CHAPTER 27

ARBITRATION

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INTRODUCTION

Arbitration as a dispute resolution method was practiced at least as early as the Phoenician merchants and Philip II of Macedon (Alexander the Great's father). The English used arbitration to resolve commercial disputes as early as the thirteenth century. George Washington put an arbitration clause in his last will and testament. During the U.S. colonial era arbitration was used as an alternative to expensive, slow, and unpredictable judicial processes. Today arbitration is a dispute resolution method used in many different fields – labor, employment, construction, real estate, commerce and business, healthcare, insurance and reinsurance, elections, transportation, banking and finance, public works and procurement, oil, gas, and other minerals, alternative energy, intellectual property, franchising, mergers and acquisitions, entertainment, telecommunications, consumer, and international commercial transactions. One example of the proliferation of arbitration use can be seen in the many separate kinds of arbitration rules created and published by the American Arbitration Association.[2]

ARBITRATION – A CREATURE OF CONTRACT

Arbitration is "a matter of contract," also often described as "a creature of contract."[3] Every attempt to compel the arbitration of a dispute begins with a state or federal court making two determinations: (1) Does a valid arbitration agreement exist? and (2) Are the asserted claims within the scope of the arbitration agreement?[4] Both of these determinations are made by a court applying state law contract construction principles and defenses. These determinations open the

door for courts to attempt more expansive intrusions into the dispute that parties previously agreed to arbitrate.[5] Trial courts are tempted to investigate the dispute subject to an arbitration agreement rather than limit the court's inquiry to the two questions of (1) valid arbitration agreement and (2) claim within scope of the arbitration agreement. This temptation ignores the severability doctrine that distinguishes the arbitration agreement from the contract containing the arbitration agreement.[6] There is also continuing confusion among trial courts about what issues or questions are to be resolved by the trial court or by the arbitrator in the arbitration being compelled – the "arbitrability" or "gateway" question.[7] The U.S. Supreme Court has made it clear that the parties have the contractual power under the FAA to delegate "gateway" and "arbitrability" questions to the arbitrator.[8]

ARBITRATION'S MULTI-FACETS

Arbitration, always a creature of contract, has many facets and distinctions. It is either domestic or international. Applicable arbitration law is either state[9] or federal or both. It is either administered by an arbitral institution[10] or non-administered. It has party-agreed arbitration rules or no agreed arbitration rules. It is usually between or among signatories to an arbitration agreement but it can also include non-signatories under certain circumstances.[11] It is conducted by a single arbitrator or a panel (usually) of three arbitrators. The arbitrators are neutral, independent, and impartial toward the parties,[12] unless the parties have agreed that one or more arbitrators may act as non-neutrals.[13] Arbitration agreements may arise either pre-dispute or post-dispute. The vast majority of U.S. domestic arbitrations arise out of pre-dispute arbitration agreements. Most parties are highly reluctant to agree to arbitrate a dispute once the dispute has arisen. One sees few post-dispute arbitration agreements but they are permitted under applicable law. Arbitration also may be non-binding[14] but is usually binding.[15]

DOMESTIC ARBITRATION IN THE UNITED STATES

Domestic arbitration as used in this chapter is arbitration in which all parties are residents, citizens, or domiciled in the U.S. Domestic arbitrations are governed by Chapter 1 of the Federal Arbitration Act[16] ("FAA") or the various arbitration acts adopted by the individual states of the U.S.[17] Domestic arbitration uses the courts of the United States (state and federal) to enforce arbitration agreements and to confirm, modify, or vacate domestic arbitration awards. If an arbitration is not an international commercial arbitration, it is a domestic arbitration.[18]

The Federal Arbitration Act, adopted in 1925,[19] authorized U.S. courts to honor pre-dispute arbitration agreements.[20] The FAA was enacted in response to widespread judicial hostility at the time to pre-dispute arbitration agreements.[21] Previously, U.S. courts did not enforce pre-dispute arbitration agreements. Parties were free to disavow such agreements with impunity. The U.S. Supreme Court has stated many times that the FAA's primary purpose is "to ensure that 'private agreements to arbitrate are enforced according to their terms'."[22] This means that pre-dispute arbitration agreements are no longer disfavored in U.S. courts.[23] Arbitration agreements, whether pre-dispute or post-dispute, are highly favored and readily enforceable by U.S. courts.

Domestic arbitration in the United States is also authorized and supported by state arbitration statutes.[24] Most of the U.S. state legislatures have adopted either the Uniform Arbitration Act (the "UAA")[25] or the Revised Uniform Arbitration Act (the "RUAA").[26] Both of these model acts were drafted and promulgated by the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws. The RUAA was revised to include developments in arbitration law since 1955 and to make the RUAA even more compatible with

the FAA and FAA jurisprudence that has developed since 1955.[27] The Texas General Arbitration Act is modeled after the UAA. The Texas legislature has not yet adopted the RUAA.

DOMESTIC ARBITRAL INSTITUTIONS

There are a number of arbitral institutions operating in the United States. Each of these institutions offers distinct arbitration services. Some of these institutions are for-profit[28] but most are not-for-profit. Some of them are appointing authorities (i.e., they assist parties in identifying and selecting potential arbitrators). These arbitral institutions may or may not have promulgated arbitration rules. Some maintain lists or "panels" of potential arbitrators available to arbitration parties. Some train arbitrators and have required amounts of annual continuing arbitrator training (e.g. American Arbitration Association). Many of them are arbitration administrators who offer a wide range of services to the parties throughout the entire arbitration process including institutional arbitration rules, applicable codes of arbitrator ethics,[29] arbitrator selection, administrative services, and the handling of party complaints or objections to sitting arbitrators.

Many of the "horror stories" one hears about arbitrations gone bad result from non-administered, *ad hoc*, private arbitrations with inexperienced, untrained arbitrators and poorly drafted arbitration agreements with no arbitral institution to manage the process or intervene to resolve process difficulties.

These domestic arbitral institutions include: American Arbitration Association ("AAA")[30]; JAMS, Inc. (formerly known as Judicial Arbitration and Mediation Services, Inc.) ("JAMS")[31]; International Institute for Conflict Prevention and Resolution ("CPR")[32]; Financial Industry Regulatory Authority ("FINRA")[33]; American Health Lawyers Association ADR Service ("AHLA")[34] ; Council of Better Business Bureaus, Inc. ("BBB")[35]; American Dispute

Resolution Center, Inc. ("ADRC")[36]; Conflict Solutions of Texas, Inc. ("CST")[37]; Resolute Systems, LLC ("RSI")[38]; National Association of Mutual Insurance Companies Arbitration Services ("NAMIC")[39]; and Arbitration Forums, Inc. ("AFI").[40]

AAA reported 1,875 employment arbitration cases filed in 2012, an approximate five percent (5%) increase in employment filings over 2011's number of new employment cases. This number does not account for the many other areas in which AAA administers arbitrations. FINRA reported a total of 3,714 new arbitration cases were filed in 2013, and 751 arbitration cases were closed in 2013. AHLA ADR Service promulgated new administered Rules of Procedure for Arbitration effective April 7, 2014. Prior to this date, AHLA ADR Service did not administer arbitrations and were basically an arbitrator appointing service with approximately two hundred fifty arbitrators on its panel. CPR also became an arbitrator administrator with its promulgation of new Administered Arbitration Rules effective July 1, 2013.

Various kinds of services are provided by these domestic arbitral institutions. Many have their own distinctive promulgated arbitration rules and codes of conduct.[41] Some have additional protocols that suggest ways to minimize arbitration costs and maximize arbitration efficiency.[42] An arbitration party or user should carefully review each institution's website and locate and interview some prior user of a particular institution's arbitration services before initiating an arbitration with that institution.

INTERNATIONAL COMMERCIAL ARBITRATION

International commercial arbitration has existed almost as long as humans have traded with each other. International commercial arbitration is generally limited to business, commercial, financial, investment, and construction arbitrations. International commercial arbitration has also been encouraged by international treaties and conventions to which sovereign

powers (countries and nations) have become signatories. The most prominent of these treaties is the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (the "New York Convention"), a United Nations-sponsored treaty. The New York Convention, as of November 26, 2013, has been ratified by one hundred forty-seven (147) signatories including the United States.[43] The New York Convention was first drafted in 1953 by the International Chamber of Commerce, Paris France. A final draft of the New York Convention was approved and became effective June 7, 1959.

Another treaty is the "Inter-American Convention on International Commercial Arbitration" (the "Panama Convention"), also United Nations-sponsored. The Panama Convention was adopted January 30, 1975 (effective for the United States as of October 27, 1990). The Panama Convention, as of May 1, 2014, has been ratified by nineteen (19) nations including the United States.[44]

The "Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" ("ICSID") was introduced in 1965.[45] Approximately one hundred sixty (160) national states have signed or ratified ICSID.[46] ICSID established its Centre for the Settlement of Investment Disputes that has its procedural arbitration rules. Other transnational arbitration treaties include the Convention Establishing the Multilateral Investment Guarantee Agency ("MIGA"), the United States Bilateral Investment Treaty ("USBIT"), and agreements supporting programs of the Overseas Private Investment Corporation ("OPIC").[47]

The New York and Panama Conventions generally provide that U.S. courts must confirm foreign arbitral awards unless one of the enumerated grounds in the applicable treaty for refusal or deferral of recognition by a U.S. court exists.[48] Both of these conventions require reciprocal adoption by the foreign country in which the foreign arbitration award in question was issued.[49]

ICSID has several essential jurisdictional conditions for an arbitration to be accepted and administered by it.[50] The state must be an ICSID Contracting State and the investor must be a person or entity that is a national of another ICSID signatory state. The dispute must arise directly out of an investment in an ICSID Contracting State. The disputing parties must consent in writing to the submission of their dispute to the Centre for the Settlement of Investment Disputes.

The principal arbitral institution administering international commercial arbitrations is the International Court of Arbitration (the "ICA"), sponsored by the International Chamber of Commerce (the "ICC"), located in Paris, France.[51] The ICA has administered more than 19,000 cases since its inception in 1923, has its own rules, and administrative staff. In 2012, approximately 759 new ICA arbitration cases that were filed involved approximately 2,036 parties from 137 countries.[52]

Other arbitral institutions administering or facilitating international commercial arbitration include the Cairo Regional Centre for International Commercial Arbitration (www.crcica.org), the Hong Kong International Arbitration Centre (www.hkiac.org), the Arbitration and Mediation Center of the World Intellectual Property Organization (www.wipo.int), the Inter-American Commercial Arbitration Commission, the China International Economic and Trade Arbitration Commission (www.cietac.org), the Beijing Arbitration Commission (www.bjac.org) the Organization for the Harmonization of Business Law in Africa (www.ohada.org), the Netherlands Arbitration Institution (www.nai-nl.org), the London Court of International Arbitration (www.lcia.org), the Singapore International Arbitration Center (www.siac.org), the Australian Centre for International Commercial Arbitration (www.acica.org), the Arbitration Institute of the Stockholm Chamber of Commerce

(www.sccinstitute.com), and the International Centre for Settlement of Investment Disputes (www.icsid.worldbank.org).

ADMINISTERED and NON-ADMINISTERED ARBITRATION

It is difficult to anticipate at the initiation of a new arbitration case all the situations that may occur throughout the arbitration process that will require an experienced, independent, neutral third-party arbitration administrator. The arbitration administrator usually oversees and performs the following tasks: (1) selection of the arbitrator; (2) initial determination of what arbitration rules apply; (3) determination of how arbitration costs are borne by the parties; (4) collection, management, and accounting for all arbitration costs, fees, and expenses; (5) evaluation and determination of all objections to the arbitrator; (6) enforcement of deadlines for final hearing and award; 7) review of award draft;[53] (8) management of the parties after the final award is issued; and (9) attention to efficiency and economy of the arbitration.

In a non-administered arbitration sometimes referred to as *ad hoc* or private arbitration, the parties are left to themselves and to their arbitration agreement with no experienced third-party neutral help to guide them through the arbitration. Even if the parties to a private arbitration can get an experienced, independent, neutral arbitrator selected, there are issues that may arise throughout the process that cannot be handled by the arbitrator without raising impartiality, independence, and neutrality questions about the arbitrator.

In the private, *ad hoc* arbitration the arbitrator has additional roles and responsibilities not required of the arbitrator in an administered arbitration. The arbitrator must also be the administrator; accountant (keeping books and records of all deposits and payments related to arbitration costs and fees); the escrow agent (for advance deposits for arbitrator fees and expenses); the clerk and registrar for all pleadings and other submissions. The arbitrator, as

administrator, must also handle objections to and complaints about the arbitration process, as well as objections to the arbitrator's continued service based on alleged bias or lack of independence and neutrality. The arbitrator, as administrator, must manage getting the arbitration completed timely. Administration of the arbitration by the arbitrator creates the risk of *ex parte* communications with the arbitrator regarding process management issues (even if inadvertent). The arbitrator as administrator must handle billing and collection for arbitrator's fees and expenses and other costs (especially where one party fails to make requested deposits and payments). The absence of an experienced, impartial, neutral arbitration administrator creates problems for the arbitrator that cannot be resolved efficiently and without the possibility of creating the appearance of bias and loss of the arbitrator's impartiality, neutrality, and independence. Surveys indicate that sophisticated users of arbitration prefer administered over non-administered arbitration. A non-administered arbitration can be managed by an experienced arbitrator but all the potential risks of the appearance of bias and loss of impartiality, neutrality, and independence cannot be eliminated. All these risks are exacerbated if the private, *ad hoc* arbitration parties select an inexperienced arbitrator who then must act as both arbitrator and administrator.

ADVANTAGES AND DISADVANTAGES OF ARBITRATION

Within the last ten years numerous objections to arbitration as an ADR method have been raised, especially from consumer advocates about Internet marketing and sales transactions, credit card agreements, and cellphone purchases. Since 2009, proposed amendments to the FAA have been filed in each session of the U.S. Congress in an attempt to ban employment, consumer, franchise, civil rights, and all other disputes that arise between parties of "unequal bargaining power."[54] S.B. 987 and H.R. 1873 introduced in the 111th U.S. Congress proposed to take away

the arbitrator's power to decide his or her own jurisdiction ("competenz-competenz") and to require a court, not the arbitrator, decide all questions of the validity and enforceability of an arbitration agreement. The U.S. Congress in 2010 did bar pre-dispute employment arbitration for federal contractors and subcontractors with U.S. Defense Department contracts over US$1 million.[55]

During this same period business-to-business arbitrations, especially international commercial arbitrations, increased. A number of U.S. law firms now have well-established arbitration sections and practice groups devoted to both domestic and international commercial arbitration. Both federal and state courts have almost unanimously recognized the benefits of arbitration and that federal and state public policy favor arbitration.

The U.S. Supreme Court has stated that the "goal of the Federal [Arbitration] Act is the expeditious resolution of claims and avoidance of cost and delay of litigation."[56] The U.S. Supreme Court has also observed that "to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate."[57] In the same decision, the U.S. Supreme Court observed that to allow one party to ignore the [arbitration] contract and resort to the courts "could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate."[58]

Justice Alito, for the majority, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* recognized that parties are willing to wave "the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[59] The U.S. Supreme Court has also recognized "the economics of dispute resolution"[60] and protected the ability of

parties to choose an arbitrator whose "knowledge and judgment concerning the demands and norms of industrial relations"[61] they trust. In *AT&T Mobility LLC v. Concepcion* the Court recognized that arbitration "allow[s] for efficient, streamlined procedures tailored to the type of dispute."[62] The Court in *Concepcion* also recognized the parties' right to select a "decisionmaker" who is "a specialist in the relevant field," to keep the proceedings "confidential to protect trade secrets," and to allow the informality of arbitral proceedings," thereby "reducing the cost and increasing the speed of dispute resolution."[63] The Fifth Circuit Court of Appeals agrees that arbitration aims "to submit a dispute to a third party for speedy and efficient resolution without resort to the courts."[64]

Texas state courts have on many occasions described the benefits of arbitration as: (1) "speed and lower cost";[65] (2) "a rapid, inexpensive alternative to traditional litigation";[66] (3) "expedited and less expensive disposition of a dispute";[67] (4) "extraordinarily narrow" judicial review of an arbitration award that limits "expense and delay" and preserves "the benefits of arbitration as an efficient, economical system for resolving disputes";[68] (5) "a lower-cost, expedited means to resolve disputes";[69] and (6) "efficiency and lower costs."[70]

Arbitration advocates have observed that "courts tend to take longer, cost more money, and lack the expert fact finders found in arbitration."[71] The advocates have also urged the following additional benefits of arbitration: (1) flexibility; (2) informality; (3) party process design; (4) adaptable process design; (5) arbitrator expertise; (6) limited discovery and e-discovery; (7) efficient evidence presentation; (8) quick discovery dispute resolution; (9) privacy and confidentiality; and (10) no required clothes and shoes removal twice-a-day for security checks.

Arbitration opponents cite the following criticisms of domestic arbitration: (1) no *stare*

decisis; (2) mistakes of law and fact permitted in awards; (3) no formal rules of evidence required; (4) application of *ex aequo et bono*[72]; (5) limited judicial appeal; (6) privacy; (7) confidentiality; (8) arbitration and arbitrator fees and costs; (9) proliferation and inefficiency of motions to compel arbitration and motions to confirm or vacate awards filed and heard in courts; (10) increased use of state law contract defenses that increase length and complexity of motions to compel arbitration; and (11) arbitrators who do not aggressively manage the arbitration process to greater economy and efficiency.

There have been numerous responses to these recent criticisms of arbitration from arbitral institutions, arbitrators, arbitration users, academics, and other ADR groups. The College of Commercial Arbitrators ("CCA") convened more than one hundred interested stakeholders in Washington, D.C. from business users, lawyers, arbitrators, and arbitration provider institutions for a well-planned working session that produced "Protocols for Expeditious, Cost-Effective Commercial Arbitration."[73] These "Protocols" were published by CCA in 2010 and provided a separate "Protocol for Business Users and In-House Counsel," "Protocol for Arbitration Providers," "Protocol for Outside Counsel," and "Protocol for Arbitrators." All four "Protocols" addressed the roles to be played by each of these four groups in promoting speed, efficiency, and economy in arbitration. Out of this initiative coupled with increased arbitrator training provided by arbitral institutions, informal and formal arbitrator groups, the American Bar Association, state bar sections, law schools, and other ADR continuing education providers, the images of the "muscular arbitrator" and the "managerial arbitrator" have developed. The "muscular" or "managerial" arbitrator is the neutral arbitrator who can and will help the arbitration process be more efficient and economical while honoring the parties' due process rights.

THE ARBITRATION PROCESS

How does an arbitration begin and end? What is the "life" or "process" of an arbitration in the United States? Although arbitrations vary widely based on the factors discussed in this chapter, there are common events that occur in almost all arbitrations.

1. **The Arbitration Agreement.** Every arbitration starts with an arbitration agreement (often called an arbitration clause, especially if contained in an additional subject matter agreement between the disputing parties). Although infrequent, a post-dispute agreement can begin an arbitration. Most arbitrations, however, begin with a pre-dispute arbitration clause in an additional subject matter contract.
2. **A Dispute Arises Within Scope of Arbitration Agreement.** A dispute described in the parties' arbitration agreement arises.
3. **The Demand for Arbitration.** One of the disputing parties makes a demand for arbitration to the other disputing party or parties and to the arbitral institution named in the parties' arbitration agreement (if an arbitral institution was named in the parties' arbitration clause).
4. **Arbitration Administrator Opens File.** The arbitral institution previously selected by the parties to administer the arbitration opens a new arbitration file upon receipt of the demand for arbitration and may conduct an administrative conference with the parties even before an arbitrator is selected.[74]
5. **Arbitrator Selected.** An arbitrator or a panel of three (usually) arbitrators is selected as described in the parties' arbitration clause under the direction of the arbitral institution or administrator, if any.
6. **Arbitrator Performs Conflicts and Disclosures Checks.** Parties provide the selected arbitrator with full names of parties and principals of the parties as well as expected

witnesses so that the potential arbitrator can perform conflicts of interest and disclosures of interests, relationships, and other matters that relate to any and all of these disclosed parties, lawyers, law firms, principals, and known witnesses.[75]

7. **Arbitrator Discloses Conflicts of Interest and Disclosures.** Selected arbitrator then publishes to the arbitral institution or administrator any and all conflicts of interest and disclosures of interests and relationships with the parties, the parties' lawyers, the other arbitrators, if any, and anticipated witnesses. These disclosures are communicated to the parties for any objections to the initially selected arbitrator.
8. **Arbitrator is Confirmed or Dismissed.** Arbitral institution then reviews any responses or objections to the selected arbitrator and decides if the selected arbitrator is neutral, independent, impartial, and unbiased. If so, the selected arbitrator's appointment is confirmed.
9. **Scheduling Conference with the Parties.** Once the arbitral institution confirms the appointment of an arbitrator or panel of arbitrators, a management conference is convened with the parties to schedule all the major events required to get the dispute resolved.[76]
10. **Scheduling Order Drafted and Issued by Arbitrator.** As a result of this initial management conference the arbitrator drafts and issues a scheduling order that establishes, *inter alia*, the final hearing dates, the final hearing location, the completion of discovery deadline, the limitations on discovery, pleading specifications for claims, counterclaims, and defenses, designation of expert witnesses, dispositive motions deadlines, stenographic record requested or rejected by the parties, preparation and exchange of final hearing exhibits, preparation and exchange of final hearing witnesses,

pre-hearing and post-hearing briefs, confirmation of applicable arbitration law, confirmation of substantive governing law, confirmation of applicable arbitration rules, and any other matters specific to the particular dispute.

11. **Arbitrator's Handling of Interim Disputes.** Interim disputes, if any, between or among the arbitration parties are heard and decided immediately by the arbitrator so that the final hearing dates are not compromised or delayed.
12. **Conduct of Final Hearing.** The final hearing is conducted, with or without a stenographic record, and once all evidence has been received and the final, corrected stenographic record is received by the arbitrator and made available to the parties, the final hearing is closed.
13. **Arbitrator Deliberations.** The arbitrator or the panel of arbitrators deliberates and decides the dispute presented by the parties.
14. **Arbitrator Drafts Final Award.** The arbitrator drafts the final award that disposes of all the issues raised by all the parties in the final hearing, and after review by the arbitral institution or administrator, the arbitrator signs and issues the final award.
15. **Arbitrator's Power Ends.** Subject to timely requests to correct clerical, typographical, or computational errors in the final award,[77] the arbitrator loses his or her power to act as arbitrator in this matter upon issuance of the final award and no longer can take any authorized action regarding the arbitration.[78]
16. **Post-Award Actions.** Once the parties receive the arbitration award, decisions have to be made about how to enforce any relief granted. The arbitration law applicable to the award will provide deadlines for confirmation, modification, and vacation of the award.[79] Each of these post-award actions has a deadline that must be determined

immediately upon a party's receipt of the award. The applicable arbitration law establishes these filing deadlines.

MOTIONS AND APPLICATIONS TO COMPEL ARBITRATION

When a party to an arbitration agreement refuses to comply with the arbitration agreement what are the other party's options? The FAA provides for a "petition proceeding in FAA §4. If the court is satisfied there is no issue about the agreement to arbitrate or the failure to comply, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[80] This hearing should be "expeditious" and "summary."[81] Interlocutory appeals are authorized for failure to stay litigation under §3 and compel arbitration under §4 of the FAA.[82]

The TGAA provides for an "application" that shows an agreement to arbitrate and the opposing party's refusal to arbitrate.[83] The Texas trial court "shall order the arbitration if it finds for the party that made the application."[84] If a party opposing an application denies the existence of the agreement to arbitrate, "the court shall summarily determine that issue."[85] Interlocutory appeals are authorized for "denying an application to compel arbitration made under Section 171.021" and "granting an application to stay arbitration made under Section 171.023."[86] Both the TGAA and the FAA interlocutory relief can now be obtained by appeal. FAA interlocutory relief no longer requires mandamus in Texas appellate courts.[87] Appeals in Texas subject to the FAA may now be taken "under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16."[88]

CLASS ARBITRATION AND CONSOLIDATED ARBITRATION

Class arbitration and class action waiver have generated lots of attention and discussion since *Green Tree Financial Corp. v. Bazzle*.[89] The parties' arbitration agreements[90] in *Bazzle*

were contained in a retail installment contract and security agreement for the financing of home improvements in South Carolina. Both the South Carolina trial court and Supreme Court concluded that the arbitration agreement's silence about class arbitration waiver permitted class arbitration that the claimant had originally demanded.[91] The U.S. Supreme Court reversed the South Carolina Supreme Court and remanded with instructions that the arbitrator, not the South Carolina courts, should decide whether the parties' arbitration agreement permitted class arbitration. The U.S. Supreme Court found that the arbitration agreements in question did not clearly preclude class arbitration.

The U.S. Supreme Court revisited class arbitration in *Stolt-Nielsen*[92] and held that class-wide arbitration can only be compelled under the FAA if there is specific evidence that the parties consented to the availability of class arbitration. In *Stolt-Nielsen***,** the parties stipulated that they had never agreed on class arbitration. Based on this stipulation, the Supreme Court reversed the arbitrator's decision to permit class arbitration. What *Stolt-Nielsen* left unanswered was what contractual language in the arbitration agreement will be sufficient to show the parties consented to class arbitration as well as who – the court or the arbitrator – decides if the parties' arbitration agreement allows for class arbitration.

The U.S. Supreme Court also considered class arbitration in 2011, in a California case in which the federal district court denied consumers class arbitration based on California's *Discover Bank*[93] rule that class arbitration was unconscionable.[94] The consumer arbitration clause in question contained a class arbitration waiver.[95] The U.S. Supreme Court held that the FAA preempted this California unenforceability of class arbitration waiver.[96]

Then in 2013 the U.S. Supreme Court upheld an arbitrator's decision to order class arbitration even though the parties' arbitration agreement didn't contain specific class arbitration

language.[97] The New Jersey trial court, the Third Circuit, and the U.S. Supreme Court upheld the arbitrator's order of class arbitration.[98] There was language in the parties' arbitration agreement that implicitly included class arbitration and the arbitrator carefully parsed this language explaining how and why he interpreted the parties' arbitration agreement to include class arbitration.[99] The U.S. Supreme Court decided that the arbitrator did not exceed his powers[100] in construing the parties' arbitration agreement.[101]

Two arbitral institutions have promulgated class arbitration rules.[102] However, numerous questions remain for class arbitration including confirmation or vacatur of the arbitration clause construction and the class certification determinations by the arbitrator. These questions also implicate the distinctions, especially for appeal purposes, of interim versus final arbitration awards.

The federal circuits are split on consolidation of separate arbitrations (as distinguished from class arbitration). Most of the arbitration consolidation cases in the U.S. relate to shipping and charter party agreements that have traditionally included arbitration clauses. Many of these disputes have common parties, common law and fact issues, possibility of conflicting awards, and other common issues that support consolidation of separate arbitrations.[103] Most of these consolidation cases have arisen in the Second Circuit where the district and circuit courts have concluded that consolidation of separate arbitrations can be ordered if the common-law tests are met even if the applicable arbitration agreements do not expressly authorize such consolidations.[104] The Fifth, Ninth, and Eleventh Circuits have only ordered consolidation of separate arbitrations where the applicable arbitration agreements authorized consolidation.[105]

DAMAGES AVAILABLE IN ARBITRATION

All damages available in litigation are also available in arbitration unless the parties'

arbitration agreement limits the damages available. However, federal statutory damages and remedies cannot be limited by contract as a violation of public policy.[106] Since *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the U.S. Supreme Court has encouraged the arbitration of federal statutory claims.[107] With *Gilmer v. Interstate/Johnson Lane Corp*., the Court made it clear that parties who make arbitration claims based on federal statutes are entitled to all the remedies provided in the federal statutes on which the parties rely in arbitration.[108]

Exemplary and punitive damages are also available in arbitration.[109] Most of the major arbitral institutions' arbitration rules permit the arbitrator to award punitive and exemplary damages.[110] The RUAA §21(a) specifically authorizes the arbitrator to award punitive damages if available in court for the same claim; however, RUAA §21(d) requires that the arbitrator specify "the basis in law" for the punitive damages award and state the amount of such damages separately from other relief granted in the award.

STANDARDS OF REVIEW FOR ARBITRATION APPEALS

An arbitration award has the effect of a final judgment of a court of last resort and is conclusive on the parties.[111] A mere mistake of law or fact or the arbitrator's failure to correctly apply the law to the facts is not sufficient to vacate an arbitration award.[112][113] A trial court's confirmation or vacatur of an arbitration award is reviewed *de novo* "while giving strong deference to the arbitrator with respect to issues properly left to the arbitrator's resolution."[114] A reviewing court will not substitute its judgment for the arbitrator's award because the court would have reached a different decision.[115] An arbitration award is entitled to "great deference" by the reviewing court.[116] The reviewing court focuses on "the integrity of the process, not the propriety of the result."[117] The losing party attempting to vacate an arbitration award "bears the burden in the trial court of bringing forth a complete record that establishes its basis for vacating

the award."[118] An arbitration award governed by the FAA can only be vacated, corrected, or modified based on one of the statutory grounds stated in 9 U.S.C. §§10 and 11; otherwise, the trial court must confirm the award.[119] However, judicial review of awards governed by the TGAA may be expanded beyond the TGAA's and FAA's statutory restraints when the expanded review is limited to "reversible error" permitted in Texas courts.[120] Some intermediate appellate courts in Texas have followed *Hall Street* in not recognizing Texas common-law grounds for vacatur[121] while other courts have recognized Texas common-law vacatur grounds.[122]

THE ARBITRATION CLAUSE

The agreement clause or agreement is the foundation for every arbitration. Arbitration is a matter of contract or a creature of contract.[123] The parties' arbitration agreement is the roadmap for the process.[124] Careful, prescient drafting is required for the arbitration agreement to do its job when a dispute arises between or among the parties thereto. The following questions need to be asked and answered when an arbitration agreement is being drafted:

1. Who will sign the agreement?
2. What disputes are to be arbitrated?
3. Has the scope of all future claims to be arbitrated been definitively stated?
4. Will the arbitrator(s) be granted the power to decide all issues of arbitrability and all challenges to the enforceability of the arbitration agreement?
5. Will arbitrators be placed under any restraints or powers limitations?
6. If so, what impact on the arbitration process will these arbitrator restraints or limited powers have?
7. Will time limits for the arbitration process be included in the agreement?
8. If so, are these time limits reasonable for completion of the anticipated arbitrations?

9. Will the anticipated arbitrations be administered or non-administered?
10. How many arbitrators will be appointed for each dispute?
11. How will the arbitrator(s) be selected?
12. Will a claim amount threshold trigger the required appointment of three arbitrators or more?
13. If so, what will be the amount of the claim amount threshold?
14. Will the arbitrator(s) be neutral or non-neutral?
15. What code of ethics will govern the arbitrator?
16. What arbitration law will govern the process?
17. What arbitration rules will apply to the process?
18. Where will the arbitration occur?
19. Will time limits be imposed on each arbitration other than those specified in the arbitration rules adopted?
20. What happens if one of the parties to the dispute refuses to pay its required arbitration fees and expenses?
21. Will the arbitration be confidential?
22. If so, what participants in the arbitration will be obligated to maintain confidentiality?
23. Does the arbitration agreement clearly distinguish the substantive governing law of the entire contract from the arbitration law?
24. Does the agreement provide that all awards are final, binding, and enforceable?
25. Is class arbitration to be waived?
26. Who will determine if class arbitration has been waived – the court or the arbitrator?
27. If class arbitration is allowed, what class arbitration rules will control the process?

28. Are arbitrations under this agreement subject to consolidation with other similar arbitrations?
29. If so, what conditions must each consolidated arbitration meet to be consolidated?
30. Who will make the consolidation decision – the court or the arbitrator?
31. Are limits to be placed on discovery in each arbitration?
32. If so, what limits?
33. Are limits to be placed on discovery of electronically stored information?
34. If so, what limits?
35. Are limits on dispositive motions to be agreed?
36. If so, what limits?
37. Are statutes of limitation to be applied to claims made pursuant to the arbitration agreement?[125]
38. If so, what statutes of limitation are to be included in the arbitration agreement?
39. Will evidence in arbitration hearings to be limited?
40. If so, what limits?
41. Will evidence be permitted in hearings by written declarations of the witnesses?
42. Will any limits be placed on damages and remedies?
43. Will attorney's fees, arbitration fees and expenses, pre-award and post-award interest be available to the parties?
44. If so, on what basis and to which parties?
45. Will the agreement contain any conditions precedent to arbitration?
46. If so, have the conditions precedent been stated clearly and been made subject to limited time periods?

47. Will the arbitrator have sanctions powers?

48. If so, are the arbitrator's sanctions powers adequately described?

CONCLUSION

Arbitration is an important ADR method that can resolve intractable disputes economically and efficiently. Arbitration requires thoughtful use of its complex process from arbitration agreement drafting to post-award action. Arbitration jurisprudence is rapidly developing in the United States as well as in foreign jurisdictions. Although there are criticisms of the process, arbitration can and more often than not produces timely, economical, and efficient dispute resolution.

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[2] *See* www.adr.org.

[3] *AT&T Techs., Inc. v. Communc'ns Workers of America*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986); *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 192 (Tex.2007); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67, 130 St.Ct. 2772, 2776, 177 L. Ed. 2d 403 (2010) ("The FAA reflects the fundamental principle that arbitration is a matter of contract. Section 2, [is] the 'primary substantive provision of the Act'.").

[4] 9 U.S.C. §2; *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1754, 179 L.Ed.2d 742 (2011); *In re Advance PCS Health L.P.*, 172 S.W.3d 603, 604 (Tex.2005); Tex. Civ. Prac. & Rem. Code §171.012 (Vernon 2013).

[5] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002); *See Tiri v. Lucky Chances, Inc.*, A136675, Cal. Ct. App. (May 15, 2014).

[6] *Rent-A-Ctr., W., Inc.*, 561 U.S. at 70-71, 130 S. Ct. at 2778, 177 L. Ed. 2d 403 (2010) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."; *Buckeye Check Cashing, Inc. v. Cardenga*, 546 U.S. 440, 445, 126 S.Ct. 1204, 1208 (2006); see also *id.*, at 447, 126 S.Ct. 1204 (the severability rule is based on 9 U.S. § 2).

[7] See, e.g., *Emp'rs Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.*, 744 F.3d 25 (1st Cir. Feb. 26, 2014); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749 (Tex.2001).

[8] *Rent-A-Center, W., Inc.*, 561 U.S. at 68-69, 130 S.Ct. at 2777 (2010) ("We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.") (*citing Howsam* 537 U.S., at 83–85, 123 S.Ct. 588; *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) (plurality opinion)). This line of cases merely reflects the principle that arbitration is a matter of contract.

[9] Texas courts recognize generally four arbitration laws: (1) the Texas General Arbitration Act (Tex. Civ. Prac. & Rem. Code ch. 171; (2) Texas Arbitration & Conciliation of International Commercial Disputes (Tex. Civ. Prac. & Rem. Code ch. 172; (3) Texas common-law arbitration (*Blue Cross Blue Shield of Texas v. Juneau*, 114 S.W.3d 126, 134 fn5 (Tex. App.—Austin 2003, no pet.); and (4) the Federal Arbitration Act (9 U.S.C. §§1-16).

[10] Also referred to variously as an "arbitration organization" (RUAA §1(1)); a "dispute resolution organization" (Tex. Civ. Prac. & Rem. Code §154.001(2)); or an "arbitration administrator."

[11] *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005).
[12] Canon IX, A, *The Code of Ethics for Arbitrators in Commercial Disputes* (effective March 1, 2004).
[13] *Id.* at Canons IX, C and X.
[14] *E.g.*, Tex. Civ. Prac. & Rem. Code §154.27.
[15] *Id.* at §171.087.
[16] 9 U.S.C. §1 et seq.
[17] For example, in Texas, the Uniform Arbitration Act ("UAA"), was adopted in Tex. Civ. Prac. & Rem. Code ch. 171; the UNCITRAL Model Act was adopted by the Texas Legislature in Tex. Civ. Prac. & Rem. Code ch. 172; and arbitration of a controversy between members of an association or corporation exempt under IRC §501(a) and (c) from payment of federal income tax or incorporated under the Texas Non-Profit Corporations Act is authorized by Tex. Civ. Prac. & Rem. Code ch. 173.
[18] 9 U.S.C. §202 ("An agreement or award arising out of such a relationship [an arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial] which is entirely between citizens of the United States shall be deemed not to fall under the [New York] Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.").
[19] *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 407, 414 (1967) (Black, J., dissenting) (discussing the legislative history of the FAA in the U.S. Congress).
[20] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681-82, 130 S. Ct. 1758, 1773, 176 L. Ed. 2d 605 (2010) ("In 1925, Congress enacted the United States Arbitration Act, as the FAA was formerly known, for the express purpose of making 'valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations'.").
[21] *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 581, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008); 9 U.S.C. §2.
[22] *Id*. at 682.
[23] The British Parliament in Arbitration Acts of 1854 and 1889 overturned the common-law rule that arbitration agreements were revocable by parties and not enforceable by the English courts.
[24] *E.g.*, Tex. Civ. Prac. & Rem. Code ch. 171 ("General Arbitration"), also known as the Texas General Arbitration Act (the "TGAA").
[25] Adopted by the Uniform Law Commission in 1955, amended in 1956, and ultimately adopted by forty-nine (49) states of the United States.
[26] Completed by the Uniform Law Commission in 2000, and as of June 1, 2014, adopted by 18 states (including the District of Columbia) and pending adoption in three additional states of the United States.
[27] The RUAA strengthens arbitrator power to order provisional remedies and to consolidate separate but related arbitration proceedings, makes the RUAA a default act whose provisions can be waived or varied by contract, requires arbitrator disclosures, provides express immunity for arbitrators, provides more powers to the arbitrator, and expressly authorizes punitive damages or other exemplary relief where appropriate.
[28] JAMS, ADRC, CST, RSI, and others.
[29] AAA, JAMS, CPR, AHLA, and others.
[30] AAA's corporate office is in New York, New York. Its website is www.adr.org.
[31] JAMS's corporate office is in Los Angeles, California. Its website is www.jamsadr.com.
[32] CPR's corporate office is in New York, New York. Its website is www.cpradr.org.
[33] FINRA's office is in New York, New York. Its website is www.finra.org.
[34] AHLA's corporate office is in Washington, D.C. Its website is www.healthlawyers.org.
[35] BBB's corporate office is in Arlington, Virginia. Its website is www.bbb.org.
[36] ADRC's corporate office is in New Britain, Connecticut. Its website is www.adrcenter.net.
[37] CST's corporate office is in San Antonio, Texas. Its website is www.csoftx.com.
[38] RSI's corporate office is in Milwaukee, Wisconsin. Its website is www.resolutesystems.com.
[39] NAMIC's corporate office is in Washington, D.C. Its website is www.namic.com.
[40] AFI's corporate office is in Tampa, Florida. Its website is www.arbfile.org.
[41] AAA, JAMS, CPR, AHLA, and others.
[42] AAA, JAMS, and CPR.
[43] 9 U.S.C. ch.2; "Scoreboard of Adherence to Transnational Arbitration Treaties," Institute for Transnational Arbitration (a Division of The Center for American and International Law, Plano, Texas) (November 26, 2013).

[44] 9 U.S.C. ch.3; "Scoreboard of Adherence to Transnational Arbitration Treaties," Institute for Transnational Arbitration (a Division of The Center for American and International Law, Plano, Texas) (November 26, 2013).
[45] *See* https://icsid.worldbank.org.
[46] *See* "Scoreboard of Adherence to Transnational Arbitration Treaties," Institute for Transnational Arbitration (a Division of The Center for American and International Law, Plano, Texas) (November 26, 2013).
[47] *Id.*
[48] 9 U.S.C. §§207 and 304.
[49] 9 U.S.C. §304.
[50] *See* Schreuer, Christoph H. *The ICSID Convention.* 2d Ed. New York: Cambridge University Press, 2014.
[51] *See* www.iccwbo.org.
[52] *See* www.iccwbo.org.
[53] Rule 15.4, CPR Administered Arbitration Rules (July 1, 2013).
[54] *See* "Arbitration Fairness Act," S.B. 987 (Franken, D-Minn) (Introduced May12, 2011) and H.R. 1873 (Johnson, D-Ga) (Introduced May 12, 2011).
[55] Public Law 111-11I, §8116, Department of Defense Appropriations Act of 2010.
[56] *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 105 S.Ct. 1238, 1241, 84 L.Ed.2d 158 (1985).
[57] *Southland Corp. v. Keating*, 465 U.S. 1, 7-8, 104 S.Ct. 852, 857, 79 L.Ed.2d 1 (1984).
[58] *Id.* at 7.
[59] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685, 130 S. Ct. 1758, 1775, 176 L. Ed. 2d 605 (2010).
[60] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001).
[61] *Alexander v. Gardner-Denver*, 415 U.S. 36, 57, 94 S.Ct. 1011 (1974).
[62]*AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749, 179 L.Ed.2d 742 (2011).
[63] *Id.*
[64] *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1061 (5th Cir.1990).
[65] *Shearson Lehman Hutton, Inc. v. McKay*, 763 S.W.2d 934, 939 (Tex.App. – San Antonio 1989, no writ); *In re MHI Partnership,Ltd.*, 7 S.W.3d 918, 921 (Tex.App. – Houston [1st Dist.] 1999, no pet.).
[66] *In re Sonic-Carrollton V, L.P.*, 230 S.W.3d 811, 814 (Tex.App. – Dallas 2007, no pet.) (quoting *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 273 (Tex.1992)).
[67] *John M. O'Quinn, P.C. v. Wood*, 244 S.W.3d 549, 553 (Tex.App. – Tyler 2007, no pet.).
[68]*Myer v. Americo Life, Inc.*, 232 S.W.3d 401, 407-408 (Tex.App. – Dallas 2007, no pet.; *Forged Components, Inc. v. Guzman*, 409 S.W.3d 91, 103 (Tex.App. – Houston [1st Dist.] 2013, no pet.).
[69] *Abdel Hakim Labidi v. Sydow*, 287 S.W.3d 922, 926 (Tex.App. – Houston [14th Dist.] 2009, no pet.); *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.3d 266, 269 (Tex. 1992).
[70] *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.3d 266, 268 (Tex.1992).
[71] Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 St. Mary's L.J. 259, 269 (1990).
[72] *Ex aequo et bono* refers to the arbitrator's equitable power to make awards based on what the arbitrator considers to be fair and equitable. This power can be granted by the parties' arbitration agreement or by the parties' adoption of arbitration rules that give this power to the arbitrator.
[73] Published as an Appendix to *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration*, Gaitis, James M. *et al*., eds, 2014; also available at http://www.TheCCA.Net.
[74] If no arbitral institution was named in the parties' arbitration agreement, then the parties or counsel for the parties have to confer and decide how to proceed without an arbitration administrator as a private, *ad hoc* arbitration.
[75] *See The Code of Ethics for Arbitrators in Commercial Disputes* (March 2004), Canon II; *e.g.* R-17, AAA Commercial Arbitration Rules (October 1, 2013) and R-15, AAA Employment Arbitration Rules (November 1, 2009).
[76] *E.g.*, P-2, Preliminary Hearing Procedures, AAA Commercial Arbitration Rules (October 1, 2013).
[77] R-50, AAA Commercial Arbitration Rules (October 1, 2013).
[78] This loss of the arbitrator's authority or power to act is known as "functus officio." *See Bosack v. Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009); *Brown v. Witco Corp*, 340 F. 3d 209 (2003).
[79] 9 U.S.C. §§9-12; Tex. Civ. Prac. & Rem. Code §§87-93.
[80] 9 U.S.C.A. § 4.
[81] *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 22, 103 S. Ct. 927, 940, 74 L. Ed. 2d 765 (U.S.N.C. 1983) ("The Act provides two parallel devices for enforcing an arbitration agreement: a stay of litigation

in any case raising a dispute referable to arbitration, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, § 4. Both of these sections call for an expeditious and summary hearing, with only restricted inquiry into factual issues.").

[82] 9 U.S.C. §16(a)(1)(A) and (B).

[83] Tex. Civ. Prac. & Rem. Code §171.021(a).

[84] *Id.* at §171.021(b).

[85] *Id.*

[86] Tex. Civ. Prac. & Rem. Code §171.098(a)(1) and (2).

[87] Tex. Civ. Prac. & Rem. Code §§51.016 and 171.093 (2009).

[88] *Id.*

[89] *Green Tree Fin. Corp.*, 539 U.S. 444, 123 St.Ct. 2402 (2003).

[90] There were three borrowers and two separate arbitrations with the South Carolina state courts certifying class arbitration at the trial court and appellate court.

[91] *Bassle v. Green Tree Fin. Corp.*,569 S.E.2d 349 (351 S.C. 244)(2003), *cert. granted*, 537 U.S. 1098 (2003), jdgt. vacated, 539 U.S. 444 (2003).

[92] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* 559 U.S. 662 (2010).

[93] *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005).

[94] *AT&T Mobility LLC v. Concepcion*, -- U.S. --, 131 S.Ct. 1740, 1745, 179 L.Ed.2d 742 (2011) ("[T]he [California Supreme] court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.").

[95] *Id.* at 1145.

[96] *Id.* at 1748 ("The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

[97] *Oxford Health Plans LLC v. Sutter*, -- U.S. --, 133 S.Ct. 2064, 186 L.Ed.2d 113, 2013 WL 2459522 (June 10, 2013).

[98] *Id.* at 2067.

[99] *Id. at* 2070 (Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But § 10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly.").

[100] 9 U.S.C. §10(a)(4).

[101] *Oxford Health Plans LLC*, 133 S.Ct. at 2071 ("Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not "exceed his powers," we cannot give Oxford the relief it wants. We accordingly affirm the judgment of the Court of Appeals.").

[102] *See* JAMS Class Arbitration Rules and AAA Class Arbitration Rules.

[103] *Matter of Arbitrations Between Benship Intern., Inc. & Phosphate Chemicals Exp. Ass'n, Inc.*, 771 F. Supp. 87, 89 (S.D.N.Y. 1991) ("In deciding whether to order the consolidation of arbitrations, courts in this Circuit have considered several factors, most important of which are the existence of common questions of law and fact, the possibility of conflicting awards or inconsistent results, and the avoidance of unnecessary prejudice, delay and cost.").

[104] *P/R Clipper Gas v. PPG Indus., Inc.*, 804 F. Supp. 570, 575 (S.D.N.Y. 1992); *Marine Trading Ltd. v. Ore Intern. Corp.*, 432 F. Supp. 683, 684 (S.D.N.Y. 1977) ("The application for a consolidation of the separate arbitrations demanded is made pursuant to 9 U.S.C. ss 4 and 5. In pursuance of those statutes the Court has well recognized power to order consolidation of arbitration demands such as sought herein, even over objection of a party thereto.").

[105] *Baesler v. Cont'l Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *see Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir.1987) and *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*, 343 F.3d 355, 363 (5th Cir. 2003) (Consolidation is described as "analogous" to class arbitration.).

[106] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 1652, 113 L.Ed.2d 26 (1991).

[107] *Mitsubishi Motors Corp.*, 473 U.S. 614, 626-27, 105 S. Ct. 3346, 3354, 87 L. Ed. 2d 444 (1985).

[108] *Gilmer*. 500 U.S. at 26, 111 S. Ct. at 1652, 114 L. Ed. 2d 26 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held

enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. §§ 1-7; § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.;* and § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2). See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). In these cases we recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.*, 473 U.S. at 628, 105 S.Ct., at 3354.").

[109] *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 58 (1995); *In re Poly-Am., L.P.*, 262 S.W.3d 337, 349 (Tex. 2008).

[110] R-47(a), AAA Commercial Arbitration Rules (October 1, 2013); Rule 24(c), JAMS Comprehensive Arbitration Rules & Procedures (October 1, 2010).

[111] *Powell v. Gulf Coast Carriers, Inc.*, 872 S.W.2d 22, 24 (Tex.App.-Houston [14th Dist.] 1994, no writ).

[112] *Powell*, 872 S.W.2d at 24; *Myer v. Americo Life, Inc.*, 371 S.W.3d 537, 541 (Tex. App.—Dallas 2012, pet. filed).

[113] *Xtria L.L.C. v. Intern. Ins. Alliance Inc.*, 286 S.W.3d 583, 591 (Tex. App.—Texarkana 2009, pet. denied).

[114] *Id*.

[115] *Myer v. Americo Life, Inc.*, 371 S.W.3d 537, 541 (Tex. App.—Dallas 2012, pet. filed).

[116] *Id*.

[117] *Myer v. Americo Life, Inc.*, 371 S.W.3d 537, 541 (Tex. App.—Dallas 2012, pet. filed).

[118] *Id*.

[119] *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).

[120] *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 87 (Tex. 2011), *cert. denied*, 132 S.Ct. 455 (2011).

[121] *See Age Indus. v. Edwards*, 318 S.W.3d 461, 463 (Tex.App. – El Paso 2010, pet. dism'd).

[122] *See Graham-Rutledge & Co. v. Nadia Corp.*, 281 s.W.3d 683, 688 (Tex.App. – Dallas 2009, no pet.).

[123] *See* fn3, *supra*.

[124] *See* Brees, Mina A., *et al., "Arbitration Road Map: A Guide to Clauses, Procedures, and Hearings,"* State Bar of Texas (2007).

[125] *See* Craig P. Miller and Laura Danysh, *"The Enforceability and Applicability of a Statute of Limitations in Arbitration,"* 32 Franchise L.J. 26-34 (Summer 2012); *See Broom v. Morgan Stanley*, 236 P.3d 182 (2010); Washington Uniform Arbitration Act, RCW 7.04A.090; *EZ Pawn Corp. v. Mancias*, 934 S.W.3d 87, 89 (Tex.1996).