

m. (§25.42) 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.

n. (§25.43) Discovery

Discovery is a controversial topic in arbitration. Often, the parties agree on how much discovery and how soon it must be completed. When this occurs, arbitration works seamlessly and efficiently. But there are times when the parties cannot agree on the scope of or the timing of discovery. The arbitration agreement may specifically address what discovery can take place. Reviewing the agreement is a good starting point 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) (2009), *available at* www.adr.org/sp.asp?id=32904. 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.

o. (§25.44) 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, Section 435.014, RSMo 2010, 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 expressly 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.

p. (§25.45) Limitations—Time for Filing Arbitration Claim

In *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79 (2002), the 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.

q. (§25.46) 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.

§ 435.385, RSMo 2010.

It is important that the award be in writing and issued within the time limits required by the agreement of the parties or by the rules under which the arbitration is proceeding. *In Re Jack Raymond Heaviside and Christina Lee Heaviside, Debtors*, No. 10-44264-659, 2010 WL 3417658 (Bkrtcy. E.D. Mo. Aug. 30, 2010), a party to an AAA arbitration proceeding filed for protection under Chapter 13 of the Bankruptcy Code shortly after conclusion of the hearing. This invoked an automatic stay pursuant to 11 U.S.C. §362(a). At the conclusion of the hearing, the arbitrator announced what his award was going to be. The debtors (the losing party) filed for bankruptcy, however, before the arbitration award was written and formally issued. Thus, AAA had an oral (not written) award which had not yet been entered. The Eastern District of Missouri held that the automatic stay did not apply to the issuance of the written arbitration award and therefore, allowed the award to be entered and to be binding upon the parties. The award included the granting of a request for an injunction whereby the debtor was enjoined from disclosing to any third party any of the company's information obtained while the debtor was employed by the company.

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.

While most arbitration awards tend to be a standard award which essentially is an "up or down" with perhaps an itemization of individual damages, there are instances when parties request written reasons either because of ongoing collateral litigation, precedential value, or for other valid reasons. The parties have a unique opportunity in arbitration to work with the arbitrator or panel of arbitrators to fashion exactly the kind of written award they want or need for other purposes. For example, in *Spirco Environmental, Inc. v. American International Specialty Alliance Insurance Co.*, 555 F.3d 637 (8th Cir. 2009), the district court and Eighth Circuit had the benefit of detailed findings from the panel of arbitrators which assisted the court in being able to determine whether the underlying arbitration claim was more like a breach of contract claim or a claim for property damage. This was important because it might be determinative of insurance issues and potential indemnity coverage.

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. This result was affirmed on appeal by the Eighth Circuit in *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971 (8th Cir. 2008).

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. An example of the confusion and disagreement that can ensue when an arbitrator retains jurisdiction after the award can be found in *Utility Workers Union of America Local 335 v. Missouri-American Water Co.*, No. 4:09 CV 1875 DDN, 2010 WL 3908933 (E.D. Mo. Sept. 30, 2010).

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 an issue 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.

r. (§25.47) 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 2010, 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. 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.

Occasionally the trial court must decide what to do with an award that it finds to be ambiguous and therefore difficult if not impossible to enforce. In such instances, the trial court may remand the arbitration to the arbitrator for clarification of an ambiguous award. *Turner v. United Steelworkers of America, Local 812*, 581 F.3d 672, 676 (8th Cir. 2009).

Prudence dictates that challenges to an award should be made initially to the arbitrator(s) who issued the award. For lack of a better description, this could take the form of a motion for reconsideration. In *Medicine Shoppe International, Inc. v. Turner*

Investments, Inc., 614 F.3d 485, 489 (8th Cir. 2010), the Eighth Circuit held that appellants had waived an argument in challenging the confirmation of an award when it was raised for the first time in their brief before the Eighth Circuit. The Court noted with approval that when a party "who contests the merits of an arbitration award in court, fails to first present the challenges on the merits to the arbitrators themselves, review is compressed still further, to nill," citing *Int'l Dhd of Elec. Workers, Local Union No. 454 v. Hope Elec. Corp.,* 380 F.3d 1084, 1101 (8th Cir. 2004).

s. (§25.48) 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), Section 435.405, RSMo 2010. 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 had for a period of time engrafted, by case law, two additional grounds on which an award could be vacated: an award that is "completely irrational" or "evidence[s] a manifest disregard for the law,". *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)). These grounds no longer exist after *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). 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.

After *Hall Street*, the Eighth Circuit explicitly stated that an arbitration award may now be vacated only for the reasons enumerated in the FAA, and not for any of the expanded judicial grounds previously applied by the Eighth Circuit or other courts. *Medicine Shoppe International, Inc. v. Turner Investments, Inc.*, 614 F.3d 485 (8th Cir. 2010). *See Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008) (citing *Hall Street*, 225 U.S. at 584). "Appellants' claims, including the claim that the arbitrator disregarded the law, are not included among those specifically enumerated in Section 10 [of the FAA] and are therefore not cognizable. *See Hall Street*, 552 U.S. at 586." *Medicine Shoppe* at *3.

Thus, 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 §25.47 above for additional discussion on disclosure requirements.

In *Williams v. National Football League*, 582 F.3d 863 (8th Cir. 2009), the Eighth Circuit rejected arguments that an arbitrator's award was tainted by evident partiality since the arbitrator had given both the Vikings and the Commissioner of the NFL legal advice on the subject of the arbitrations. The Eighth Circuit concluded that the union waived any objection to the arbitrator's evident partiality by failing to object to that person serving as the arbitrator. Further, the court stated that even if the union had not waived this issue, the union failed to carry the "heavy burden" of demonstrating that the arbitrator's actions show evident partiality as the union did not even allege that the arbitrator's actions were motivated by "improper motives." *Id.* at 886.

An arbitrator's exclusion of evidence can be a ground to vacate the award. Exclusion of evidence may be easier 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.

An arbitrator or panel of arbitrators who exceed their powers under the arbitration agreement subject their award to a motion to vacate. In *Behnen v. A.G. Edwards & Sons, Inc.*, 285 S.W.3d 777 (Mo. App. E.D. 2009), the Eastern District reversed the trial court and upheld a panel's award over an attack that the panel exceeded its powers. The arbitration involved an employee who was terminated from A.G. Edwards & Sons, Inc. In accordance with the National Association of Securities Dealers (NASD) rules, A.G. Edwards was required to file a form U-5 that described the circumstances of the employee's termination. A.G. Edwards stated that the employee was terminated for violating a firm policy and industry rules and regulations, among other reasons. The arbitration panel found in favor of the employee and ordered that the Form U-5 be amended to state that the employee was voluntarily terminated even though this in fact was not the case. A.G. Edwards convinced the trial court that this award exceeded the panel's authority under the arbitration agreement. The

appellate court reversed on the basis that the panel decided an issue that was within the scope of the arbitration agreement and thus they did not exceed their powers in ordering the change on the Form U-5. "Because the arbitrators did not exceed their powers and because courts must give a high degree of deference to their award, we conclude that the trial court erred by vacating in part the award." *Id.* at 780. The difficulty in finding that an arbitrator or panel exceeded their authority and the results that it sometimes leads to prompted the judge writing the opinion for the majority of the court to note as follows:

> This writer alone notes the antithetical nature of reversing one improper order to reinstate an award that was arbitrary and capricious, but that is how our standard limits us. In my estimation, we essentially affirm what was patently untrue.

Id. at FN 5.

It is difficult to successfully convince a court that an arbitration award should be vacated. In *Cargill Inc. v. Morgan*, No. 1:10CV00088 SNLJ, 2010 WL 3000045 (E.D. Mo. July 28, 2010), the United States District Court for the Eastern District of Missouri denied a motion to vacate where the allegations were that the arbitrators were guilty of misconduct by refusing to modify a briefing schedule or to allow the moving party to file a brief untimely. The court noted that the NGFA Arbitration Rules that were applicable to this particular arbitration granted the arbitrators a procedural basis for declaring the party in default for failure to file briefs by an established deadline. *Id*. at *2. The trial court determined that the arbitration panel followed the established procedure when it entered a default judgment under the terms of NGFA Arbitration Rules. *Id*.

However, in *Stolt-Nielsen v. Animalfeeds International Corp*., 130 S. Ct. 1758 (2010), the Supreme Court held that an arbitration panel exceeded its powers under the FAA by imposing class arbitration on parties who had not agreed to authorize class arbitration. By deciding to certify the arbitration as having class status, the panel took it upon itself to reach this decision. "The conclusion is inescapable that the panel simply imposed its own conception of sound policy." *Id*. at 1769. The panel had based its belief that it could reach a policy decision of this sort on the U.S. Supreme Court's decision in *Greentree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). "Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case at the time of the arbitration proceeding." *Id*. at 1772.

t. (§25.49) Expanding Grounds to Vacate Award

Some parties have tried to expand, through an express arbitration provision, a court's jurisdiction and basis to consider and affirm or overturn an award in arbitration. The 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.

u. (§25.50) High/Low Arbitration and Baseball Arbitration

In some 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.*

v. (§25.51) Insurance or Appraisal Clauses

Under the Missouri Uniform Arbitration Act, arbitration clauses in insurance contracts are unenforceable. Section 435.350 RSMo 2010**.** By contrast, an appraisal clause contained in an insurance policy is enforceable. An appraisal clause can be found in an insurance agreement whereby the policy mandates that the amount of loss is to be set by appraisal which often can mean the cost to repair. *CNS Corp. v. Global Aerospace, Inc.*, No. 2:10CV18 JCH, 2010 WL 2978063 (E.D. Mo. July 23, 2010). While state and federal courts nationwide are split on this issue, "Missouri courts have long held that appraisal clauses are distinct from arbitration clauses and can be enforced. *Id.*, citing *TAMKO Bldg. Products, Inc. v. Factor Mut. Ins. Co.*, No. 4:09CV1401 CDP 2009 WL 5216999 at *2 (E.D. Mo. Dec. 30, 2009).

w. (§25.52) Merger Clause

Contracts frequently contain a merger clause stating that the contract is the complete and exclusive agreement between the contracting parties. The court in *Krueger v. Heartland Chevrolet, Inc.*, 289 S.W.3d 637, 639 (Mo. App. W.D. 2009), held that the following merger provision in a retail installment contract superseded a retail buyer's order that contained an arbitration provision:

> Oral agreements or commitments to loan money, extend credit or to forbear from enforcing repayment of a debt including promises to extend to renew such debt are not enforceable. To protect you (borrower(s)) and us (creditor) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, *which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it*.

(emphasis added)

Accordingly, the Western district upheld a circuit court's denial of a motion to compel arbitration because the arbitration provision was not in the retail installment contract.

x. (§25.53) Postponement/Continuance of Hearing

With some frequency due to varying circumstances, one or both parties may request a brief postponement of the date set for hearing or a continuance to a completely new hearing date. These requests can create unique issues for an arbitrator that may be distinct from those a traditional trial judge faces. The reason for this is contained within the Missouri Arbitration Act and the Federal Arbitration Act. Section 435.405.1(4) RSMo 2010 provides that the court shall vacate an arbitration award upon application of a party where:

> 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.

The Federal Arbitration Act has a similar provision in 9 U.S.C. § 10(a)(3). This provision reads:

> (c) 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.

In *Scharf v. Kogan*, 385 S.W.3d 362 (Mo. App. E.D. 2009), the Eastern District ruled that an arbitrator did not overstep his statutory authority by denying a motion to postpone a hearing. He set out in some detail his reasons for the denial in an arbitration order. The reasons included that the matter had been pending for many months, with a hearing date selected by the parties in consultation with the arbitrator, that the discovery-related problems that in part prompted the request were mostly the result of the parties undertaking discovery late rather than early in the process, and that a change in counsel did not "under all the circumstances" rise to a level to prompt a postponement of the hearing. The Eastern District concluded: "Any and all of the

explanations stated by the arbitrator would provide a reasonable basis for denying the request for a postponement. Accordingly, the trial court did not err in confirming the arbitration award . . ." *Id*. at 374. In reaching this result, the Eastern District noted that the Eighth Circuit has held that "[c]ourts will not intervene in an arbitrator's decision not to postpone a hearing if any reasonable basis for it exists.", *citing El Dorado School Dist. No. 15 v. Continental Casualty Co*., 247 F.3d 843, 848 (8th Cir. 2001). In that case, the arbitrator did not give specific reasons for denying the motion for a postponement, which probably is a more frequent occurrence than the more detailed reasons the arbitrator provided in *Scharf*. Nevertheless, the two courts reached the same conclusion.

y. Practice Suggestions

1. (§25.54) 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 for redress from an arbitration pending outside 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).

Accordingly, it is important that the parties, if they have an option, keep in mind the substantive law of the state where the arbitration hearing will take place. The Eighth Circuit, like Missouri 's appellate courts, has held that the location of the arbitration hearing determines which state court has jurisdiction over that proceeding, as it is the state where the arbitration is

held. *Oglala Sioux Tribe v. C&W Enterprises, Inc*., 542 F.3d 224 (8th Cir. 2008). "Here, the state court has jurisdiction because the arbitration occurred in South Dakota . . .; the locus of the work is irrelevant." *Id.* at 233.

2. (§25.55) 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, if not literally 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 §25.46-47 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. (§25.56) 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.

z. (§25.57) 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.

aa. (§25.58) 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 2010.

An appellate court has *de novo* review of a trial court's decision on whether a matter is subject to arbitration and on the award itself. *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.*

The Supreme Court has stated: "as long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." *Eastern Assoc. Coal Corp. v. United Mine Workers*, 531 US 57, 62 (2000).

A judgment compelling arbitration is not appealable under § 435.440 RSMo 2010. *Braden v. JF Enterprises, LLC*, 274 S.W.3d 564, 565 (Mo. App. W.D. 2008). Accordingly, an appellate court lacks jurisdiction to consider an appeal from a trial court's order compelling arbitration.

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.

In *3M Co. v. Amtex Security, Inc*., 542 F.3d 1193 (8th Cir. 2008), the Eighth Circuit held that it had jurisdiction to consider on appeal a federal district court's order to compel arbitration where that order disposed of the only matter that was then pending before that trial court.

> "We agree with the position taken by Amtex and circuit courts which have concluded that when a motion to compel arbitration and a motion for a stay are brought *separately*, they should be treated individually and the resulting order compelling arbitration is final and appealable. *Prudential*, 42 F.3d at 1302; *S+L+H S.p.A. v. Miller-St. Nazianz, Inc*., 988 F.2d 1518, 1522-23 (7th Cir. 1993) (order compelling arbitration held to be final and appealable because it originated in separate matter from case with motion to stay, even though cases were before same district court judge who held a joint hearing on the motions and issued one opinion dealing with both motions); *but cf. CitiFinancial Corp. v. Harrison*, 453 F.3d 245, 251 (5th Cir. 2006) (orders to compel arbitration and for stay issued by two judges sitting within the same federal district were reviewed together by the Fifth Circuit since "[j]urisdiction is lodged in a court, not in a person").

Id. at 1198.

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.

Even if the validity of the arbitration clause is in issue at the trial court level, the appellate court does not have jurisdiction under either Section 512.020 or Section 535.440 RSMo 2010 to entertain an appeal from a trial court's decision to send the dispute to arbitration. *National Management Corp. v. Kaplan*, 271 S.W.3d 55 (Mo. App. E.D. 2008). This is true even if there is a strong argument that it would not be judicially economical to proceed to arbitration without resolving first whether in fact the dispute is subject to arbitration.

In *Robinson v. Advance Loans II, LLC*, 290 S.W.3d 751 (Mo. App. E.D. 2009), the Eastern District dismissed both plaintiff's appeal and defendant's appeal. The court concluded that neither a trial court's order compelling arbitration with the National Arbitration Forum (NAF) nor the trial court's judgment staying an arbitration pending resolution of an NAF arbitrator issue is appealable.

If an appellate court determines that it has no jurisdiction, it is not reluctant to dismiss an appeal. In *Alpine Glass, Inc. v. Illinois Farmers Insurance Co.*, 531 F.3d 679 (8th Cir. 2008), the Eighth Circuit dismissed an appeal from a district court's order compelling arbitration on the basis that the order was not final as additional post-arbitration matters would be going back to that district court including a determination under Illinois' No-Fault Act since an arbitrator's decision on a legal question is subject to *de novo* review by the district court. *Id.* at 682.

The Eighth Circuit draws a distinction between whether the district court grants a motion to stay and then orders the matter

to proceed in arbitration or dismisses the case and orders the matter to proceed in arbitration. If the court merely grants a stay, it presumptively continues to have jurisdiction over possible later matters, and thus its order to compel arbitration is not final or appealable. *On Equity Sales Co. v. Pals*, 528 F.3d 564, 569-70 (8th Cir. 2008).

In a case of first impression, the Eighth Circuit in *Industrial Wire Products, Inc. v. Costco Wholesale Corp.*, 576 F.3d 516 (8th Cir. 2009), considered whether to follow the Federal Circuit or the Third Circuit in deciding if, in a patent infringement action, an interlocutory appeal concerning arbitrability falls within the exclusive appellate jurisdiction of the Federal Circuit. *See Microchip Tech. Inc. v. U.S. Philips Corp*., 367 F.3d 1350, 1354-55 (Fep. Cir. 2004) (Federal Circuit has exclusive jurisdiction); Medtronic AVE, Inc. v. Advance Cardiovascular Sys., Inc., 247 F.3d 44, 51-53 (3d Cir. 2001) (the Federal Circuit does not have exclusive jurisdiction). After carefully weighing the alternative options, the Eighth Circuit concluded that the Federal Circuit does not have exclusive jurisdiction.

bb. (§25.59) 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.

In *MFA, Inc. v. HLW Builders, Inc.*, 303 S.W.3d 620, 625 (Mo. App. W.D. 2010), the Western District concluded that 19 months in court and the filing of a third party petition created prejudice to the opposing party and constituted a waiver of an arbitration provision. The court found that the party opposing arbitration had been forced to incur litigation expenses defending a third-party action and participated in discovery. "Prejudice was sufficiently established." *Id.* at 625.

While delay alone does not constitute prejudice sufficient to warrant a court's finding of waiver, prejudice may be established when a party's time and funds are expended because that party has not received the benefit of arbitration; namely, efficient and low-cost resolution of disputes. *Major Cadillac, Inc. v. General Motors Corp.*, 380 S.W.3d 717, 723 (Mo. App. W.D. 2009). In *Major Cadillac*, the Western District concluded that GM created prejudice and waived its right to assert arbitration by removing a case to federal court, causing the petitioners to seek a remand which GM defended and thereby caused the petitioners to incur legal expenses. "If GM had filed a motion to compel arbitration earlier, they otherwise would not have expended these resources." *Id.* The appellate court affirmed the trial court's denial of the motion to compel arbitration.

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.

In *Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.*, 589 F.3d 917 (8th Cir. 2009), the Eighth Circuit found waiver of an arbitration provision since the evidence established that party knew of its existing right to arbitrate, acted inconsistently with that right by actions taken in court and thereby prejudiced the other party with inconsistent positions. *Id*. at 924. The Eighth Circuit recognized that the prejudice (the party filed a motion to dismiss) was less than the prejudice in other cases where the Eighth Circuit has upheld a finding of prejudice. Nevertheless, the court concluded that filing the motion to dismiss forced the other party to litigate substantial issues on the merits and compelling arbitration in light of that would require a duplication of effort. *Id.* at 924. *See Southeastern Stud & Components, Inc. v. American Eagle Design Build Studios, LLC*, 588 F.3d 963 (8th Cir. 2009) (the Eighth Circuit affirms a finding of waiver when the party failed to safeguard its right to arbitrate, substantially invoked the litigation machinery by moving for judgment in its favor and by failing to move to compel arbitration and stay litigation in a timely manner, and by not asserting its right to arbitrate for 13 months).

When one party to a valid, binding arbitration provision decides it will not participate in the arbitration proceeding (for example, it will not pay administrative fees), the process of arbitration comes to a halt. This conduct can thwart an aggrieved party from proceeding in arbitration and thus from having its grievance adjudicated. In *Boulds v. Dick Dean Economy Cars*, 300 S.W.3d 614 (Mo. App. E.D. 2010), the AAA declined to administer an arbitration due to one party's failure to participate and failure to pay appropriate fees. This forced the other party to proceed in court. The party that refused to participate then objected in court, arguing that the matter was subject to binding arbitration. The Eastern District concluded that this was a waiver of a party's rights to participate in arbitration. "Dean's refusal to abide by the AAA's rules and cooperate in the arbitration proceedings deprived Boulds of resolution of her claims as contemplated by the Arbitration Agreement. To obtain a resolution of her claims, Dean left Boulds with no option other than to re-file in circuit court." *Id.* at 621.

Finally, a party cannot initiate an arbitration, submit the dispute to arbitration, obtain an award and then claim that there is no arbitration agreement. *Cornelius v. CJ Morrill*, 302 S.W.3d 176, 179 (Mo. App. E.D. 2009). "Plaintiff cannot have this issue

reconsidered in a judicial proceeding to vacate the arbitration award under Section 455.405.1(5)." *Id.*

cc. (§25.60) Class Actions

The 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.

This decision prompted the AAA to rewrite its rules to provide supplemental rules for class arbitrations effective October 8, 2003. See AAA's Supplementary Rules for Class Arbitrations. These rules require an arbitrator as a threshold matter to determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." Rule 3.

The *Green Tree* decision has caused confusion for some parties and arbitrators. Consequently, the Supreme Court in *Stolt-Nielsen v. Animalfeeds International Corp*., 130 S. Ct. 1758 (2010), amplified its holding in *Green Tree*. The case involved a supplemental agreement providing for the question of class certification to be submitted to a panel of three arbitrators who were to follow the new rules of AAA. The parties selected a panel of arbitrators and stipulated that the arbitration clause was "silent" with respect to class certification. The arbitrators concluded given *Green Tree* that the arbitration clause allowed for class certification. In reversing what the panel had done, the Supreme Court stated that the "conclusion is inescapable that the panel simply imposed its own conception of sound policy." *Id.* at 1769. The high court stated that the arbitration agreement did not allow for the panel to provide class certification. "An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id*. at 1775.

Since *Green Tree* there have been numerous appellate decisions involving class actions.

In *Robinson v. Title Lenders, Inc.*, 303 S.W.3d 638, 642 (Mo. App.

E.D. 2010), the Eastern District upheld a trial court's ruling that granted a motion to compel arbitration after striking from the arbitration provision a waiver of class action. The Eastern District dismissed the appeal due to lack of jurisdiction.

The Eastern District has found that the waiver of a class action proceeding contained in a mandatory arbitration clause that was part of a form loan contract was a contract of adhesion and thus unconscionable. *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 98 (Mo. App. E.D. 2009). The Eastern District noted that the loan contract in question involved repeated situations where disputes between the contracting parties will predictably involve small amounts of damages and the party with the superior bargaining power has "carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Id.* Thus, the court found waiver of class action to be unenforceable. "An arbitration clause that defeats the prospect of class-action treatment in a setting where the practical effect affords the defendant immunity is unconscionable." *Id.* It was proper, however, to sever the class action waiver provision and allow the arbitration to proceed without it.

By contrast, the Eastern District in *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.2d 556 (Mo. App. E.D. 2009), determined that an arbitration agreement, which waived the rights of the customers of a dealership to class action arbitration, was unconscionable. *Id.* at 559. Further, the dealership at oral argument stated that the class waiver provision was essential to its arbitration agreement because the dealership's payment of certain fees and costs were based on the expectation that arbitration would be limited to individuals. "Given that neither party sought to sever the unconscionable class waiver provision from the arbitration agreement and the trial court did not expressly rule on this issue, we decline to sever the class waiver provision in order to render the arbitration agreement enforceable." *Id.* at 561. Thus, the appellate court affirmed the trial court's denial of the motion to compel arbitration.

In *Brewer v. Missouri Title Loans, Inc.*, No. SC 90G47, 2010 WL 3430411 (Mo. August 31, 2010), the Supreme Court of Missouri found the waiver of a class arbitration provision was unconscionable because its practical effect was to force upon an aggrieved consumer the pursuit of an individual arbitration. The consequence of this would be to "deny the injured party of remedy—because a reasonable attorney would not take the suit if

it could not be brought on a class basis either in court or through class arbitration. . . ." *Id*. at *3. Since the class arbitration is not an option, the court concluded that the only way to remedy the unconscionability in this particular case was to strike the entire arbitration agreement. "Given the FAA's prohibition of class arbitration under the facts of this case and the fact that the unconscionable aspects of the arbitration contract are a result of the class arbitration waiver, the appropriate remedy is to strike the arbitration agreement in its entirety." *Id*. at *5.

Similarly, the Supreme Court of Missouri in *Ruhl v. Lee's Summit Honda*, No. SC 90601, 2010 WL 3441256 (Aug. 31, 2010 Mo.), decided that a provision in an arbitration agreement whereby the buyer waived a right to pursue class action was unconscionable. If the consumer had prevailed on its claim, her maximum recovery would have been approximately $600. "An attorney will not find it an attractive risk to represent consumers on these claims because the potential recovery is so low." *Id*. at *2. The court determined that under these circumstances the class waiver provision would "immunize Honda from individual consumer claims, likely brought without the assistance of counsel, and allow it to continue in its alleged deceptive practices against individuals purchasing a new car." *Id*. Therefore, the court held that since the class waiver was unconscionable, if the consumer were required to pursue her claim in arbitration, this would require her to do the very thing found to be unconscionable. Accordingly, the Supreme Court of Missouri concluded that the consumer was not required to submit her claim to arbitration.

In *Whitney v. Alltel Commc'n, Inc*., 173 S.W.3d 300, 308 (Mo. App. W.D. 2005), the Western District determined that an arbitration provision contained in a class action waiver was unconscionable. Plaintiff had been a wireless telephone customer of Alltel. Alltel sent the customer a list of new terms and conditions and stated that continued use of Alltel's services would constitute acceptance of those terms. One of the new terms required that the parties arbitrate on an individual basis any dispute. The appellate court concluded that the arbitration clause was substantively unconscionable because it "contained a provision which prohibited an award of any incidental, consequential, punitive, or exemplary damages as well as attorneys' fees," and "prohibited class actions and required the customer to bear the costs of arbitration, thereby limiting Whitney and other customers to a forum where the expense of pursuing most claims related to incorrect billing would far exceed the amount in controversy." *Id.* at 313. By

contrast, in *Pleasants v. American Express Co*., 541 F.3d 853, 858 (8th Cir. 2008), the Eighth Circuit upheld a waiver of class action in arbitration by noting that this particular provision did not limit claimant's remedies, as opposed to the limitations in *Whitney*. "In this case, Pleasants's total recovery of attorney's fees, costs, and statutory damages of $2,000.00 would likely exceed the cost of pursuing her claim. Enforcing the agreement under the circumstances of this case, therefore, does not lead to an unconscionable result." *Id.* at 859.

Distinguishing *Whitney*, the Eighth Circuit in *Cicle v. Chase Bank USA,* 583 F.3d 549 (8th Cir. 2009), found that a Chase credit card arbitration agreement specifically provided an exception to binding arbitration and a class-action waiver; namely, an individual claim could be filed in small claims court which would afford the claimant a relatively inexpensive, quick and easy adjudication. "Small claims court provides 'a practical remedy'—an alternative venue for vindication of Cicle's rights with a judicial process specifically designed for claims like hers." *Id.* at 555. Thus, the Eighth Circuit overturned a district court's conclusion that a class-action waiver and cost-sharing provisions within an arbitration agreement were unconscionable.

dd. (§25.61) Suits Against Tribunals and Arbitrators

In the past, disputes in arbitration occasionally prompted 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. *See Gov't e-Mgmt. Solutions, Inc. v. Am. Arbitration Ass'n*, 142 S.W.3d 857 (Mo. App. E.D. 2004).

ee. (§25.62) *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.

ff. (§25.63) 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).

In *United States of America for the use of Lighting and Power Services, Inc. v. Interface Construction Corp.*, 553 F.3d 1150 (8th Cir. 2009), a sub-subcontactor on a substantial contract to renovate portions of a federal building in St. Louis was not

equitably estopped from refusing to arbitrate its Miller Act claim against its contractor, subcontractor and the contractor's surety when the sub-subcontractor asserted only a Miller Act claim in federal court. The court determined that since the claim was only pursuant to the Miller Act, the sub-subcontractor could proceed against a bonding company without regard to the fault of the contractor and thus there was no invocation of an arbitration provision.

In an unusual set of facts, the Western District concluded that a trial court could not use the findings from an arbitration panel against one defendant to apply as the damages to be assessed against the other defendant whose action was proceeding through the trial court rather than arbitration. *Pope v. Ray*, 298 S.W.3d 53 (Mo. App. W.D. 2009). The respondent and defendant were two Ph.D.s who practiced clinical psychology. A patient had made them aware that her adoptive father had sexually abused her as an infant. Pursuant to § 210.115, plaintiff alleged that these incidents should have been reported by the psychologists to the Department of Social Services, Children's Division. One psychologist proceeded to arbitration and the other to trial. The trial court used the arbitration panel's finding of $8,000,000 in damages and another $8,000,000 plus in prejudgment interest as the measure of damages against the other psychologist in court. The appellate court determined that this exceeded the mandate it had provided as to how the trial court was to proceed.

B. (§25. 64) Real Estate Case Law

Missouri's appellate courts have considered real estate matters involving arbitration in a variety of ways. Examples by subject matter are:

1. (§25.65) Realtor Suspended – Lock Box Violation

The Board of Realtors is a not-for-profit corporation incorporated under the laws of Missouri. Multi List Service, a subsidiary of the Board of Realtors, is a for-profit corporation incorporated under the laws of Missouri. Through the use of the Multi List Service, members can review pertinent market information about homes available for sale. In *ND Sell, Inc. v. Greater Springfield Board of Realtors, Inc.*, 224 S.W.3d 623 (Mo. App. 2007), the Southern District considered a complaint against one of the members of the Board of Realtors based on the realtor providing her Multi List lock box key to an unauthorized user. The Board of Realtors

includes a Standards Committee which has the power through arbitration to resolve disputes about commissions and to conduct an ethics hearing. The Standards Committee issued a written opinion regarding the complaint finding that the realtor's actions were a violation of a sub-lease agreement and recommended "exactly the same punishment as the Multi Board did in its prior administrative decision; that is, a one-year suspension and a $5,000 fine." The Southern District affirmed this result.

2. (§25.66) Unconscionable

The Supreme Court of Missouri ruled that an arbitration provision in a builder's real estate contract was unconscionable. It provided that the arbitrator was to be selected by the president of the Home Builders Association of Greater St. Louis. The president of this organization, according to the court, will always be biased and thus an inappropriate person to select a neutral arbitrator. *Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006). The Missouri Supreme Court also ruled, however, that the contract was not unconscionable or unenforceable when it provided that only the builder had the right to select arbitration. Noting a split amongst jurisdictions, the Supreme Court of Missouri concluded, in a case of first impression, that such a contract will not be invalidated for lack of mutuality of obligation of the arbitration clause provided the parties exchanged consideration in the making of the contract as a whole. The court also found to be unconscionable a provision that placed all the fees for the arbitration on the home purchaser. The court turned to§ 435.360 RSMo, noting that it addresses the situation at hand, by providing that when the method for selection of an arbitrator contained in the arbitration provision "fails" or "for any reason cannot be followed" then the court on application of a party shall appoint one or more arbitrators.§ 435.395 RSMo, the court determined that the costs shall be paid as provided in the award. Accordingly, the court arrived at an alternative statutorily approved method to select the arbitrator and to initially cover arbitration costs. With these changes, the court enforced the rest of the arbitration provision.

3. (§25.67) Arbitration by Default

Sometimes parties desire an arbitration provision as a default mechanism if measures short of that are not successful. By relying on binding arbitration as a last resort to dispute resolution, the parties set up a process for finality. In *Weber v.*

Moerschel, 313 S.W.3d 220 (Mo. App. E.D. 2010), the Eastern District noted an agreement that provided that any dispute was to be resolved by the parties hiring a real estate appraiser to determine the value of property at the time of death of one of the partners. The agreement in place provided that "[i]f they cannot agree on an appraiser, the appraisal shall be made in accordance with the rules of the American Arbitration Association then in effect . . ." *Id.* at *223. The matter did not reach arbitration because the parties were able to proceed with the appraisal.

4. (§25.68) Agreement to Arbitrate

For an arbitration provision to be enforceable, it must expressly state in some manner that the parties agree that the dispute will be subject to arbitration. In *Weil v. Kirn*, 952 S.W.2d 399 (Mo. App. E.D. 1997), a real estate salesperson brought an action against a co-salesperson for breach of a commission distribution agreement. The agreement in question provided that the broker in its sole discretion shall have the right to settle the dispute and the settlement shall be binding upon the salesperson. The salesperson argued that he was a third-party beneficiary under this contract and that he had a right to have his dispute resolved by arbitration with a third-party arbitrator. The court rejected this argument, finding that there was no arbitration provision.

5. (§25.69) Stay Not Final – Appeal Dismissed

Frequently, trial courts grant a motion to stay a pending lawsuit and send the dispute to arbitration. See §25.19. In *Precision Investments, LLC v. Cornerstone Propane, L.P.*, 119 S.W.3d 611 (Mo. App. S.D. 2003), the Southern District determined that disputes over the sale of various pieces of property could not, despite the request of both sides, be subject to an appropriate appeal once the matter was stayed and referred to arbitration. The court rejected the argument that by referral to arbitration the trial court had reached a final decision which was appealable. "Accordingly, we have no jurisdiction over this appeal for the simple reason previously stated: the judgment disposing of the remaining claims in the petition does not, on its face, meet the requirements of a final judgment as defined by Rule 74.01(b)." *Id.* at 616.

6. (§25.70) Mechanic's Liens

In construction, a contractor or subcontractor who is not paid will frequently file a mechanic's lien against the real estate upon which that contractor or subcontractor performed the work. In *Dunn Industrial Group, Inc. v. City of Sugar Creek, Missouri*, 112 S.W.3d 421 (Mo. 2003), the Supreme Court of Missouri held that while an equitable mechanic's lien action in court is the exclusive method of litigating mechanic's lien claims and other claims regarding property, arbitration is a proceeding separate from litigation based upon its underlying purpose of encouraging dispute resolution without resort to the courts. *Id*. at 430-31. The Supreme Court of Missouri ruled that the trial court erred in denying the motion of one party to compel arbitration. Thus, an arbitration agreement can be enforced even though the mechanic's lien claims will be decided in court. Typically, the court claims are stayed pending the outcome in the arbitration.

7. (§25.71) Punitive Damages

A dispute over the purchase of a single family home may result in an arbitration award of punitive damages of $50,000 as well as compensatory damages of $50,000 to the buyer. That is the result in *Groceman v. Pulte Homes Corp*., 53 S.W.3d 599 (Mo. App. W.D. 2001). The buyers had alleged that the house they purchased contained a number of structural deficiencies including a downward deflection of the roof, inadequate rafters and roof framing and cracks in the ceiling. They alleged fraud and misrepresentation, negligent misrepresentation, breach of contract, professional negligence and breach of warranty of habitability. The court stayed the proceedings and after a two-day hearing, the arbitrator entered his award. The court held: "The arbitrator was not required to explain his decision." *Id.* at 602. "And the arbitrator was not required to write a legal opinion justifying his award." *Id.* at 603. Accordingly, the appellate court affirmed the judgment of the trial court which confirmed the arbitration award including the award of punitive damages.

8. (§25.72) Split Claims Between Arbitration and Litigation

If the arbitration provision does not expressly provide that the arbitrator or panel of arbitrators has jurisdiction over all disputes, then part of the dispute may be resolved in arbitration, and part in litigation. In *Reis v. Peabody Coal Co*., 997 S.W.2d 49 (Mo. App. E.D. 1999), the Eastern District affirmed a trial court's

decision that allowed part of the matter to proceed to arbitration and part to proceed to a jury verdict. The underlying dispute involved royalty lease payments between a lessor and lessee pursuant to a mineral lease agreement. One of the parties invoked the arbitration provision of the lease claiming a breach in the lease and fraud. The arbitration panel determined that it lacked authority to consider the fraud claim. After a hearing, the arbitration panel found that Peabody breached the lease by failing to include in its calculation of average gross sales realization the amounts that Peabody billed to and received from its customers. The United States District Court for the Eastern District of Missouri confirmed the arbitration award and entered judgment. The Eastern District affirmed the "severing" of claims between arbitration and trial especially since the severing was actually done by a panel of arbitrators as opposed to the voluntary act of one or both parties.

While this case shows that claims can be severed, the preferred practice is for all claims that relate to the dispute be resolved in one forum. This leads to consistency and efficiency. One of the parties in *Peabody Coal* expressly argued that *res judicata* should apply such that any finding of the arbitration panel would be binding on the court. The Eastern District rejected this argument since plaintiffs were not able to litigate their fraud claims in arbitration and "res judicata does not apply." *Id.* at 73.

9. (§25.73) Waiver

In *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085 (8th Cir. 2007), the Eighth Circuit found that Green Tree waived its rights to arbitrate Lewallen's claims in a Chapter 13 adversary proceeding against a mortgage lender and servicing agent to recover under the Real Estate Settlement Procedures Act (RESPA) and other consumer laws. The court noted that Green Tree waited several months in the bankruptcy proceeding before asserting the arbitration provision. "Green Tree fails to explain why it could not have asserted its right to arbitration earlier than it did." *Id.* at 1092. The court found that Green Tree also acted inconsistently with its right to arbitrate by urging the bankruptcy court to dispose of Lewallen's claims on the merits and by serving discovery requests on Lewallen. As for prejudice, the Eighth Circuit concluded that Green Tree's actions likely created duplicative expenses if forced to arbitrate issues and time and expense one party already had incurred in preparing and serving discovery requests and responses. "Moreover, Green Tree's delay

has hindered the administration of Lewallen's bankruptcy estate; it could have requested arbitration anytime after Lewallen objected to the proof of claim but failed to do so, instead inexplicably waiting almost eleven months to invoke its contractual right." *Id.* at 1094.

10. (§25.74) Narrow Arbitration Provision

A narrow arbitration provision allows the parties to submit only those issues specifically covered by the arbitration provision. Other issues must be resolved in court. See §25.25. In *Lipton-U. City v. Shurgard Storage Centers, Inc.*, 454 F.3d 934 (8th Cir. 2006), a lessee brought a suit against the lessor to compel arbitration regarding the price at which the purchase option might be exercised under their commercial lease. There was no dispute that the parties agreed to arbitrate additional terms or conditions not expressly discussed in the contract. However, "the scope of the agreement to arbitrate did not include arbitration of the price term under the purchase option section of the lease agreement." *Id.* at 938-39. The court concluded that if the parties were to treat the price term as if it had never been agreed upon, then the purchase option, on its face, failed to set forth the material and essential terms of a real estate contract, making it unenforceable. The court further rejected the argument that arbitration of the sale price at some later date is an acceptable method of determining price in a real estate contract. The Eighth Circuit reversed the district court's decision to compel arbitration.

11. (§25.75) Injunction

Even the most broadly worded arbitration provision can present challenges for speedy justice when injunctive relief is needed. Therefore, it is not unusual for parties to seek injunctive or other emergency relief such as a TRO in a court of law. An example of this can be found in *Transcontinental Holding Ltd v. First Banks, Inc.*, 299 S.W.3d 629 (Mo. App. E.D. 2009). The underlying merits after the court's actions on injunctive relief can then be resolved through the arbitration process.

IV. 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.

There always will be cases that do not settle and cases that more appropriately should be resolved in court. The fields of mediation and arbitration are flourishing, however. This trend should continue into the foreseeable future.