

**Excerpt from  
David Hoffman and David Matz,  
*Massachusetts Alternative Dispute Resolution (1994)***

**CHAPTER TEN**

**ARBITRATION**

**§ 10.01 Introduction and Scope of Chapter**

**§ 10.02 History of Arbitration**

**§ 10.03 Types of Arbitration - Private/Court-Annexed, Administered/Non-Administered, Voluntary/Mandated**

**§ 10.04 Legal Framework - Common Law Arbitration, Federal and State Arbitration Statutes**

**§ 10.05 Governing Law - What Law Does the Arbitrator Apply?**

**§ 10.06 Jurisdiction - Federal and State Courts**

**§ 10.07 Stay of Litigation and Motions to Compel Litigation**

**§ 10.08 Arbitrability**

**§ 10.09 Waiver**

**§ 10.10 Provisional Remedies - Judicial and Arbitral**

**§ 10.11 Consolidation and Multiparty Disputes**

**§ 10.12 Bifurcation and Dispositive Motions**

**§ 10.13 The Award - Form, Scope of Relief, Punitive Damages, Interest, Attorney's Fees, Costs, Default or Ex Parte Award, Consent Award, Time for Issuance**

**§ 10.14 Judicial Enforcement and Review of Arbitration Award**

**§ 10.15 Appellate Review of Enforcement Decisions**

**§ 10.16 Collateral Estoppel and Res Judicata**

- § 10.17 **Arbitral Immunity**
  - § 10.18 **Conducting the Arbitration as Counsel -- Practice and Procedure**
  - § 10.19 **Advising a Client about Arbitration**
  - § 10.20 **Initiation of Arbitration - Demands, Answers, Counterclaims, and Submission Agreements**
  - § 10.21 **Challenges to Arbitrability**
  - § 10.22 **Security and Escrow Arrangements**
  - § 10.23 **Selection of Arbitrators -- Methods of Selection, Disclosures, Ex Parte Contacts**
  - § 10.24 **Logistics - Location, Scheduling, Participants, Confidentiality, Stenographic Record, Form of Award**
  - § 10.25 **Preparing for the Arbitration -- Discovery, Motions, Preliminary Hearing**
  - § 10.26 **The Hearing - Opening and Closing Arguments, Evidentiary Objections, Expert Witnesses, Chalks, Demonstrations, Site Visits, Briefing**
  - § 10.27 **Proceedings to Confirm, Modify, or Vacate the Award**
  - § 10.28 **Mediation/Arbitration (Med/Arb)**
  - § 10.29 **Private Judging**
-

## **§ 10.01 Introduction and Scope of Chapter.**

Arbitration is a form of adjudication that is private and less formal than litigation in court. The decisionmaker is usually an individual or a panel of three individuals selected by the parties or by a neutral agency. Often, the arbitrators are experts in the subject matter of the dispute -- for example, a panel in a construction case might include an architect, a general contractor, and a construction lawyer.

Arbitration is perhaps the most common form of alternative dispute resolution in the United States and antedates the concept of ADR. In some areas of the law -- such as construction and labor law -- arbitrations are the norm and litigation the exception, because arbitration is written into standard construction industry documents and labor union collective bargaining agreements. Some industries, such as textiles and apparel, have developed their own arbitration systems with expert arbitrators and a governing council composed of representatives of various trade associations within the industry.<sup>1</sup>

This chapter provides an overview of commercial arbitration, including arbitration of construction and other business disputes and disputes involving torts and statutory causes of action. Sections § 10.02 and § 10.03 discuss the development of arbitration in the United States. Sections § 10.04 - § 10.17 address some of the more common legal issues that arise in connection with arbitration, and sections § 10.18 - § 10.27 discuss the practice of arbitration from the perspective of counsel. Section § 10.28 discusses the use of “med/arb,” a combination of mediation and arbitration, and section § 10.29 describes “private judging,” a form of ADR similar in many ways to arbitration.

This chapter does not address labor-management arbitration, public sector employment arbitration, securities arbitration, international arbitration, or domestic relations or probate arbitration. For a discussion of arbitration in those and other specialized fields, the reader should refer to Chapter 14 and the bibliography. This chapter also does not focus on the questions of when and whether arbitration, or other ADR methods, should be used; those issues are discussed in chapters 4 and 5.

### **§ 10.02 History of Arbitration**

Arbitration has played a role in dispute resolution throughout history. As early as the fifth century B.C., Thucydides discussed using arbitration for resolving disputes between city-states in the Peloponnesian War.<sup>2</sup> Arbitration also played a role in colonial America,<sup>3</sup> and has been used throughout our national history. Consider the following examples:

- In Boston, by order of town meeting, no congregation member could litigate “unless there had been a prior effort at arbitration.”<sup>4</sup>
- Massachusetts required justices of the peace in the early nineteenth century to recommend arbitration as an alternative to litigation.<sup>5</sup>
- George Washington provided in his will that any disputes under it would be resolved by arbitration.<sup>6</sup>

---

<sup>1</sup> See generally ROBERT COULSON, BUSINESS ARBITRATION - WHAT YOU NEED TO KNOW 75-94 (3d ed. 1987).

<sup>2</sup> Jed L. Babbin & Garylee Cox, Saving Time & Money - Arbitration and Mediation of Government Disputes under the ADRA, in ARBITRATION AND THE LAW, 1991-92, 229 239 (AAA, 1992).

<sup>3</sup> See generally Susan L. Donegan, ADR in Colonial America: A Covenant for Survival, 48 ARB. J. 14 (June 1993).

<sup>4</sup> JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 23 (1983).

<sup>5</sup> JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 48 (1983).

<sup>6</sup> JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 48 (1983).

- In colonial Rhode Island, where Roger Williams and his followers established a code of “government by arbitration for our ‘loving friends and neighbors,’” arbitration was used to settle “property disputes and all personal controversies.”<sup>7</sup>
- In colonial New York, where arbitration was used to settle disputes involving “wage claims, contractual disagreements, [and] the quality of tobacco,” the Chamber of Commerce established in 1768 the first private tribunal for non-adjudicative resolution of disputes.<sup>8</sup>

In the nineteenth and early twentieth centuries, chambers of commerce and trade associations in various industries used commercial arbitration to avoid the “hard feeling and ultimate disruption” of commercial relationships that might result from litigation.<sup>9</sup> For example, the Silk Association, which adopted arbitration in 1898, embraced arbitration because it would enable business people to “settle their disputes themselves” according to trade customs and “the ordinary understanding of what is right and wrong.”<sup>10</sup>

Despite the wide use of arbitration, the common law remained hostile to agreements to arbitrate future disputes. Most courts in the United States held that such agreements were unenforceable because they were seen as infringing on the courts’ jurisdiction to handle disputes. This view did not change until the early twentieth century.

The modern era of commercial arbitration began in 1920 when New York State adopted the first statute to permit enforcement of agreements to arbitrate future disputes. In 1925

---

<sup>7</sup> Susan L. Donegan, ADR in Colonial America: A Covenant for Survival, 48 ARB. J. at 14, 18-19 (June 1993) (citations omitted).

<sup>8</sup> Susan L. Donegan, ADR in Colonial America: A Covenant for Survival, 48 ARB. J. at 14, 19 (June 1993) (citations omitted).

<sup>9</sup> JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 102 (1983).

<sup>10</sup> JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 107-8 (1983).

Congress enacted the Federal Arbitration Act (FAA), which was based on the New York statute, and in 1926 the American Arbitration Association was founded.<sup>11</sup>

During that era, lawyers and the law became increasingly involved in the conduct of arbitrations. As commercial arbitration expanded beyond specific industries, trade custom and usage no longer provided the rules of decision, and legal norms came into play. Judicial enforcement of arbitral decisions hastened the “legalization” of arbitration. According to American Arbitration Association records, lawyers participated as counsel in only 36% of AAA arbitrations in 1927. By 1947, that figure had changed to 91%.<sup>12</sup> As historian Jerold Auerbach has noted, “legal arbitration reached its formal maturity by 1930 [with the appearance of] Wesley Sturges’s thousand-page Treatise on Commercial Arbitration.”<sup>13</sup>

In 1955 the Commissioners on Uniform State Laws adopted a Uniform Arbitration Act (UAA), which differs slightly from the FAA, and today all but two states (Alabama and West Virginia) have adopted either the Uniform Act or a similar statute under which an agreement to arbitrate future disputes is enforceable. Massachusetts adopted a slightly modified version of the UAA in 1960.<sup>14</sup>

The increasing use of arbitration after World War II to resolve labor-management disputes contributed to the acceptance of arbitration in other areas of the law. The U.S. Supreme

---

<sup>11</sup> See §13.02 for a discussion of the AAA.

<sup>12</sup> JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 111 (1983).

<sup>13</sup> JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 111 (1983).

<sup>14</sup> MASS. GEN. L. ch. 251 (1992). Massachusetts was the second state to adopt the UAA.

Court's "Steelworkers Trilogy" decisions of 1960<sup>15</sup> demonstrated the Court's acceptance of, and deference to, arbitration as the preferred method of resolving labor disputes.<sup>16</sup>

As a result of these developments, the traditional hostility of the courts to arbitration agreements has now been almost entirely reversed. Arbitration has become a favored procedure, and doubts as to arbitrability are construed in favor of the "liberal federal policy favoring arbitration agreements."<sup>17</sup> As the Massachusetts Appeals Court has noted:

Where parties agree to have their disputes resolved through arbitration -- generally a procedure providing the advantages of speed, convenience, and low cost and guaranteeing neutrality -- the policy considerations for enforcing the agreement are strong.<sup>18</sup>

In deference to that policy, judicial review of arbitral awards is limited and the scope of review narrow.<sup>19</sup>

As arbitration has become an accepted alternative to litigation, the courts have become increasingly receptive to the use of arbitration to resolve not only contractual claims -- arbitration's traditional bailiwick -- but also statutory claims, including civil rights and regulatory statutes, such as the federal Age Discrimination in Employment Act of 1967

---

<sup>15</sup> *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>16</sup> See also *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957) (noting that Labor Management Relations Act "expresses a federal policy that federal courts should enforce these [arbitration] agreements . . . and that industrial peace can be best obtained only in that way").

<sup>17</sup> *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); see also *Town of Danvers v. Wexler Constr. Co.*, 12 Mass. App. Ct. 160, 163, 422 N.E.2d 782, 784 (1981) (noting "strong public policy favoring arbitration as an expeditious alternative to litigation for settling commercial disputes").

<sup>18</sup> *Aetna Casualty & Surety Co. v. Faris*, 27 Mass. App. Ct. 194, 196, 536 N.E.2d 1097, 1099, rev. denied, 405 Mass. 1201, 541 N.E.2d 344 (1989).

<sup>19</sup> See *Marino v. Tagaris*, 395 Mass. 397, 400, 480 N.E.2d 286, 288 (1985).

(“ADEA”),<sup>20</sup> the Employee Retirement Income Security Act of 1974 (“ERISA”),<sup>21</sup> the Racketeer Influenced and Corrupt Organizations Act (“RICO”) the Securities Exchange Act of 1934,<sup>22</sup> the Sherman Antitrust Act,<sup>23</sup> the Massachusetts consumer protection statute,<sup>24</sup> and various state and federal employment discrimination statutes.<sup>25</sup> As the U.S. Supreme Court has noted, statutory claims are now as enforceable in arbitration proceedings as other claims:

Th[e] duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded upon statutory rights. . . . “[W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals” should inhibit enforcement of the [Federal Arbitration] Act ““in controversies based on statutes.””<sup>26</sup>

In Massachusetts, there are statutes providing for arbitration in cases involving such disparate matters as public and private labor disputes, closing of hazardous waste facilities, home improvement contracts, administration of condominiums, administration of estates, uninsured vehicle coverage, and torts by public officials.<sup>27</sup>

### **§ 10.03 Types of Arbitration -- Private/Court-Annexed, Administered/Non-Administered, and Voluntary/Mandated.**

---

<sup>20</sup> Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1652 (1991).

<sup>21</sup> Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (3d Cir. 1993).

<sup>22</sup> Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 234, 242 (1987).

<sup>23</sup> Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628-9 (1985).

<sup>24</sup> MASS. GEN. L. ch. 93A (1992). See, e.g., Bonofiglio v. Commercial Union Insurance Co., 411 Mass. 31, 576 N.E.2d 680 (1991); Greenleaf Engineering & Constr. Co. v. Teradyne, Inc., 15 Mass. App. Ct. 571, 576, 447 N.E.2d 9, 12 (1983).

<sup>25</sup> See, e.g., Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76, 77, 80 (D. Mass. 1993) (enforcing arbitration agreement with respect to employment discrimination claims under Title VII, 42 U.S.C. § 2000e, MASS. GEN. L. ch. 151B, and MASS. GEN. L. ch. 93, § 102; sexual harassment claim under MASS. GEN. L. ch. 214, § 1C; and civil rights claim under MASS. GEN. L. ch. 12, §§ 11H, 11I).

<sup>26</sup> Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (citations omitted).

Arbitration was once an exclusively private, voluntary arrangement -- a creature of contract -- usually administered by a sponsoring organization such as the AAA or a trade organization (such as the General Arbitration Council of the Textile Industry). Today some parties participate in arbitration through publicly funded court-annexed ADR programs, other parties arbitrate disputes without an administering agency, and still others participate in arbitrations that are mandated by “adhesion” contracts<sup>28</sup> with non-negotiable arbitration clauses. In short, the term “arbitration” now encompasses an increasingly wide array of dispute resolution methods. The subsections below describe some of the emerging variations.

(a) Private/Court-Annexed Arbitrations. Court-annexed arbitration -- sometimes referred to as judicial arbitration -- is a non-binding adjudicative process that a number of courts have adopted as a means of reducing the backlog of cases awaiting trial. Most courts that use this method of ADR employ it for smaller, less complex cases and often set a dollar-figure threshold below which cases are automatically referred for arbitration.<sup>29</sup>

In court-annexed arbitration, the parties present their cases as they would in any other arbitration and the arbitrators issues an award. In some court-annexed arbitrations, evidence is presented in a more summary fashion than it would be at trial or in private, commercial arbitration.<sup>30</sup> The primary difference between private and court-annexed arbitration is that in the latter, in most courts, either party is free to reject the award and proceed to trial. If neither party requests a trial, the award is entered as a judgment of the court. If the parties proceed to trial, the

---

<sup>27</sup> See Appendix E for a list of Massachusetts statutes providing for arbitration.

<sup>28</sup> An adhesion contract is a "standard contract form offered to consumers ... on essentially [a] 'take it or leave it' basis ..." BLACK'S LAW DICTIONARY 38 (5th ed. 1979).

<sup>29</sup> See, e.g., 28 U.S.C. § 652(a) (1988) (\$100,000 threshold).

<sup>30</sup> See THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE, § 22:14 (Bette J. Roth et al., eds. 1993) (discussing reliance on documents as opposed to live witnesses).

arbitration results (and the fact that there was an arbitration) are not disclosed to the jury. In some courts, if a party rejects an arbitration award and does not obtain a better result at trial, that party must pay a penalty, such as the costs of the arbitration, the opposing party's attorney's fees, or both.<sup>31</sup> Such penalties have survived constitutional challenges, but some courts have set limits on the penalties that can be imposed.<sup>32</sup>

The practice of court-annexed arbitration was inaugurated in 1952 when the Philadelphia Court of Common Pleas began using it as a docket-clearing mechanism.<sup>33</sup> The experiment was a success and has now spread to several hundred courts in the United States.<sup>34</sup> Twenty federal district courts have used such arbitration as part of a pilot program launched by Congress.<sup>35</sup> Although court-annexed arbitration is not widely used in Massachusetts,<sup>36</sup> it is "by far the most prevalent compulsory nonbinding ADR form"<sup>37</sup> in the United States<sup>38</sup>. Studies of court-annexed arbitration show a high degree of party satisfaction with the process, a result attributed to the fact that, unlike the parties in cases that settle, the parties in arbitrated cases receive their "day in

---

<sup>31</sup> See 28 U.S.C. § 655 (1988); Deborah R. Hensler, What We Know and Don't Know About Court-Administered Arbitration, 69 JUDICATURE 270, 271 (1986).

<sup>32</sup> Deborah R. Hensler, Court-Ordered Arbitration: An Alternative View, 1990 U. CHI. LEGAL FORUM 399, 401 (1990).

<sup>33</sup> Deborah Hensler, What We Know and Don't Know About Court-Administered Arbitration, 69 JUDICATURE 270 (1986).

<sup>34</sup> Deborah R. Hensler, Court-Ordered Arbitration: An Alternative View, 1990 U. CHI. LEGAL F. 339, 403-4 (1990).

<sup>35</sup> 28 U.S.C. §§ 651-58 (1988).

<sup>36</sup> The Middlesex Multi-Door Courthouse (MMDC) offers non-binding arbitration (referred to in the MMDC literature as "Modified Arbitration") as an option. In several Superior Courts (Barnstable, Essex, and Middlesex through the Greater Lowell ADR Program) parties are given the option of referral to an arbitrator for binding arbitration pursuant to MASS. GEN. L. ch. 251. In the Massachusetts Federal District Court, the Standing Orders of Hon. William G. Young include referral to arbitration as an option.

<sup>37</sup> Note, Why We Should Abolish Penalty Provisions for Compulsory Nonbinding Alternative Dispute Resolution, 7 OHIO ST. J. ON DISP. RESOL. 173, 174 (1991) (citing state statutes).

<sup>38</sup> See THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE, § 22:28 (Bette J. Roth et al., eds. 1993) (citing studies).

court.”<sup>39</sup> A study conducted by the Federal Judicial Center of ten of the pilot districts using court-annexed arbitration concluded that the experience was sufficiently favorable to warrant federal legislation authorizing arbitration in all federal district courts, “to be mandatory or voluntary in the discretion of the court.”

(b) Administered or Non-Administered Arbitrations. The administrative arrangements for an arbitration can be made by the parties themselves (resulting in an “ad hoc” or “non-administered” arbitration) or by a neutral agency, such as the American Arbitration Association (AAA) (resulting in an “administered” arbitration). The majority of commercial arbitrations in the United States are administered by the AAA or other sponsoring organizations. Although ad hoc, non-administered arbitrations are more unusual, the Center for Public Resources (CPR) has recently developed Rules for the Non-Administered Arbitration of Business Disputes.

In many cases the parties cannot unilaterally decide whether their arbitration will be administered or non-administered. If their contract calls for arbitration to be conducted under the AAA Rules<sup>40</sup> or administered by the AAA (or another sponsoring organization), either party may insist on compliance with that provision. The parties can make a subsequent agreement, however, to conduct their arbitration without an administering organization, regardless of the provisions of their contract. In making such a decision, a number of advantages and disadvantages of non-administered arbitration should be considered.

---

<sup>39</sup> BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 12 (Federal Judicial Center, 1990).

<sup>40</sup> Rule 3 of the AAA Commercial Arbitration Rules provides that, if the parties specify the AAA Rules in their agreement, “they thereby authorize the AAA to administer the arbitration.” AAA, COMMERCIAL ARBITRATION RULES, Rule 3 (1993).

The principal advantages of nonadministered arbitration are greater flexibility and lower cost than administered arbitration. Although the arbitrator(s) must be paid in both administered and non-administered arbitrations, there is no administrative fee in the latter. Greater flexibility is achieved by allowing the parties to negotiate the logistics and scheduling of the arbitration and to use any mutually acceptable arbitrators. The CPR commentary to its Rules for Non-Administered Arbitration states that “the arbitrator(s) and advocates often may be better able to control the conduct of the proceeding than [an administering] organization.” Non-administered arbitration tends to work best when (1) the parties are in a close working relationship, and (2) the parties, counsel, and arbitrator are experienced and knowledgeable.

The disadvantages are the following. First, the arbitrators, who are usually selected for their substantive knowledge or legal ability, may not be effective at managing the administrative details of the arbitration process. Second, without an administering organization, the parties must deal directly with the decisionmakers or with each other in negotiating the arrangements for the arbitration; an administering organization provides a buffer between the parties and eliminates the need for contact with the arbitrators. Third, an administering organization maintains rosters of qualified arbitrators and provides biographical sketches of them; without an organization to propose a slate of proposed arbitrators, the selection process could bog down. Finally, unless the parties in a non-administered arbitration use a well-established set of rules, they risk the possibility of extensive discussion, negotiation, or even litigation over the ad hoc procedures they develop. The AAA Rules have been in use for dozens of years and have been tested (in connection with such issues as the method of selecting arbitrators and the locale for the arbitration); therefore, the AAA Rules have a body of case law behind them, adding to the predictability of results when they are used.

With the promulgation of its Rules for Non-Administered Arbitration, CPR has given parties and their attorneys a useful alternative. The CPR Rules contain the following provisions that differ from the AAA Commercial Arbitration Rules:<sup>41</sup> (a) unless otherwise agreed, the arbitrators issue a reasoned award instead of a “bare” award; (b) attorney’s fees may be awarded at the discretion of the arbitrators (the AAA rules do not provide for such fees); (c) the scope and extent of pre-hearing discovery is determined by the arbitrators (the AAA rules are silent on the scope of discovery); (d) the arbitrators must be impartial even if party-appointed (under the AAA rules, a party-appointed arbitrator need not be neutral); (e) the arbitrators have broader powers to issue interim relief orders; and (f) the arbitrator(s) are compensated at ordinary hourly rates instead of on a modest per diem basis.<sup>42</sup> Of course, as noted in section 6.05 above, the parties can, with careful drafting, incorporate by reference in their agreement the AAA Rules or the rules of any other organization without necessarily accepting that organization as the administrator of the dispute resolution process.

Some administering organizations have more than one set of arbitration rules. For example, Endispute has both Streamlined Arbitration Rules and Comprehensive Arbitration Rules, and the AAA has, in addition to its highly specialized rules for various industries and trades, two variations on its Commercial Arbitration Rules: a set of expedited procedures for claims under \$50,000 and guidelines for expediting larger, complex commercial arbitrations.

(c) Voluntary or Mandated Arbitration. Mandated arbitration -- the use of arbitration clauses in non-negotiable contracts, such as consumer loan agreements and brokerage contracts - - is one of the more controversial areas in arbitration law. Although the use of arbitration clauses

---

<sup>41</sup> A copy of both the CPR Rules and the AAA Commercial Arbitration Rules are in Appendix F.

<sup>42</sup> This last item is especially significant given the fact that the CPR Panel of Distinguished Neutrals consists primarily of senior partners at large law firms around the country.

has been a standard practice for certain kinds of contracts, such as collective bargaining agreements and construction contracts, the terms of those contracts are usually negotiated, and modification of an arbitration clause is not unusual. Recently, however, lending institutions, securities dealers, and employers have begun using non-negotiable arbitration clauses as part of printed-form contracts, often referred to as “contracts of adhesion.”<sup>43</sup> Brokerage firms, for example, typically include arbitration clauses in their customers’ brokerage agreements and rarely negotiate or waive those clauses.<sup>44</sup>

When an individual who has signed an adhesion contract with an arbitration clause has a dispute with the organization or firm that drafted the contract, and the drafter insists on arbitration, the individual may challenge the enforceability of the arbitration clause. These challenges have taken two main avenues.

First, mandatory arbitration provisions have been challenged on traditional waiver or unconscionability theories. For example, in *Patterson v. ITT Consumer Financial Corporation*,<sup>45</sup> a class of California consumers challenged an arbitration provision in a non-negotiable consumer loan agreement with a major institutional lender. The agreement required arbitration administered in Minnesota, under procedural rules (not disclosed in the loan agreement) that called for payment of a substantial administrative fee. The California Court of Appeals held that

---

<sup>43</sup> See generally Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 HARV. L. REV. 1173, 1174 (1983).

<sup>44</sup> See Government Accounting Office, Securities Arbitration: How Investors Fare 30-31 (No. GAO/GGD-92-94, May 1992) (“most of the [securities] firms that required arbitration clauses in account agreements with individual and institutional investors never or almost never waived or negotiated the clauses”).

<sup>45</sup> *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, rehearing denied (May 13, 1993), review denied, 1993 Cal. LEXIS 4332 (Aug. 12, 1993), petition for cert. filed, 62 USLW 3429 (U.S. Dec. 17, 1993) (No. 93-952).

the arbitration provision was “beyond the reasonable expectations of the borrower.”<sup>46</sup> That finding, combined with the difference in bargaining power between the parties, rendered the arbitration clause unconscionable and therefore unenforceable.<sup>47</sup>

Second, in the employment arena, mandatory arbitration clauses have been challenged on arbitrability grounds -- i.e., can an employer force employees to relinquish the agency and/or judicial forum provided in antidiscrimination statutes? In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>48</sup> an employer required its financial services manager, Gilmer, to sign a New York Stock Exchange application as a condition of employment. The registration application provided for arbitration of all disputes relating to Gilmer’s employment. When he was fired at age 62, Gilmer filed an age discrimination claim with the Equal Employment Opportunity Commission and federal District Court. The U.S. Supreme Court held that Gilmer was bound by the arbitration provision of the registration application and that Gilmer’s claim was subject to compulsory arbitration. In doing so, the Court rejected arguments that Congress had intended age discrimination claims to be heard solely by the EEOC and the courts. The Court noted that arbitration of age discrimination claims would not undermine the authority of the EEOC, because that agency has the power to investigate and punish discrimination even when the affected individual does not file a claim. The Court also noted that the federal Age

---

<sup>46</sup> *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 567, rehearing denied (May 13, 1993), review denied, 1993 Cal. LEXIS 4332 (Aug. 12, 1993), petition for cert. filed, 62 USLW 3429 (U.S. Dec. 17, 1993) (No. 93-952)

<sup>47</sup> *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 567 rehearing denied (May 13, 1993), review denied, 1993 Cal. LEXIS 4332 (Aug. 12, 1993), petition for cert. filed, 62 USLW 3429 (U.S. Dec. 17, 1993) (No. 93-952)

<sup>48</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

Discrimination in Employment Act does not prohibit employees from waiving their right to a judicial forum.<sup>49</sup>

One of the important factors in determining the effect of mandatory arbitration of statutory claims is whether the rights created by the statute are fully enforceable in the arbitration. As the U.S. Supreme Court noted in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>50</sup> “[b]y agreeing to arbitrate a statutory claim, a party does not forgo [sic] the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum.”<sup>51</sup>

In drafting mandatory arbitration provisions, counsel should be aware that an arbitration clause containing limitations on the scope of relief available could leave the claimant with a viable cause of action on which she could bring a law suit or file a claim with a regulatory agency, seeking the relief excluded from the arbitration. For example, an arbitration clause in an employment agreement which bars any injunctive relief might leave a terminated employee with a viable court action for reinstatement after an arbitration focusing exclusively on lost wages.<sup>52</sup>

---

<sup>49</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 1653-4 & n.3 (1991). The Court also rejected Gilmer's unconscionability argument, stating that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” *Id.* at 1655 (emphasis added). The Court went on to note, however, that there was no evidence that Gilmer, “an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause” and therefore “this claim of unequal bargaining power is best left for resolution in specific cases.” *Id.* at 1656.

<sup>50</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>51</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (cited with approval in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1652 (1991). *See also id.* at 637 (“[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function”) (emphasis added).

<sup>52</sup> *See, e.g.*, *Carr v. Transgas, Inc.*, 35 Mass. App. Ct. 581, 585, 623 N.E.2d 505, 507-8 (1993) (labor arbitration decision finding “just cause” for termination does not preclude claimant's filing handicap discrimination claim); *Rooney v. Yarmouth*, 410 Mass. 485, 491, 573 N.E.2d 969, 972 (1991) (“[E]mployees need not submit to arbitration disputes based on independent statutory rights that are not addressed and encompassed by the collective bargaining agreement”), seeking the relief excluded from the arbitration. For example, an arbitration clause in an employment agreement which bars any injunctive relief might leave a terminated employee with a viable court action for reinstatement after an arbitration focusing exclusively on lost wages.

Courts have shown a willingness to enforce mandatory arbitration provisions, even when the arbitration provision was only stated in an unsigned employee handbook. In *Corion Corp. v. Chen*,<sup>53</sup> an employee was given a personnel policies manual, which stated that the employee had the right to arbitrate any dispute involving employment termination. When the employee sought to arbitrate claims arising from his termination, the employer argued that the arbitration provision was not part of a binding contract and therefore was not enforceable. The District Court ruled that the arbitration provision was enforceable, and the U.S. Court of Appeals for the First Circuit affirmed.<sup>54</sup> Of course, in *Corion* the employer's position was weakened by the fact that the employer was trying to avoid an arbitration provision it drafted for its own manual, but the decision indicates the bias in favor of arbitration, even where the arbitration provision in contained in an unsigned, unilaterally imposed document such as a personnel manual.<sup>55</sup> This bias is a reversal of the courts' previous hostility to such provisions.

#### **§ 10.04 Legal Framework - Common Law Arbitration, Federal and State Arbitration**

##### **Statutes**

(a) Common Law Arbitration. Before the enactment of modern arbitration statutes beginning in the 1920s, the common law of contracts controlled enforcement of arbitration agreements. Although courts were reluctant to enforce contracts requiring arbitration of future disputes, an agreement to arbitrate after the dispute had arisen was enforceable. Today, if an arbitration agreement is not within the scope of a federal or state arbitration statute, the

---

<sup>53</sup> *Corion Corp. v. Chen*, 124 Lab. Cas. □ 57,220 (CCH) (D. Mass 1991), aff'd, 964 F.2d 55 (1st Cir. 1992) (per curiam).

<sup>54</sup> *Corion Corp. v. Chen*, 964 F.2d 55 (1st Cir. 1992) (per curiam).

<sup>55</sup> See, e.g., *Lang v. Burlington Northern R.R.*, 8 IER Cases 1732 (D. Minn. 1993) (upholding enforceability of arbitration clause added by employer to personnel handbook).

proceedings may be considered a “common law” arbitration.<sup>56</sup> Such an agreement is binding on the parties, but it is not clear whether specific performance of the agreement (i.e., by means of a court order compelling the recalcitrant party to arbitrate) is available.<sup>57</sup>

(b) Federal and State Arbitration Statutes. With the adoption of federal and state arbitration statutes, the legal framework for commercial arbitration changed dramatically. Both the Federal Arbitration Act (FAA) and Massachusetts Uniform Arbitration Act (MUAA) provide that agreements to arbitrate future or existing disputes are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>58</sup> The parties to such agreements can obtain specific performance through motions to compel arbitration,<sup>59</sup> and by motions to stay litigation of any arbitrable matters.<sup>60</sup> The statutes give the arbitrator the power to subpoena witnesses and documents.<sup>61</sup> The arbitrator’s award can be entered as a judgment of the court,<sup>62</sup> and, perhaps most importantly, the statutes restrict the courts’ power to modify or vacate arbitration awards to such an extent that appeals are relatively rare.<sup>63</sup>

---

<sup>56</sup> GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION, REVISED EDITION, § 3:02 at 24 (1991).

<sup>57</sup> Compare GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION, REVISED EDITION, § 3:02 at 24 (1991) (common law arbitration agreements “are not specifically enforceable”) with DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK § 3.2 at 35 (John H. Wilkinson, ed. 1990)(questioning whether specific performance is available as a remedy).

<sup>58</sup> 9 U.S.C. § 2 (1988); see also MASS. GEN. L. ch. 251, § 1 (1992).

<sup>59</sup> 9 U.S.C. § 4 (1988); MASS. GEN. L. ch. 251, § 2 (1992).

<sup>60</sup> 9 U.S.C. § 3 (1988); MASS. GEN. L. ch. 251, § 2(d) (1992).

<sup>61</sup> 9 U.S.C. § 7 (1988); MASS. GEN. L. ch. 251, § 7 (1992).

<sup>62</sup> 9 U.S.C. § 9 (1988); MASS. GEN. L. ch. 251, § 14 (1992).

<sup>63</sup> Courts may vacate an arbitrator’s award if there was fraud, corruption, or evidence that the arbitrator was guilty of misconduct or for improper exclusion of evidence. 9 U.S.C. § 10 (1988); MASS. GEN. L. ch. 251, §§12, 13 (1992).

Although the federal and Massachusetts statutes are very similar, the following differences are worth noting.

(i) Uniform Act. The MUAA is based on the Uniform Arbitration Act (UAA), and therefore, interpretations of the UAA in other jurisdictions are generally relevant to the application of the MUAA.<sup>64</sup>

(ii) Scope. The FAA, UAA, and MUAA differ in their overall scope. The FAA applies to “any maritime transaction or a contract evidencing a transaction involving commerce.”<sup>65</sup> The term “commerce” is defined in the statute to mean interstate and international commerce,<sup>66</sup> and the U.S. Supreme Court has “equated the breadth of ‘involving commerce’ with the extent of Congress’ power to regulate under the commerce clause.”<sup>67</sup> In *Allied-Bruce Terminix Cos. v. Dobson*, the Supreme Court held that the FAA governs agreements to arbitrate even if the parties did not contemplate interstate activity but where such activity was in fact involved.<sup>68</sup> The UAA does not contain any such limitation and therefore applies to any “written agreement” to submit a dispute to arbitration.<sup>69</sup> The coverage of the MUAA contains the same language as the UAA but the title of the statute, “Uniform Arbitration Act for Commercial

---

<sup>64</sup> See MASS. GEN. L. ch. 251, § 19 (1992) (“This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.”).

<sup>65</sup> 9 U.S.C. § 2 (1988).

<sup>66</sup> 9 U.S.C. § 1 (1988).

<sup>67</sup> *Snyder v. Smith*, 736 F.2d 409, 418 (7th Cir.), cert. denied, 469 U.S. 1037 (1984) (construing *Southland Corp. v. Keating*, 465 U.S. 1, 14-15 (1984)); see *El Hoss Engineering & Transp. Co. v. American Independent Oil Co.*, 183 F. Supp. 394, 398 (S.D.N.Y. 1960) (holding that Congress intended the Arbitration Act to encompass the full extent of Congress' power under the Commerce Clause), rev'd on other grounds, 289 F.2d 346 (2d Cir. 1961), cert. denied, 368 U.S. 837 (1961).

<sup>68</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 115 S.Ct. 834 (1995) (reversing decision of Alabama Supreme Court, which applied Alabama law barring the enforcement of predispute arbitration clauses).

<sup>69</sup> UNIF. ARBITRATION ACT § 1, 7 U.L.A. 5 (1985).

Disputes,”<sup>70</sup> differs from the UAA and, along with the legislative history of the statute, suggests that the MUAA does not apply to non-commercial disputes.<sup>71</sup> Thus, for example, while the issue of spousal support (not a “commercial” matter) has been held to be arbitrable under the UAA pursuant to a valid separation agreement calling for such arbitration,<sup>72</sup> one could argue that in Massachusetts arbitration of spousal support would be a common law arbitration rather than an arbitration enforceable under the MUAA. However, where the parties have agreed to arbitrate a dispute involving marital property pursuant to the MUAA, that agreement is enforceable.<sup>73</sup>

(iii) Employment Disputes. One of the unsettled controversies surrounding the FAA is its seemingly ambiguous exception for employment-related claims: the FAA does not apply to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>74</sup> The U.S. Supreme Court has never decided whether this exception includes all employment contracts or only those that involve employees in the transportation industries. In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>75</sup> the Court declined to rule on this issue because the arbitration provision was contained in a securities registration application, not a contract of employment, and therefore the issue was left “for another day.”<sup>76</sup> The majority view among the lower courts, in a variety of pre- and post-*Gilmer* decisions, has

---

<sup>70</sup> MASS. GEN. L. ch. 251 (1992) (emphasis added).

<sup>71</sup> See “Report of the Commission on Uniform State Laws,” Mass. Legislative Documents, House Rep. No. 84, at 8 (MUAA is “restricted to commercial arbitration” as opposed to the arbitration of labor disputes).

<sup>72</sup> See *Crutchley v. Crutchley*, 293 S.E.2d 793 (N.C. 1982).

<sup>73</sup> See *Reynolds v. Whitman*, Middlesex Probate and Family Court, No. 89-D-3353-D-1, at 6 (Apr. 8, 1994) (“Binding arbitration in domestic relations cases may be conducted pursuant to the provisions of chapter 251.”).

<sup>74</sup> 9 U.S.C. § 1 (1988).

<sup>75</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

<sup>76</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 1652 (1991).

been that the FAA does apply to individual employment contracts unless the employee is involved in interstate or foreign transportation.<sup>77</sup>

Unlike the FAA, the UAA affirmatively includes employment contracts. Section 1 of the UAA states that it “applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].”<sup>78</sup> This language was deleted from the version of the UAA adopted by the Massachusetts Legislature when it enacted the MUAA. The legislative report noted that, since the Legislature had already adopted a modified version of the UAA for the arbitration of collective bargaining agreements,<sup>79</sup> the MUAA was limited to the coverage of commercial disputes.<sup>80</sup> The deletion of the language regarding employment, along with the legislative history, supports the inference that the MUAA does not apply to employment disputes. The practical significance of this exclusion would be diminished considerably if the FAA were held to apply to employment disputes. The FAA

---

<sup>77</sup> Cases holding that FAA does apply to employment contracts: Corion Corp. v. Chen, 124 Lab. Cas. § 57,220 (CCH) (D. Mass 1991) (holding that arbitration clause in employee handbook was enforceable), *aff'd*, 964 F.2d 55 (1st Cir. 1992); Dickstein v. DuPont, 443 F.2d 783 (1st Cir. 1971) (holding that brokerage application containing an arbitration provision was enforceable as part of an employment agreement); Scott v. Farm Family Life Ins. Co., 287 F. Supp. 76, 80 (D. Mass. 1993) (holding that F.A.A. exclusion was not applicable to an insurance agent); Management Recruiters Int'l v. Nebel, 765 F. Supp. 419, 421 (N.D. Ohio 1991) (holding that F.A.A. employment exclusion did not apply to agreements with non-union account executives); Spellman v. Securities, Annuities & Ins. Serv., Inc., 10 Cal. Rptr. 2d 427 (holding that employment contract with securities firm contained enforceable compulsory arbitration provisions), modified on other grounds, 8 Cal. App. 4th 1198, rev. denied, 1992 Cal. LEXIS 5123 (1992); Erving v. Virginia Squire Basketball Club, 468 F.2d 1064 (2d Cir. 1972) (holding that arbitration provision contained in basketball contract was enforceable); Tenney v. United Elec. R. & M. Workers, 207 F.2d 450 (3d Cir. 1953) (holding that employees engaged in production of goods for subsequent sale in interstate commerce by the FAA employment exemption).

Cases holding that FAA does not apply to employment contracts: Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 312 (6th Cir. 1991) (stating that "it seems clear that 'contracts for employment' are excluded from the scope of the FAA); United Elec. R. & M. Workers v. Miller Metal Prod., 215 F.2d 221 (4th Cir. 1954) (holding that arbitration clause did not extend to the no-strike clause of a collective bargaining agreement).

<sup>78</sup> UNIF. ARBITRATION ACT, § 1, 7 U.L.A. 5 (1985).

<sup>79</sup> MASS. GEN. L. ch. 250C (1992).

<sup>80</sup> See "Report of the Commission on Uniform State Laws," Mass. Legislative Documents, House Rep. No. 84, at 7-8.

applies in both state and federal courts,<sup>81</sup> and most Massachusetts employees are engaged in “interstate commerce” as that term has been defined by the U.S. Supreme Court. Accordingly, arbitration provisions in Massachusetts employment contracts would, in most cases, be covered by the FAA.<sup>82</sup>

(iv) Consolidation. The MUAA contains a unique provision concerning consolidation of arbitrations, which does not appear in either the FAA or UAA.<sup>83</sup> This provision is discussed in sections 6.20 and § 10.11.

(v) Discovery. Under the FAA, the UAA and the MUAA, the parties are entitled to limited discovery. All three statutes permit the arbitrator to subpoena witnesses and records.<sup>84</sup> The UAA and MUAA go beyond the FAA by permitting depositions of witnesses “who cannot be subpoenaed or [are] unable to attend the hearing.”<sup>85</sup> However, the MUAA goes beyond both of the other two statutes by allowing the full range of document discovery permitted under Mass. R. Civ. P. 34.<sup>86</sup>

(vi) Attorney’s Fees. Both the MUAA and UAA expressly exclude an award of attorney’s fees from the remedies available in arbitration.<sup>87</sup> The FAA is silent on the subject of attorney’s fees.

(vii) International Arbitration.<sup>88</sup> Unlike the UAA and MUAA, the FAA contains provisions dealing with the enforceability of foreign arbitral awards.<sup>89</sup> These sections of the

---

<sup>81</sup> Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

<sup>82</sup> Snyder v. Smith, 736 F.2d 409, 418 (7th Cir.), cert. denied, 469 U.S. 1037 (1984).

<sup>83</sup> MASS. GEN. L. ch. 251, § 2A (1992).

<sup>84</sup> 9 U.S.C. § 7 (1988); UNIF. ARBITRATION ACT § 7(a), 7 U.L.A. 114 (1985); MASS. GEN. L. ch. 251, § 7 (1992).

<sup>85</sup> MASS. GEN. L. Ch. 251 § 7(b) (1992); see also UNIF. ARBITRATION ACT § 7(b), 7 U.L.A. 114 (1985).

<sup>86</sup> MASS. GEN. L. ch. 251, § 7(e) (1992).

<sup>87</sup> MASS. GEN. L. ch. 251, § 10 (1992); UNIF. ARBITRATION ACT § 10, 7 U.L.A. § 10 (1985).

FAA provide that the New York Convention of 1958<sup>90</sup> and the Panama Convention of 1975<sup>91</sup> shall be enforced in United States courts.”<sup>92</sup>

### **§ 10.05 Governing Law - What Law Does the Arbitrator Apply?**

The differences between arbitration and litigation are often assumed to be primarily procedural -- i.e., limitations on discovery, a more informal hearing process, relaxed application of the law of evidence, and limitations on appeals, among others. But an even more significant difference is substantive: whether the arbitrators will apply the law and, if so, what law they will apply.

(a) Must an arbitrator apply the law? The Federal Arbitration Act (FAA) and Massachusetts Uniform Arbitration Act (MUAA) are silent on the issue of whether arbitrators must apply the law -- i.e., determine a case solely on the basis of legal (as opposed to purely equitable) principles. Rule 43 of the AAA Commercial Arbitration Rules makes no mention of applying the law and permits the arbitrator to “grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties.”<sup>93</sup> One of the leading commentators on commercial arbitration, Martin Domke, has stated that arbitrators are not obligated to apply the law:

---

<sup>88</sup> International arbitration is discussed in section 14.09.

<sup>89</sup> 9 U.S.C. §§ 201 et seq. (1988)

<sup>90</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.

<sup>91</sup> The Inter-American Convention on International Commercial Arbitration of January 30, 1975.

<sup>92</sup> 9 U.S.C. §§ 201, 301 (1988). In addition, the FAA contains a section rejecting the "Act of State Doctrine"; the effect of this provision is to ensure that arbitral awards can be enforced against foreign governments or governmental organizations. See David D. Siegel, Practice Commentary, 9 U.S.C.A. § 15 (West Supp. 1992) (noting that Act of State Doctrine is "a rule of decision . . . that precludes examining into a foreign nation's act on its own soil").

<sup>93</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 43 (1993) (emphasis added).

The practice of commercial arbitration in the United States is indeed that the arbitrator has the freedom of determining the disputed questions according to his sense of the justice of the case. Unless parties expressly or impliedly wish the arbitrator to determine the question by application of a specific law, the arbitrator appears free to resolve the dispute on the basis of his just and fair appreciation.<sup>94</sup>

This view is apparently consistent with arbitrators' own views of their role. An oft-cited study of those views found that while 80% of arbitrators believed that their decisions should be made within the framework of legal principles, 90% thought they were free to ignore those principles in order to accomplish justice in a given case.<sup>95</sup>

Although the view that arbitrators are free to apply equitable principles has received some judicial endorsement,<sup>96</sup> it is not clear whether it is the law. Various courts, including the U.S. Supreme Court, have stated that an arbitral decision may be overturned where the arbitrators' award demonstrates a "manifest disregard of the law."<sup>97</sup> At the same time, there is an overwhelming body of case law supporting the principle that an error of law is insufficient grounds for overturning an arbitral award.<sup>98</sup> Moreover, in both the FAA and MUAA the grounds for vacating an arbitral award do not include an error of law or even a disregard of the law. The

---

<sup>94</sup> GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION*, REVISED EDITION § 25:01 at 391 (1991).

<sup>95</sup> Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 860-62 (1961).

<sup>96</sup> *See, e.g.*, *University of Alaska v. Modern Construction, Inc.*, 522 P.2d 1132, 1140 (Alaska 1974) ("The general rule in both statutory and common law arbitration is that arbitrators need not follow otherwise applicable law when deciding issues properly before them, unless they are commanded to do so by the terms of the arbitration agreement.")

<sup>97</sup> *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 7 (1st Cir. 1990); *Baghdady v. Sadler*, 974 F.2d 1339 (1st Cir. 1992).

<sup>98</sup> *See* *DOMKE ON COMMERCIAL ARBITRATION*, REVISED EDITION § 34:00 et seq. (1991); 6 C.J.S. *Arbitration* § 162 (1975 & Supp. 1993); *see, e.g.*, *Trustees of Boston & Maine Corp. v. Massachusetts Bay Transp.*

language used in the FAA to describe the agreements it covers suggests the latitude of arbitrators: the Act applies to any written agreement “to settle [disputes] by arbitration.”<sup>99</sup> Non-lawyers are free to serve as arbitrators -- an arrangement that supports the view that arbitrators need not adhere to the law -- and as the U.S. Supreme Court has stated, the arbitrators’ expertise is “the law of the shop not the law of the land.”<sup>100</sup>

If such a fundamental issue -- whether arbitrators must apply the law -- is unresolved, how can individuals and companies considering the submission of a dispute to arbitration feel any confidence about the predictability of the result? In industries where arbitration decisions are published, such as labor law and maritime law, a body of “common law” specific to that industry tends to develop.<sup>101</sup> Published decisions enable the parties to assess the judgment and ability of the arbitrators, and provide a basis for making informed decisions about arbitrator selection. Even where there are no written opinions, however, the parties to an arbitration can select as their arbitrators lawyers or retired judges -- at least in those cases where the parties are seeking a strict application of the law. The most effective means of ensuring arbitral adherence to substantive legal principles, however, is to specify in the arbitration agreement itself that the dispute will be decided by the arbitrators in accordance with applicable law.<sup>102</sup> In some cases, the parties may wish to specify the opposite, as George Washington did in his will, which calls

---

Auth., 363 Mass. 386, 390, 394 N.E.2d 340, 343 (1973) (even “grossly erroneous” error of law does not furnish grounds for vacating arbitral award).

<sup>99</sup> 9 U.S.C. § 1 (1988) (emphasis added). The arbitration clause suggested by the American Arbitration Association uses the same language: “Any claim or controversy . . . shall be settled by arbitration . . .” AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES 3 (1993) (emphasis added).

<sup>100</sup> Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

<sup>101</sup> See FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 651 (4th ed. 1985) (discussing development of arbitral “common law” on the issue of what constitutes “just cause” for termination of employment) (footnotes omitted).

for the use of three arbitrators who “shall, unfettered by Law, or legal constructions, declare their sense of the Testator’s intention; and such decision is . . . to be as binding on the Parties as if it had been given in the Supreme Court of the United States.”<sup>103</sup>

(b) What substantive law should be applied? To the extent that there are substantive legal issues in a case (e.g., should the plaintiff’s failure to wear a seat belt be considered contributory negligence?), the governing law is ordinarily the law of the locale of the arbitration unless (i) the parties’ agreement specifies otherwise, or (ii) choice of law principles of the locale dictate another body of law as governing the outcome of the dispute.<sup>104</sup>

(c) What procedural law should be applied? The answer to this question requires consideration of the FAA, the MUAA, and their interaction. First, one must consider whether either or both of those statutes apply to a particular arbitration. As noted above (section § 10.4), the scope of the FAA and MUAA differ somewhat, and the exceptions to coverage of the two Acts also differ. For example, if the arbitration involves commerce but not interstate commerce, or is within one of the exclusions of the FAA, the MUAA applies. If the arbitration does involve interstate commerce and is not within one of the exclusions of the FAA, the FAA governs the conduct of the arbitration, but state law governs on the question of whether an agreement to arbitrate exists and the scope of arbitrability.<sup>105</sup>

---

<sup>102</sup> If the arbitrators ignored such a provision in deciding the case, their failure to apply the law could be challenged in a motion to vacate the award. 9 U.S.C. § 10(d) (1988) (award may be vacated where “arbitrators exceeded their powers”); MASS. GEN. L. ch. 251, § 12(a)(3) (1993) (same).

<sup>103</sup> GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION*, REVISED EDITION § 1307 at 187-8 (1991) (citation omitted).

<sup>104</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 218 comment b (“Provision by the parties in a contract that arbitration shall take place in a certain state may provide some evidence of an intention on their part that the local law of this state should govern the contract as a whole.”) (Proposed official draft 1967).

<sup>105</sup> See *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Eassa Properties v. Shearson Lehman Bros., Inc.*, 851 F.2d 1301, 1305 n.7 (11th Cir. 1988).

Second, one must consider whether there is any conflict between the two Acts. Under the Supremacy Clause of the U.S. Constitution, the FAA governs in cases where it conflicts with state law.<sup>106</sup> However, state law is not preempted if the parties state in their agreement that their arbitration will be governed by state law.<sup>107</sup> In most cases, the FAA and MUAA are in harmony. The most notable exceptions are MUAA section 2A, which permits consolidation of arbitrations,<sup>108</sup> and section 7, which permits broader discovery than the FAA. It is worth noting that where the FAA and MUAA differ, but do not conflict, the state procedures can be used, except as provided above.<sup>109</sup>

If the arbitration is covered by both the FAA and MUAA, the two statutes do not conflict, and the parties have not specified either one as governing the arbitration, both statutes apply to the procedural aspects of the arbitration.

It is important to note that, following the Supreme Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,<sup>110</sup> the body of law governing the procedural aspects of the arbitration may differ from the law governing the substantive rights of the parties. In *Mastrobuono*, however, the Court held that, even though the parties' agreement provided that it would be governed by the laws of New York, the arbitration provision should be interpreted in accordance with the FAA. Accordingly, the Court allowed an arbitrator's award of punitive damages to stand, even though New York law prohibits arbitrators from awarding them.

---

<sup>106</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (FAA preempts state laws to the extent that they are inconsistent).

<sup>107</sup> See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478, 109 S. Ct. 1248, 1255 (1989).

<sup>108</sup> See discussion of consolidation in sections 6.20 and 10.11.

<sup>109</sup> See THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE, ¶ 2:6 (Bette J. Roth et al., eds. 1993) (citing *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 4 (1st Cir. 1988), cert. denied, 489 U.S. 1077 (1989)).

<sup>110</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

(d) Which rules, if any, should be applied? If the parties to an arbitration agreement wish to use the rules of a particular organization to govern the arbitration, two issues need to be addressed in the contract: (i) which particular rules shall apply (assuming the organization has more than one set of rules), and (ii) are the applicable rules those in effect at the time the agreement is executed or at the time the dispute is arbitrated.

(i) The organization with the largest variety of arbitration rules is the AAA, with approximately two dozen different sets of rules. If the parties' agreement specifies the AAA as the administrator of the dispute but not a particular set of rules, the AAA has the authority to determine which of its rules apply.<sup>111</sup>

(ii) If the parties' agreement specifies the AAA or a set of AAA rules but does not specify whether to apply the rules in effect at the time the agreement was executed or those in effect at the time of the demand for arbitration, Rule 1 of the AAA Commercial Arbitration Rules provides that the applicable rules are those in effect when the arbitration is initiated.<sup>112</sup> The CPR Rules for Non-Administered Arbitration of Business Disputes contain a similar provision.<sup>113</sup>

Finally, it is worth noting that both the AAA and CPR Rules permit the parties to "vary the [arbitral] procedures" by agreement.<sup>114</sup>

## **§ 10.06 Jurisdiction - Federal and State Courts**

---

<sup>111</sup> For example, although Rule 1 of the AAA Commercial Arbitration Rules, the AAA Construction Arbitration Rules, and the Arbitration Rules for Professional Accounting and Related Services Disputes provides that "[t]he Parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association . . .," Rule 52 of all three sets of Rules provides that the provisions pertaining to the selection of rules "shall be interpreted and applied by the AAA."

<sup>112</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 1 (1993).

<sup>113</sup> CENTER FOR PUBLIC RESOURCES, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 1.1 (1993).

The issue of jurisdiction arises typically, if at all, when one party seeks to compel or resist arbitration or, after the arbitration is completed, when the prevailing party seeks to enforce the award. The federal and state courts have different requirements with respect to jurisdiction.

(a) Federal Courts. For a federal court to have the legal authority to issue rulings in connection with the arbitration, the applicant must establish that: (1) the court has subject matter jurisdiction over the dispute, and (2) the court has personal jurisdiction over the parties. In addition, the applicant must show that the arbitration is within the scope of the Federal Arbitration Act -- i.e., that the dispute involves interstate commerce or maritime transactions, and does not fall within the exception for certain kinds of employment contracts.<sup>115</sup>

Subject matter jurisdiction -- based either on a federal question or, more typically, diversity of citizenship and the requisite \$50,000 in controversy<sup>116</sup> -- is not conferred by the Federal Arbitration Act itself.<sup>117</sup> The Act, however, does confer personal jurisdiction if section 9 of the Act, which permits an application to be made "to the United States court in and for the district within which such award was made," is satisfied.<sup>118</sup> Section 9 provides that, once the respondent has been served with notice of the motion to confirm an arbitration award, "the court shall have jurisdiction of such party as though he had appeared generally in the proceeding."<sup>119</sup>

---

<sup>114</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 1 (1993); Center for Public Resources, Rules for Non-Administered Arbitration of Business Disputes, Rule 1.1.

<sup>115</sup> See discussion of that exception in Section 10.04

<sup>116</sup> See 28 U.S.C. §§ 1331, 1332 (1988).

<sup>117</sup> *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 26 n.32 (1983); *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 7 n.6 (1st Cir. 1988), cert. denied, 489 U.S. 1077 (1989).

<sup>118</sup> *Weststar Associates, Inc. v. Tin Metals Co.*, 752 F.2d 5, 7 (1st Cir. 1985) (per curiam). In *Weststar*, the defendant participated in an arbitration in Massachusetts, lost the arbitration, and then asserted that the federal district court lacked personal jurisdiction over it because, except for the arbitration, it transacted no business in Massachusetts. The District Court agreed, but the First Circuit reversed, holding that section 9 "was precisely meant to enable the district court for the district within which the award was made to exercise personal jurisdiction over the parties to the award." Id.

<sup>119</sup> 9 U.S.C. § 9 (1988).

Thus, for example, if an arbitration were conducted in Massachusetts, and it involved interstate commerce or a maritime transaction (without falling under the employment exception), and the requirement of subject matter jurisdiction were met, the arbitration could be enforced in the federal District Court in Massachusetts.

(b) State Courts of Massachusetts. Under state law in Massachusetts, the Superior Courts, a division of the Trial Court, have subject matter jurisdiction over disputes involving commercial arbitrations pursuant to MASS. GEN. L. ch. 251.<sup>120</sup> Personal jurisdiction exists whenever the parties have conducted, or agreed to conduct, their arbitration in Massachusetts.<sup>121</sup>

Because of the legislative history of chapter 251, which is entitled “Uniform Arbitration Act for Commercial Disputes” (emphasis added)<sup>122</sup>, it is not clear whether the MUAA applies to non-commercial disputes. The title of the Act and the report urging its enactment differentiate the disputes covered by the Act from labor disputes, which are governed by MASS. GEN. L. ch. 150C, and some have argued that the state courts have jurisdiction under the MUAA only in connection with “commercial” cases.

Neither federal nor state courts have jurisdiction without the filing of an application to enforce the arbitration agreement, to confirm the award, or to take other actions permitted under the state and federal arbitration acts. In addition, no judgment can be entered directly on the award without the filing of an appropriate motion.<sup>123</sup>

---

<sup>120</sup> See MASS. GEN. L. ch. 251, §§ 2, 16 (1992); *City of Lawrence v. Falzarano*, 7 Mass. App. Ct. 591, 592 n.2, 389 N.E.2d 435, 436 n.2 (1979) (proceedings in probate court with respect to commercial arbitration were a nullity because superior court has exclusive jurisdiction), rev'd on other grounds, 380 Mass. 18, 420 N.E.2d 1017 (1980).

<sup>121</sup> *Stancioff v. Hertz*, 10 Mass. App. Ct. 843, 844, 406 N.E.2d 1318, 1319 (1980).

<sup>122</sup> The emphasized words were added by the Massachusetts Legislature and are not in the Uniform Arbitration Act. The emphasized words were added by the Massachusetts Legislature and are not in the Uniform Arbitration Act. The emphasized words were added by the Massachusetts Legislature and are not in the Uniform Arbitration Act.

<sup>123</sup> *Pittsfield General Hospital v. Markus*, 355 Mass. 519, 522-23, 246 N.E.2d 444, 446 (1969).

(c) Venue. The Massachusetts Uniform Arbitration Act provides for venue in “the superior court for the county in which the agreement provides the arbitration hearing shall be held . . . or in which it was held.”<sup>124</sup> If the parties have incorporated the AAA Rules in their agreement, their failure to agree on the location of the arbitration gives the AAA the authority to select the location<sup>125</sup> and thus to determine the proper venue for applications to enforce, modify, or vacate an award, or to take other actions with respect to the arbitration, such as motions to stay or compel the arbitration. If no location or location-selection mechanism is specified in the agreement, venue is proper in the county where the adverse party resides or has a place of business.<sup>126</sup> If the defendant is located outside Massachusetts, the superior court in any county can hear the matter, but all subsequent motions in the same matter must be brought to the same court.

The Federal Arbitration Act does not have any venue provisions, and therefore venue is determined as it would be for any other civil action.<sup>127</sup> As one commentator has noted, if the parties have specified a location or a method of site selection for the arbitration, “under the FAA, the doctrine of forum non conveniens does not apply [and the] arbitration forum selection clause must be enforced even if the result is unreasonable.”<sup>128</sup>

### **§ 10.07 Stay of Litigation and Motions to Compel Arbitration**

---

<sup>124</sup> MASS. GEN. L. ch. 251, § 17 (1992).

<sup>125</sup> Stanicioff v. Hertz, 10 Mass. App. Ct. 843, 844, 406 N.E.2d 1318, 1319 (1980).

<sup>126</sup> MASS. GEN. L. ch. 251, § 17 (1992).

<sup>127</sup> See 28 U.S.C. §§ 1391 - 1412 (1988).

<sup>128</sup> James J. Tansey, The Principal Differences Between Arbitration and Litigation, in COMMERCIAL ARBITRATION FOR THE 1990's 41, 48 (Richard J. Medalie, ed. 1991).

The Federal Arbitration Act (FAA) and Massachusetts Uniform Arbitration Act (MUAA) provide for summary consideration of both motions to stay litigation and motions to compel arbitration.<sup>129</sup> Although the statutes are similar, each contains certain specifics worth noting.

For example, under section 2(d) of the MUAA, a party is entitled to a stay of litigation of arbitrable issues even if the pending lawsuit involves both arbitrable and non-arbitrable issues.<sup>130</sup> In addition, the MUAA makes it clear that the court should not consider the merits of the arbitrable issues in deciding whether to compel arbitration: “An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.”<sup>131</sup> Finally, under the FAA, a party resisting a motion to compel arbitration in federal District Court is entitled to a jury trial if there are factual issues in dispute concerning “the making of the agreement for arbitration or the failure to comply therewith.”<sup>132</sup> If no such issues are present in the case, the Court rules on the motion without a jury. The MUAA does not provide for jury trials.

Motions to stay litigation or compel arbitration present an opportunity to raise a number of issues: the existence of an agreement to arbitrate, the scope of that agreement, the arbitrability of the dispute, and whether the party seeking arbitration has waived the right to arbitrate.<sup>133</sup> In many cases, these preliminary proceedings present the most important opportunity to obtain or

---

<sup>129</sup> See 9 U.S.C. § 3, 4 (1988); MASS. GEN. L. ch. 251, § 2 (1992).

<sup>130</sup> This provision is consistent with the interpretation given to the FAA, 9 U.S.C. § 3 (1988). See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 214 (1985) (enforcing agreement to arbitrate claims arising in suit involving both arbitrable and non-arbitrable issues, “even if the result is ‘piecemeal’ litigation”).

<sup>131</sup> MASS. GEN. L. ch. 251, § 2(e) (1992).

<sup>132</sup> 9 U.S.C. § 4 (1988). The only exception is for cases within the admiralty jurisdiction of the court. *Id.*

<sup>133</sup> The issues of waiver and arbitrability are discussed in sections 10.08 and 10.09. For a general discussion of motions to stay litigation or compel arbitration, see Anthony De Toro & Bette J. Roth, *Compelling and Resisting Arbitration*, in *THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE*, ch. 6 (Bette J. Roth et al., eds. 1993).

resist arbitration because, as a practical matter, courts will be reluctant to undo a completed arbitration in which both parties have participated.

### § 10.08 Arbitrability

The issue of arbitrability involves two questions: (a) procedural arbitrability -- i.e., who decides whether a dispute is arbitrable, the arbitrator or the court? and (b) substantive arbitrability -- does the arbitrator have the authority to decide the dispute?

(a) Procedural Arbitrability. The general rule in Massachusetts and in other states is that the arbitrability of a dispute is to be determined by the court.<sup>134</sup> The parties to the dispute can agree, however, to have the question of arbitrability decided by the arbitrators.<sup>135</sup> “The courts have consistently upheld the right of contracting parties to specify in their agreement that arbitrability issues will be decided by the arbitrators, rather than the courts.”<sup>136</sup> Moreover, Massachusetts courts have held that an arbitrator’s decision concerning arbitrability deserves the same deference as any other decision properly within the scope of the arbitrator’s powers.<sup>137</sup>

If the issue of arbitrability has not been expressly delegated to the arbitrator, the question of who decides arbitrability often turns on where it is first raised: if presented to the arbitrators, they may decide the question, and their decision is entitled to the ordinary deference accorded to arbitral decisions, but if the issue is first presented to a court (on a motion to compel arbitration or a motion for a stay), the court must consider arbitrability in order to rule on the motion.<sup>138</sup>

---

<sup>134</sup> *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 472 (1st Cir. 1989) (citing cases).

<sup>135</sup> *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (citing cases).

<sup>136</sup> Michael F. Hoellering, *Arbitrability*, in *COMMERCIAL ARBITRATION FOR THE 1990s* 1, 2-3 (Richard J. Medalie, ed. 1991). See *First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920 (1995).

<sup>137</sup> *City of Boston v. McCarthy*, 5 Mass. App. Ct. 890, 890, 369 N.E.2d 465, 465-66 (1977). See also *First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920 (1995).

<sup>138</sup> See *FAA*, 9 U.S.C. § 3 (1988) (on motion to stay litigation, court must be "satisfied that the issue involved in [the litigation] is referable to arbitration" under the parties' agreement); Michael F. Hoellering, *Arbitrability*, in

(b) Substantive Arbitrability. The starting point for determining the scope of the arbitrators' authority to decide the dispute is the parties' agreement. The job of both the courts and arbitrators is to determine the intent of the parties as expressed in their agreement to arbitrate. If the agreement contains a broad coverage clause (e.g., "all claims or controversies arising out of or related to this Agreement . . ."), there is a presumption that the clause should be read expansively,<sup>139</sup> and doubts concerning the scope of arbitrable issues should be resolved in favor of arbitrability.<sup>140</sup> If, on the other hand, the coverage clause is restrictive (e.g., "only those claims involving franchise termination . . ."), the clause is construed more narrowly.<sup>141</sup>

Even where the parties' arbitration clause is broad, however, there may be statutory or public policy grounds for removing a dispute from arbitration. For example, in *Hannon v. Original Gunitite Aquatech Pools, Inc.*,<sup>142</sup> the Supreme Judicial Court held that an individual did not have to submit his consumer protection claim under MASS. GEN. L. ch. 93A to arbitration, even though his contract called for arbitration of all claims. Noting the special provision in

---

COMMERCIAL ARBITRATION FOR THE 1990s 1, 2 (Richard J. Medalie, ed. 1991) (discussing *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986)).

<sup>139</sup> See ROBERT M. RODMAN, *COMMERCIAL ARBITRATION WITH FORMS* □ 5.2, at 176 (1984) ("an agreement to arbitrate which is expressed in general terms should be construed as broadly as it was intended"); see, e.g., *Quirk v. Data Terminal Systems, Inc.*, 379 Mass. 762, 768, 400 N.E.2d 858, 862 (1980) (holding that the language of a contract calling for arbitration of all claims and disputes "arising out of, or relating to, this Contract or the breach thereof" clearly encompassed a claim of fraud in the inducement of the contract as a whole). See also *Tracer Research Corp. v. National Environmental Services*, 42 F.3d 1292 (9th Cir. 1994) (holding that arbitration clause did not cover dispute "related to" the parties' agreement because the clause covered only disputes "arising from" the contract).

<sup>140</sup> See *McGinnis v. E.F. Hutton and Co.*, 812 F.2d 1011 (6th Cir.) (holding that when language is unclear or ambiguous, any doubts concerning the scope of arbitrability should be resolved in favor of arbitration), cert. denied, 484 U.S. 824 (1987); see also *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983) ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration").

<sup>141</sup> See GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION, REVISED EDITION*, § 12:02 at 46 n.4 (Supp. 1992) ("when presented with a narrowly drawn commercial arbitration clause, the court should consider whether the conduct in issue is on its face within the scope of the clause"); see, e.g., *Beckham v. William Bayley Co.*, 655 F. Supp. 288, 291 (N.D. Tex. 1987) (holding that the parties' failure to use broad coverage terminology indicated that they did not intend all disputes to be arbitrable).

<sup>142</sup> *Hannon v. Original Gunitite Aquatech Pools, Inc.*, 385 Mass. 813, 434 N.E.2d 611 (1982).

section 9 of the consumer protection statute, which states that the consumer need not “initiate, pursue, or exhaust any remedy established by any . . . state or federal law or statute or the common law,” the Court held that the consumer’s chapter 93A claims against the pool contractor “were not properly before the arbitrator.”<sup>143</sup> Accordingly, even though the arbitrator had already heard the case and issued an award, the Court ignored the arbitral award and affirmed the results of a subsequent jury-waived trial.<sup>144</sup>

Separability. A further potential limitation on arbitrability arises when a contract has been rescinded or found to be induced by fraud: is the arbitration clause in such a contract separable and does it therefore survive the demise of the rest of the contract? In the leading case on this issue, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>145</sup> the U.S. Supreme Court held that:

[A]rbitration clauses as a matter of federal law are “separable” from the contracts in which they are embedded, and . . . where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.<sup>146</sup>

Massachusetts law is consistent with *Prima Paint*.<sup>147</sup>

---

<sup>143</sup> *Hannon v. Original Gunitex Pools, Inc.*, 385 Mass. 813, 826, 434 N.E.2d 611, 618-19 (1982).

<sup>144</sup> *Hannon's* limitation on the arbitrability of chapter 93A claims applies only to consumer claims under section 9, as opposed to business-to-business claims under section 11 of that law. See *Greenleaf Engineering & Construction Co. v. Teradyne, Inc.*, 15 Mass. App. 571, 574, 447 N.E.2d 9, 12 (1983). In addition, even consumer claims under section 9 may be enforceable under the Federal Arbitration Act, which, by virtue of the Supremacy Clause, supersedes any inconsistent provision of state law. See G. Richard Shell, *The Power to Punish: Authority of Arbitrators to Award Multiple Damages and Attorneys' Fees*, 72 MASS. L. REV. 26, 27-28 (1987).

<sup>145</sup> *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967).

<sup>146</sup> *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 402 (1967) (footnote omitted).

<sup>147</sup> See *Mendez v. Trustees of Boston University*, 362 Mass. 353, 285 N.E.2d 446 (1972) (Even “[t]he termination of a contract, whether by rescission according to its terms, by abandonment, by termination for justifiable cause, or otherwise, does not necessarily terminate a provision for arbitration”); *County of Middlesex v. Gevyn Construction*

The CPR Rules for Non-Administered Arbitration of Business Disputes also embody this principle, stating that “[f]or purposes of challenges to the jurisdiction of the [arbitrator(s)], the arbitration clause shall be considered as separable from any contract of which it forms a part.”<sup>148</sup>

### § 10.09 Waiver

The issue of waiver arises primarily in two settings in arbitration: (a) waiver of the right to arbitrate by proceeding with litigation, and (b) waiver of an objection to arbitration by proceeding with the arbitration. In both situations there is, in the federal courts at least, a strong presumption in favor of arbitration.<sup>149</sup>

(a) Waiver of Arbitration. Arbitration is a creature of contract, and therefore the parties are free to waive the right to arbitrate.<sup>150</sup> A defendant hauled into court must assert the right to arbitrate as an affirmative defense in his answer or risk waiver, and either party may lose the right to arbitrate by proceeding with the litigation.<sup>151</sup>

In *Home Gas Corporation v. Walter’s of Hadley, Inc.*,<sup>152</sup> the Massachusetts Supreme Judicial Court discussed the factors to be considered in determining whether a party has waived his right to arbitrate a particular dispute:

- Whether the party has actually participated in the law suit;

---

Corporation, 450 F.2d 53 (1st Cir. 1971), cert. denied, 405 U.S. 955 (1972) (material breach of a construction contract does not rescind arbitration clause agreed to by the parties).

<sup>148</sup> CPR, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, RULE 8.2 (1993).

<sup>149</sup> See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983) (doubts should be resolved in favor of arbitration).

<sup>150</sup> ROBERT RODMAN, COMMERCIAL ARBITRATION WITH FORMS □ 6.1 (1984) (citing *Sikora v. Hogan*, 315 Mass. 66, 51 N.E.2d 970 (1943); *Powell’s General Contracting Co. v. Marshfield Housing Authority*, 7 Mass. App. Ct. 763, 390 N.E.2d 267 (1979)).

<sup>151</sup> See ROBERT M. RODMAN, COMMERCIAL ARBITRATION WITH FORMS □ 6.4 (Supp. 1992) (citing *Fed. R. Civ. P. 8(c)*; *McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152 (D. Conn. 1985). See, e.g., *Tumim v. Palefsky*, 7 Mass. App. Ct. 847, 384 N.E.2d 1253 (1979) (arbitration clause is not jurisdictional and therefore party waived clause by proceeding to trial of issues in dispute without requesting arbitration). Of course, if the parties do not have a pre-existing agreement to arbitrate, there is no basis for such an affirmative defense.

- Whether the parties were well into preparation of a lawsuit;
- Whether there has been a long delay in seeking a stay or the trial was near at hand;
- Whether the defendant has invoked the jurisdiction of the court by filing a counterclaim;
- Whether important intervening steps have taken place (such as discovery which would have been unavailable in an arbitration);
- Whether the other party “was affected, misled, or prejudiced by the delay.”<sup>153</sup>

Home Gas was itself an easy case under this analysis, because, although the defendant had moved for a stay of judicial proceedings pending arbitration before discovery had begun, the defendant did not ask for a hearing on its motion until two and a half years after commencement of the action. At that point there had been a fourteen-day hearing before a master, who issued a report recommending judgment for the plaintiff. The Court had no difficulty finding that the right to arbitrate had been waived.<sup>154</sup> In other cases, however, the courts have faced more difficult issues of line-drawing, where the delay was less extreme and the opposing party’s prejudice less palpable.<sup>155</sup>

(b) Waiver of Objection to Arbitration. Parties with a valid basis for seeking to stay arbitration may nevertheless lose the right to do so by sleeping on their rights. Even where there is no agreement to arbitrate the dispute, an arbitration award will be confirmed if the party

---

<sup>152</sup> Home Gas Corporation v. Walter's of Hadley, Inc., 403 Mass. 772, 532 N.E.2d 681 (1989).

<sup>153</sup> Home Gas Corporation v. Walter's of Hadley, Inc., 403 Mass. 772, 775-76, 532 N.E.2d 681, 683-84 (1989).

<sup>154</sup> Home Gas Corporation of Massachusetts, Inc. v. Walter's of Hadley, Inc., 403 Mass. 772, 785, 532 N.E.2d 681, 685 (1989).

<sup>155</sup> See, e.g., J&S Construction Co. v. Travelers Indemnity, Inc., 520 F.2d 809 (1975) (delay of thirteen months in requesting arbitration after suit was commenced did not amount to waiver in the absence of prejudice to the opposing party); Hurlbut v. Gantshar, 674 F. Supp. 385, 389 (D. Mass. 1987) (delay of five months in filing motion to compel arbitration did not amount to waiver where the moving party had pleaded in his answer that the action was barred by an arbitration agreement).

opposing confirmation participated in the arbitration without objection.<sup>156</sup> Such waiver can occur even in the early stages of the process -- for example, by failing to challenge a court's decision to stay litigation so that an arbitration can proceed,<sup>157</sup> or by failing to object to arbitration at the outset of the proceedings.<sup>158</sup>

## § 10.10 Provisional Remedies - Judicial and Arbitral

Provisional remedies -- such as an attachment, preliminary injunction, or a bill to reach and apply assets -- are often needed in order to maintain the status quo while a dispute is arbitrated. The Federal Arbitration Act (FAA) and Massachusetts Uniform Arbitration Act (MUAA) are silent on the subject of provisional remedies, and therefore the courts have had to infer from legislative history and the underlying purposes of those statutes whether such remedies are available.<sup>159</sup>

(a) Injunctive Relief Awarded by the Courts. In *Salvucci v. Sheehan*,<sup>160</sup> the Massachusetts Supreme Judicial Court held that awarding injunctive relief in a dispute that was submitted to arbitration does not deprive the arbitrators of jurisdiction over the dispute, but instead “bring[s] the property in question within [the court’s] control pending a determination of the issues” to be arbitrated.<sup>161</sup>

---

<sup>156</sup> ROBERT M. RODMAN, *COMMERCIAL ARBITRATION WITH FORMS* § 24.11 at 543-44 (1984) (citing *Migneault v. United Services Automobile Association*, 519 P.2d 1162 (Ariz. App. 1974)).

<sup>157</sup> See e.g., *Reeves v. Tarvizian*, 351 F.2d 889, 891 (1st Cir. 1965).

<sup>158</sup> See e.g., *Geller v. Temple B'nai Abraham*, 11 Mass. App. 917, 919, 415 N.E.2d 246, 248 (1981) (objection to the arbitral forum as being different from the one specified in the parties' contract was waived when the objecting party failed to raise the issue at the outset of the arbitration).

<sup>159</sup> See e.g., *Charles Construction Co. v. Derderian*, 412 Mass. 14, 586 N.E.2d 922 (1992).

<sup>160</sup> *Salvucci v. Sheehan*, 349 Mass. 659, 212 N.E.2d 243 (1965).

<sup>161</sup> *Salvucci v. Sheehan*, 349 Mass. 659, 663, 212 N.E.2d 234, 245 (1965). See also *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986) (since FAA does not prohibit court from issuing preliminary injunctions during pendency of arbitration, courts have discretion to do so to maintain the status quo).

The factors governing the issuance of interim injunctive relief in cases where an arbitration is pending are the same as those governing the award of such relief in other cases:

[T]he court must find: (1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction.<sup>162</sup>

Review of the court's decision is governed by an "abuse of discretion" standards,<sup>163</sup> and therefore such decisions are rarely reversed on appeal.<sup>164</sup>

(b) Injunctive Relief Awarded by the Arbitrator. Since the FAA and MUAA neither prohibit nor authorize the award of interim relief by an arbitrator, the issue has been left largely to the parties to decide in their agreements. Adoption of the AAA Commercial Arbitration Rules, for example, authorizes the arbitrator to "issue such orders for interim relief as may be deemed necessary to safeguard the property that is the subject matter of the arbitration. . ."<sup>165</sup> The AAA Construction Arbitration Rules, as recently amended, contain a somewhat broader

---

<sup>162</sup> Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 51-52 (1st Cir. 1986).

<sup>163</sup> Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 52 (1st Cir. 1986).

<sup>164</sup> In *Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co.*, 399 Mass. 640, 649 (1987), the Court held that, although a court's decision on a motion for preliminary injunction requires consideration of the moving party's likelihood of success on the merits, such a review "does not invade the province of the arbitrator" because the court's assessment of the merits at a preliminary stage of the proceedings "may not correspond to the final judgment."

<sup>165</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 34 (1993). Such a provision does not prevent the parties from seeking injunctive relief from a court if such relief is needed to prevent irreparable harm or preserve the status quo.

interim relief provision: the arbitrators “may take whatever interim measures [they] deem[] necessary with respect to the dispute, including measures for the conservation of property.”<sup>166</sup>

The Center for Public Resources (CPR) Rules contain a similar “interim relief” provision, with even more specificity: the arbitrators “may take such interim measures as [they] deem necessary in respect of the subject matter of the dispute, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods. The [arbitrators] may require security for the costs of such measures.”<sup>167</sup>

Both the AAA and CPR Rules provide that participation in a judicial proceeding by a party relating to the subject matter of the arbitration does not constitute a waiver of that party’s right to arbitrate.<sup>168</sup>

### **§ 10.11 Consolidation and Multiparty Disputes**

In disputes involving multiple parties, it is usually more efficient to combine the separate claims in some manner, in order to achieve consistent results and avoid unnecessary duplication of effort. Efficiency, however, is not the only relevant consideration. As discussed in section 6.20, the decision to consolidate two or more cases could be outcome-determinative. The following subsections discuss the law governing that decision.

(a) Consolidation. The Massachusetts Uniform Arbitration Act (MUAA) contains an unusual provision, section 2A, which does not exist in the Federal Arbitration Act (FAA) or Uniform Arbitration Act (UAA). Only three other states (California, Florida, and Georgia) have

---

<sup>166</sup> AAA, CONSTRUCTION INDUSTRY ARBITRATION RULES, Rule 34 (1993). Compare Charles Construction Co. v. Derderian, 412 Mass. 14, 586 N.E.2d 992 (1992) (holding that Rule 34 of the AAA Commercial Arbitration rules applies only to specific property subject to dispute).

<sup>167</sup> CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 12.1 (1993).

<sup>168</sup> AAA COMMERCIAL ARBITRATION RULES, AAA Rule 47(a); CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 12.2

such provisions.<sup>169</sup> Section 2A provides that any party to an arbitration can petition the Superior Court for an order to consolidate that arbitration with another related arbitration, provided that the method of arbitrator selection is the same for all of the consolidated arbitrations.<sup>170</sup> The Court is required to apply the standards of the Massachusetts Rules of Civil Procedure, which govern the consolidation of civil actions. Most significantly, section 2A provides that consolidation is permitted even if the parties' agreement prohibits consolidation.

Prior to the adoption of section 2A, Massachusetts courts had held that court-ordered consolidation of arbitrations was not permitted.<sup>171</sup> After its enactment in 1977, however, consolidated arbitrations have been upheld, even in the federal courts, which have ruled that section 2A does not conflict with, and therefore is not preempted by, the FAA.<sup>172</sup> However, the U.S. Court of Appeals for the First Circuit has indicated in dicta that section 2A's effort to override the terms of an arbitration agreement which barred consolidation would likely fail because it is in conflict with the strong federal policy, as expressed in the FAA, of enforcing the terms of an arbitration agreement in the same manner as any other contract.<sup>173</sup>

The courts have recognized that the inability to consolidate arbitration may result in inefficiency. However, as the U.S. Supreme Court has noted, the primary purpose of the FAA is

---

<sup>169</sup> See Note, Consolidating Arbitrations in Federal Courts, 8 OHIO ST. J. ON DISPUTE RES. 457, 467 n.58 (1993).

<sup>170</sup> The statute carves out an exception for arbitrations under MASS. GEN. L. ch. 149, § 29 (1992) (concerning construction-related disputes with public agencies and municipalities), which has its own consolidation provision.

<sup>171</sup> See Stop & Shop Co. v. Gilbane Building Co., 364 Mass. 325, 330, 304 N.E.2d 429, 432 (1973).

<sup>172</sup> See New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1, 5 (1st Cir. 1988), cert. denied, 489 U.S. 1977 (1989).

<sup>173</sup> See New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1, 5 & n.3 (1st Cir. 1988) ("Supreme Court precedent strongly indicates . . . that state law should not prevail over . . . a privately negotiated contractual provision."), cert. denied, 489 U.S. 1977 (1989).

not efficiency but enforcement of privately negotiated agreements in accordance with their terms.<sup>174</sup>

A related issue arises in multiparty cases which cannot be consolidated because some of the claims are non-arbitrable. The Massachusetts Appeals Court has ruled that a court may stay litigation of non-arbitrable claims pending arbitration, “despite the fact that some judicial inefficiency might result.”<sup>175</sup>

(b) Class Actions. Class actions in an arbitration setting are rare. Courts have certified classes of franchisees and bank customers for arbitrations,<sup>176</sup> but have declined certification in other cases.<sup>177</sup> As mandatory arbitration contracts in consumer transactions become increasingly common, the use of class certification in arbitration is likely to become more common, even though it is a mechanism which requires more judicial involvement in the arbitration process (e.g., in certifying a class) than is customary.<sup>178</sup>

## § 10.12 Bifurcation and Dispositive Motions

One of the principal complaints about arbitration is that the hearing can be, in some cases, as long as or longer than a trial. Hearings sometimes last for weeks or months, often with recesses in order to accommodate the schedules of the parties, counsel, and the arbitrators. Even

---

<sup>174</sup> Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-21 (1985); see, e.g., Government of United Kingdom v. Boeing Co., 998 F.2d 68, 71 (2d Cir. 1993) (holding that FAA does not authorize consolidation of arbitrations “unless doing so would be ‘in accordance with the terms of the agreement’”).

<sup>175</sup> Danvers v. Wexler Construction Co., 12 Mass. App. Ct. 160, 165, 422 N.E.2d 782, 785 (1981) (footnote omitted).

<sup>176</sup> See, e.g., Keating v. Superior Court, 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192 (1982) (franchisees), rev'd in part on other grounds, 465 U.S. 1 (1984); Badie v. Bank of America, San Francisco Superior Court No 944916 (Complaint filed August 4, 1992) (bank customers).

<sup>177</sup> Champ v. Siegel Trading Co., 55 F.3d 269 (7th Cir. 1995) (commodity options customers).

<sup>178</sup> See generally Wells, “Arbitration of Class Actions,” in THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE, ch. 15 (Bette J. Roth et al., eds. 1993); Note, Classwide Arbitration: Efficient Adjudication or Procedural Quagmire, 67 VA. L. REV. 787 (1981); Note, Classwide Arbitration and 10b-5 Claims in the Wake of Shearson/American Express, Inc. v. McMahon, 74 CORNELL L. REV. 380 (1989).

without scheduling problems, however, arbitration hearings may run longer than necessary because the arbitrators wish to avoid limiting the evidence they will hear. One of the few grounds for overturning an arbitral award is that the arbitrators “refus[ed] to hear evidence pertinent and material to the controversy.”<sup>179</sup>

The use of bifurcation and dispositive motions enables arbitrators to streamline the proceedings by considering potentially dispositive issues before hearing all of the evidence in the case.<sup>180</sup> If the evidence pertinent to liability is distinct from the evidence concerning damages, the parties may ask the arbitrator to rule on liability before taking evidence on damages. Or, there may be a dispositive legal issue, such as the statute of limitations, which can be decided on a motion to dismiss or for summary judgment.

There is no provision in either the FAA or the MUAA which specifically permits or prohibits bifurcation or dispositive motions, although it is clear that both statutes give arbitrators wide latitude in ordering the proceedings.<sup>181</sup> The rules of the AAA also do not address the use of dispositive motions,<sup>182</sup> but the CPR Rules call for discussion at the pre-hearing conference of “the desirability of bifurcation or other separation of the issues in the arbitration.”<sup>183</sup> A number of commentators have noted the utility of bifurcation and dispositive motions in complex

---

<sup>179</sup> Federal Arbitration Act, 9 U.S.C. § 10(a) (1988). The Massachusetts Uniform Arbitration Act contains a similar provision. MASS. GEN. L. ch. 251, § 12(a)(4) (1992).

<sup>180</sup> See Section 6.19 for a discussion of contract clauses incorporating bifurcation and dispositive motions in arbitration agreements.

<sup>181</sup> See, e.g., *Carter, Moore & Co. v. Donahue*, 345 Mass. 672, 677 (1963) (arbitrators may “sever the issues or . . . decide only one issue”).

<sup>182</sup> One of the authors has proposed that the AAA adopt rules that would permit the use of dispositive motions. See Carl M. Sapers & David A. Hoffman, *Dispositive Motions in Arbitration Proceedings*, 47 ARB. J. 51 (March 1992).  
<sup>One</sup> of the authors has proposed that the AAA adopt rules that would permit the use of dispositive motions. See Carl M. Sapers & David A. Hoffman, *Dispositive Motions in Arbitration Proceedings*, 47 ARB. J. 51 (March 1992).

<sup>183</sup> CPR, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 9.4(a).

multiparty arbitrations, not only to “eliminate, as well as shape, many of the issues” in the case, but also to “facilitate settlement by some, if not all, of the parties.”<sup>184</sup>

### **§ 10.13 The Award - Form, Scope of Relief, Punitive Damages, Interest, Attorney’s Fees, Costs, Default or Ex Parte Award, Consent Award, Time for Issuance**

The purpose of an arbitration is to arrive at a decision, known as the “award,” upon which judgment can be entered by a court. While it may not be necessary that the award be confirmed by a court and entered as a judgment (e.g., the respondent may comply with the award voluntarily), if the award is entered as a judgment it can be -- indeed, must be -- enforced by the Court upon request by one of the parties. The following subsections discuss some of the formal requirements and limitations of arbitral awards, as well as the relief available in arbitrations.

(a) Form of Award. Under the Massachusetts Uniform Arbitration Act (“MUAA”) an arbitration award must be in writing and signed by the arbitrators.<sup>185</sup> There is no similar provision requiring a written and signed decision in the Federal Arbitration Act (“FAA”).

Most arbitral awards are “bare” -- i.e., they do not contain findings of fact or conclusions of law, but simply state the result, such as an amount of damages to be paid by one of the parties.<sup>186</sup> Although there is no requirement under the MUAA or FAA for a “reasoned” award (i.e., an award containing a statement of the reasons for the award),<sup>187</sup> the parties are entitled to a reasoned award if their arbitration agreement calls for one.<sup>188</sup>

---

<sup>184</sup> Richard J. Medalie, Developing Innovative Procedures in a Complex Multiparty Arbitration, in COMMERCIAL ARBITRATION FOR THE 1990s 56, 67-70 (Richard Medalie, ed. 1991).

<sup>185</sup> MASS. GEN. L. ch. 251, § 8(a) (1992). There is no requirement that the signatures be notarized.

<sup>186</sup> See Section 6.22 for a discussion of the advantages and disadvantages of a "bare" award.

<sup>187</sup> See United Steel Workers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960); Fazio v. Employer's Liability Assurance Corp., 347 Mass. 254, 258, 197 N.E.2d 598, 601 (1964).

<sup>188</sup> See Western Employers, Ins. v. Jefferies & Co., 958 F.2d 258, 262 (9th Cir. 1992) (arbitrator's failure to provide reasoned award where the parties' agreement calls for one is grounds for vacating award). See Western Employers,

Once the award is issued, modifications cannot be made by the arbitrators, except in accordance with § 9 of the MUAA, which requires that any motion for modification filed with the arbitrators be filed within twenty days after the award is issued.<sup>189</sup> As one commentator has noted, “the power of the arbitrators ends with the making of the award.”<sup>190</sup> Of course, the parties may agree to reopen the hearing for modification of the award. Absent such agreement, however, the arbitrators lack the authority to modify their award after the twenty-day period has elapsed.<sup>191</sup>

(b) **Scope of Relief.** The parties can control the scope of relief available in an arbitration by defining in their agreement the boundaries of the arbitrators’ power to award relief. The MUAA provides that the arbitrators’ power may, in some cases, extend beyond what a court would be empowered to do: “the fact that the relief was such that it could not or would not be granted by a court of law is not grounds for vacating or refusing to confirm the award.”<sup>192</sup> There is no similar provision in the FAA.

Both the FAA and MUAA provide that a court can modify an arbitral award on the ground that the arbitrators exceeded their authority.<sup>193</sup> Accordingly, it is important to define the arbitrators’ powers carefully in the arbitration agreement. For example, if the arbitration is conducted in accordance with the AAA Commercial Arbitration Rules or the CPR Arbitration

---

*Ins. v. Jefferies & Co.*, 958 F.2d 258, 262 (9th Cir. 1992) (arbitrator's failure to provide reasoned award where the parties' agreement calls for one is grounds for vacating award).

<sup>189</sup> MASS. GEN. L. ch. 251, § 9 (1992). *See* *Baxter Health Care Corp. v. Harvard Apparatus, Inc.*, 35 Mass. App. Ct. 204, 209, 617 N.E.2d 1018, 1022 (1993) (holding that arbitrators could not modify award after a twenty-day period had elapsed).

<sup>190</sup> ROBERT M. RODMAN, 5B M.P.S. § 1989, at 283 (1981).

<sup>191</sup> ROBERT M. RODMAN, 5B M.P.S. § 1989, at 283-84 (1981). Modification of the award by a court is discussed in sections 10.14 and 10.27.

<sup>192</sup> *See* MASS. GEN. L. ch. 251, § 12(a)(5) (1992).

<sup>193</sup> 9 U.S.C. § 10(a)(4) (1988); MASS. GEN. L. ch. 251, § 12(a)(3) (1992).

Rules, the arbitrators have the authority to award injunctive relief, including specific performance of a contract.<sup>194</sup>

(c) Punitive Damages. Punitive damages are not available under Massachusetts law without specific statutory authorization, but an award of punitive damages by an arbitrator is not without precedent. In the leading case of *Raytheon Co. v. Automated Business Systems, Inc.*, the U.S. Court of Appeals for the First Circuit (applying Massachusetts law) upheld an award of punitive damages by the arbitrators.<sup>195</sup> In *Raytheon*, the Court found that punitive damages would have been available if the case had been tried in court and therefore “there is no compelling reason to prohibit a party which proves the same conduct to a panel of arbitrators from recovering the same damages.”<sup>196</sup>

Until the Supreme Court’s decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,<sup>197</sup> it had been widely held that punitive damages were not available (a) in jurisdictions (such as New York) where governing law prohibited arbitrators from awarding them, or (b) in cases where the law of such jurisdictions has been specified in the parties agreement as the governing law.<sup>198</sup> In *Mastrobuono*, however, the Court cited *Raytheon* with approval and held that an arbitration provision calling for the resolution of “any controversy” included claims for punitive damages, even though the parties’ agreement provided that it would be governed by the laws of New York. The Court reasoned that there was no conflict between these two provisions: New

---

<sup>194</sup> See AAA, COMMERCIAL ARBITRATION RULES, Rule 43 (arbitrator may grant “any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to specific performance of a contract”); CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 13.1 (same).

<sup>195</sup> *Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6, 12 (1st Cir. 1989).

<sup>196</sup> *Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6, 12 (1st Cir. 1989).

<sup>197</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, \_\_\_ S.Ct. \_\_\_ (1995).

<sup>198</sup> *Garrity v. Lyle Stuart, Inc.*, 368 N.Y.S.2d 831, 353 N.E.2d 793, 794 (1976); *Thomson McKinnon Securities, Inc. v. Cucchiella*, 32 Mass. App. Ct. 698, 708, 594 N.E.2d 870, 872 (1992) (applying New York law).

York law would govern the substantive provisions of the agreement, and (absent an express exclusion of punitive damages) the arbitration clause would be interpreted broadly to include the availability of any type of relief.

Multiple damages under MASS. GEN. L. ch. 93A can be awarded by arbitrators, unless the parties agree to the contrary,<sup>199</sup> just as such damages are available in arbitrations involving federal statutes, where the statutes provide for them.<sup>200</sup> If the arbitrator does not award them, however, they cannot be added by the court in proceedings to confirm the award.<sup>201</sup>

(d) Interest. Pre-award interest is generally not available in arbitrations under Massachusetts law, unless the parties provide otherwise in their agreement.<sup>202</sup> Interest is available, however, from the date of the award.<sup>203</sup>

In cases where a substantial amount of time has elapsed since a lawsuit was commenced or the contract breached, the accumulated interest can be significant and therefore may have a bearing on whether to elect arbitration. Under Massachusetts law, a party is entitled to collect pre-judgment interest (currently set at 12% by statute) for tort, contract, and certain other claims litigated in the courts.<sup>204</sup> Pre-judgment interest is calculated from the date of breach in contract cases and from the date of commencement of the lawsuit in tort cases and other cases in which

---

<sup>199</sup> See *Drywall Systems, Inc. v. Zvi Construction Company, Inc.*, 435 Mass. 664 (2002); *Greenleaf Engineering & Construction Co. v. Teradyne, Inc.*, 15 Mass. App. Ct. 571, 477 N.E.2d 9 (1983).

<sup>200</sup> See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that federal RICO claims are arbitrable).

<sup>201</sup> See *Bonofiglio v. Commercial Union Insurance Co.*, 411 Mass. 31, 576 N.E.2d 680 (1991).

<sup>202</sup> *Sansone v. Metropolitan Property & Liability Insurance Co.*, 30 Mass. App. Ct. 660, 572 N.E.2d 588, rev. denied, 410 Mass. 1044, 577 N.E.2d 309 (1991); *Reilly v. Metropolitan Property & Liability Insurance Co.*, 412 Mass. 1006, 1007, 588 N.E.2d 628, 629 (1992) (rescript).

<sup>203</sup> *Sansone v. Metropolitan Property & Liability Insurance Co.*, 30 Mass. App. Ct. 660, 663, 572 N.E.2d 588, 590, rev. denied, 410 Mass. 1044, 577 N.E.2d 309 (1991) (purpose of awarding such interest is to "encourage 'swift obedience' to the award without the necessity of court proceedings"); see also *Reilly v. Metropolitan Property & Liability Insurance Co.*, 412 Mass. 1006, 1007, 588 N.E.2d 628, 629 (1992)

an interest rate is not otherwise determined by statute.<sup>205</sup> In addition, Massachusetts law provides for post-judgment interest at the rate of 12%.<sup>206</sup>

If the parties give the arbitrator the authority to award statutory interest, the arbitrator's decision will generally not be overturned even if the interest awarded differs from the amount prescribed by statute.<sup>207</sup> Arbitrators also have discretion not to award interest, even if it would have been awarded by a court or is available pursuant to the parties' agreement.<sup>208</sup>

(e) **Attorney's Fees.** In most cases an arbitrator may not award attorney's fees unless authorized to do so by statute or the parties' arbitration agreement.<sup>209</sup> Attorney's fees are expressly excluded from the relief available in arbitrations under the MUAA, absent agreement by the parties to the contrary,<sup>210</sup> but the FAA is silent on the subject of attorney's fees.

Accordingly, the availability of attorney's fees in arbitrations in Massachusetts turns on three questions: (1) are attorney's fees available under a specific statute; and (2) if so, is the arbitration governed by the FAA; or (3) does the parties' contract authorize an award of attorney's fees?

(1) In most cases, attorney's fees are available solely because a statute -- such as a state or federal antidiscrimination act -- provides for them. In those cases, if the parties' agreement is silent on the question of attorney's fees, the availability of such fees may turn on

---

<sup>204</sup> MASS. GEN. L. ch. 231, § 6B (1992) (applicable to "any action in which a verdict is rendered . . . for personal injuries"); *id.*, § 6C (applicable to "all actions based on contractual obligations"); *id.*, § 6H (other claims).

<sup>205</sup>

<sup>206</sup> MASS. GEN. L. ch. 231, §§ 6B, 6C, 6H (1992).

<sup>207</sup> *See, e.g.*, *Blue Hills Regional School District Committee v. Flight*, 10 Mass. App. Ct. 459, 471-72, 409 N.E.2d 226, 235 (1980).

<sup>208</sup> *Coughlan Construction Co. v. Rockport*, 23 Mass. App. Ct. 994, 997, 505 N.E.2d 203, 206 (1987).

<sup>209</sup> *See* Rosemary S. Page, *Attorney's Fees and Arbitration*, in *CRITICAL ISSUES IN ARBITRATION 10* (ABA, Nov. 5, 1993); ROBERT M. RODMAN, *COMMERCIAL ARBITRATION WITH FORMS* § 21.25 at 481 (1984) (citing Massachusetts cases).

<sup>210</sup> MASS. EN. L. ch. 251, § 10 (1992).

whether the FAA or MUAA applies. It is worth noting, however, that some statutes which authorize an award of attorney's fees limit the availability of fees to actions filed in court.<sup>211</sup>

(2) Since the FAA requires that arbitration agreements be enforced according to their terms,<sup>212</sup> the Supremacy Clause would seem to require state and federal courts to enforce an award of attorney's fees in an arbitration under the FAA, despite the contrary provision of the MUAA, if the parties implicitly or explicitly agreed that such fees would be available or an applicable statute provides for them.<sup>213</sup> However, if the parties specified that the arbitration would be conducted in accordance with the MUAA, the parties' choice of law would be enforced under the FAA, and attorney's fees would likely be unavailable, unless the parties' agreement expressly permitted such an award.<sup>214</sup> And, under the MUAA, even if attorney's fees are available under a specific statute, that statute will not override the MUAA's general statement that attorney's fees are not within the scope of costs awardable by the arbitrator.<sup>215</sup>

(3) The parties can also provide for an award of attorney's fees either by expressly stating in their agreement that they will be available or by incorporating rules which

---

<sup>211</sup> See, e.g., *Raytheon Co. v. Computer Distributors, Inc.*, 632 F. Supp. 553, 559 (D. Mass. 1986) (holding that MASS. GEN. L. ch. 93A authorizes attorney's fees for judicial, not arbitral resolution of disputes); *Schultz v. Subaru of America, Inc.*, 407 Mass. 1004, 1005, 553 N.E.2d 893, 894 (1990) (same, with respect to Massachusetts Lemon Law, MASS. GEN. L. ch. 90, § 7N1/2) (1992); *Floors, Inc. v. B.G. Danis of New England, Inc.*, 380 Mass. 91, 101, 401 N.E.2d 839, 845 (1980) (same, MASS. GEN. L. ch. 149, § 29); *Total Prop. Ser. of New England, Inc. v. Lockwood McKinnon Co.*, Mass. Lawyers Weekly No. 12-028-92 (1992) (arbitrator has no power to award attorney's fees in ch. 93A case).

<sup>212</sup> See *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 475 (1989).

<sup>213</sup> See James J. Myers, *Arbitration Awards*, in *COMMERCIAL ARBITRATION FOR THE 1990s* 78, 87 (Richard J. Medalie, ed. 1991) ("Under the FAA, . . . there is a sound legal basis for upholding such an award in a case in which an applicable state or federal statute permits the recovery of attorneys' fees").

<sup>214</sup> The MUAA's exclusion of attorney's fees is prefaced by the words "[u]nless otherwise provided in the agreement to arbitrate." MASS. GEN. L. ch. 251, § 10 (1992).

<sup>215</sup> See *Floors, Inc. v. B.G. Davis of New England, Inc.*, 380 Mass. 91, 101, 401 N.E.2d 839, 845 (1980).

allow for attorney's fees.<sup>216</sup> The AAA Rules are silent on the subject of attorney's fees, but the CPR Rules allow the arbitrator to award them.<sup>217</sup>

(f) Costs. Under the MUAA the costs available in arbitration are of two types: (1) the fees and expenses of the arbitrators and (2) expenses of the arbitration (not including attorney's fees) incurred by the parties. The parties can, by agreement, exclude an award of costs from the arbitral award.<sup>218</sup>

The FAA is silent on the subject of costs, but "there is little question that arbitrators are free to assess costs against either party in the same manner as the federal courts."<sup>219</sup>

The AAA Commercial Arbitration Rules provide that arbitrators may award to either party all or part of the administrative fees, arbitrators' fees, and witness expenses borne by that party.<sup>220</sup> In the absence of any ruling by the arbitrators, the costs are borne equally by the parties and each party pays for the expenses associated with its own witnesses.<sup>221</sup> The CPR Rules permit arbitrators to award costs "between or among the parties in such manner as [they] deem[] reasonable."<sup>222</sup>

(g) Default or Ex Parte Award. Although it is not an everyday occurrence, parties will sometimes decline to respond to a demand for arbitration. Under those circumstances, the

---

<sup>216</sup> See *Floors, Inc. v. B.G. Davis of New England, Inc.*, 380 Mass. 91, 101, 401 N.E.2d 839, 845 (1980).

<sup>217</sup> CPR Rule 15 permits shifting of attorney's fees and costs of the arbitration (including expenses for expert witnesses offered by the parties and those appointed by the arbitrators) according to the following standard: the arbitrators "may apportion the costs of arbitration [including attorney's fees] between or among the parties in such manner as [they] deem [] reasonable taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration." CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule, 15.3 (1993).

<sup>218</sup> MASS. GEN. L. ch. 251, § 10 (1992).

<sup>219</sup> James J. Myers, in *COMMERCIAL ARBITRATION FOR THE 1990s* 78, 88 (Richard J. Medalie, ed. 1991).

<sup>220</sup> AAA, *COMMERCIAL ARBITRATION RULES*, Rule 43 (1993).

<sup>221</sup> AAA, *COMMERCIAL ARBITRATION RULES*, Rule 49 (1993).

MUAA permits arbitrators to issue a default or ex parte award.<sup>223</sup> As with a judicial proceeding to assess damages against a defendant who has defaulted, the arbitrator must conduct a hearing in which the claimant presents the evidence on which the award is based.<sup>224</sup> The FAA is silent on the issue of default awards, but such awards have been upheld under the FAA.<sup>225</sup>

(h) Consent Award. When the parties settle a case on the doorstep of the arbitrator's conference room or in the middle of the arbitration, they may wish to embody their agreement in the form of an award. The AAA Commercial Arbitration Rules expressly provide for the issuance of a consent award: "If the parties settle their dispute during the course of the arbitration, the arbitrator may set forth the terms of the agreed settlement in an award."<sup>226</sup> The advantage of such a procedure is that the award is then readily enforceable as a judgment, without the need to initiate a lawsuit to enforce the agreement.

(i) Time for Issuance. The MUAA requires that the award be issued within the time specified in the parties' agreement or within the time prescribed by court order, if either party has obtained an order requiring issuance of the award by a date certain.<sup>227</sup> The FAA has no provision regarding the time for issuance of the award. There is a time limit of 30 days, however, under the AAA Commercial Arbitration Rules for issuance of an award.<sup>228</sup> The CPR Rules are less definite, stating that the award "should in most circumstances be rendered within

---

<sup>222</sup> CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 15.3 (1993).

<sup>223</sup> MASS. GEN. L. ch. 251, § 5(a) (1992).

<sup>224</sup> MASS. GEN. L. ch. 251, § 5(a) (1992); see also AAA, COMMERCIAL ARBITRATION RULES, Rule 30 (1993) (even if one party defaults, the other party must present "such evidence as the arbitrator may require for the making of an award"); CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 14 (1993) (same).

<sup>225</sup> See, e.g., *Catz American Co. v. Pearl Grange Fruit Exchange, Inc.*, 292 F. Supp. 549 (S.D.N.Y. 1968).

<sup>226</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 44 (1993).

<sup>227</sup> MASS. GEN. L. ch. 251, § 8 (1992).

one month” after the close of the hearing.<sup>229</sup> The parties have the power to amend their agreement so as to extend the time for issuing an award.

#### **§ 10.14 Judicial Enforcement and Review of Arbitration Award**

One of the principal advantages of arbitration is its finality. The grounds for overturning an arbitral award are so narrow that challenges to such awards are rare. Nevertheless, arbitral awards are not self-enforcing, and therefore unless the parties voluntarily comply with the award, judicial proceedings are necessary.<sup>230</sup>

The options available to the parties once an arbitration award has been issued are rather straightforward: (1) a motion to modify the award,<sup>231</sup> (2) a motion to vacate the award,<sup>232</sup> or (3) a motion to confirm the award.<sup>233</sup> The Court’s authority, in response to such motions, is similarly narrow: “[t]he courses of action open to the court are to confirm the award as made, correct the award and confirm it as corrected, vacate the award, or dismiss the proceedings.”<sup>234</sup> If the award is vacated, the matter may be remanded to the arbitration panel for further action.<sup>235</sup>

---

<sup>228</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 41 (1993).

<sup>229</sup> CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 13.7 (1993).

<sup>230</sup> See *Pittsfield General Hospital v. Markus*, 355 Mass. 519, 522-23, 246 N.E.2d 444, 446 (1969).

<sup>231</sup> Under the Massachusetts Uniform Arbitration Act (MUAA), such a motion may be made to the arbitrators within 20 days of the award, or to the court within 30 days. MASS. GEN. L. ch. 251, §§ 9, 13 (1992). Under the Federal Arbitration Act (FAA), motions to modify must be made in court within three months after the award is filed or delivered, 9 U.S.C. § 12 (1988); there is no provision for such a motion to be made to the arbitrators, and there is likewise no such provision in the AAA Commercial Arbitration Rules.

<sup>232</sup> Under MASS. GEN. L. ch. 251, § 12 (1992), such a motion must be filed within thirty days after the award is delivered to the applicant or, if the grounds for challenging the award are "corruption, fraud or other undue means," within thirty days after such grounds "are known or should have been known." This "discovery rule" does not exist in the FAA, under which a motion to vacate must be filed within three months after the award is filed or delivered. 9 U.S.C. §§ 10, 12 (1988).

<sup>233</sup> The MUAA provides no time limit for motions to confirm. MASS. GEN. L. ch. 251, § 11 (1992). Under the FAA, a motion to confirm must be made within one year after the date of the award. 9 U.S.C. § 9 (1988)

<sup>234</sup> ROBERT M. RODMAN, COMMERCIAL ARBITRATION WITH FORMS § 24.2, at 532 (1984) (citing cases).

<sup>235</sup> See, e.g., *Ciampa v. Chubb Group of Ins. Companies*, 26 Mass. App. Ct. 941, 525 N.E.2d 1344 (1988) (resubmitting to arbitrators issue of present value calculation).

(a) Motions to Confirm. A motion to confirm an arbitral award generally requires a showing of an agreement to arbitrate and the issuance of an award.<sup>236</sup> The respondent can assert as a defense any of the statutory grounds for vacating or modifying the award. The court will not confirm the award unless the statutory period within which a motion to vacate or modify the award may be made has elapsed -- thirty days under the MUAA and three months under the FAA.<sup>237</sup> In addition, if the award has already been paid by the respondent at the time the application to confirm is filed, the court will dismiss the claimant's petition on the ground of mootness or that the claim is precluded by accord and satisfaction.<sup>238</sup> If the motion to confirm is allowed, however, the court must enter judgment on the award.<sup>239</sup>

(b) Motion to Vacate. The grounds for vacating an award under the Federal Arbitration Act (FAA) and Massachusetts Uniform Arbitration Act (MUAA) are similar:<sup>240</sup>

- (a) Corruption, fraud, or undue means;
- (b) Evident partiality of the arbitrators (or, in the MUAA, "misconduct prejudicing the rights or any party");<sup>241</sup>
- (c) Arbitrators acted in excess of their powers (or, in the FAA, "so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter was not made");<sup>242</sup>

---

<sup>236</sup> See ROBERT M. RODMAN, COMMERCIAL ARBITRATION WITH FORMS § 24.3 at 533-34 (1984) (sample affidavit).

<sup>237</sup> MASS. GEN. L. ch. 251, §§ 12, 13 (1992); 9 U.S.C. § 12 (1988). See, e.g., *Holmsten Refrigeration, Inc. v. Refrigerated Storage Center, Inc.*, 357 Mass. 580, 584, 260 N.E.2d 216, 218 (1970) (holding that Superior Court could not confirm an arbitral award until the statutory period had expired).

<sup>238</sup> See *Hanna v. Berkshire Mut. Ins. Co.*, Suffolk Superior Court No. 92-5082 (April 2, 1993).

<sup>239</sup> MASS. GEN. L. ch. 251, § 14 (1992); 9 U.S.C. § 9 (1988).

<sup>240</sup> See MASS. GEN. L. ch. 251, § 12 (1992); 9 U.S.C. § 10 (1988).

<sup>241</sup> MASS. GEN. L. ch. 251, § 12(a)(2) (1992).

<sup>242</sup> 9 U.S.C. § 10(d) 1988.

(d) Arbitrators refused to postpone the hearing, upon good cause being shown, refused to hear evidence material to the controversy, or engaged in other misconduct of the hearing which prejudiced the parties' rights.

The MUAA adds to these grounds the absence of an arbitration agreement, as long as the party seeking to vacate the award "did not participate in the arbitration hearing without raising the objection."<sup>243</sup> The same grounds can be alleged under the FAA, which requires a written agreement to arbitrate.<sup>244</sup>

In addition to the statutory grounds for vacating an arbitral award, public policy has been used by the courts as a basis for vacating, or at least declining to enforce, an arbitral award.<sup>245</sup> But the public policy must be "well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."<sup>246</sup> Public policy arguments for refusing to enforce an arbitral award have been successful in the employment setting, where arbitrators have overturned employment termination decisions based on positive drug tests and awarded reinstatement. The courts have refused to enforce the reinstatement portion of these awards.<sup>247</sup>

(c) Motions to Modify Award. The grounds for modifying arbitral awards under the FAA and MUAA are identical:<sup>248</sup>

---

<sup>243</sup> MASS. GEN. L. ch. 251, § 12(a)(5) (1992).

<sup>244</sup> 9 U.S.C. §§ 2, 9 (1988).

<sup>245</sup> See City of Lawrence v. Falzarano, 380 Mass. 18, 28, 402 N.E.2d 1017, 1024 (1980).

<sup>246</sup> United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 43 (1987) (citation omitted).

<sup>247</sup> See, e.g., Exxon Shipping Co. v. Exxon Seamen's Union, 788 F. Supp. 829 (D.N.J. 1992). See also City of Everett v. Teamster Local, 380, 18 Mass. App. Ct. 137, 463 N.E.2d 1200 (1984) (vacating reinstatement order where city could not recall employee without violating state civil service law).

<sup>248</sup> See MASS. GEN. L. ch. 251, § 13 (1992); 9 U.S.C. § 11 (1988).

- (a) An evident miscalculation of figures or misdescription of “any person, thing, or property referred to in the award”;
- (b) Arbitrators awarded “upon a matter not submitted to them”;
- (c) The award is “imperfect in a matter of form not affecting the merits of the controversy.”

If the court finds that an award must be modified for any of these reasons, it has the power to modify and then confirm the award as modified, without sending it back to the arbitrators.<sup>249</sup>

- (d) Judicial Review of Arbitral Awards. In acting upon motions to vacate or modify arbitral awards, the courts apply a heavy presumption in favor of the validity of the award. Cases following this presumption are collected elsewhere.<sup>250</sup>

There are several grounds on which arbitral awards can not be overturned. Perhaps the most common, but least successful, ground for challenging an arbitral award is that the arbitrator erred with respect to the facts or the law. As the Massachusetts Supreme Judicial Court has stated:

“Our decisions have plainly indicated . . . the narrow scope of judicial review available when a matter submitted to arbitration has been decided. If an arbitrator has committed an error of law or fact in arriving at his decision, a court will not upset the finding unless there is fraud involved. Even a grossly erroneous decision is binding in the absence of fraud.”<sup>251</sup>

---

<sup>249</sup> See MASS. GEN. L. ch. 251, § 13(b) (1992); 9 U.S.C. § 11 (1988).

<sup>250</sup> See, e.g., cases listed in the annotations of MASS. GEN. L. Ann. ch. 251, §§ 12, 13 (West 1988 and Supp. 1993), and 9 U.S.C.A. §§ 10, 11 (West Supp. 1992).

<sup>251</sup> Trustees of Boston & Maine Corp. v. Massachusetts Bay Transportation Authority, 363 Mass. 386, 390, 294 N.E.2d 340, 343 (1973) (emphasis added) (citations omitted).

The U.S. Supreme Court has described the standard of review as requiring a “manifest disregard of the law” on the part of the arbitrator.<sup>252</sup>

The courts’ lack of sympathy to such challenges stems not from a lack of concern about justice or truth-finding, but rather from a healthy respect for the parties’ choice of forum. As one Superior Court Justice recently explained:

Honest mistakes by the arbitrators are a risk [the parties] take. It bears emphasizing that this policy is not the product of some naively hopeful expectation that arbitrators will not commit errors. On the contrary, both the legislative and judicial expressions of the policy reflect a realistic acknowledgment that errors will be made and will go uncorrected. The errors will be tolerated in service of the parties’ agreed objective of obtaining expeditious resolution of their disputes. To put it somewhat more crudely, the policy permits the parties to value speed over accuracy in resolving their differences.<sup>253</sup>

Nor can arbitral awards be overturned on the basis of newly discovered evidence. Unlike judicial decisions, there is no mechanism for reopening an arbitration once the award is issued and confirmed. As one commentator has noted:

The parties give up certain procedural and substantive rights when they agree to submit disputes to arbitration, rights that they would otherwise normally have in litigation. The grounds for review under the statutes are exclusive. Newly

---

<sup>252</sup> Wilko v. Swan, 346 U.S. 427, 436-37 (1953), overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

<sup>253</sup> Tully & Assoc., Inc. v. Bentley College, Middlesex Superior Court, No. 90-2759-F (Jan. 15, 1993) (citations omitted).

discovered evidence is not among those grounds and may not be used to attack an award.<sup>254</sup>

### § 10.15 Appellate Review of Enforcement Decisions

Appellate review of trial court decisions with respect to an arbitral decision is unusual. The Federal Arbitration Act (FAA) and Massachusetts Uniform Arbitration Act (MUAA) are substantially similar in their approach to appellate review. The two basic principles discernible from the FAA and MUAA and the cases applying them are the following.

First, a successful appeal on the merits of the issues decided in the award is virtually impossible, absent fraud or one of the other statutory grounds for vacating an award.

Second, the rules concerning interlocutory appeals of trial court decisions are asymmetrical and favor arbitration. Interlocutory appeals are disfavored unless the interlocutory order prevents the arbitration from going forward -- i.e., interlocutory orders staying litigation and compelling arbitration are rarely reviewed by an appellate court on an interlocutory basis, although orders staying arbitration are reviewable on an interlocutory basis.

(a) Interlocutory Orders. Under the FAA, appeals may be taken from interlocutory orders enjoining arbitration, refusing to compel arbitration, and refusing to stay litigation of arbitrable matters.<sup>255</sup> The MUAA contains similar provisions.<sup>256</sup> Although these statutes appear

---

<sup>254</sup> ROBERT M. RODMAN, COMMERCIAL ARBITRATION WITH FORMS § 25.27, at 588 (1984); see GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION, REVISED EDITION, § 33:05, at 473-74 (1991)

<sup>255</sup> 9 U.S.C. § 16 (1988).

<sup>256</sup> MASS. GEN. L. ch. 251, § 18 (1992). See also *Town of Danvers v. Wexler Construction Co.*, 12 Mass. App. Ct. 160, 162 n.3, 422 N.E.2d 782, 783 n.3 (1981) (order denying stay of litigation pending arbitration was the equivalent of an order refusing to compel arbitration and was therefore appealable under MUAA § 18); *Old Rochester Regional Teacher's Club v. Old Rochester Regional School District*, 18 Mass. App. Ct. 117, 463 N.E.2d 581 (1984) (rejecting appeal of order denying preliminary injunction against claimant's proceeding with arbitration), *rev. denied*, 392 Mass. 1103, 465 N.E.2d 262 (1984); *George A. Fuller Co. v. Nelson J. Sanford & Sons, Inc.*, 5 Mass. App. Ct. 802, 360 N.E.2d 1281 (1977) (holding that denial of a stay of arbitration was an interlocutory order, not final judgment subject to appeal). Compare *School Committee of Agawam v. Agawam Education Association*,

to give no opportunity for immediate appellate review of a judicial decision refusing to stay an arbitration, the FAA has been interpreted to permit such review when the party seeking the stay brings a separate action seeking only one form of relief: to enjoin the arbitration from going forward. Denial of the injunction then becomes a final order, which is immediately appealable, because “there is nothing left to be done in the district court.”<sup>257</sup> A similar result would likely obtain under the MUAA.<sup>258</sup>

(b) Final Orders. Like their counterparts in the trial courts, federal and state appellate courts refrain from reviewing the merits of the issues decided by the arbitrator. The scope of their review is limited to whether the trial court decision was based on an error of law or a clearly erroneous finding of fact.<sup>259</sup> The federal courts of appeals are split on the question of whether “a clearly erroneous” standard applies if the district court did not conduct an evidentiary hearing and therefore the appellate court is reviewing the same paper record that the district court reviewed.<sup>260</sup>

## § 10.16 Collateral Estoppel and Res Judicata

---

371 Mass. 845, 359 N.E.2d 956 (1977) (holding that order denying an application to stay an arbitration is not an appealable final judgment), with *Hanslin Builders, Inc. v. Britt Development Corp.*, 15 Mass. App. Ct. 319, 321, 445 N.E.2d 188, 190 (1983) (stating that denial of an order to compel arbitration was immediately appealable) (dicta), rev. denied, 388 Mass. 1105, 448 N.E.2d 766 (1983).

<sup>257</sup> *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 471 n.3 (1st Cir. 1989) (citation omitted).

<sup>258</sup> See MASS. GEN. L. ch. 251, § 18(6) (1992).

<sup>259</sup> FED. R. CIV. P. 52(a); MASS. R. CIV. P. 52(a); see Kurt J. Wolff, Appeals From District Court Determinations Involving Arbitration, in COMMERCIAL ARBITRATION FOR THE 1990s 105 (Richard J. Medalie, ed. 1991); see, e.g., *Taunton Municipal Light Plant Commission v. Paul L. Geiringer & Associates*, 560 F. Supp. 1249 (D. Mass. 1983), aff'd, 725 F.2d 664 (1st Cir. 1983).

<sup>260</sup> See Kurt J. Wolff, Appeals From District Court Determinations Involving Arbitration, in COMMERCIAL ARBITRATION FOR THE 1990s 105, 113 (Richard J. Medalie, ed. 1991).

Collateral estoppel and res judicata are related doctrines which concern the effect of prior judicial or arbitral proceedings on subsequent proceedings.<sup>261</sup>

Under the doctrine of collateral estoppel (often referred to as “issue preclusion”), a party who has litigated or arbitrated a legal or factual issue necessary to the decision of a claim can be precluded from relitigating that issue. For example, assume a disappointed client arbitrates a fee dispute against her attorney and is ordered to pay the attorney’s fees; her subsequent malpractice suit against the attorney, in which she alleges that the lawyer was negligent, may be dismissed on the ground that the issue of the lawyer’s negligence was already litigated in the fee dispute.<sup>262</sup>

The doctrine of res judicata (or “claim preclusion”) bars the litigation of a claim that either was already decided in a prior proceeding or could have been litigated in the prior proceeding.<sup>263</sup> For example, assume that an employee arbitrates an unjust dismissal claim against his employer and then later files a lawsuit alleging handicap discrimination. The later claim will not be barred if it could not have been brought in the arbitration.<sup>264</sup> If the claim “could have” been submitted to arbitration but was not, the claim is preserved from a res judicata bar, because the arbitration tribunal lacks the authority to decide (or bar) the claim.<sup>265</sup> On the other hand, if the arbitrator had the authority to decide the discrimination claim and made no finding of discrimination, that claim may not be relitigated in the subsequent suit.

---

<sup>261</sup> For an excellent discussion of these two doctrines, see generally, G. Richard Shell, Res Judicata and Collateral Estoppel Effects of Commercial Arbitration, 35 UCLA L. REV. 623 (1988).

<sup>262</sup> See *Altamore v. Friedman*, 602 N.Y.S.2d 894 (Sup. Ct. App. Div. 1993) (dismissing legal malpractice suit due to prior fee arbitration).

<sup>263</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 84 (“a valid and final award by arbitration has the same effects under the rules of res judicata . . . as a judgment of a court”).

<sup>264</sup> See *Carr v. Transgas, Inc.*, 35 Mass. App. Ct. 581, 623 N.E.2d 505 (1993); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974) (“[I]n general, submission of a [racial discrimination] claim to one forum does not preclude a later submission to another.”).

<sup>265</sup> See *Wolf v. Gruntal & Co.*, 45 F.3d 524 (1st Cir. 1995).

In Massachusetts the principle of res judicata applies to arbitral awards. An arbitral award will bar a subsequent lawsuit on the same claim.<sup>266</sup> In *Reeves v. Tarvizian*,<sup>267</sup> the trial court stayed a discharged employee's suit against his employer pending arbitration. The arbitrators ruled that the employee had been terminated for cause, and the trial court then dismissed the suit, over the plaintiff's objection. On appeal, the First Circuit ruled that the employee could not relitigate the arbitrated claim.<sup>268</sup>

Similar principles apply with respect to issue preclusion. As the Supreme Judicial Court stated in *Miles v. Aetna Casualty & Surety Co.*,<sup>269</sup>

When an arbitration affords opportunity for presentation of evidence and argument substantially similar in form and scope to judicial proceedings, the award should have the same effect on issues necessarily determined as a judgment has.

In *Miles*, the plaintiff was injured in an automobile accident and arbitrated her claim for underinsurance benefits against two insurance companies. The arbitrator determined that she was entitled to \$65,000, and after making deductions for payments she had already received from other sources, she was paid fully on her claim. A year later she filed another arbitration demand against another insurer. The trial court refused to compel arbitration, and the Supreme Judicial Court affirmed on the ground that the amount of her damages had already been

---

<sup>266</sup> See *Reeves v. Tarvizian*, 351 F.2d 889, 891 (1st Cir. 1965) ("Massachusetts law is clear that a decision by arbitrators to which a party has submitted is res judicata of what has been decided, and may be enforced by court order."); see, e.g., *Miles v. Aetna Casualty & Surety Co.*, 412 Mass. 424, 426-30, 589 N.E.2d 314, 316-18 (1992) (affirming summary judgment for defendant on the ground that a prior arbitration barred the plaintiff's claim).

<sup>267</sup> *Reeves v. Tarvizian*, 351 F.2d 889 (1st Cir. 1965).

<sup>268</sup> *Reeves v. Tarvizian*, 351 F.2d 889, 891 (1st Cir. 1965).

<sup>269</sup> *Miles v. Aetna Casualty & Surety Co.*, 412 Mass. 424, 427, 589 N.E.2d 314, 317 (1992) (citation omitted).

determined and could not be relitigated, even in the face of allegations of newly discovered medical problems.<sup>270</sup>

Commentators have noted that the doctrine of collateral estoppel is more difficult to apply to arbitral awards than to judicial decisions, because in most arbitrations there is no transcript of the proceedings and arbitrators' awards often do not disclose what was actually decided.<sup>271</sup> In some cases, it may be obvious -- e.g., in a case where the sole issue is a construction defect, a monetary award in favor of the owner will be viewed as preclusive on the issue of whether the structure was defective. In planning for an arbitration, if either party anticipates the need to invoke collateral estoppel with respect to any part of the arbitral decision, a reasoned award with specific findings of fact and conclusions of law should be requested.<sup>272</sup>

### **§ 10.17 Arbitral Immunity**

Arbitrators enjoy the same immunity from civil liability as judges. The Massachusetts Supreme Judicial Court held more than a hundred years ago, in *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, that:

An arbitrator is a quasi judicial officer, under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of

---

<sup>270</sup> *Miles v. Aetna Casualty & Surety Co.*, 412 Mass. 424, 428-29, 589 N.E.2d 314, 318 (1992) ("We see no reason to depart from the general rule that a plaintiff 'is entitled to one recovery in a personal injury action for all past and reasonably expected future losses and injuries.'") (citations omitted).

<sup>271</sup> See G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 651 (1988).

<sup>272</sup> See discussion in § 10.13. In the absence of an agreement by the parties or a provision in the applicable rules, the arbitrator is not obligated to provide a reasoned award.

a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity extends to him.<sup>273</sup>

This immunity extends to the organizations that administer arbitrations. The AAA and CPR include in their rules exculpatory provisions,<sup>274</sup> but it appears that such organizations would enjoy the same immunity as their arbitrators even without such provisions. As the court noted in *Corey v. New York Stock Exchange*,<sup>275</sup> immunity for the organizations sponsoring the arbitration “is a natural and necessary product of the policies underlying arbitral immunity . . . . It would be of little value to the whole arbitral process to merely shift the liability to the sponsoring association.”<sup>276</sup>

Arbitral immunity includes immunity from testifying about the reasons for the award or any other aspect of the arbitration. In one of the leading cases, *Gramling v. Food Machinery & Chemical Corp.*,<sup>277</sup> the court explained the rationale for the rule as follows:

It would be most unfair to the arbitrators to order them to come into court to be subjected to grueling examinations by the attorneys for the disappointed party and to afford the disappointed party a “fishing expedition” in an attempt to set aside the award.<sup>278</sup>

---

<sup>273</sup> *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 426 (1884).

<sup>274</sup> See AAA, COMMERCIAL ARBITRATION RULES, Rule 47(d) (1993) (“Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.”); CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 18 (1993) (“Neither CPR nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules.”)

<sup>275</sup> *Corey v. New York Stock Exchange*, 691 F.2d 1205 (6th Cir. 1982).

<sup>276</sup> *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1211 (6th Cir. 1982).

<sup>277</sup> *Gramling v. Food Machinery & Chemical Corp.*, 151 F. Supp. 853 (W.D.S.C. 1957).

<sup>278</sup> *Gramling v. Food Machinery & Chemical Corp.*, 151 F. Supp. 853, 861 (W.D.S.C. 1957). See also *Arco Alaska, Inc. v. Superior Court*, 214 Cal. Rptr. 51, 58 (Cal. App. 1985) (“The deliberations of the arbitrators are sacrosanct. Absent an agreement to do so, the parties to an arbitration may not join in the deliberations of the arbitrators as they sit around the arbitration table or through discovery of documents reflecting those deliberations.”).

The one exception to the rule of arbitral immunity from testifying arises when there has been a colorable claim of arbitrator misconduct. It is not enough to allege that the arbitrators' decision exceeded the scope of their powers or that they imperfectly exercised their authority. Instead, there must "an objective basis . . . for a reasonable belief that misconduct has occurred."<sup>279</sup> In *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, the arbitrators had inspected the premises that were the subject of the dispute without consent of the parties and had relied on the inspection in making their award. The court held that, under those circumstances, the arbitrators' testimony would be admissible, but only on the narrow issue of the alleged misconduct: "we do not by this ruling authorize inquisition into the mental process of the arbitrators."<sup>280</sup>

For attorneys serving as arbitrators as part of their professional activities, attorney malpractice insurance coverage will generally cover claims arising from an arbitration. It is necessary, of course, to refer to the specific language of the attorney's policy. For non-lawyers, liability insurance is generally available for activities as an arbitrator or mediator.

### **§ 10.18 Conducting the Arbitration as Counsel - Practice and Procedure<sup>281</sup>**

In most commercial arbitrations in the United States, the parties are represented by counsel. In the 1920s lawyers were involved in approximately one-third of the cases administered by the American Arbitration Association, but today attorneys are involved in more than 90% of AAA arbitrations.<sup>282</sup> Of course in cases where the amount in controversy is

---

<sup>279</sup> *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 230 S.E.2d 380, 388 (N.C. 1976).

<sup>280</sup> *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 230 S.E.2d 380, 387 (N.C. 1976). See also *Kauffman v. Haas*, 318 N.W.2d 572, 574 (Mich. App. 1982) (holding that limited discovery of arbitrator would be allowed where partiality of the arbitrator had been shown).

<sup>281</sup> The following sections focus on the role of counsel in an arbitration. For information about serving as an arbitrator, see American Arbitration Association, Guide for Commercial Mediators (1993).

<sup>282</sup> See JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 111 (1983).

relatively small (such as Lemon Law arbitrations and cases arbitrated by the Better Business Bureau), it may not be cost-effective for the parties to retain counsel. Where the stakes are substantial, however, representation by counsel is generally advisable, especially where an attorney will be representing the opposing party.

Under the Massachusetts Uniform Arbitration Act, the parties have a right to be represented by counsel.<sup>283</sup> The Federal Arbitration Act contains no similar provision, but the AAA and CPR Rules permit the parties to be represented by counsel or non-lawyers.<sup>284</sup> Therefore, the right to representation in arbitrations under the FAA would be governed by the provisions of those rules if they were specified in the parties' agreement.

If one or more of the parties participate in an arbitration without legal representation, the arbitrators should inform the parties of their right to retain counsel, and a record should be made that the parties have been so advised. In *Marino v. Tagaris*,<sup>285</sup> enforcement of an award in an attorney fee arbitration was refused because the respondent had been told by a staff member at the Fee Arbitration Board that she would not need an attorney due to the informality of the proceeding. On the other hand, the Appeals Court enforced an arbitration award in *Bay State York Co. v. Canter Construction Co.*,<sup>286</sup> where the respondent was not represented by counsel, because the respondent had delayed the arbitration proceedings on numerous occasions and then discharged its counsel shortly before the date set for the arbitration. Thus, the right to counsel can be lost if the parties do not promptly retain counsel who are prepared to go forward with the arbitration.

---

<sup>283</sup> MASS. GEN. L. ch. 251, § 6 (1992).

<sup>284</sup> See AAA, COMMERCIAL ARBITRATION RULES, Rule 22 (1993); CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 4 (1993).

<sup>285</sup> *Marino v. Tagaris*, 395 Mass. 397, 399, 401, 480 N.E.2d 286, 288, 289 (1985).

The following sections §§ § 10.19 - § 10.27 address the role of counsel in preparing for and conducting an arbitration.

### **§ 10.19 Advising a Client about Arbitration**

The opportunity to advise clients about arbitration ordinarily arises in one of two settings. First, if a dispute has arisen and litigation is either contemplated or has already been commenced, submission of the dispute to arbitration by the parties should be considered. Unless the parties to the dispute have a contract of some kind with an arbitration provision, such a submission can be accomplished only by agreement. It is worth noting, however, that in a multiparty dispute, two or more parties can agree to submit the issue of their respective rights and obligations to arbitration without the consent of the remaining parties. For example, co-defendants in a civil action could submit to arbitration the question of their respective contribution to any judgment obtained by the plaintiff, and this could be done regardless of whether the plaintiff wished to participate in the arbitration.

Second, parties entering into an agreement or designing a dispute resolution system should consider whether arbitration -- either standing alone or in combination with other dispute resolution methods -- will be required.<sup>287</sup>

In deciding whether to use arbitration, the client needs to understand that the decision to use arbitration involves a trade-off of certain advantages (such as privacy, control over selection of the decisionmaker, procedural flexibility, greater finality, and in most cases less time and expense) for certain disadvantages (such as reduced availability of appeal, lack of precedential

---

<sup>286</sup> Bay State York Co. v. Canter Construction Co., 5 Mass. App. Ct. 192, 193, 360 N.E.2d 900, 901 (1977).

<sup>287</sup> The considerations relevant to this decision are discussed in Chapter 4 (concerning the advisability of using ADR), and drafting issues are discussed in Chapter 6 (concerning ADR clauses).

value, and limited discovery). Not every case is a good candidate for arbitration, but the attorney has a duty to make sure that the client is well informed in making that decision.

One of the major concerns that clients express about arbitration is the fear that the arbitrator will simply “split the baby.” Most clients are convinced of the merit of their cause, and therefore the prospect of a “compromise” decision is unappealing. The American Arbitration Association has compiled statistics concerning arbitral awards in AAA arbitrations for many years, and those statistics dispel the notion that arbitrators typically decide either claims or counterclaims on a compromise basis. For example, the AAA’s survey of 1992 cases showed that only 11% of the awards fell in the range of 40-59% of the amount sought by the claimant - i.e., in 89% of the cases, the claimant received either less than 40% or more than 59% of the amount sought. The following table shows the distribution of awards for claims and counterclaims in AAA commercial arbitrations for 1992:<sup>288</sup>

<b>Percent of Claims Awarded</b>	<b>Number of Cases</b>	<b>Percent</b>
80-100%	1,088	26
60- 79%	434	10
40- 59%	452	11
20- 39%	507	12
1- 19%	448	10
Claim denied	1,294	31

  

<b>Percent of Counterclaims Awarded</b>	<b>Number of Cases</b>	<b>Percent</b>
80-100%	55	5

---

<sup>288</sup> The following data were obtained from the American Arbitration Association's national department of case administration.

60- 79%	45	4
40- 59%	62	6
20- 39%	81	7
1- 19%	96	9
Claim denied	763	69

Another concern about arbitration is that the client would fare better in court. For example, a personal injury claimant may fear that an arbitrator would be less generous than a jury in awarding damages. There is, of course, no way to be certain whether a judge, jury, or arbitrator would be the best decisionmaker in any given case. Where the parties have such a choice, they should consider (1) the demographics of the jury pool in the jurisdiction where the case would be tried, (2) the judges available for assignment to the case (and the likelihood of change in that lineup); and (3) the available arbitrators and the method of selection that would be used.

Empirical studies of jurors and arbitrators suggest that the outcomes that can be expected in an arbitration are not significantly different from those that can be expected from a jury trial. In one study involving Michigan medical malpractice cases, 247 arbitrated cases were compared with cases that had been tried in court.<sup>289</sup> The study found that plaintiffs prevailed in 22% of the arbitrated cases, as compared to 18% in the litigated cases.<sup>290</sup> Another study used a simulated case, so that the decisions of arbitrators and jurors with respect to the same set of facts could be compared.<sup>291</sup> Each group was given the same written material, describing the injury suffered by the plaintiff (a severe burn on her knee caused by an operating room accident) and asked to determine the compensation that should be awarded for pain and suffering. The jurors' median

---

<sup>289</sup> Thomas B. Metzloff, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429, 439 n.40 (1992).

<sup>290</sup> Thomas B. Metzloff, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429, 439 n.43 (1992).

award was \$47,850, compared with a median award of \$57,000 for the arbitrators, although the researchers reported that the \$10,000 difference was not statistically significant. One of the interesting differences was that the jurors' awards ranged from \$4,000 to \$198,000, while the arbitrators' range was \$15,000 to \$75,000.<sup>292</sup> Data have also been analyzed recently by the General Accounting Office on the extent to which arbitrators award punitive damages in securities cases, when such damages are available. The data indicate that arbitrators rarely award punitive damages and, when they do, the amounts awarded are relatively modest.<sup>293</sup>

Timing. Although there are some advantages to initiating arbitration before incurring the expense of extensive pretrial discovery, in some cases the decision to arbitrate may come late in the process. For example, having completed discovery and motions for summary judgment, the parties may decide that they would prefer an expert decisionmaker instead of a lay judge or jury. Or, the parties may opt for arbitration because it will enable them to control the scheduling of the case. In short, the decision can be made at various points along the way toward a trial, depending on the circumstances of the parties.

## **§ 10.20 Initiation of Arbitration - Submission Agreements, Demands, Answers, Counterclaims, and Amendments**

---

<sup>291</sup> Neil Vidmar, The Unfair Criticism of Medical Malpractice Juries, 76 JUDICATURE 118, 123 (1992).

<sup>292</sup> Neil Vidmar, The Unfair Criticism of Medical Malpractice Juries, 76 JUDICATURE 118, 123 (1992). Another study -- again using written materials -- tested the hypothesis that jurors would award more damages if they believed that the defendant had "deep pockets." Id. at 124. Jurors were asked to award damages to a teenager who suffered a severe injury resulting in considerable pain and suffering; one set of jurors was told that the injury was caused by the negligence of a doctor and hospital, while the others were told that the injury was caused by the negligence of an automobile driver. Once again the results were surprising: "[t]he average award rendered against doctors and hospitals was not different from that rendered against automobile drivers." Id.

<sup>293</sup> Government Accounting Office, Securities Arbitration: How Investors Fare 45 (No. GAO/GGD-92-94, May 1992). The GAO study reports that securities industry arbitrators were asked to award punitive damages in 28% of the cases they decided and did so in only 12% of those cases, with a punitive damages award amounting to a median of 11% of the amount of compensatory damages sought by the claimant. In AAA securities arbitrations, the results were similar.

Arbitration can be initiated by demand, when the parties have a pre-existing agreement to arbitrate (or are otherwise bound, such as by the terms of a personnel manual or industry rules), or by a submission agreement.<sup>294</sup> Initiation by demand is the most common method. For example, in 85% of the American Arbitration Association's cases, the parties have a contract with an arbitration provision specifying the AAA Rules and/or the AAA as the administering organization, and only 15% of its arbitration cases arise from submission agreements.<sup>295</sup> The reason for this disparity may be that once a dispute has arisen, the parties find it difficult to reach agreement on a dispute resolution mechanism.

(a) Initiation by Submission Agreement. If an arbitration is initiated by submission agreement, the agreement defines the scope of the matter submitted for decision, including both claims and counterclaims, if any. Submission agreements often specify a set of rules to be used; the names of the arbitrators, unless they are to be selected or proposed by the administering organization; the date and time of the hearing; and the location of the hearing.<sup>296</sup> The agreement should be signed by the parties themselves, not their attorneys.<sup>297</sup>

(b) Initiation by Demand. When the parties are bound by an arbitration clause, arbitration can be initiated by serving a demand on the opposing party and, if the arbitration is administered by the AAA or another organization, filing copies of the demand with that

---

<sup>294</sup> In jurisdictions which use court-annexed arbitration, see § 10.3, arbitration can be initiated by reference from the court.

<sup>295</sup> These figures were provided by the American Arbitration Association (letter from Christine Newhall to David A. Hoffman, February 8, 1994). See also Stephen A. Hochman, We Need a Lawyers' Arbitration Forum for Commercial Arbitration, in CRITICAL ISSUES IN ARBITRATION (American Bar Association, 1993).

<sup>296</sup> Chapter 6 contains a sample submission agreement and model clauses.

<sup>297</sup> See Anthony De Toro & Bette J. Roth, Commencing Arbitration, in THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE Chapter § 8.3 (Bette J. Roth et al., eds. 1993).

organization, along with the appropriate administrative fee.<sup>298</sup> Unless the administering organization requires the use of a particular form, any written notice of the demand, including an ordinary letter, will suffice.<sup>299</sup> Absent agreement to the contrary, service of the demand may be made by the same means by which a Complaint in a lawsuit would be served; under the AAA Rules, service by mail is acceptable.<sup>300</sup> The claimant should arrange for service, in any event, in such a manner that receipt of the demand can be shown. The demand should include the names of the parties, a copy of the contract provision which commits the parties to arbitration, a description of the claim(s), including the amount of money involved, and the relief sought.<sup>301</sup> The description of the claim is important because the scope of the arbitration is determined by the demand and the underlying agreement -- i.e., the arbitrable matters are those set forth in the demand, which in turn is limited by the terms of the parties' original contract.

The demand should also specify the location of the hearing. Under the AAA Rules, the arbitration is conducted at the location specified in the demand, unless the respondent objects within 10 days. If an objection is filed or the location is not specified, the AAA chooses the location.<sup>302</sup>

---

<sup>298</sup> If the parties' agreement calls for arbitration pursuant to the rules of the AAA or another organization, the parties must adhere to the filing requirements of that organization. For example, the AAA requires that three copies of the demand and arbitration provision be filed with the AAA, along with an administrative fee. See AAA, COMMERCIAL ARBITRATION RULES, Rule 6(b) (1993).

<sup>299</sup> See GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION, REVISED EDITION, ¶ 6:06 (1991) (Practice Guide); ROBERT M. RODMAN, COMMERCIAL ARBITRATION WITH FORMS §§ 8.5, 8.7 (1984).

<sup>300</sup> See, e.g., AAA, COMMERCIAL ARBITRATION RULES, Rule 40 (parties specifying AAA Rules "shall be deemed to have consented" to service by mail); see Mulcahy v. Whitehill, 48 F. Supp. 917 (D. Mass. 1943); GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION, REVISED EDITION, § 14:02 (1991); ROBERT M. RODMAN, COMMERCIAL ARBITRATION WITH FORMS § 8.16 (1984).

<sup>301</sup> See AAA, COMMERCIAL ARBITRATION RULES, Rule 6 (1993); James P. Kleinberg, Initiating Arbitration, in COMMERCIAL ARBITRATION FOR THE 1990s 17, 19 (Richard J. Medalie, ed. 1991).

<sup>302</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 11 (1993).

Arbitration demands typically contain only a bare-bones description of the dispute. Some practitioners recommend a more detailed statement, including a chronological presentation of events leading up to the dispute and copies of key documents.<sup>303</sup> Since arbitrators often review the demand and answer before commencing the arbitration hearing, those documents provide the parties with an opportunity to inform and, to some extent, persuade the arbitrator. Overstating one's case, however, can be dangerous from the standpoint of maintaining credibility with the arbitrator. Anything that counsel is not confident will be shown at the hearing should be omitted from the demand and answer.

The demand must be filed within the time specified in the parties' contract. If no time is specified, the demand must be filed before the running of the statute of limitations on the claim(s) asserted.<sup>304</sup> Of course, the parties can modify the time for filing a claim -- making the period either longer or shorter than the statute of limitations.<sup>305</sup> The time for measuring the statute of limitations is the date on which the demand is filed, not the date when confirmation of the award is sought.<sup>306</sup>

(c) Answer. Neither the Federal Arbitration Act (FAA) nor the Massachusetts Uniform Arbitration Act (MUAA) require the filing of an answer. Answers are required, however, under

---

<sup>303</sup> See Anthony De Toro & Bette J. Roth, Commencing Arbitration, in THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE, Chapter 8, § 8.7 (Bette J. Roth et al., eds. 1993).

<sup>304</sup> The question of whether the claim is time-barred or not is generally considered to be an issue for the arbitrator, not the court, to decide if the claim is properly before the arbitrator, because deciding that issue often involves a review of the merits of the claim. See *Painewebber v. Landay*, \_\_\_ F. Supp. \_\_\_ (D. Mass 1995) (deferring statute of limitations question to arbitrator where claimants contended the statute should be tolled because of the respondent's alleged fraudulent concealment). But see *Smith, Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193 (1995) (holding that statute of limitations issue should be decided by the court).

<sup>305</sup> Cf. *Pioneer Acceptance Corp. v. Irving Coven Construction, Inc.*, 4 Mass. App. Ct. 433, 350 N.E.2d 466 (1976) (holding that demand for arbitration was untimely where contract required that the demand be served no later than date when final payment was due, and claimant served demand almost six years after that date).

<sup>306</sup> See *City of Worcester v. Park Construction Co.*, 361 Mass. 879, 281 N.E.2d 600 (1972) (rescript) (statute of limitations is not a bar to confirmation of the arbitration award if the demand for arbitration was made within period allowed by the statute).

the rules of certain administering organizations. For example, the Rules of the Securities Industry Conference on Arbitration (SICA), which are used in arbitrations for the New York Stock Exchange (NYSE) and National Association of Securities Dealers (NASD), provide that an answer must be filed within twenty days. The answer must be specific as to the facts and defenses on which the respondent relies. The failure to supply such an answer, or the filing of a general denial without facts and specific defenses, may lead to the respondent's being "barred from presenting such facts or defenses at the time of the hearing."<sup>307</sup>

The AAA Commercial Arbitration Rules, however, contain no such requirement. The respondent may file a general denial or no answer at all. Under AAA Rule 6, the failure to file an answer "will be treated as a denial of the claim." Since most forms of discovery are not available in arbitration, there may be a strategic advantage in some cases to withholding a detailed statement of defenses, particularly where the defenses may be unknown to the claimant. On the other hand, because of the potential collateral estoppel effects of an arbitral award, the respondent should consider specifying the defenses she will assert in the arbitration.<sup>308</sup> Once the arbitration is concluded, the demand, answer, and award may be the only documentary record of the issues that were actually litigated in the arbitration. Also, some practitioners consider it desirable to provide a detailed answer, especially where the demand includes a detailed account of the claim, because it provides an opportunity to persuade the arbitrator.<sup>309</sup>

(d) Counterclaims. Neither the FAA nor the MUAA contain a rule that requires the assertion of certain compulsory counterclaims. AAA Rule 6 provides that a respondent may file a counterclaim with her answer, along with the appropriate filing fee for counterclaims.

---

<sup>307</sup> NYSE Rule 612(c); NASD Code 25(c).

<sup>308</sup> See § 10.16 for a discussion of collateral estoppel.

Nevertheless, because of the res judicata effects of an arbitral award, the failure to file a counterclaim could result in the respondent's being barred from ever asserting a claim which could have been litigated in the original arbitration.<sup>310</sup> Some commentators have noted that the filing of a counterclaim "has the advantage of shifting some focus from respondent's alleged misconduct to that of the claimant."<sup>311</sup> If there is a good faith basis for the counterclaim, it will of course serve to offset the claimant's award or may wipe it out altogether. Where there is no sound basis for a counterclaim, however, the assertion of one may undermine the credibility of the respondent or respondent's counsel.

(e) Amendments. There is no provision in the FAA or the MUAA governing amendments of the demand and answer. Under both the AAA Rules and those of the Center for Public Resources (CPR), the demand and answer may be freely amended (including the assertion of new claims and counterclaims) until the arbitrator is appointed and then only with the arbitrator's permission.<sup>312</sup> Arbitrators are in most cases willing to permit the parties to amend their pleadings, absent a showing that a last-minute amendment would unduly delay the proceedings.<sup>313</sup>

## **§ 10.21 Challenges to Arbitrability**

---

<sup>309</sup> See CRAIG A. PETERSON & CLAIRE MCCARTHY, ARBITRATION STRATEGY AND TECHNIQUE § 2-3(A) (1986).

<sup>310</sup> See § 10.16 for a discussion of res judicata.

<sup>311</sup> CRAIG A. PETERSON & CLAIRE MCCARTHY, ARBITRATION STRATEGY AND TECHNIQUE § 2-3(A) (1986).

<sup>312</sup> CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 3.8 (1993); AAA, COMMERCIAL ARBITRATION RULES, Rule 8 (1993).

<sup>313</sup> See CRAIG A. PETERSON & CLAIRE MCCARTHY, ARBITRATION STRATEGY AND TECHNIQUE § 2-3(B) (1986).

When presented with a demand for arbitration by an opposing party, the respondent has a number of options: (a) ignore the demand; (b) file an answer, with or without defenses; or (c) file a civil action to enjoin the arbitration.

(a) Ignore the Demand. As noted in the previous section, the failure to file an answer will, in some cases, be deemed a general denial of the claim. If the respondent does not appear at the hearing, a default award will be entered if the claimant makes a showing that she is entitled to relief.<sup>314</sup> The respondent may then challenge the enforcement of the award on the ground that there was no agreement to arbitrate or that the matter arbitrated was outside the boundaries of any such agreement.

(b) File an Answer. An alternative course is to raise all of the available challenges to arbitrability in the arbitration itself. In most instances, the arbitrator has the authority to decide such issues in the first instance, and courts are often as reluctant to disturb the arbitrators' decisions on those matters as they are to consider the merits of the controversy.

One practitioner suggests the following checklist of defenses that should be considered:<sup>315</sup>

- No valid contract or submission for arbitration exists
- Other party has failed to comply with conditions precedent to arbitration
- No issue referable to arbitration exists (i.e., dispute lies outside the scope of the arbitration agreement)
- Fraud in the inducement of the arbitration provision
- Waiver

---

<sup>314</sup> Default awards are discussed in § 10.13.

<sup>315</sup> George Friedman, Checklist for Commercial Arbitration, 37 ARB. J. 10 (September 1982); see also ROBERT COULSON, BUSINESS ARBITRATION: WHAT YOU NEED TO KNOW 154 (rev. 3d ed. 1987).

- By filing judicial action
- By answering or counterclaiming to judicial action
- By other conduct inconsistent with arbitration
- Illegal contract
- Contract impossible of performance
- Existence of subsequent written contract superseding, or releasing parties from requirements of, arbitration contract
- Nonarbitrable issue (e.g., statute barring arbitration of claim)

One should also consider whether the statute of limitations for the claim, or the notice period provided for in the underlying contract, expired before the demand for arbitration was filed. In addition, where the arbitration clause appears in a warranty or non-negotiable contract of adhesion, the defenses of unconscionability and non-waiver of the right to trial are potentially available.<sup>316</sup>

The primary disadvantage of raising these issues with the arbitrators is that any participation in the arbitration, even under protest, may be viewed as a waiver of the objection. As one of the leading commentators on commercial arbitration has noted, “Any challenge which a party may have against the enforcement of the arbitration agreement will be waived when he participates in the selection of arbitrators, and even more when he appears before the arbitrators.”<sup>317</sup>

---

<sup>316</sup> See § 10.3 for a discussion of mandated arbitration.

<sup>317</sup> GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION*, REVISED EDITION, § 19:01 (1991); see also ROBERT COULSON, *BUSINESS ARBITRATION: WHAT YOU NEED TO KNOW* 154 (rev. 3d ed. 1987) (“Party seeking to raise issues opposing arbitration should avoid any participation in the arbitration proceedings.”).

(c) File for Injunction. A third alternative -- one that avoids the problem of waiver -- is to challenge the arbitrability of the dispute in court. Under the Federal Arbitration Act (FAA) and Massachusetts Uniform Arbitration Act (MUAA), a party seeking to stay an arbitration may file a petition and receive an expeditious hearing of the matter.<sup>318</sup>

The primary disadvantage of this alternative is the delay and cost of filing an action in court. Although the parties are entitled to a speedy resolution of the matter in the trial court under both the FAA and MUAA, if the petition to enjoin the arbitration is successful (or unsuccessful), the decision may be appealed.

If judicial involvement is sought, the party seeking to enjoin the arbitration should ask the court to stay the arbitration pending the outcome of the court's decision. In a case administered by the AAA, if the opposing party will not agree to a stay, the-AAA will ordinarily continue with the arbitration unless and until a court issues a stay.<sup>319</sup>

## **§ 10.22 Security and Escrow Arrangements**

In cases where one of the parties is concerned about performance of the award, that party will often demand the posting of some form of escrow or security.<sup>320</sup> Although there are no provisions in the FAA or MUAA concerning security and escrow arrangements, such a provision in a submission agreement is fully consistent with the purposes of those statutes.

If the parties do not reach agreement concerning such arrangements, the party requesting security may proceed with the arbitration and ask the arbitrators to provide interim relief in the form of an escrow, bond or other security, as permitted under AAA Rule 34 and CPR Rule §

---

<sup>318</sup> Under 9 U.S.C. § 4 (1988), the party seeking to enjoin the arbitration may demand a jury trial, and the court "shall proceed summarily to the trial thereof." Under MASS. GEN. L. ch. 251, § 2(b) (1992), there is no right to jury trial, but the matter "shall be forthwith and summarily determined."

<sup>319</sup> See Mary A. Bedikian, The Arbitration System, in DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK § 3.21 (John Wilkinson, ed. 1992).

10.1.<sup>321</sup> Alternatively, such security could be requested from a court in the form of a preliminary injunction. Under both the AAA and CPR Rules, such a request in a judicial forum would not constitute a waiver of the right to arbitrate.<sup>322</sup>

In some cases there is already security in place in the form of a surety bond given by one of the parties to a contract.<sup>323</sup> For example, in *Powers Regulator Co. v. United States Fidelity & Guaranty Co.*,<sup>324</sup> a supplier succeeded in obtaining payment of an award from the respondent's insurer, which had issued a payment bond. An award against the respondent is generally viewed as prima facie evidence of the surety's liability to the successful claimant in the arbitration.<sup>325</sup>

### **§ 10.23 Selection of Arbitrators - Methods of Selection, Disclosures, Ex Parte Contacts**

Selecting the arbitrator is the probably the most important decision in an arbitration. As one leading commentator has said:

The arbitrator is the decisive element in any arbitration. His ability, expertness, and fairness are at the base of the arbitration process. . . . It is for these reasons that the utmost care should be given to his appointment.<sup>326</sup>

Or, as another commentator put it, "the selection is crucial because the [arbitrator's] decision is likely to be largely immune from traditional judicial scrutiny."<sup>327</sup>

---

<sup>320</sup> A suggested clause for such an arrangement is in section 6.11.

<sup>321</sup> See discussion of those rules in section 10.10, above.

<sup>322</sup> See AAA, COMMERCIAL ARBITRATION RULES, Rule 47(a) (1993); CPR, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 10.2 (1993).

<sup>323</sup> See ROBERT M. RODMAN, COMMERCIAL ARBITRATION WITH FORMS § 21.27 at 484 (1984) ("such bonds are often used in order to avoid the necessity for an action on the award [and] are construed according to the rules applicable to bonds generally").

<sup>324</sup> *Powers Regulator Co. v. United States Fidelity & Guaranty Co.*, 7 Mass. App. Ct. 913, 388 N.E.2d 1205 (1979).

<sup>325</sup> ROBERT M. RODMAN, COMMERCIAL ARBITRATION WITH FORMS § 21.27 at 487 (1984).

<sup>326</sup> GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION, REVISED EDITION, § 20:00 at 301 (1991).

(a) Methods of Selection. The most common methods of arbitrator selection are (a) selection from a panel nominated by the AAA or another administering organization, and (b) the use of party-appointed arbitrators who then appoint a neutral arbitrator who serves as chair of the three-member arbitration panel.<sup>328</sup> If the selection method set forth in the parties' agreement fails, both the Federal Arbitration Act (FAA) and Massachusetts Uniform Arbitration Act (MUAA) permit court-appointment of an arbitrator.<sup>329</sup>

Making an informed decision about an arbitrator requires either personal knowledge of the people available for appointment or a review of their resumes. Most arbitrations do not result in a published opinion, and therefore it is usually impossible to evaluate an arbitrator's work product. It is possible, however, to request a list of references, including counsel who have appeared before the arbitrator and who may be in the best position to comment on the arbitrator's ability.

In selecting a party-appointed arbitrator, one of the considerations should be the extent to which the individual knows the legal and arbitration communities and therefore can make an informed choice of the neutral arbitrator. In that setting, the party-appointed arbitrator serves as the surrogate for the party, who relies on the surrogate to pick the best possible decisionmaker.

(b) Disclosures. Once selected, an arbitrator must disclose any circumstances that would either require disqualification or suggest a lack of impartiality.<sup>330</sup> In the leading federal case on disclosure by arbitrators, *Commonwealth Coatings Corp. v. Continental Casualty Co.*,

---

<sup>327</sup> CRAIG A. PETERSON & CLAIRE MCCARTHY, *ARBITRATION STRATEGY AND TECHNIQUE* § 3-3(A) (1986).

<sup>328</sup> See, e.g., American Arbitration Association, *Commercial Arbitration Rules*, Rules 13-15 (1993).

<sup>329</sup> 9 U.S.C. § 5 (1988); MASS. GEN. L. ch. 251, § 3 (1992).

<sup>330</sup> Canon II of the American Arbitration Association-American Bar Association Code of Ethics for Arbitrators of Commercial Disputes (1977) provides that "[a]n arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias."

the U.S. Supreme Court held that an award should be vacated because the arbitrator had failed to disclose previous consulting engagements for the respondent.<sup>331</sup> Even repeat service as an arbitrator in cases involving one of the parties in a case should be disclosed, since it may be considered a “business relationship.”<sup>332</sup> The courts have recognized, however, that “the most qualified business arbitrators [are] likely to be ‘prominent and experienced members of the specific business community in which the dispute to be arbitrated arose’”<sup>333</sup> and therefore may have had incidental contacts with the parties or their attorneys. While an arbitrator “cannot be expected to provide the parties with his complete and unexpurgated business biography,” it is the better practice to “err on the side of disclosure.”<sup>334</sup>

Under the American Arbitration Association Rules, once an arbitrator has made a disclosure, the parties must determine whether they wish to proceed with that arbitrator. If any party objects, the AAA decides whether to disqualify the arbitrator, and “its decision . . . shall be conclusive.”<sup>335</sup> The rules also provide that party-appointed arbitrators are not subject to disqualification for lack of impartiality.<sup>336</sup>

---

<sup>331</sup> Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1965) (arbitrator must disclose any information about circumstances likely to affect impartiality).

<sup>332</sup> See *Neaman v. Kaiser Foundation*, 9 Cal App. 4th 1170, modified, reh'g denied, 10 Cal. App. 4th 293a, rev. denied, 1992 Cal. LEXIS 6281 (Dec. 17, 1992) (overturning arbitration award because neutral arbitrator had not disclosed that on at least five occasions the respondent had selected him as the neutral arbitrator).

<sup>333</sup> *Coughlan Construction Co., Inc. v. Town of Rockport*, 23 Mass. App. Ct. 994, 997, 505 N.E.2d 203, 206 (1987) (rescript).

<sup>334</sup> Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 151-52 (1965) (White, J., concurring).

<sup>335</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 19 (1993). CPR has similar authority under its rules. CPR, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 7 (1993).

<sup>336</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 12 (1993).

If, after full disclosure, a party fails to object to an arbitrator, the objection is waived, and any subsequent challenge to the arbitration award on the grounds of partiality will fail if it is based solely on the matter disclosed.<sup>337</sup>

(c) Ex Parte Contacts. In arbitrations, unlike mediations, ex parte contact (i.e., by one side only) with the arbitrator is prohibited. Although neither the FAA nor the MUAA addresses the issue, the rules of the American Arbitration Association and Center for Public Resources explicitly prohibit ex parte communications.<sup>338</sup>

## **§ 10.24 Logistics - Location, Scheduling, Participants, Confidentiality, Stenographic**

### **Record, Form of Award**

As with the selection of arbitrators, the logistical arrangements for an arbitration can be handled by an organization administering the proceedings (such as the American Arbitration Association) or by the parties themselves. Even if the arbitration is administered, however, the parties can agree to vary the procedures and arrangements that would otherwise apply under the rules of the sponsoring organization. Among the more common and important logistical issues that are addressed in the AAA and CPR Rules, and therefore should be considered by the parties, are the following: (a) location, (b) scheduling, (c) participants, (d) confidentiality, (e) stenographic record, and (f) form of award.

(a) Location. The location of the proceeding can be a critical issue in arbitrations where the parties are distant from one another. The cost and inconvenience of appearing in

---

<sup>337</sup> See *Wilson v. Dan McCabe's Creative Carpentry, Inc.*, 11 Mass. App. Ct. 956, 417 N.E.2d 49 (1981); *Coughlan Construction Co., Inc. v. Town of Rockport*, 23 Mass. App. Ct. 994, 505 N.E.2d 203 (1987) (rescript); ROBERT M. RODMAN, *COMMERCIAL ARBITRATION WITH FORMS* § 9.11 (1984).

<sup>338</sup> AAA, *COMMERCIAL ARBITRATION RULES*, Rule 29 (1993); CPR, *RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES*, Rule 9.3 (19\_\_). AAA Rule 29 prohibits ex parte communications "unless the parties and the arbitrator agree otherwise. CPR Rule 9.3 flatly prohibits ex parte contact.

another city or country, with counsel and witnesses, can influence a party's underlying decision as to whether an arbitrable matter should be contested.

The parties can control this risk by deciding on a locale for the arbitration and including it in either a pre-dispute clause or a submission agreement. If the parties do not specify a locale, and are proceeding under the AAA Rules pursuant to a pre-dispute clause, the claimant ordinarily specifies the location for the hearing.<sup>339</sup> Under the AAA Rules, if the respondent does not object within 10 days after the AAA has sent notice of the locale requested by the claimant, the hearing will be held in that location.<sup>340</sup> If the respondent objects to the locale requested by the claimant, the issue is decided by the AAA and its decision "shall be final and binding."<sup>341</sup> Under the CPR Rules, the arbitrators, as opposed to CPR, choose the locale if the parties have not agreed on one.<sup>342</sup> The courts have upheld an administering organization's choice of locale as binding on the parties where they have incorporated the organization's rules into their agreement.<sup>343</sup>

(b) **Scheduling.** In most arbitrations there are two critical scheduling issues -- the date(s) of the hearing and the date the award is issued. While those dates may be determined by rules referenced in the parties' agreement, the parties can vary that schedule by further agreement.

In an administered arbitration, the date and time for the hearing are determined by the arbitrator and the parties, with a case administrator often acting as an intermediary to facilitate

---

<sup>339</sup> See AAA, COMMERCIAL ARBITRATION RULES, Rule 6 (1993).

<sup>340</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 11 (1993).

<sup>341</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 11 (1993).

<sup>342</sup> CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 9.6 (1993).

<sup>343</sup> *Stancioff v. Hertz*, 10 Mass. App. Ct. 843, 486 N.E.2d 1318 (1980).

the process of setting a date.<sup>344</sup> Under the AAA Rules, an arbitrator may grant postponements “for good cause shown” and must grant a postponement when the parties agree to one.<sup>345</sup> Absent such agreement, however, “[t]he granting of a continuance [by the arbitrators] is a matter of discretion” and the arbitrators’ decision granting or denying a continuance will be considered error “only if there is an abuse of discretion.”<sup>346</sup> In practice, the arbitrators’ broad discretion in scheduling matters is usually tempered by their concern about fairness and the opportunity for each party to be heard. Under both the Federal Arbitration Act (FAA) and Massachusetts Uniform Arbitration Act (MUAA), the failure to make a reasonable accommodation of a party’s schedule could be grounds for vacating the award if that party was thereby prejudiced in presenting its case.<sup>347</sup> Accordingly, arbitrators tend to be flexible in scheduling matters. If one party seeks a continuance on short notice, however, arbitrators have the authority under the AAA Rules to tax as costs the expenses incurred by other parties to the arbitration as a result of the rescheduling, and the AAA itself has a schedule of costs chargeable to a party who requests such rescheduling.

The filing of the award must be done “promptly” under the AAA Rules and in any event within 30 days of the close of the hearing, or within 14 days in an arbitration under the Expedited Procedures applicable to matters where the amount in controversy is \$50,000 or under.<sup>348</sup> Under the CPR Rules, arbitrators are encouraged to deliver their awards within one month, but the rule is not hard and fast: “arbitrators shall use their best efforts to comply with

---

<sup>344</sup> See AAA, COMMERCIAL ARBITRATION RULES, Rule 21 (1993).

<sup>345</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 26 (1993).

<sup>346</sup> Bay State York Co. v. Canter Construction Co., 5 Mass. App. Ct. 192, 194, 360 N.E.2d 900, 901 (1977).

<sup>347</sup> See 9 U.S.C. § 10(c) (1988); MASS. GEN. L. ch. 251, § 12(a)(4) (1992).

<sup>348</sup> See AAA, COMMERCIAL ARBITRATION RULES, Rules 53-57 (1993).

this schedule.”<sup>349</sup> Obviously if the parties have requested or agreed that a reasoned award be issued by the arbitrators, they should expect the preparation of the award to take longer than it would otherwise. If the timing of the issuance of the award is not governed by any applicable rule or provision of their arbitration agreement, the parties should consider including such a provision in any agreement they execute with the arbitrators in order to avoid delay.

(c) Participants. Attendance at an arbitration is generally limited to the parties, their counsel, and witnesses. Arbitrators have the authority under both AAA and CPR Rules to determine who may attend an arbitration and may exclude witnesses while other witnesses are testifying.<sup>350</sup>

(d) Confidentiality. Although neither the FAA nor the MUAA requires that commercial arbitrations be conducted in private, they are rarely, if ever, open to the public. The AAA Rules state that the arbitrator “shall maintain the privacy of the hearings.”<sup>351</sup> The CPR Rules are broader in this regard and impose an obligation on the parties as well as the arbitrator: “The parties and the arbitrators shall treat the proceedings, any related discovery and the decisions of the [arbitrators] as confidential . . .”<sup>352</sup>

Not all arbitrations are confidential, however. The decisions of labor arbitrators are published, although the proceedings themselves are not public. Likewise, arbitral decisions in New York Stock Exchange arbitrations are available to the public.<sup>353</sup>

---

<sup>349</sup> CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 13.7 (1993).

<sup>350</sup> See AAA, COMMERCIAL ARBITRATION RULES, Rule 25 (1993); CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 11.4 (1993).

<sup>351</sup> See AAA, COMMERCIAL ARBITRATION RULES, Rule 25.

<sup>352</sup> See CPR, RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 16 (1993).

<sup>353</sup> See Michael F. Hoellering, Arbitrability, in COMMERCIAL ARBITRATION FOR THE 1990s (Richard J. Medalie, ed. 1991).

Parties concerned about the confidentiality of an arbitration proceeding can, of course, include a confidentiality provision in their agreement to arbitrate.<sup>354</sup>

(e) Stenographic Record. Although arbitration proceedings are seldom transcribed by a stenographer, a transcript is sometimes useful in a lengthy, complex arbitration conducted over the course of several weeks or months. Because of scheduling difficulties, arbitration hearings in such cases are often interrupted with recesses between hearing sessions, and a transcript allows both the parties and the arbitrator(s) to refresh their recollection about the proceedings to date.

There is no provision in the FAA or MUAA which addresses the issue of transcripts, but under the AAA rules, either party can arrange for a stenographic record to be made.<sup>355</sup> Some arbitrations, such as those conducted under the auspices of the National Association of Securities Dealers, are tape recorded, so that a transcript can be made if one is needed. As with other logistical arrangements, the parties are free to provide for, or prohibit, by agreement the making of a record of the hearing.

(f) Form of Award. Arbitrators are sometimes called upon to provide the parties with a written opinion stating the basis for the award. Even if the parties do not request a reasoned award, however, they should consider drafting the form of the award, with blanks to be filled in by the arbitrator(s), especially in a complex case. This will reduce the possibility of litigation after the award is issued, because of disagreement as to the scope of the dispute that was submitted to the arbitrator(s).<sup>356</sup>

---

<sup>354</sup> See section 6.15 for an example of such a provision.

<sup>355</sup> See AAA, COMMERCIAL ARBITRATION RULES, Rule 23 (1993). If the stenographic record is determined to be the official record of the proceedings, the arbitrator(s) must be given access to it. Id. The CPR Rules do not contain a provision concerning stenographic records of the arbitration.

<sup>356</sup> An example of such a form for an award can be found in section 6.22.

## § 10.25 Preparing for the Arbitration - Discovery, Motions, Preliminary Hearing

Preparation for arbitration is not fundamentally different from trial preparation. Counsel must (a) determine the elements of the claims she seeks to prove or disprove, and (b) marshal the evidence that must be presented in support of the client's claims and defenses. The basic tasks are the same: investigating the opposing party's case, interviewing and preparing witnesses, drafting a chronology of key events, reviewing relevant documents, outlining witness examinations, preparing exhibits, and briefing the legal issues.

This section focuses on some of the significant differences between preparation for trial and preparation for arbitration.

(a) Discovery. Perhaps the most significant difference between the forums is the limited discovery available in arbitrations. Without full discovery, effective cross-examination of the opposing party's witnesses is difficult, and an assessment of the strength of the opponent's case may be harder still.

The availability of pre-arbitration discovery is governed by the parties' agreement, the rules they have agreed to use, and the governing law. Under the Federal Arbitration Act (FAA), an arbitrator has the authority to subpoena witnesses and records for the hearing, but no authority to order prehearing document production and depositions.<sup>357</sup> Under the Massachusetts Uniform Arbitration Act (MUAA), an arbitrator has the additional authority to order document production -- to the same extent as is available under the Massachusetts Rules of Civil Procedure -- and depositions of witnesses who are unavailable for the hearing or cannot be subpoenaed.<sup>358</sup>

The courts have interpreted these limitations on discovery strictly. Under Massachusetts law, courts will not use their authority to order discovery in a civil matter where the purpose of

---

<sup>357</sup> 9 U.S.C. § 7 (1988).

the discovery is to aid a party in arbitration. For example, in *Cavanaugh v. McDonnell & Co.*,<sup>359</sup> an arbitration claimant sought an order from the Court to permit the taking of three depositions and production of various documents in aid of the arbitration. The Court denied the claimant's discovery requests and stated:

Our conclusion is that discovery purportedly in aid of arbitration proceedings would not in reality aid, but would tend to handicap, those proceedings. We also feel that arbitration, once undertaken, should continue freely without being subjected to judicial restraint which would tend to render the proceedings neither one thing nor the other, but transform them into a hybrid, part judicial and part arbitrational.<sup>360</sup>

The courts will, however, enforce discovery orders by arbitrators which are within the scope of the arbitrators' authority.

Arbitrators can order discovery beyond what is permitted under the FAA and MUAA if the parties provide for such discovery in their agreement or provide that the arbitration will be conducted under rules which permit broader discovery.<sup>361</sup> Even under such rules, however, arbitrators are unlikely to permit the broad discovery that is typically available in litigation. The Commentary to the Center for Public Resources (CPR) Rules for Non-Administered Arbitration of Business Disputes notes that "arbitration is not for the litigator who will 'leave no stone unturned.' Unlimited discovery is incompatible with the goals of efficiency and economy . . . .

---

<sup>358</sup> MASS. GEN. L. ch. 251, § 7 (1992).

<sup>359</sup> *Cavanaugh v. McDonnell & Co.*, 357 Mass. 452, 258 N.E.2d 561 (1970).

<sup>360</sup> *Cavanaugh v. McDonnell & Co.*, 357 Mass. 452, 457, 258 N.E.2d 561, 564 (1970).

<sup>361</sup> Under Rule 10 of the Center For Public Resources Rules for Non-Administered Arbitration of Business Disputes, arbitrators may allow "such discovery as [they] shall determine as appropriate in the circumstances" and may issue protective orders with respect to "proprietary information, trade secrets, and other sensitive information."

Discovery should be limited to that for which a party has a substantial, demonstrable need.”<sup>362</sup>

Some arbitration rules, such as those of the New York Stock Exchange, do permit document production, information requests, depositions, and subpoenas -- virtually the full array of discovery available in litigation.<sup>363</sup> Thus, the parties in an arbitration can define as broadly or narrowly as they wish the boundaries of pre-hearing discovery, even if the result is a “hybrid, part judicial and part arbitrational.”<sup>364</sup>

In negotiations over the boundaries of discovery in an arbitration, some parties will resist the taking of depositions, which can become lengthy, open-ended proceedings that are both expensive and, in some cases, burdensome. However, it may be possible for the parties to agree that only a certain number of depositions, or depositions of only certain individuals, shall be taken and that they will be limited to a particular amount of time.

Among the discovery tools which are seldom if ever enjoyed in arbitration are interrogatories and requests for admissions.<sup>365</sup> Parties in an arbitration can obtain information about the other parties’ positions, however, by agreeing to provide the arbitrators with a stipulation of agreed facts. During the course of negotiation over such a stipulation, each party will obtain some insight into the other parties’ respective positions on contested and non-contested issues.

(b) Motions. Another significant difference between trial preparation and preparation for an arbitration is the lack of motion practice. There is a division of opinion among arbitrators

---

The Commercial Arbitration Rules of the American Arbitration Association contain no provisions regarding discovery.

<sup>362</sup> CPR, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Commentary 12 (1993).

<sup>363</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1654 (1991).

<sup>364</sup> *Cavanaugh v. McDonnell & Co.*, 357 Mass. 452, 457, 258 N.E.2d 561, 564 (1970).

<sup>365</sup> See FED. R. CIV. P. 33, 36; MASS. R. CIV. P. 33, 36.

and lawyers involved in handling arbitrations as to whether motion practice has any place in arbitration. Some fear that permitting motions (such as the dispositive motions discussed in section § 10.12) will make arbitration more like litigation, with all of litigation's attendant complexity, expense and delay. Others contend that without the use of motions to manage arbitrations more effectively, the virtues of efficiency and speed will be lost in complex cases.

Although motions are not favored, counsel should consider using them to bifurcate the proceedings or schedule the proceedings in a manner that creates the greatest opportunity for settlement. For example, in a construction case, both parties may be close to agreement as to the degree of fault but far apart on damages; in such a case, it would make sense to schedule a hearing on damages first, especially if the liability phase of the arbitration would involve several days of hearing but the damages phase would not. If the opposing party will not agree to a reasonable scheduling order or bifurcation of the issues, filing a motion with the arbitrator should be considered.<sup>366</sup>

(c) Preliminary Hearing. Both the AAA Commercial Arbitration Rules and the CPR Rules for Non-Administered Arbitration of Business Disputes provide for preliminary hearings. The AAA Rules provide for an administrative conference with the case administrator (not the arbitrator) at the request of any party or at the discretion of the AAA.<sup>367</sup> A preliminary hearing with the arbitrator(s) is scheduled, under the AAA Rules, in large or complex cases, at the request of the parties, or at the discretion of the arbitrator(s), in order

---

<sup>366</sup> The AAA Commercial Arbitration Rules are silent on the subject of motions, but the Commentary to the CPR Rules for Non-Administered Arbitration of Business Disputes discuss dispositive motions: "Some controversies hinge on one or two key issues of law which in litigation may be decided early on motion for partial summary judgment." CENTER FOR PUBLIC RESOURCES, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Commentary 9 (1993).

<sup>367</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 10 (1993).

to specify the issues to be resolved, to stipulate to uncontested facts, and to consider any other matters that will expedite the arbitration proceedings.

Consistent with the expedited nature of arbitration, the arbitrator may, at the preliminary hearing, establish (i) the extent of and schedule for the production of relevant documents and other information, (ii) the identification of any witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute.<sup>368</sup>

Under the CPR Rules a pre-hearing conference is mandatory, unless the parties agree that it should not be held. Rule 9.4 states that “[a]s promptly as possible after the selection of the Tribunal, the Tribunal shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding.”<sup>369</sup>

Preliminary hearings provide an opportunity for both tailoring the arbitration hearing (e.g., by setting upper and lower limits on the award<sup>370</sup> or considering dispositive motions) and a last attempt at settlement. As noted in the Commentary to the CPR Rules, “[s]imply bringing the attorneys together for purposes of a conference may lead to [settlement] discussions.” If such discussions occur, however, the arbitrators should avoid participating in them, since doing so might compromise their ability to serve as arbitrators in the case. Mediation is often considered at this stage of the proceedings, but again the arbitrators usually should avoid serving in that role:

---

<sup>368</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 10 (1993).

<sup>369</sup> CPR, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 9.4 (1993) (emphasis added).

<sup>370</sup> See discussion of "bracketed" awards in section 6.22.

While it is proper for an appointed arbitrator to serve as a mediator, . . . [if] the mediation fails, [the arbitrator] more than likely would not be able to continue as an arbitrator.<sup>371</sup>

Preliminary hearings can be conducted by conference call instead of in person, and this method is obviously convenient when the parties are not located in the same area. Whether they are held in person or on the phone, however, it is often important to have the parties' agreements and the arbitrators' decisions concerning procedural matters recorded in some manner, either as an interim order or as a stipulation. Without such a record, disagreements may surface later as to the precise meaning of the arbitrators' preliminary ruling or the parties' procedural agreement.

#### **§ 10.26 The Hearing - Opening and Closing Arguments, Evidentiary Objections, Expert Witnesses, Chalks, Demonstrations, Site Visits, Briefing**

An arbitration hearing is, in many ways, not fundamentally different from a bench trial. The parties or their counsel usually make a brief opening statement; each party presents its case through witness testimony and exhibits, with an opportunity for cross-examination of witnesses;<sup>372</sup> and closing arguments are made.

Perhaps the most distinguishing feature of an arbitration is its informality and procedural flexibility -- at least as compared with court proceedings. The arbitration hearing is usually conducted in a conference room, with people seated around a table. Rules of evidence are not strictly enforced.

From counsel's standpoint, the informality of the arbitration hearing presents both an opportunity and a set of problems. The opportunity to educate the factfinders is greater in an

---

<sup>371</sup> American Arbitration Association, A Guide for Commercial Arbitrators, 5 (1993).

<sup>372</sup> Under the Massachusetts Uniform Arbitration Act, MASS. GEN. L. ch. 251, § 5(b) (1992), the parties have a right to be heard, present evidence and cross-examine witnesses.

arbitration, since the arbitrators will often ask questions to clarify points they do not understand. On the other hand, the informality of the conference room setting and the absence of judicial robes create an atmosphere in which witnesses may be difficult to control.

The most significant similarity is the arbitrators' control of the process. Like the judge in a trial, the arbitrator's authority with respect to the procedural aspects of the arbitration is virtually absolute and nearly unreviewable.<sup>373</sup> The arbitrators' power includes interpretation of arbitration rules.<sup>374</sup> As stated in the CPR Rules, the arbitrators have the authority to "conduct the arbitration in such manner as [they] shall deem appropriate."<sup>375</sup>

(a) Opening and Closing Statements. If prehearing briefs have been filed with the arbitrators, they may encourage counsel to proceed without an opening statement. Opening statements are useful, however, because they reinforce the points counsel wishes to emphasize and provide an opportunity to gauge the reaction of the arbitrator to the points made. Empirical research on jurors has shown that their verdicts correspond closely to their early impressions of the merits of the case, and there is little reason to assume that arbitrators respond differently.<sup>376</sup>

Although the tone and presentation of an opening statement in an arbitration may be more informal than an opening statement in a courtroom, the material should be cogently and persuasively organized, and delivered without reading from an outline. The first few minutes of the statement are crucial -- studies have shown that "the crucial segment in any statement, the

---

<sup>373</sup> See *Danvers v. Wexler Construction Co.*, 12 Mass. App. Ct. 160, 168 n.9, 422 N.E.2d 787 n.9 (1981) (citing MASS. GEN. L. ch. 251, § 5(a)) (arbitrator has considerable discretion in managing case); *Town of Bay State York Co. v. Canter Construction Co.*, 5 Mass. App. Ct. 192, 194, 360 N.E.2d 901, 901 (1977) (same).

<sup>374</sup> See *Bernard v. Hemisphere Hotel Management, Inc.*, 16 Mass. App. Ct. 261, 363-64, 450 N.E.2d 1084, 1086 (1983), *rev. denied*, 390 Mass. 1102, 454 N.E.2d 1276 (1983); *Stancioff v. Hertz*, 10 Mass. App. Ct. 843, 844, 406 N.E.2d 1318, 1319 (1980) (where rules give the arbitrator the power to interpret and apply them [e.g., Rule 53 of AAA Commercial Arbitration Rules], the arbitrator's interpretation will not be disturbed by the court).

<sup>375</sup> CPR, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 9.1 (1993).

only period during which the speaker can count on the complete attention of the full audience, is the first four minutes.”<sup>377</sup> Once those first few minutes have elapsed, it may be possible to recapture the arbitrator’s full attention by showing an exhibit, a “chalk” (i.e., an illustration not admitted as an exhibit), or a piece of physical evidence. As in a trial, however, it is very important not to promise what one cannot deliver.<sup>378</sup>

Closing arguments are equally important, even where post-hearing briefs will be submitted.<sup>379</sup> One commentator goes so far as to say that “[a]rbitration counsel should never waive the opportunity to present oral closing argument.”<sup>380</sup> The emphasis in a closing argument should be on the key legal or factual issues, but even more importantly the overall fairness of the result for which counsel is contending. Unless the parties’ agreement provides otherwise, the arbitrators are not bound by legal technicalities and are often more concerned with reaching a result that is equitable.<sup>381</sup>

(b) Evidentiary Objections. As noted in section 6.18, the rules of evidence are not strictly enforced in most arbitrations.<sup>382</sup> Accordingly, one of the most frequent responses to

---

<sup>376</sup> See Paul Marcotte, Useful Trial Tips, 74 ABA J. 39 (Oct. 1988) (studies have shown that 85-90 percent of jurors make up their minds about a case after hearing opening statements).

<sup>377</sup> BNA CRIMINAL PRACTICE MANUAL § 91:101 (1987 ed.) (citing studies).

<sup>378</sup> Cf. RALPH C. MCCULLOUGH & JAMES C. UNDERWOOD, CIVIL TRIAL MANUAL 580 (1980) (“Counsel should never . . . overstate his case to the jury. The jury will take a decidedly dim view of counsel’s tactics if any of the things that he promises to prove in an opening statement are not proved during the course of the trial.”).

<sup>379</sup> One possible variation is to postpone closing argument until each party has submitted a post-hearing brief.

<sup>380</sup> CRAIG A. PETERSON & CLAIRE MCCARTHY, ARBITRATION STRATEGY AND TECHNIQUE § 8-1 (1986).

<sup>381</sup> CRAIG A. PETERSON & CLAIRE MCCARTHY, ARBITRATION STRATEGY AND TECHNIQUE § 8-1, at 161 (1986).

<sup>382</sup> Rule 31 of the AAA Commercial Arbitration Rules provides that “[t]he arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary.” AAA, COMMERCIAL ARBITRATION RULES, Rule 31 (1993); Rule 11.2 of the CPR RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES provides that the arbitrators are “not required to apply the rules of evidence used in judicial proceedings,” but must respect attorney-client privilege and work-

evidentiary objections in an arbitration is the familiar statement: “I will take it [i.e., the proffered evidence] for what it’s worth.” Notwithstanding the likely response, evidentiary objections are often worthwhile because they alert the arbitrator to the deficiencies in the opponent’s evidence. Since the grounds for challenging an arbitral award are quite narrow, and there is no stenographic record in most arbitrations, the point of making such objections is seldom to “preserve the record” and lay the ground for reversal.<sup>383</sup> Instead, the objections become, in effect, a commentary on the opponent’s evidence. To be sure, one can antagonize the arbitrator by objecting too readily, and therefore objections should be based on established evidentiary principles.

(c) Expert Witnesses. In cases involving highly technical issues, the quality of the expert testimony offered by the parties is often the deciding factor in a case. The expert should be encouraged to make eye contact with the arbitrators as she testifies and direct her comments directly to them.<sup>384</sup> The relative informality of the arbitration may lead to questions from the arbitrators, and these are invaluable inasmuch as they reveal the points on which further persuasion is needed (or unnecessary). Some arbitrators have suggested that, if there is contradictory testimony from the expert witnesses in a case, the experts should be examined simultaneously, with an opportunity for each expert to ask the other questions and respond to the

---

product immunity. CPR, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 11.2 (1993). Note, however, that some arbitration rules provide that the rules of evidence must be adhered to. E.g., Dalkon Shield Claimants Trust, Rules Governing Regular Arbitration, Rule XII(E) (“The Federal Rules of Evidence shall apply to the conduct of the arbitration hearing . . .”).

<sup>383</sup> If the arbitrators sustain an evidentiary objection, however, the party offering the evidence should make an offer of proof, so that that party can support a claim that the arbitrators refused to hear evidence material to the controversy, in violation of MASS. GEN. L. ch. 251, § 12(a)(4) (1992). See, e.g., Farm Construction Service, Inc. v. Robinson, 21 Mass. App. Ct. 955, 956, 487 N.E.2d 873, 873 (1986) (rescript).

<sup>384</sup> This is true, of course, with respect to all witnesses. Accordingly, seating at the arbitration should be arranged so that the witnesses face the arbitrators.

answers given. The CPR Rules permit another possible variation: that the arbitrators appoint an independent expert, “whose testimony shall be subject to cross examination and rebuttal.”<sup>385</sup>

(d) Chalks, Demonstrations, and Site Visits. Although chalks, models, demonstrations, videotapes, and site visits (often referred to as “views”)<sup>386</sup> are standard fare for jury trials, counsel should be no less willing to use such aids in the more confining quarters of the arbitration conference room. The job of counsel in an arbitration is largely to teach and explain the client’s theory of the case, and the full array of pedagogical tools should be used where appropriate.

(e) Briefs. Briefs may be filed with the arbitrators before and after the hearing. The AAA Guide for Commercial Arbitrators recommends that prehearing briefs be limited to five pages -- a reasonable limit in all but the most complex cases. If briefs are to be filed after the hearing has ended, the arbitrator determines the schedule for their submission and the maximum length. The hearing is not considered “closed” until the final date for submission of briefs.<sup>387</sup> In most cases, unless the financial resources of the parties do not permit briefing, counsel should strongly consider submitting briefs. An initial brief will make counsel’s job in an opening statement far easier. Post-hearing briefs are also useful because, if the arbitrators take the case under advisement at the conclusion of the hearing, the parties’ briefs may provide the only summary of the evidence presented and the arguments adduced. In order to maximize the usefulness of the briefs, it may be desirable to stagger the briefing schedule so that, instead of submitting briefs simultaneously, each party has an opportunity to respond to the other party’s arguments.

---

<sup>385</sup> CPR, RULES FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES, Rule 11.3 (1993).

<sup>386</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 33 (1993) permits the arbitrators to inspect the site or perform any other investigation with notice to the parties and an opportunity for them to be present.

## § 10.27 Proceedings to Confirm, Modify, or Vacate the Award

Most parties comply with arbitration awards without judicial involvement, and the courts expect such compliance in most cases.<sup>388</sup> Accordingly, counsel are well advised to challenge confirmation of arbitral awards only in cases where there is a substantial basis for doing so.

(a) **Motions to Confirm.** Since the principal reason for seeking confirmation is enforcement, a motion to confirm is unnecessary if the non-prevailing party complies with the award. The other potential reasons for seeking entry of a judgment on the award -- such as the res judicata effect or the use of a judgment as precedent -- have little application in the setting of arbitration. The award provides essentially the same res judicata effect as a judgment,<sup>389</sup> and an arbitration award has little (if any) precedential value even if it is entered as a judgment, because of the broad discretion given to arbitrators in reaching a decision.

A party seeking confirmation of an arbitral award should wait until the period for filing motions to modify or vacate the award has ended. During that period the court lacks the power to confirm the award,<sup>390</sup> and the motion may trigger the filing of a counter-motion to vacate or modify the award which would not otherwise have been filed. Under the MUAA there is no time limit for the filing of a motion to confirm; under the FAA, a motion to confirm may be filed within a year after the award is issued.

---

<sup>387</sup> AAA, COMMERCIAL ARBITRATION RULES, Rule 35 (1993).

<sup>388</sup> See *Sansone v. Metropolitan Property & Liability Insurance Co.*, 30 Mass. App. Ct. 660, 572 N.E.2d 588 ("It should be the rule, rather than the exception, that when arbitrators hand down an award the parties will comply with it, without the necessity of court proceedings.") (quoting *Lundgren v. Freeman*, 307 F.2d 104, 112 (9th Cir. 1962) (emphasis in original)), *rev. denied*, 410 Mass. 1104, 577 N.E.2d 309 (1991).

<sup>389</sup> See GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION, REVISED EDITION*, § 36:03 at 491 (1991) (citing New York and Pennsylvania cases).

<sup>390</sup> See *Holmsten Refrigeration, Inc. v. Refrigerated Storage Center, Inc.*, 357 Mass. 580, 260 N.E.2d 216 (1970) (upholding challenge to confirmation of arbitration award, where award was confirmed before time permitted for motions to modify or vacate the award had elapsed).

The procedure for obtaining confirmation of the award is the same regardless of whether the case is already pending in the court where the motion is filed or no case is on file. The moving party files a motion, arranging for service on the opposing party.<sup>391</sup> The motion should ask that the award be confirmed and that a judgment be entered on the award. If the motion is allowed, the court will issue a judgment which can be enforced in the same manner as any other judgment. Under the MUAA, costs are available to the prevailing party on a motion to confirm, vacate or modify an award.<sup>392</sup>

(b) Motions to Modify or Vacate. Because of judicial deference to arbitral awards, a motion to modify or vacate should be filed only after careful review of the statutory grounds for modifying or vacating the award.<sup>393</sup> Counsel should also pay close attention to the time periods within which such motions are permitted.

Under the MUAA, a motion to modify may be presented to the arbitrator within twenty days of the issuance of the award and a motion to modify or vacate may be filed in court within thirty days after issuance of the award. The FAA does not provide for modification by the arbitrator but allows three months for the filing of motions with the court to vacate or modify the award. After those time periods have elapsed, the opportunity to challenge the award is gone.<sup>394</sup>

---

<sup>391</sup> Under the FAA, service is accomplished in the same manner as any other motion. 9 U.S.C. § 12 (1988). Under the MUAA, the motion is served in the same manner as a summons. MASS. GEN. L. ch. 251, § 15 (1992). Superior Court Rule 9A requires the moving party to wait ten days for a response before filing the motion and any opposition.

<sup>392</sup> MASS. GEN. L. ch. 251, § 14 (1992). See Glenn Acres, Inc. v. Cliffwood Corp., 353 Mass. 150, 156, 228 N.E.2d 835, 839 (1967) (decision concerning the awarding of costs is within "the judge's discretion to which no exception lies").

<sup>393</sup> MASS. GEN. L. ch. 251, §§ 9, 12, 13 (1992); 9 U.S.C. §§ 10, 12 (1988).

<sup>394</sup> See, e.g., MASS. GEN. L. ch. 251, § 13(a) (1992).

The courts strictly enforce these time limitations, and even clerical errors cannot be corrected after they have elapsed.<sup>395</sup> The purpose of the short periods prescribed in the federal and state arbitration statutes for motions to vacate or modify is to “accord the arbitration award finality in a timely fashion.”<sup>396</sup>

In response to a motion to vacate or modify an award, the court can vacate or modify, or recommit the matter to the arbitrators.<sup>397</sup> The grounds on which the court may vacate or modify the award are discussed in section § 10.14.

### **§ 10.28 Mediation/Arbitration (Med/Arb)**

Arbitration brings the advantages of finality: the dispute will end with the end of the arbitration. But arbitration also means the loss of control by the parties over the outcome. Mediation, by contrast, leaves control of the outcome with the parties, but does not guarantee that the dispute will be over at the end of the mediation. By combining mediation and arbitration into one process (“med/arb”), some see the possibility of gaining the advantages of each.

In med/arb, the parties agree in advance to attempt mediation. Sometimes there is a time limit placed on the mediation, sometimes it is left to either party to say when that process is no longer useful. The mediator conducts the process as if only a mediation were underway.

If the mediation does not succeed in producing agreement, however, the pre-process agreement authorizes the mediator to adopt the role of arbitrator. If the (now) arbitrator believes that she has heard all the evidence she needs, and the parties make no request to present further testimony, she can proceed to render a decision. More often, the parties wish to present, and the

---

<sup>395</sup> Quirk v. Data Terminal Systems, Inc., 394 Mass. 334, 339-40, 475 N.E.2d 1208, 1211-12 (1985).

<sup>396</sup> Quirk v. Data Terminal Systems, Inc., 394 Mass. 334, 337, 475 N.E.2d 1208, 1211 (1985) (citations omitted).

<sup>397</sup> MASS. GEN. L. ch. 251, § 9 (1992); 9 U.S.C. § 10(e) (1988). See, e.g., Ciampa v. Chubb Group of Insurance Companies, 26 Mass. App. Ct. 941, 942, 525 N.E.2d 1344, 1344-45 (1988) (arbitrator's "present value" calculation

arbitrator wishes to hear, testimony and formal argument, much abbreviated in contrast with a normal arbitration since the arbitrator has already heard a great deal while mediating.

Once the mediation has become an arbitration, all the legal principles governing arbitration apply. Thus the considerations that go into drafting an arbitration agreement are relevant to a mediation/arbitration agreement.<sup>398</sup>

Med/arb offers the advantages of giving the parties room to reach their own agreement and guaranteeing that there will be a final decision ending the dispute if agreement cannot be reached. It does raise the problem, however, that the parties may not use the same level of candor in the mediation phase of med/arb that they would in conventional mediation because they know the mediator may soon have the power to rule definitively on their dispute. In mediation, for example, it is not uncommon for a party to acknowledge to the neutral the weaknesses in its case. An advocate in arbitration is less likely to do this, and an attorney in a med/arb will certainly feel some constraint during the mediation phase, thus undermining the effectiveness of the mediation.

Med/arb also poses difficulties for the mediator/arbitrator who, as mediator, may wish to use confidential caucus sessions, but, as arbitrator, must assure himself and the parties that each side has had a fair opportunity to meet the opponent's arguments. One solution is to avoid caucus sessions during the mediation phase of med/arb, but to do so weakens the process. Another solution is to inform the parties that the caucus sessions will not remain confidential vis a vis their opponents if the case goes from mediation to arbitration phases. The most typical solution to the problems posed by med/arb is to use two different people or organizations to

---

in arbitration award contained "evident miscalculation," which could be corrected pursuant to timely motion to modify).

<sup>398</sup> See chapter 6 concerning drafting ADR contract clauses

serve as the neutrals. Although this approach may be more costly because of the need to educate an additional neutral if the mediation fails, there is a greater likelihood of success in the mediation if that process is not undermined by procedural constraints.

### **§ 10.29 Private Judging**

Private judging -- sometimes referred to as “rent-a-judge” -- involves reference of a case by a court to a neutral decisionmaker, often a retired judge, who conducts a trial and issues a written opinion which is then submitted to the court for entry of judgment. The court has no authority to alter the decision, but the parties may appeal the decision in the same manner as any other trial court judgment.<sup>399</sup>

The process is similar in many respects to arbitration: (a) the process is consensual (i.e., both parties must agree to the reference); (b) the parties can select the referee (or the judge can appoint one); (c) the proceedings are private; (d) the parties can, by stipulation, control the discovery process and the ground rules for the trial; and (e) the parties generally obtain a result more quickly.<sup>400</sup>

The primary differences from arbitration are that (a) the proceedings are usually more formal -- absent stipulation to the contrary, the rules of evidence and civil procedure apply; (b) the proceedings are transcribed by a privately retained court reporter; (c) the private judge is required to adhere to the applicable substantive law, rather than simply to principles of “fairness,

---

<sup>399</sup> For a useful introduction to the subject of private judging, see generally Note, Private Judging in California: Ethical Concerns and Constitutional Questions, 23 NEW ENGLAND L. REV. 363 (1988); David J. Shapiro, Private Judging in the State of New York: A Critical Introduction, 23 COLUM. J.L. & SOC. PROBS. 275 (1990); Note, Private Judging: An Effective and Efficient Alternative to the Traditional Court System, 21 VALPARAISO UNIV. L. REV. 681 (1987).

<sup>400</sup> See generally Richard Chernick, California Lawyer Makes Affirmative Defense of State's Private Judging Procedures, in ADR: PRACTICE AND PERSPECTIVES 226 (Martha A. Matthews, ed. 1991). In California, a referee is required by statute to file the statement of decision within 20 days after the close of the trial. Id. at 228.

equity, and commercial custom”;<sup>401</sup> (d) judgment can be entered directly on the private judge’s decision without a motion to confirm; (e) there is one decisionmaker instead of three, as in some arbitrations;<sup>402</sup> (f) privacy and confidentiality are more difficult to maintain because the private judge’s decision is filed in court;<sup>403</sup> and (g) perhaps most importantly, the parties have the right to appeal the decision in the same manner as any other judgment.

The use of private judging has increased dramatically in recent years. Although much of this growth has occurred in California, where private judging is authorized by statute and a state constitutional provision,<sup>404</sup> approximately half of the states permit private judging.<sup>405</sup> The purpose of private judging is to “remove complex and technical cases, as well as simple cases, from the traditional court docket . . . [in order to] reduce[] court congestion and delay.”<sup>406</sup>

In Massachusetts there is no statute authorizing the use of private judges, but reference to a master involves virtually the same process.<sup>407</sup> The primary difference is that the master’s report is reviewable by the trial court, and therefore two levels of review are available -- the trial

---

<sup>401</sup> Note, Private Judging: An Effective and Efficient Alternative to the Traditional Court System, 21 VALPARAISO UNIV. L. REV. 681, 704 (1987).

<sup>402</sup> Althoughh juries are potentially available in private judging arrangements, as a practical matter they are almost never used. See Winslow Christian, Private Judging, in THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE, § 40:5 (Bette J. Roth et al., eds. 1993).

<sup>403</sup> See M.L. Stein, Will 'rent-a-judges' hold secret proceedings? EDITOR & PUBLISHER 23 (August 15, 1992).

<sup>404</sup> See Richard Chernick, The Rent-a-Judge Option: A Primer for Commercial Litigators, 12 LOS ANGELES LAWYER 18 (October 1989). California has three different private judging procedures: "temporary judges," who have the same authority as sitting judges (such as contempt power); special referees, who decide particular issues in a case; and general referees, who decide the entire case but lack some of the powers of the temporary judge. Id.

<sup>405</sup> See Winslow Christian, Private Judging, in THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE, § 40:2 (Bette J. Roth et al., eds. 1993). At least ten states have statutes permitting private judging of the kind practiced in California. See Note, Private Judging in California: Ethical Concerns and Constitutional Questions, 23 NEW ENGLAND L. REV. 363, 363 & nn.5, 6 (1988). Other states have statutes or court rules permitting reference to a master. Id. at 364 & nn.7, 8.

<sup>406</sup> Note, Private Judging: An Effective and Efficient Alternative to the Traditional Court System, 21 VALPARAISO UNIV. L. REV. 681, 701 (1987) (footnote omitted).

<sup>407</sup> For a discussion of the use of masters, see chapter 11.

court and an appellate court. Accordingly, use of masters is typically less expeditious than private judging, in which the trial court has no authority to review the private judge's decision.

Private judging, like ADR generally, has been controversial. Critics have frequently described the California model, in which large numbers of cases are referred to for-profit private judging firms, as a two-tiered system of justice -- one for those who can afford expeditious dispensing of justice, and another for those who cannot. One commentator has called the system "legal apartheid,"<sup>408</sup> and other critics have expressed concern about whether the diversion of cases to a private system will rob the public system of advocates for improvement:

[Private judging] is creating a double standard of justice in which the poor and middle class are compelled to compete for limited resources in an increasingly deteriorating system. . . . The long-term impact is that the wealthy . . . have no reason to pitch in. Los Angeles has the worst public-school system in the nation for the same reason. Why change the public schools when it is easier to send your kids to a private institution?<sup>409</sup>

Private judging has been defended on the ground that only a small percentage of cases are in fact diverted from the public system, and that this "dual but parallel system of justice" enhances the public system by reducing the case load and providing new models for dispute processing.<sup>410</sup> A 1990 study of the California private judging system by the state's Judicial Council Advisory Committee on Private Judges concluded that the system "is a useful dispute

---

<sup>408</sup> See Richard Chernick, What's Wrong With Private Judging, 12 LOS ANGELES LAWYER 19, 22 (November 1989).

<sup>409</sup> David Stolberg, Rent-a-Judge, 33 LOS ANGELES MAGAZINE 98 (November 1988) (quoting public interest lawyer Robert Gnaizda).

<sup>410</sup> See, e.g., Richard Chernick, What's Wrong With Private Judging, 12 LOS ANGELES LAWYER 19, 24 (November 1989).

resolution alternative to a public system unable to provide timely dispute resolution services,”  
but it also recommended increased regulation of private judging.<sup>411</sup>

LGXN01\_DOC (704983 v. 1)

---

<sup>411</sup> Don J. DeBenedictis, Study OKs Rent-A-Judge, 76 ABA J. 41 (November 1990).