IS THERE PERIL IN SEEKING PRIVATE JUSTICE THROUGH ARBITRATION – AND FOR WHOM?

Paula J. Morency
Schiff Hardin LLP
233 S. Wacker Drive, Suite 6600
Chicago, IL  60606

and

J. Michael Dady
Dady & Gardner, P.A.
5100 IDS Center
80 South Eighth Street
Minneapolis, Minnesota  55402

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CONCLUSION
The Federal Arbitration Act (the “FAA”) came before Congress at a time of great concern over the substantial delays and costs required to obtain results in the federal and state courts. In response to repeated judicial expressions of hostility toward any alternate system, including private arbitration, the FAA was designed not only to permit arbitration, but to “promote” its use. Accordingly, the FAA expressly provided that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

Since its passage in 1925, the FAA has generated a robust body of judicial opinions challenging, explaining and ultimately protecting the private system of justice the FAA was designed to promote. The U.S. Supreme Court has discussed the benefits of “streamlined” private dispute resolution, including “lower costs, greater efficiency and speed,” confidentiality, and “the ability to choose expert adjudicators to resolve specialized disputes.” Courts have repeatedly described the FAA as “embodying a national policy favoring arbitration.” Interpreting the FAA in light of that policy, courts have invalidated a number of state substantive and procedural laws that would limit the enforceability of arbitration agreements. More recently, they have limited the arbitrability of class claims, unless they are expressly contemplated by the language the parties adopted for their arbitration clause.

At the same time, courts and commentators have acknowledged the dark side of arbitration. The informality has costs, including limited review, and the risk that “errors will go uncorrected.” The touted advantages of lower cost and increased efficiency may be more aspirational than real, given the deposits required by arbitration services, the hourly rates required for lawyers and arbitrators, and the practical limitations on dispositive motions.

Against that backdrop, this paper will examine the forms of private justice available in franchising today, and how the drafting and application of arbitration clauses can affect both the procedural steps and substantive outcome of disputes. In addition, we will offer practical suggestions on how to try a franchise arbitration, and how to address the procedural requirements for an appeal. The overall process can be efficient, streamlined, and unimpeded by slow court dockets, with decisions by professionals rather than a jury. Or – the process can be expensive, slow, and provide only limited review of decisions with life-changing implications for individual franchisees, and potentially system-wide implications for franchisors.

I. INTRODUCTION – THE RISE OF PRIVATE JUSTICE IN FRANCHISING

Franchising has played a prominent role in the development and application of arbitration law. The U.S. Supreme Court has repeatedly confirmed the permissibility of

4 See, e.g., Concepcion at 346; Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).
5 Stolt-Nielsen at 685-86; Concepcion at 350-52.
6 Id. at 350.
arbitration clauses in franchise agreements, as well as other forms of agreements affecting commerce.⁷

As the field of franchising has gained experience with arbitration clauses, many franchisors have included – and expanded the specificity of -- those contractual provisions. Accordingly, the private system of justice outlined in arbitration clauses and FDDs today provides the framework for placing many franchise disputes, small and large, in the hands of private arbitrators. A number of systems have shaped and individualized the contours of their particular form of private justice, whether in specifying the type of arbitrator selected, limiting discovery, or, in some cases, requiring a second arbitration – or de novo litigation - if the first proceeding results in a decision significantly adverse to the franchisor.

Given the recent Supreme Court support for private arbitration agreements, and the FAA pre-emption of state limitations, it is important for franchisors and franchisees to understand how the system works before they establish and agree to arbitration clauses in their franchise agreements.

II. HOW THE SYSTEM WORKS

The starting point for addressing any arbitrable dispute is the wording of the arbitration clause itself. As the body of law interpreting the FAA has grown more sophisticated, so have the arbitration clauses incorporated into private agreements.

A. The Contents of the Arbitration Clause

1. Arbitration Service Providers and Applicable Rules

Some older arbitration clauses appear, upon first reading, to be very simple. Some provide for “confidential arbitration of any disputes between the parties arising out of this agreement, under the rules of the American Arbitration Association.”

Over the years, though, organizations like the AAA, JAMS and other arbitration service providers have developed increasingly complex subject-area rules that will affect an arbitration’s substantive scope, as well as its procedures. Within the structure of a particular service provider, which rules apply? Often the answer is determined not by any preferences the parties actually discussed in negotiating the arbitration clause. Instead, it is determined by the rules in force at the time of the arbitration, and the nature and size of the underlying controversy. For example, some AAA Rules apply in commercial disputes (the “Commercial Rules,” and the more elaborate subset of Procedures for Large, Complex Commercial Disputes). There are other rules for putative and certified class actions (the “Class Rules”), for smaller matters in which the parties seek expedited treatment (the “Expedited Rules”), for disputes with consumers (the “Consumer Rules,” requiring registration of clauses and additional fees) and for employment (the “Employment Rules”), construction, and other controversies. The parties’ arbitration clause may refer to those industry-specific rules, or simply reflect an agreement to follow the “Rules” of a particular service provider. Furthermore, increasing availability of competing domestic and international arbitration services (including CPR, NAM, and the International Court of Arbitration of the International Chamber of Commerce (the “ICC”)) has led

to additional forms of clauses that adopt those alternate rules instead, frequently as an economic choice (see discussion of Fees, below).

The rules of the arbitration services often govern filing requirements, arbitrator selection, emergency relief, default judgments, discovery, motions, sanctions, and even appeals within the structure of the particular arbitration service, and, in the case of the Class Rules, stays pending judicial appeal. In international matters, the ICC rules will require the Tribunal to draft Terms of Reference, setting out each of the issues placed before the arbitrators.

Accordingly, some arbitration clauses are not as streamlined as the parties may initially have hoped when they developed those provisions. Each set of arbitration service rules creates its own system of private justice, and it is essential to assess at the outset how the chosen service and rules may impact a particular dispute.

2. Preliminary Requirements and Scope

In addition to designating an arbitration provider and its rules, the arbitration clause may establish other agreed procedures that will override the service provider rules. It is common to see threshold requirements, like a mandate that the parties must complete a mediation before an arbitration demand can be filed. The parties may also have specified what kinds of controversies will be subject to arbitration. Some sweep broadly to cover “any controversy or claim arising out of or relating to this Agreement or with regard to its interpretation or breach.” Others are more narrow, covering disputes “between the parties, and no claims of any other person.” As described below, there may be an express waiver of class or representative actions.

Some arbitration clauses carve out from their scope disputes regarding the enforcement of the franchisor’s trademarks or other intellectual property rights, or matters requiring emergency injunctive relief from a court. In some cases, such clauses create dual litigation paths, and may result in simultaneous arbitral and judicial proceedings.

The arbitration clause will frequently provide that a controversy will be heard by one arbitrator or three. It may also prescribe the amount of discovery the parties will be permitted to take, the rules of evidence that will apply at the hearing, and whether the prevailing party will be entitled to an award of attorneys’ fees (and the frequently substantial administrative and arbitrator fees and expenses). The clause may establish a forum and a choice of law.

Finally, as set forth below, the parties may decide to permit an appeal within the structure of their arbitration service. Organizations like JAMS and the American Arbitration Association (“AAA”) have established internal appellate review procedures, which the parties may choose to invoke before appealing an arbitration award to a judicial body.

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authority to remand to the original panel. Instead, they approve, reverse and modify the first instance award themselves.\footnote{See AAA Optional Appellate Arbitration Rule Article A-19(a); JAMS Optional Arbitration Appeal Procedure ¶ D; CPR Arbitration Appeal Procedure Rules 8.2 and 8.3.} In a new wave of clauses, some parties are agreeing privately that the results of an arbitration will simply be void if the franchisee obtains an award above a specified amount, calling for a new arbitration or a de novo judicial proceeding.

With each such development, a body of case law has developed to evaluate whether such requirements can be enforced. Accordingly, it will be important to review carefully the arbitration clause that will apply to your dispute, identify the enforceable provisions, review the applicable rules, and prepare for private litigation.

**B. The Arbitration Demand and Response**

Where the parties have signed an agreement that includes an arbitration clause, the first step in resolving most disputes is for one of the parties to file a Demand for Arbitration with the designated arbitration service. That party becomes the “Claimant,” bringing claims against the “Respondent.” Some agreements will specify the time period in which that filing must be made, such as within a particular number of days after a demand letter, or after an unsuccessful mediation. Once the filing is made, the rules of the arbitration service will dictate the next steps.

For JAMS, AAA and ICDR filings, there is no requirement that the Respondent file a formal answer. Silence will be taken as a denial of the claim.\footnote{See, e.g., AAA Commercial Arbitration Rules R-5(a), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased (last visited Aug. 18, 2016).} However, if a Respondent wishes to make a response, or files a counterclaim, the arbitration provider’s rules will set the deadlines for doing so. From the outset, then, the Claimant and Respondent face the strategic question of what kind of description of their claims they first want the arbitrators to see, and the initial impressions they will want to make.

**C. Filing Fees and Arbitrator Expenses**

Some clients are startled by the high cost of private justice. The expenses include filing fees, ongoing administrative fees, and substantial deposits to compensate the arbitrator(s) at their hourly rates. In addition, arbitrators may charge significant fees to postpone or cancel hearings.

The filing and administrative fees can vary substantially among the available arbitration services. For example, the AAA issued its new fee schedule effective July 1, 2016, requiring that a Claimant pay an initial filing fee in a range from $750 - $10,000 and more, depending on the amount in dispute. Cases with three or more arbitrators are subject to an initial filing fee of $4000.\footnote{See “Standard Fee Schedule,” https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2031504 (last visited Aug. 18, 2016).} Under the JAMS fee schedule for complex commercial disputes, for example, the initial filing fee is lower, currently $1200 for a two-party matter, but the ongoing fees can be substantial. An ongoing “Case Management Fee” will be billed to the parties, calculated as 12% of “all Professional Fees,” including the arbitrator fees for “hearings, pre-and post-hearing...
reading and research and award preparation.” 13 Most services require an additional filing fee from the Respondent for the filing of a counterclaim.

The arbitrator deposits are in addition to the filing fees, and are based on the amount of time the AAA and the arbitrators estimate will be required to address the issues, frequently at rates that range from $300 – $1000 per hour. Some arbitrators will specify, in the information they provide to the arbitration service and the parties that they expect to receive a cancellation fee, to be assessed if the parties settle their dispute, or reschedule a hearing, within a defined time period. For arbitrators, who often have private law practices or conduct other arbitrations, unexpected cancellations can leave them unable to readjust their time commitments upon short notice.

The arbitration services have each established rules to handle the problem of a litigant who fails to pay the required deposits. The AAA, for example, permits the opposing party to pay the missing share of the funds that will be required to pay for the arbitrator(s) time and expenses, as well as the AAA’s own administrative fees. If the opponent decides not to advance those funds, the AAA will suspend the proceeding.

The fees required, and a party’s ability and willingness to pay them, therefore present serious strategic issues. They became even more serious earlier this year with the Ninth Circuit decision in Tillman v. Tillman, which held that if a party is unable to pay continuing arbitration fees, the case can continue in federal court, lifting the stay imposed by a court pending arbitration.14

D. Where a Party Turns First to the Courts

If a party ignores the arbitration clause and files a Complaint with a state or federal court, proceedings become more complicated, requiring swift attention once the defendant is served.

1. Removal Issues Arise Early

If the matter is brought by an individual plaintiff or a group of plaintiffs, rather than by a class, and the defendant has grounds for federal question or diversity jurisdiction, removal must occur within 30 days of service. If the case is not immediately removable, then it will have a second 30-day window after receiving “an amended pleading, motion order or other paper from which it may first be ascertained that the case is one which is or has become removable” – as long as that second window falls within the first year after the commencement of the action.15

In cases eligible for removal under the Class Action Fairness Act (“CAFA”), the rules are materially different. In the circuits that have decided the issue, the removal period begins to run only “when the defendant receives a document from the plaintiff from which the defendant can unambiguously ascertain CAFA jurisdiction.”16 Furthermore, there is no one-year limitation on

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16 See, e.g., Graiser v. Visionworks of Am., Inc., 819 F.3d 277, 284-85 (6th Cir. 2016) (collecting cases from the First, Seventh and Ninth Circuit).
Once removal occurs, the motion to dismiss or answer will generally be due within 21 days. In some states, like California, it may be efficient for a defendant to file a general denial before removal, without waiving its rights to remove or to compel arbitration.

Once removal occurs, the defendant generally must act promptly to seek arbitration, both to avoid the procedural requirements imposed by the Federal Rules, like deadlines to answer or otherwise plead or initial disclosure requirements, and to avoid waiver of the right to arbitrate. In _Martin v. Yasuda_, for example, the Ninth Circuit affirmed the district court’s denial of a motion to compel arbitration of a class claim, after defendants failed to file a motion to compel arbitration until after they moved and obtained a ruling on a motion to dismiss, filed an answer, participated in a 26(f) conference, made 26(a) disclosures, engaged in discovery, and participated in a scheduling conference with the court. Such litigation efforts represented “revocation of the arbitration clause,” and the late motion was an attempt “to manipulate the judicial and arbitral systems and to gain an unfair advantage.” Although waiver is disfavored, courts will invoke it where a party engages in “conduct inconsistent with the right to arbitrate,” to the prejudice of the opposing party.

2. The Motion to Compel Arbitration

A motion to compel arbitration presents the court with a written dispute resolution clause reflecting an agreement to arbitrate. The motion then explains that the clause covers the legal and factual disputes between the parties, and asks the court to compel arbitration and stay all other proceedings.

The determination whether a dispute is arbitrable does not reach the merits of the party’s claims. Rather, if the court decides that a dispute falls within the scope of the parties’ arbitration agreement, even an issue without apparent merit must be submitted for decision by the arbitrator.

a. Legal Standard

The FAA “gives the adjudicating court no discretion as to whether to award relief.” When a party seeks relief under section 3 of the FAA, the court “upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has

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17 Id. at 282.


20 Id.

21 Id. at *4 n.3, *8.

22 Id. at *5 (collecting cases).

23 _AT&T Techs., Inc. v. Commc’n Workers of Am._, 475 U.S. 643, 650 (1986).

24 Id.; accord _Zurich Am. Ins. Co. v. Watts Indus., Inc._, 466 F.3d 577, 581 (7th Cir. 2006).

been had in accordance with the terms of the agreement.” The FAA “leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”

Because arbitration clauses are to be liberally construed, any doubts about the scope of an arbitration clause will be resolved in favor of arbitration. As the Supreme Court has explained:

Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration… The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Accordingly, “where a contract contains an arbitration clause, courts apply a presumption in favor of arbitrability as to particular grievances, and the party resisting arbitration bears the burden of establishing that the arbitration agreement is inapplicable.” When presented with motions to compel arbitration, many courts will therefore limit their inquiry to whether an agreement to arbitrate exists, and whether it encompasses issues in dispute.

As a threshold matter, the court will examine closely the language of the agreement and decide whether the parties have submitted a particular dispute to arbitration. The agreement may contain language that other decisions have described as a “broad and general” arbitration clause, applying for example to “all claims arising out of the agreement” between the parties. Where the arbitration clause is phrased in such broad terms, “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” As the Ninth Circuit explained that standard, “[t]o require arbitration, [an aggrieved party's] factual allegations need only 'touch matters' covered by the contract containing the arbitration clause . . . .”

In deciding whether a particular dispute is arbitrable, courts will decide certain “gateway matters” (defined tautologically as questions that the parties “would normally expect a forum-
based decisionmaker to decide”). Sometimes called “questions of arbitrability,” these have been held to include issues such as whether the parties are bound by a particular arbitration clause, or whether a clause in an otherwise enforceable contract applies to a particular type of controversy. These disputes are “for judicial determination unless the parties clearly and unmistakably provide otherwise.”

There is a second category of issues that courts will send to the arbitrator for decision. These include procedural issues, like laches, delay and statutes of limitation, that are “presumptively not for the judge, but for an arbitrator, to decide.” In addition, the arbitration clause itself may contain language that broadens the scope of issues for decision by an arbitrator. For example, the clause may provide that the arbitrator will determine the scope and applicability of the arbitration clause to the underlying dispute. That requirement may be explicit, or may arise from the parties’ incorporation of particular arbitration service rules that contain similar language. For example, the Commercial Rules reserve, for decision by the arbitrator, any disputes regarding the “existence, scope and validity” of the arbitration agreement. Rule 7 of the AAA Commercial Rules provides, in relevant part:

**Jurisdiction**

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

Where such language appears in an agreement, or is incorporated by reference, the arbitrator will have broad power to determine, in the first instance, the scope and validity of the arbitration clause.

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34 Id. at 84.

35 Id. at 83 (internal punctuation omitted); Martin v. Yasuda, 2016 WL 3924381, at *4.

36 Howsam at 83.

37 Id. at 84-85; Martin at *4.

38 AAA Commercial Rules R-7.

b. Questions Regarding Existence of an Agreement

If there is a question whether the opposing party actually signed or entered into the arbitration agreement, the FAA provides for an immediate hearing on that issue.\(^{40}\) Section 4 provides, in relevant part:

If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

As one court summarized, “Courts have read 9 U.S.C. § 4 to require a jury trial ‘only if there is a triable issue concerning the existence or scope of the agreement.’”\(^{41}\) The party resisting arbitration has the burden of showing that it is entitled to a jury trial.\(^{42}\) If it is apparent to the district court that an arbitration agreement exists, the court will refer remaining matters to the arbitrator.

c. Potential Application to Guarantors

A guarantor can be bound by an arbitration clause in some circumstances, even if the guarantor did not sign the agreement that contained the clause. As the U.S. Supreme Court observed in *Arthur Andersen, LLP v. Carlisle*, an arbitration agreement is governed by “traditional principles” of state law regarding its validity, revocability, and enforceability.\(^{43}\) Those

AAA, which authorizes an arbitrator to determine jurisdictional issues, is “clear and unmistakable evidence that the issue of arbitrability is to be submitted to the arbitrator.”\(^{44}\)

\(^{40}\) 9 U.S.C § 4.

\(^{41}\) Wyndham Vacation Resorts, Inc. v. Garcia, No. 15-01540, 2015 U.S. Dist. LEXIS 128777, at *6 n.2 (N.D. Cal. Sept. 24, 2015) (quoting Saturday Evening Post Co. v. Rumbleseat Press Inc., 816 F.2d 1191, 1196 (7th Cir. 1987) (“It is not true that by merely demanding a jury trial a party to an arbitration agreement can get one”); Tinder v. Pinkerton Sec., 305 F.3d 728, 735 (7th Cir. 2002) (same); Dillard v. Merrill Lynch, Pierce, Fenner & Smith Inc., 961 F.2d 1148, 1154 (5th Cir. 1992) (same); see also Doctor’s Associates, Inc. v. Distajo, 107 F.3d 126, 129-30 (2d Cir. 1997) (“As when opposing a motion for summary judgment under Fed. R. Civ. P. 56, the party requesting a jury trial [under 9 U.S.C. § 4] must submit evidentiary facts showing that there is a dispute of fact to be tried.”). One of the authors of this paper served as counsel for Wyndham in the Garcia case.

\(^{42}\) Garcia at *6 n.2; Doctor’s Assocs., 107 F.3d at 129-30.

principles allow a contract to be enforced even against nonparties to the arbitration agreement through “assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,” among others. Accordingly, “there is no doubt that, where state law permits it, a third-party claim is ‘referable to arbitration under an agreement in writing.”

In some circumstances, a non-signatory who is closely aligned with a signatory may bring an arbitration as a Claimant, as well as be named as a Respondent. As the district court explained in *Limonium Maritime S.A. v. Mizushima Marinera, S.A.*, a non-signatory to an agreement containing an arbitration clause may both compel arbitration, and be compelled to arbitrate, where the underlying arbitration clause “contains language broad enough ‘to allow non-signatories' disputes to be brought within its terms.” Specifically:

> When determining whether the language of an . . . arbitration clause is broad enough to encompass a dispute which is not solely between signatories to the charter party [arbitration agreement], 'courts have consistently drawn a distinction between [an] arbitration clause . . . specifically identifying the parties to which it applies, and a broader form of arbitration clause which does not restrict the parties.'” *Lucky Metals Corp. v. M/V Ave.,* No. 95 Civ. 1726, 1995 WL 575195, at *2 (quoting *In re Southwind Shipping Co.*, 709 F. Supp. 79, 82 (S.D.N.Y. 1989)). Hence, courts have held that arbitration clauses providing that “all disputes arising out of this contract are to be submitted to arbitration” are broad enough to cover disputes involving nonsignatories to the charter party. See, e.g., *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venez.*, 991 F.2d 42, 47-49 (2d Cir. 1993); *Son Shipping Co. v. De Fosse & Tanghe, 199 F.2d 687, 688-89 (2d Cir. 1952).*

3. **Potential Challenges**

For many years, litigants attempted to resist motions to compel arbitration by claiming that the overall agreement had been fraudulently induced, or that the provisions of the arbitration clause were unconscionable or oppressive. The cases decided over the past 50 years have clarified the standards for evaluating the fairness of an agreement and an arbitration clause, usually leaving that determination to the arbitrator rather than the courts.

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44 Id. (citations omitted).


46 No. 96 CIV. 1888 DC, 1999 WL 46721, at *5 (S.D.N.Y. Feb. 1, 1999), aff'd, 201 F.3d 431 (2d Cir. 1999) (mem.).

47 Id.; see also *O & Y Landmark Assocs. v. Nordheimer, 725 F. Supp. 578, 582 (D.D.C. 1989) (holding that whether a guarantor is bound by an arbitration clause contained in the original contract necessarily turns on the language chosen by the parties in the guaranty; an arbitration clause that applies by its own terms to all disputes and is not limited to those arising between the original parties to the underlying contract, binds not only the original parties, but also all those who subsequently consent to be bound by the terms of the contract); Compania Espanola de Petroleos, S. A. v. Nereus Shipping, S. A., 527 F.2d 966, 974 (2d Cir. 1975) (collecting cases).
a. **Fraudulent Inducement Allegations**

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co*, the Supreme Court held that the statutory language of the FAA does not permit a court to consider a plaintiff’s claim that it was fraudulently induced to enter into an agreement, as opposed to fraudulently induced into a particular arbitration clause.\(^{48}\) Where a party argues that it should not be bound by an agreement because it was misled, rushed or fraudulently induced into signing, the FAA requires instead that the issues of fact be submitted to the arbitrator in the first instance.

b. **Unconscionability and Public Policy Grounds**

Parties resisting motions to compel arbitration have made repeated efforts over the years to invalidate arbitration clauses under the doctrine of unconscionability; or on the grounds that they are against public policy. In a series of lawsuits brought in California, for example, parties to arbitration agreements argued that particular arbitration provisions were procedurally and/or substantively unconscionable, and therefore should not be enforced. They claimed that particular clauses failed to meet “minimum standards” of procedural fairness, because they did not provide for discovery, did not expressly say that the parties were waiving a jury trial, did not require a written decision, and/or would produce a result that would be subject only to limited review.\(^{49}\)

This type of challenge has been roundly rejected by the U.S. Supreme Court, most recently in cases like *AT&T v. Concepcion* and *DirecTV, Inc. v. Imburgia*.\(^{50}\) As the Supreme Court has held repeatedly, the FAA preempts state laws and decisions that refuse to enforce particular forms of arbitration agreements on grounds of unconscionability or public policy.\(^{51}\) That is true even when the doctrine a state applies to bar or disfavor arbitration is “a doctrine normally thought to be generally applicable, such as duress … or unconscionability.”\(^{52}\) Those objections have been rejected as among the “devices and formulas” that have a “disproportionate impact on arbitration agreements” and reflect an impermissible “hostility toward arbitration.”\(^{53}\) As Justice Scalia explained, “nothing” in the savings clause of Section 2 of the FAA “suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”\(^{54}\)

The vehemence of those Supreme Court rulings has not entirely prevented some state and federal courts from trying to invoke policy reasons for declaring an arbitration clause unenforceable. In *Altalese v. U.S. Legal Services Group, LP*, the New Jersey Supreme Court

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\(^{48}\) 388 U.S. 395, 404 (1967).


\(^{50}\) *Imburgia*, 136 S. Ct. 463 (2015).

\(^{51}\) *Concepcion* at 341.

\(^{52}\) Id.

\(^{53}\) Id. at 342 (rejecting *Discover Bank* rule); *Preston*, 552 U.S. at 357-58; *Imburgia* at 468; *Doctor’s Assocs*, 516 U.S. at 687.

\(^{54}\) *Concepcion* at 343.
described its requirements for an enforceable arbitration clause, including language providing that the parties “are giving up their right to bring their claims in court or have a jury resolve their dispute.”\textsuperscript{55} Accordingly, an arbitration agreement that does not “clearly and unambiguously signal that parties are surrendering their right to pursue a judicial remedy” is unenforceable.\textsuperscript{56}

In the New Jersey Superior Court case \textit{Barr v. Bishop Rosen}, two arbitration clauses had provided, “I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the organizations indicated … [A]ny arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.”\textsuperscript{57} The New Jersey court held that the clauses “failed to clearly and unambiguously inform plaintiff of his waiver of the right to pursue his claims in a judicial forum.”\textsuperscript{58}

Similarly, in \textit{MHN Government Services, Inc. v. Zaborowski}, the Ninth Circuit affirmed a district court refusal to enforce an arbitration provision in an employment agreement that appeared to “stack the deck unconscionably” in favor of the employer.\textsuperscript{59} Like the lower court, the Ninth Circuit deemed the clause to be both procedurally and substantively unconscionable, in setting a 6-month statute of limitations, giving the employer control over the selection of the three-person panel, imposing filing fees on the employee, and requiring a waiver of punitive damages, among other features.\textsuperscript{60}

In many jurisdictions, the most effective strategic move may be to reserve such challenges for decision by the arbitrator. An arbitrator will have the power to evaluate specific claims of fraudulent inducement, to interpret the terms of the contract, and to decide what restrictions will apply, in light of traditional principles of contract interpretation.

\textbf{4. Appeal of Orders Staying or Dismissing Claims}

Once a case is referred to arbitration, the court has the power to stay all other proceedings pending arbitration, or to dismiss the case altogether.\textsuperscript{61} If the court stays the action, that order is not appealable. If the district court dismisses the action, then the party compelled to arbitrate may appeal that order to the appellate court.\textsuperscript{62}


\textsuperscript{56} Id. at 444, 448; see also \textit{Barr v. Bishop Rosen}, 422 N.J. Super. 599, 126 A.3d 328 (2015), cert. denied, 224 N.J. 244, 130 A.3d 1246 (2016) (refusing to compel arbitration of a FINRA dispute due to failure to advise the plaintiff that the arbitration agreement would waive his right to a judicial proceeding).

\textsuperscript{57} Id. at *8-9.

\textsuperscript{58} Id. at *9.

\textsuperscript{59} 601 F. App’x 461, 464 (9th Cir. 2014), cert. granted, 136 S. Ct. 27 (2015); cert. dismissed, 136 S. Ct. 1539 (2016).

\textsuperscript{60} Although the Supreme Court initially granted certiorari, certiorari was dismissed last spring, leaving the Supreme Court unable to comment on whether refusing to enforce an “unfair” arbitration clause can be consistent with Supreme Court decisions like \textit{Concepcion} and \textit{Imburgia}.

\textsuperscript{61} 9 U.S.C. § 3.

\textsuperscript{62} Id., § 16.
The FAA “represents Congress’s intent to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.”63 To further that purpose, the FAA contains express provisions designed to “limit appeals from orders directing arbitration.”64 Accordingly, orders granting motions to compel arbitration and stay proceedings pending the arbitration’s resolution are non-appealable.65 Section 16(a)(3) permits the appeal only of “a final decision with respect to an arbitration that is subject to this title.” Unless the order granting a motion to compel is certified under 28 U.S.C. 1292(b), there can be no appeal from the order compelling arbitration and granting a stay under Section 3.

In contrast, an order denying a motion to compel arbitration is immediately appealable. Section 16(a) of the FAA provides that an interlocutory appeal may be taken from an order that denies a motion either to compel arbitration or for a stay pending arbitration.66 Importantly, if a party loses a motion to compel arbitration, and proceeds with the litigation without exercising its right to appeal, it risks waiving its right to arbitration if the opponent can provide evidence of prejudice.67

5. Seeking a Full or Partial Stay

In some unusual cases, an arbitration agreement will be worded in a way that calls both for arbitration and litigation. In one recent case, *Chorley Enterprises v. Dickey’s Barbecue Restaurants, Inc.*, the Fourth Circuit split the claims of the parties, permitting some to be arbitrated and others to be heard in federal court in Maryland.68

In *Chorley*, the underlying franchise agreements required arbitration of all claims “arising out of or relating to” the agreements. However, each of the relevant agreements also provided that they did not require the franchisees to waive their “right to file a lawsuit alleging a cause of action arising under Maryland Franchise Law in any court of competent jurisdiction in the State of Maryland.”69 The district court initially concluded that these provisions created an ambiguity that only a jury could resolve. Reversing that decision, the Fourth Circuit held: “As a matter of law, the clear and unambiguous language of these provisions requires that the common law claims asserted by Dickey’s must proceed in arbitration, while the franchisees' Maryland Franchise Law claims must proceed in the Maryland district court.”70

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63 Dees v. Billy, 394 F.3d 1290, 1292 (9th Cir. 2005).

64 Bushley v. Credit Suisse First Boston, 360 F.3d 1149, 1153 (9th Cir. 2004).

65 9 U.S.C. § 16(b)(1) (“[A]n appeal may not be taken from an interlocutory order granting a stay of any action under section 3 of this title.” (emphasis added)).


68 807 F.3d 553 (4th Cir. 2015), cert. denied, 136 S. Ct. 1656 (2016).

69 Id. at 557-58.

70 Id. at 558.
The appellate court recognized that “requiring the parties to litigate in two different forums may be inefficient, and could lead to conflicting results.” Nonetheless, it concluded that the FAA required this “piecemeal litigation where, as here, the agreements call for arbitration of some claims, but not others.” The Fourth Circuit directed the district court to compel arbitration of the common law claims only, and left to the lower court’s discretion the question whether to stay the franchisees' Maryland Franchise Law claims pending conclusion of the arbitration. The district court later entered such a stay, recognizing that the arbitration award might significantly affect its determination of the statutory issues.

6. Moving to Compel Individual or Class Treatment

Where an adversary has filed a putative class action, the motion to compel should specify whether it seeks an order compelling arbitration, or compelling an arbitration of the individual claims without class treatment.

a. Who Decides

A key question will be “who decides” whether class treatment is available: the court or the arbitrator. A majority of the Supreme Court has not yet held expressly whether the availability of class arbitration is a gateway matter presumptively for the courts to decide. However, there is currently a split among the Circuits, which have answered in different ways the question whether classwide arbitration is so substantive and so fundamentally different from other questions that a court should decide the issue.

With respect to the question whether an arbitration agreement authorizes class treatment, four federal circuits have taken the position that it is a “gateway issue” for the court to address before the arbitration proceeds, absent “clear and unmistakable” evidence to the contrary. However, the Fifth Circuit, and a number of district courts in other jurisdictions, have concluded that certain contractual provisions constitute “clear and unmistakable” evidence that the parties intended the arbitrator to decide whether class treatment is available. For example, in the Fifth Circuit case Robinson v. J & K Administrative Management Services, the district court had evaluated the effect of language that required the arbitration of “claims challenging the validity or enforceability of” the agreement. After the lower court left the question of class

71 Id.
72 Id.
73 Id. at 566, 571.
77 817 F.3d 193, 194 (5th Cir. 2016).
arbitration to the arbitrator, the Fifth Circuit affirmed, finding that language to be “unambiguous evidence of the parties’ intention to submit arbitrability disputes to arbitration.”

Accordingly, before moving to compel arbitration of a putative class claim, the movant should have a clear understanding whether the court or the arbitrator(s) will decide whether class treatment is available, under the language of the underlying agreement and applicable law.

b. The Applicable Standard

Fundamentally, classwide proceedings are only available if the parties consented to that approach, either within the arbitration clause or in another way. Accordingly, whoever makes the decision will apply the test set forth in Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.: “A party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.” The reasoning derives from the procedural complexity of class arbitration. It creates such a “procedural morass” and due process risks that the Supreme Court has held it to be inconsistent with the FAA, and unavailable unless the parties agreed to class arbitration.

c. If the Arbitrator Decides

If the arbitrator is entrusted with the decision whether class treatment is available, the arbitration rules frequently call for two distinct steps. The first is a “clause construction” phase, in which the parties brief for the arbitrator whether the contractual provision contemplates class treatment. The second is the “class certification” phase, to determine whether a class should be certified. The arbitrator may impose a stay of the arbitration itself after a clause construction or class certification decision, in order to permit the parties to move to vacate or confirm those interim Awards.

Some agreements reflect the express intentions of the parties on the issue of class treatment, either permitting or forbidding that procedure. Common class waiver provisions will expressly prohibit “class, mass or representative actions,” or “any disputes other than an individual disagreement between X and Y.” Class waiver provisions have been routinely upheld since the Supreme Court decision in Concepcion, except for certain California employment claims.

Importantly, most arbitration services provide that an action pleaded as a class will not be entitled to confidentiality during the clause construction and class certification phases. Accordingly, in screening potential arbitrators (see Practical Advice below, Section III (A)), it will

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78 Id. at 198 (finding parties’ intent to submit class arbitration to arbitrator in clause submitting “[a]ll disputes, claims or controversies arising from or relating to this contract” to arbitration (citing Green Tree Financial Corp., 539 U.S. at 448 (plurality)); Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc., 343 F.3d 355, 359 (5th Cir. 2003) (finding parties’ intent to submit class arbitration to arbitrator in clause submitting to arbitrators “any dispute . . . in connection with the [a]greement” entrusted them with determinations of class or collective arbitration); see also In re A2P SMS Antitrust Litig., No. 12-CV-2656 AJN, 2015 WL 876456, at *2-7 (S.D.N.Y. Mar. 2, 2015) (certifying issue for interlocutory appeal).


80 Id. at 685-86; Concepcion, 563 U.S. at 350.

81 See subsection (d) infra.
be possible to locate and review prior opinions issued by the panel members you and your client are considering.

d. **Carve-Outs from Class Waivers**

Under California law, courts have carved out one category of representative claims from class waiver provisions, and allowed them to proceed in court rather than in arbitration. The California Supreme Court has held that claims brought under California’s Labor Code Private Attorneys General Act (“PAGA”) do not fall under the FAA.82

A PAGA claim “is a dispute between an employer and the state, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the Labor Code.”83 The real dispute in a PAGA case is thus “between an employer and the state Labor and Workforce Development Agency.”84 Although a PAGA case is precipitated by an individual complaint, “the government exercises initial control over the action, receives the lion’s share of the statutory recovery, and is bound by any judgment obtained.”85 Accordingly, several state and federal California cases have held that a PAGA claim “lies outside the FAA’s coverage” because “it is not a dispute between an employer and an employee arising out of their contractual relationship.”86

### 7. The Role of Associational Claims

In light of the increasing restrictions on class arbitration, a number of litigants have sought to achieve a similarly broad litigation effect by bringing claims on a consolidated basis, or by enlisting the assistance of a franchisee association.

An associational claim is an established means of seeking declaratory or injunctive relief regarding issues that affect the members of the association.87 An association acts as an agent for its members with respect to the issues placed in arbitration.88 The Supreme Court has explained:

> We have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise

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82 The California cases invalidating class waivers for PAGA claims are unreviewed by the United States Supreme Court, which has not yet accepted certiorari on this issue.


84 *Zenelaj v. Handybook Inc.*, 82 F. Supp. 3d 968, 977 (N.D. Cal. 2015).

85 *Iskanian* at 360; *Zenelaj* at 978; *Hernandez v. DMSI Staffing, LLC*, 79 F. Supp. 3d 1054, 1064 (N.D. Cal. 2015).


88 See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (holding that association and the members who authorize its positions are “in every practical sense identical”).
have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.89

When an association seeks relief, and the underlying system agreements contain an arbitration clause, a number of threshold issues arise. If the arbitration clause is broad enough, it may permit arbitration of associational claims. Conversely, narrow agreements may lead a court to permit litigation between the association and the franchisor, while requiring bilateral arbitration between the franchisor and an individual franchisee on the same issue.

For example, the language of an arbitration clause might call for arbitration of “any controversy or claim arising out of or relating to this Agreement or with regard to its interpretation or breach.” Such a broad arbitration clause does not limit an arbitration to the “parties” to a particular agreement, and might be read to encompass associational claims asserted for the benefit of franchisees who individually signed such agreements. That wording stands in contrast with narrower provisions, such as “Any dispute between the parties arising out of or relating to this Agreement shall be addressed by arbitration under the Commercial Arbitration Rules of the American Arbitration Association.” In the eyes of many courts, there is a distinction between an arbitration clause specifically identifying the parties to which it applies, and a broader form of arbitration clause which does not restrict the parties.90 Where an arbitration clause is broad enough to encompass “any controversy or claim arising out of or relating to this Agreement or with regard to its interpretation or breach,” even nonsignatories can invoke, or be bound to, its terms, under traditional contract and agency doctrines like assignment, alter ego, and incorporation by reference.91

8. How Does Class or Representative Arbitration Work?

A number of arbitration services have established Class Rules, which set three phases for a class arbitration: (1) a clause construction proceeding; (2) if the clause contemplates class treatment, then a class certification proceedings; and (3) a proceeding on the merits.92

For due process reasons, class arbitration requires notice to class members, public filings and proceedings. Class members have the right to be informed fully about whether and how the class representatives and the arbitrator are addressing their claims. Accordingly, the normal presumptions of confidentiality will not apply, unless and until the defendant successfully defeats the class certification motion. Both JAMS and the AAA maintain a public docket for class arbitrations, permitting broad electronic access to each filing, notice and ruling.93

89 United Food at 553 (quoting Hunt at 343).
90 See, e.g., Limonium Maritime, 1999 WL 46721, at *5.
92 See, e.g., AAA Class Rules, R-3-5.
In contrast, an associational claim proceeds like an individual arbitration. It does not require a clause construction or class certification ruling. Because the parties can be bound by confidentiality rules (which generally allow disclosure to the association members), the proceedings are usually confidential – unless and until an Award is appealed.94

E. **Limited Rights of Judicial Review**

A party might wish to ask a state or federal court to review a partial or interim award issued by an arbitrator or panel, as well as a final award on the merits. Partial awards are decisions rendered by the arbitrator that do not finally resolve all issues presented. They have included orders entering protective orders, clause construction and class certification rulings. Questions of whether an appeal is permitted, and what standard or review will apply, may yield different answers depending on the stage of the arbitration.

Fundamentally, there are very limited grounds for appeal from an arbitration award. In comparing arbitration and litigation, the contrast in appellate rights is a stark one. As Justice Scalia explained in *Concepcion*, review under the FAA generally “focuses on misconduct, rather than mistake.”95

Finally, an appeal is the point at which confidentiality begins to dissolve. A petition to vacate or confirm an interim or final Award will physically attach the Award – and in some cases the briefs submitted to the arbitrator. The court deciding the appeal may comment on the claims, witnesses, and conclusions reached by the arbitrator. Accordingly, it is important to include in an arbitration clause any additional confidentiality the parties expect beyond the arbitration proceedings themselves, including any requirement that a party ask the court to accept an arbitration award and the underlying record under seal. Although some federal courts will not agree to review those submissions under a protective order, others will do so.

1. **Statutory Grounds for Appeal under the FAA**

The FAA provides a “streamlined treatment,” with little substantive review, for a party seeking “a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it.”96 Although there are some “gateway” issues that may be decided *de novo*,97 Section 10(a) of the FAA will apply to most petitions for judicial review. That section sets forth four circumstances in which a court may enter an order vacating an arbitration award:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

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94 See Section E *infra*.

95 563 U.S. at 350-51.


97 The Supreme Court has not decided whether an arbitrator’s decision to allow class arbitration should be reviewed *de novo* or under the deferential standard of Section 10 of the FAA. See *Oxford Health*, 133 S. Ct. at 2068, n.2; *Stolt-Nielsen*, 559 U.S. at 680.
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.98

The party moving to vacate an arbitration award “bears a heavy burden.”99 As Justice Kagan explained for a unanimous court in *Oxford Health*:

>[C]onvincing a court of an arbitrator’s error – even his grave error – is not enough. So long as the arbitrator was ‘arguably construing the contract – and this one was – a court may not correct his mistakes under § 10(a)(4) . . . . The potential for those mistakes is the price of agreeing to arbitration . . . . The arbitrator’s construction holds, however good, bad, or ugly.100

### 2. The Current Status of the Manifest Disregard Standard

In explaining the grounds enumerated in Section 10 of the FAA, some courts have recognized an “implied ground” for vacating an arbitral award, called “manifest disregard of the law.”101 Under the manifest disregard standard, an arbitration award may be vacated if an arbitrator is “fully aware of the existence of a clearly defined governing legal principle, but refuse[s] to apply it, in effect, ignoring it.”102

In *Hall Street*, the Supreme Court considered Hall Street’s argument that the manifest disregard standard was “a further ground for *vacatur* on top of those listed in § 10,” and recognized that several Circuits had reached the same conclusion.103 Those conclusions stemmed from *dicta* in *Wilko v. Swan*.104 Without directly deciding that issue, in *Hall Street* the Supreme Court appeared to view that statement skeptically: “We see no reason to accord [the *Wilko* language] the significance that Hall Street urges.” *Id.*

Whether viewed as an additional ground for *vacatur* or as an explanation of the grounds set forth in the FAA, though, courts agree that the manifest disregard standard is “severely

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98 9 U.S.C. § 10(a) (emphasis added); see discussion of state law standards *infra* at Section E(3).
99 *Oxford Health*, 133 S. Ct. at 2068; *Stolt-Nielsen*, 559 U.S. at 671.
100 133 S. Ct. at 2070-71.
101 *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451–52 (2d Cir. 2011); see also *Stolt-Nielsen*, 559 U.S. at 672 n.3; *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007); *Landmark Ventures, Inc. v. InSightec, Ltd.*, 63 F. Supp. 3d 343, 351–52 (S.D.N.Y. 2014) (summarizing cases), *aff’d*, 619 F. App’x 37 (2d Cir. 2015).
102 *Id.* (quoting lower court decision in *Stolt-Nielsen* and summarizing Second Circuit cases).
103 552 U.S. at 584.
104 *Id.* at 585 (citing *Wilko v. Swan*, 346 U.S. 427 (1953)).
limited, highly deferential, and confined to those exceedingly rare instances of egregious impropriety on the part of the arbitrator[].” A party objecting to an arbitration award on the grounds of manifest disregard of the law must establish that the law allegedly ignored was clear, improperly applied, and led to an erroneous outcome, and that the arbitrator not only knew of the law but intentionally disregarded it. Disputes over contractual interpretation “do not rise to the level of manifest disregard of the law.” Instead, an award will be enforced “if there is even a barely colorable justification for the outcome reached.”

3. Varying the Grounds for Appeal

The parties cannot vary, by agreement, the grounds set by the FAA for appeal to a federal court. Although there have been many efforts to do so, the Supreme Court has twice declared, “[P]arties may not contractually expand the grounds or nature of judicial review.” The statutory grounds are “exclusive.”

Those declarations under the FAA do not preclude efforts to obtain broader judicial review by appealing to a state court under a state arbitration statute. Justice Souter, writing for the majority, acknowledged in Hall Street:

In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the [FAA], we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.

Some arbitration services have created an additional procedural option, by permitting an appeal within the framework of their system. Both JAMS and the AAA have issued Optional Appellate Rules, which the parties can agree to incorporate into a contractual clause or agree (by stipulation) to adopt once a dispute arises. As the AAA explained:

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105 Stolt–Nielsen, 548 F.3d at 95 (citation and internal quotation marks omitted).

106 Id.; see also T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339 (2d Cir. 2010).

107 Landmark Ventures, 63 F. Supp. 3d at 356.

108 Id. at 358; compare Hardy v. Walsh Manning Sec., L.L.C., 341 F.3d 126, 133 (2d Cir. 2003) (vacating an arbitration award where legal issue the arbitrator interpreted was not contested by the parties and “no reading of the facts [could] support the legal conclusion” the arbitrator reached).

109 Hall Street, 552 U.S. at 578; Concepcion, 563 U.S. at 351.

110 Hall Street at 578.

111 Id. at 590; see also Bankers Life & Cas. Ins. Co. v. CBRE, Inc., No. 15-1471, 2016 WL 4056400, at *2 (7th Cir. July 29, 2016) (vacating arbitration award under Illinois Uniform Arbitration Act, 710 ILCS 5/12(3), because “gross errors of judgment in law or a gross mistake of fact” were “apparent upon the face of the award”); Finn v. Ballentine Partners, LLC, No. 2015-0332, 2016 WL 3268852, at *9 (N.H. June 14, 2016) (holding that state statute allowed court to vacate an award for “plain mistake.”).
The following rules provide for an appeal to an appellate arbitral panel that would apply a standard of review greater than that allowed by existing federal and state statutes. The appellate rules anticipate an appellate process that can be completed in about three months, while giving both sides adequate time to submit appellate briefs. The rules permit review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous.\textsuperscript{112}

Once an arbitration award is appealed under the governing rules of the arbitration service, the decision is no longer considered “final” for purpose of an appeal to a court. Under the JAMS rules, the Appeal Panel “will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision.” The Panel may affirm, reverse or modify an Award.\textsuperscript{113}

4. **Timing Requirements**

If a litigant has grounds for moving to vacate an arbitration award, timing is key – and a trap for the unwary. Notice of a motion asking a court to vacate, modify, or correct an award “must be served upon the adverse party or his attorney within three months after the award is filed or delivered.”\textsuperscript{114}

Importantly, Rule 6(a)(1)(A) of the Federal Rules of Civil Procedure does not apply under the FAA. For other deadlines, Rule 6(a) directs that the court should “exclude the day of the event that triggers the period” in computing time. But the time limits set forth in the FAA supersede those of the Federal Rules.\textsuperscript{115} The FAA specifies that the notice of a motion to vacate must be served “within three months after the award is filed or delivered.”\textsuperscript{116} The limitation period for serving the petition is therefore calculated from the date the award is delivered, counting the delivery date as Day One, rather than commencing the count on the day after delivery.\textsuperscript{117}

This limitation period has been strictly construed.\textsuperscript{118} The very narrow exception of equitable tolling may not apply, because “there is no common law exception to the three month limitations period on the motion to vacate.”\textsuperscript{119}

\footnotesize{\textsuperscript{112} AAA Optional Appellate Rules at 4; see also JAMS Optional Arbitration Appeal Procedure.  
\textsuperscript{113} Id. at ¶ D.  
\textsuperscript{114} 9 U.S.C. § 12.  
\textsuperscript{116} 9 U.S.C. § 12.  
\textsuperscript{118} Id.; Waveform Telemedia, Inc. v. Panorama Weather N. Am., No. 06 Civ. 5270, 2007 WL 678731, at *5 (S.D.N.Y. Mar. 2, 2007) (petition to vacate was not timely when served three months and three days after the award was delivered); see also Florasynth, Inc. v. Pickholz, 750 F.2d 171, 175 (2d Cir. 1984) (“[A] party may not raise a motion to vacate, modify, or correct an arbitration award after the three month period has run, even when raised as a defense to a motion to confirm.”).}
The prevailing litigant may choose to move for confirmation of an award, whether or not the adversary challenges it. If a court confirms the award and enters judgment, then the arbitration result has the full effect of a federal decision and enforcement proceedings can begin.\textsuperscript{120} The FAA provides in relevant part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.\textsuperscript{121}

Some Circuits have interpreted the FAA to require that a motion to confirm an award must be brought within a year, and thereafter cannot prevail.\textsuperscript{122} Others view the language as permissive, permitting summary disposition within a year but allowing a confirmation thereafter.\textsuperscript{123}

The issue is still unresolved by the Supreme Court. Rather than find oneself on the cutting edge of this statutory interpretation, it will be prudent for a prevailing party to seek confirmation within the one year period, if enforcement proceedings are likely to be necessary.

\textsuperscript{119} Id. at 175; Waveform, 2007 WL 678731, at *5 ("There are no exceptions ....").

\textsuperscript{120} The FAA provides that once judgment is entered confirming an arbitration award, "The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13. Several Circuits have noted, however, that a judgment upon a confirmed arbitration award is "qualitatively different" from a judgment entered after in a court proceeding, even though both are recognized for enforcement purposes. \textit{Citigroup, Inc. v. Abu Dhabi Inv. Auth.}, 776 F.3d 126, 132-33 (2d Cir. 2015); \textit{Collins v. D.R. Horton, Inc.}, 505 F.3d 874, 880 (9th Cir. 2007). That distinction can make a difference when a party later seeks to use the confirmed arbitration award for res judicata or collateral estoppel purposes. See discussion infra in Section II (D)(6).

\textsuperscript{121} 9 U.S.C. § 9 (emphasis added).

\textsuperscript{122} Photopaint Techs., LLC v. Smartlens Corp., 335 F.3d 152, 156-57 (2d Cir. 2003) (finding that the one-year period to petition for a confirmation of an arbitration award under section 9 imposes a statute of limitations on seeking such a confirmation); \textit{Md. Transit Admin. v. Nat'l R.R. Passenger Corp.}, 372 F. Supp. 2d 478, 483-84 (D. Md. 2005) (declining to confirm arbitration award).

\textsuperscript{123} See, e.g., Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 156 (4th Cir. 1993) (holding that section 9 must be interpreted as a "permissive provision which does not bar the confirmation of an award beyond a one-year period"); \textit{Watkins v. Duke Med. Ctr.}, No. 1:13CV1007, 2014 WL 4442936, at *5 (M.D.N.C. Sept. 9, 2014) (collecting cases), aff'd, 592 F. App'x 226 (4th Cir. 2015).
5. Jurisdiction for an Appeal to the District Court

Although the FAA is a federal statute, the federal courts do not automatically have jurisdiction of an appeal from an arbitration award. Instead, the appellant must establish diversity or federal question jurisdiction over the dispute.124

Whether a dispute satisfies the $75,000 jurisdictional amount for diversity purposes may depend on the Circuit in which an arbitration takes place. There are two principal approaches: the “Demand Approach,” examining the amounts the parties demanded from another in the course of the arbitration, and the “Award Approach,” examining the amounts awarded by the arbitration panel.125

In the Fifth Circuit case Pershing, LLC v. Kiebach, for example, a FINRA panel of arbitrators had found against investors who claimed $80 million in damages from a Ponzi scheme, but nonetheless awarded them $10,000 in compensation for “certain arbitration-related expenses.”126 Respondent Pershing filed a motion to confirm the arbitration award in federal court, pursuant to the Federal Arbitration Act (“FAA”). The investors moved to dismiss on the grounds that the amount in controversy was only $10,000, less than the $75,000 threshold amount for diversity jurisdiction. In view of the investors’ arbitration demand, the district court concluded that the $75,000 amount in controversy was satisfied. The Fifth Circuit affirmed, explaining, that the demand approach “recognizes the true scope of the controversy between the parties.”127 Furthermore, following the demand approach would avoid applying two conflicting jurisdictional tests for the same controversy, one at the beginning of the arbitration and at the end. The court explained that to do otherwise might provide federal jurisdiction for a motion to compel arbitration, based on the amount claimed, but no federal jurisdiction for the same case if it came before the court for the first time after an arbitration award of less than $75,000. Finally, the Fifth Circuit was concerned by the prospect of promoting “gamesmanship,” like filing motions for arbitration at the start of the case in order to “to preserve their right to a federal forum for review of the eventual award.” It concluded that the Demand Approach would provide the same jurisdictional outcome whether the case was arbitrated or litigated.128

124 Pershing, L.L.C. v. Kiebach, 819 F.3d 179, 182 n.2 (5th Cir. 2016) (stating that the FAA “creates federal substantive law requiring the parties to honor arbitration agreements, [but] . . . does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise” (citing Southland Corp. v. Keating, 465 U.S. 1, 16 n.9 (1984)).

125 See, e.g., Pershing at 182 (applying demand approach, holding that “the amount in controversy is the amount sought in the underlying arbitration rather than the amount awarded.”); Bull HN Info Sys., Inc. v. Hutson, 229 F.3d 321, 329 (1st Cir. 2000) (demand approach); Am. Guar. Co. v. Caldwell, 72 F.2d 209, 211 (9th Cir. 1934) (demand approach); contra Karsner v. Lothian, 532 F.3d 876, 882 (D.C. Cir. 2008) (applying award approach, holding that “the amount in controversy is determined by the amount of the underlying arbitration award regardless of the amount sought.”); Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1472 (11th Cir. 1997) (award approach); Ford v. Hamilton Insvs., Inc., 29 F.3d 255, 260 (6th Cir. 1994) (award approach).

126 819 F.3d at 181.

127 Id. at 182.

128 Id. at 182-83.
6. **The Role of Collateral Estoppel**

The FAA provides that once judgment is entered confirming an arbitration award, the judgment “shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.”\(^{129}\) Several Circuits have noted, however, that a judgment upon a confirmed arbitration award is “qualitatively different” from a judgment entered after in a court proceeding, even though both are enforceable.\(^\text{130}\) In contrast to an appellate review of judicial order, a proceeding to confirm an arbitration award does not require (or permit) a review of the merits of the underlying claim. It is not affected by the Federal Rules of Civil Procedure for reopening or modifying judgments, like Federal Rules of Civil Procedure 59 and 60. Instead, a motion to confirm or vacate an arbitration award is summary in nature.\(^\text{131}\)

That distinction may make a difference when a party later seeks to use the confirmed arbitration award for *res judicata* or collateral estoppel purposes. In general terms, under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the principles of collateral estoppel, a judgment in a prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Sometimes called “issue preclusion,” collateral estoppel is premised upon the belief that parties should be precluded from contesting matters that they have already had a full and fair opportunity to litigate.

Some jurisdictions will not permit a new arbitration or suit between the parties that seeks to relitigate the underlying issues, allowing a court to use of the “All Writs Act” to prevent the new proceeding from going forward. That statute invests the federal courts with the power to “issue all writs necessary or appropriate in aid of their respective jurisdictions.”\(^\text{132}\) The reasoning of this line of decisions is that additional arbitrations or suits threaten to “undermine” prior federal judgments that confirmed arbitration awards.\(^\text{133}\) Other courts will simply apply the res judicata doctrine themselves, without express reference to the All Writs Act.\(^\text{134}\)

The Second Circuit took a different approach, however, in *Citigroup, Inc. v. Abu Dhabi Investment Authority*, and left the arbitrator with the task of determining issue or claim preclusion.\(^\text{135}\) The court was mindful of “the weighty practical concern for the integrity of federal judgments” that could arise if parties “felt free to relitigate in arbitration proceedings claims


\(^{130}\) *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 883 (9th Cir. 2007); *see also Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 131 (2d Cir. 2015).

\(^{131}\) *See generally Collins* (collecting cases, citing *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1133-34 (9th Cir. 2000)).


\(^{133}\) *See, e.g.*, *Citigroup*, 776 F.3d at 129; *In re Y & A Group Sec. Litig.*, 38 F.3d 380, 382-83 (8th Cir. 1994).

\(^{134}\) *See, e.g.*, *Watkins*, 2014 WL 4442936, at *6-8 (applying both federal and North Carolina law in holding that res judicata barred a federal suit because the plaintiff presented similar claims during a prior arbitration).

\(^{135}\) 776 F.3d 126 (2d Cir. 2015).
previously resolved by a federal court.” Nonetheless, it rejected the “All Writs Act” as a basis for enjoining such a proceeding, given the limited role of the federal court in entering judgment on an arbitration award. Instead, it held that the new arbitration should proceed, leaving to the second arbitrator the decision whether the first arbitration award and judgment barred the new round of claims, whether under the doctrine of res judicata or under principles of collateral estoppel.

In most commercial cases, where the prerequisites for collateral estoppel are satisfied, it is the arbitrator who will evaluate the preclusive effect of prior federal judgments. Arbitrators “are not free to ignore the preclusive effect of prior judgments under the doctrines of res judicata and collateral estoppel, although they generally are entitled to determine in the first instance whether to give the prior judicial determination preclusive effect.”

III. PRACTICAL ADVICE FOR ARBITRATION PROCEEDINGS

Once an arbitration demand is filed, the rules embedded in the underlying contractual arbitration clause will frequently determine the procedural steps, speed and sometimes the outcome of the proceeding. Importantly, the parties will have a new opportunity to negotiate different rules if they can and choose to do so.

Although franchisees often do not have a role in the development of the contractual arbitration clause, their counsel can have a substantial role in shaping the arbitration process by agreement. Where the parties agree on a variation from the arbitration clause, almost all arbitration services will honor such a stipulation, consistent with the concept that arbitration is a matter of consent.

Within the arbitration proceedings, the most important practical steps are the selection of the arbitrator, the evaluation of whether to bring motions, and a realistic evaluation of the quality and kinds of proof you and your client are able to present – and to counter – at the arbitration hearing.

A. Maximizing the Opportunity to Obtain an Effective Arbitrator

Once the procedural rules have placed a matter in arbitration, there is no more important decision that the selection of an arbitrator, or a three-person panel. Whether or not there is a selection method in the underlying contract or in the rules the parties specified, most arbitration services will allow the parties to select an arbitrator by agreement, if they can do so. Within the franchise community, counsel for the parties are likely to be familiar with the logical candidates, and to know which potential arbitrators have an appreciation for the issues each side faces.

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136 Id. at 129 (citations omitted).

137 Although beyond the scope of this paper, we note that there are distinct issue preclusion rules under remedial statutes like Title VII and the ADA. See, e.g., Coleman v. Donahoe, 667 F.3d 835, 854 (7th Cir. 2012) (holding that arbitration decisions have no preclusive effect in later federal discrimination claims); Nance v. Goodyear Tire & Rubber Co., 527 F.3d 539, 547-49 (6th Cir. 2008) (same); Gautier v. Celanese, 143 F. Supp. 3d 423, 440 (W.D. Va. 2015) (refusing to apply issue preclusion based upon unreviewed arbitration award).

138 Collins, 505 F.3d at 880; Aircraft Braking Sys. Corp. v. Local 856, 97 F.3d 155, 159 (6th Cir. 1996); Miller v. Runyon, 77 F.3d 189, 193 (7th Cir. 1996); John Morrell & Co. v. Local Union 304A, 913 F.2d 544 (8th Cir. 1990).

139 Collins at 880 (citations omitted); Aircraft Braking Sys. Corp. at 159.
In polarized disputes, it is often easiest to agree either to a former judge, or to a three-person panel in which each side selects someone they trust, and the parties allow their designated arbitrators to agree upon the third member of the panel. While the expense of either a former judge or a three-person panel can be substantial, many litigants will see the resulting potential for fairness as far preferable to the selection of one arbitrator with predominant experience on one side or the other.

In most cases, though, the arbitration service will provide the parties with lists of potential arbitrators, frequently with experience in the relevant fields. The quality of those lists can vary substantially. The parties then engage in a process of striking the names they cannot accept, ranking the others, and then deliver their ranked list to the administrator without showing their strikes and rankings to the other side.

It is keenly important for the parties to remember that they are in control of the process. While many arbitration selection services say they will select an arbitrator if the parties cannot agree, counsel for the parties can demand additional lists, and can specify any additional credentials they will require, like franchise experience or industry expertise. To that end, it will be helpful to maintain a cordial relationship with the administrator appointed by the arbitration service, who will often make the initial decision to prepare and send an additional list, and/or will be the conduit through which the parties’ requests reach a supervisor.

Investigating the names of potential arbitrators can and should be a rigorous exercise. Although most services provide a limited packet of information, the litigants will generally need to find and review for themselves the prior cases litigated by the arbitrator, and the cases in the AAA and JAMS databases of class opinions. Those databases, together with PACER, Lexis, Westlaw and inquiries to trusted sources in the Forum membership directory are extremely useful resources in assessing which arbitrators can address effectively the issues presented in a given arbitration.

If the parties are selecting a panel of three arbitrators, it will be important to keep in mind the potential panel dynamics. The parties might, for example, select three “neutral” arbitrators who may be strangers to one another, or may have their own established working relationships from other matters, or the Forum, or their long careers. Alternatively, the parties may each select a “party-appointed” arbitrator, leaving to them the selection of the third arbitrator.

Some arbitration rules prohibit any contact at all between the parties and their selected arbitrators, other than inquiries about availability and conflicts. Others have ethical rules that apply once the complete Panel is selected, and “constituted.” In the reinsurance world, it is customary for parties to confer throughout the arbitration with their party arbitrator, including engaging in strategic discussions and exploring questions the party-appointed arbitrator might ask, or arguments to make, in order to advocate for the appointing party. Fundamentally, it is wise for the parties to understand what the applicable rules are, and if necessary to agree in advance how and when they may communicate with their potential arbitrators.

B. Preparing the Case for Hearing

At the initial case management conference, sometimes called a preliminary hearing, the arbitrator(s) will walk through a checklist of procedures, asking the parties what the case is about, how much time they need to prepare for the arbitration, what discovery will be required, and the nature of any motions they intend to bring. (Most arbitrators appreciate efforts by counsel for the parties to meet and confer on such issues in advance of the conference.) The
arbitrator will then set a series of deadlines for the completion of each step, leading to a hearing date.\(^\text{140}\) It is important to prepare for this proceeding, because it is the first opportunity for the parties’ counsel to talk directly to the panel.

At the case management conference, most panels will be focused on ways to bring efficiency to the arbitration process. The arbitrator training process for several arbitration service providers discusses ways to keep the steps of the arbitration on track, and many arbitration rules expressly direct the arbitrators to do just that. For example, the ICDR Rules provide, “The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute…. In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings.”\(^\text{141}\)

1. **Discovery Rules**

The parties and counsel who bring a dispute to arbitration are interested in finding out what documents their adversary has, and sometimes what the testimony will be, before the hearing occurs. They are closely familiar with the discovery procedures established by federal or state litigation rules, and are often unwilling to take the uncomfortable leap of faith required to proceed without discovery. Accordingly, most arbitration rules accord the arbitrator broad powers to direct and control discovery, with a focus on the efficient conduct of the overall proceedings. For example, Rule 22 of the AAA Commercial Rules provides in relevant part:

> The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party’s opportunity to fairly present its claims and defenses.

AAA Commercial Rules, R. 22(a). In some cases, depending on the complexity and amount at stake, the document requests can be as voluminous as those the parties would submit in a case filed in state or federal court. Although international arbitrators are sometimes more receptive to limitations on discovery, especially if they are trained in legal traditions that avoid the expense of full American discovery, most arbitrators will permit document discovery proportional to the issues at stake, provide that a party can articulate a colorable reason for the requests it wishes to make. Depositions are another matter. International arbitration rules frequently discourage “American style discovery,” including depositions and requests to admit. For example, Article 21 of the rules promulgated by the International Center for Dispute Resolution provides in relevant part: “Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.”\(^\text{142}\)

The wave of electronic discovery concerns has reached the world of arbitration as well, resulting in requests for electronic documents, including emails and other materials. As a result, many arbitration service providers have developed rules that require a party to make its

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\(^\text{140}\) See, e.g., ICC Rules, Article 24; AAA Commercial Rules, R-21.


\(^\text{142}\) ICDR International Dispute Resolution Procedures, Article 21(10) (2014).
electronic documents available “in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form.”143 As in a litigation setting, it will be wise for the parties to meet and confer regarding search parameters, timing and costs.

2. Obtaining Evidence from Third Parties

As a practical matter, it is far easier to obtain the cooperation of third-party witnesses today than when the FAA was enacted. Today, such witnesses often will not be required to appear in person, and under most arbitration service rules can appear “by alternative means,” including video conferencing or Internet means like Facetime and Skype, as long as the parties have a full opportunity to present “any evidence that the arbitrator deems material and relevant to the resolution of the dispute,” and are able to conduct cross-examination.144

Where a third-party witness holds material information and refuses to attend, then the parties face a difficult choice: compelling the unhappy witness or trying the case without essential information. The FAA permits arbitrators to issue a summons compelling the appearance of a non-party witness at a hearing.145 The witness subpoenaed to testify at the hearing also may be required to bring to the hearing any documents “which may be deemed material as evidence in the case.”146 The summons is signed by the arbitrator(s), and must be served “in the same manner as subpoenas to appear and testify before the court,” with a witness fee.147 If the witness fails or refuses to comply, then a party may petition the United States district court for the district in which the arbitrators, or a majority of them, are sitting, to compel the attendance of the witness, “or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.”148

But what mechanisms are available to obtain testimony or documents from non-parties in advance of the hearing? If the witness agrees, the parties can arrange for deposition testimony, often provided most effectively on video. If the witness does not agree, then the range of options may depend upon geography, because the federal courts are split on whether an arbitrator may issue pre-hearing discovery subpoenas. Both the Eighth Circuit and the Sixth Circuit have long held that arbitrators have the authority to issue subpoenas for the production of documents in advance of a hearing.149 As the Eighth Circuit has explained its view, the authority of an arbitrator to require production of documents before a hearing is implied by the arbitrator’s power to require production of documents at the final hearing. It is both fair and

143 Id., R. 22(b) (iv).
144 See, e.g., AAA Commercial Arbitration Rules, R-32(c).
146 Id.
147 Id.
148 Id.
149 See, e.g., In re Sec. Life Ins. Co. of Am., 228 F.3d 865 (8th Cir. 2000); Am. Fed’n of Television & Radio Artists, AFL-CIO v. WJBK-TV, 164 F.3d 1004 (6th Cir. 1999).
efficient to provide the parties will an opportunity to review the documents well in advance of the actual hearing.\textsuperscript{150}

Other courts have determined that an arbitrator lacks any authority to issue discovery subpoenas, because 9 U.S.C. §7 expressly limits that power, allowing the arbitrator to require evidence for the hearing, and no more.\textsuperscript{151} The Second Circuit’s opinion in \textit{Life Receivables Trust} noted what it considered to be an "emerging rule" and a "growing consensus" that an arbitrator may not issue discovery subpoenas.\textsuperscript{152}

In the face of criticism that precluding discovery subpoenas will deprive the parties of material information and add to the expense of arbitration, the Fourth Circuit has explained: "Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes. … [B]ecause [the parties] have elected to enter arbitration, neither may reasonably expect to obtain full-blown discovery from the other or from third parties."\textsuperscript{153}

Finally, the Fourth Circuit has left room for a compromise between the split between jurisdictions, holding that the FAA does not generally grant an arbitrator the authority to order non-parties to appear at deposition or to demand pre-hearing document production from nonparties unless the requesting party can show a “special need."\textsuperscript{154}

Private arbitration rules and a number of courts therefore have developed practical ways to obtain essential third party information without the uncertainty and expense of such jurisdictional disputes. The AAA Commercial Rules, for example, suggest that the arbitrators may set an early portion of the hearing in the jurisdiction where testimony is to be given and documents are to be produced, and therefore may properly require a non-party to appear before the arbitrators at the site of the preliminary hearing to provide the testimony or documents. Rule 35 provides, in relevant part:

\begin{quote}
If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon
\end{quote}

\textsuperscript{150} \textit{In re Sec. Life Ins. Co. of Am.}, 228 F.3d at 870-71.

\textsuperscript{151} See, e.g., \textit{Life Receivables Trust v. Syndicate 102 at Lloyd's of London}, 549 F.3d 210, 216-18 (2d Cir. 2008).


\textsuperscript{153} \textit{COMSAT Corp. v. Nat'l Science Found.}, 190 F.3d 269, 276 (4th Cir. 1999).

\textsuperscript{154} \textit{Id.} at 276 (emphasis supplied).
payment by the requesting party of all reasonable costs associated with such examination.\textsuperscript{155}

Courts have regularly authorized such proceedings.\textsuperscript{156} In the \textit{Celanese} case, for example, the Second Circuit affirmed the district court’s enforcement of a subpoena that presented the parties and the arbitration panel with more than 300 boxes of documents. The court was careful not to call the required exchange of information “discovery,” but, rather, described it as an early “hearing,” during which evidence was provided.\textsuperscript{157}

Summoning a witness to an early “hearing” simplifies other procedures as well. If an arbitrator is “sitting” at a hearing in the state where the discovery is being produced, the district court has the power to compel the appearance of a non-party, should the witness fail to appear.\textsuperscript{158}

In many states that have their own arbitration statutes, those statutes expressly address the authority of arbitrators to issue subpoenas for discovery depositions and document production. Some states also have statutes or court rules of more general application, permitting their courts to assist legal proceedings in other states by issuing subpoenas. However, at least one court has refused to apply its general rules to issue and enforce subpoenas in an out-of-state arbitration under the FAA. Reversing a lower court, the Indiana Court of Appeals refused to enforce an arbitration discovery subpoena that a party had sought and obtained under Indiana Trial Rule 28(E).\textsuperscript{159} The appellate court held that only the Indiana federal district court could enforce a subpoena issued under 9 U.S.C. §7, even in the absence of diversity between the parties.

Accordingly, the most efficient route to third party information remains the time-honored effort to obtain voluntary cooperation. If that fails, the law of the Eighth and Sixth Circuits will authorize the enforcement of a subpoena. Outside those Circuits, other jurisdictions and rules will enforce a subpoena that requires a third party to deliver material documents and/or witnesses to a preliminary “hearing” that the parties and the arbitrator attend, at a time and place that may be different from the presentations of opening statements and other evidence.

3. \textbf{Motions}

There can be material differences between the motion procedures available in arbitration, and those available in a judicial proceeding. The arbitration agreement, arbitration service rules, later agreements between counsel for the parties, and the background of the panel members will all play a role in whether particular motions are permitted, briefed, and decided in advance of the hearing. As a practical matter, if a party expects to bring a dispositive

\begin{itemize}
\item \textsuperscript{155} AAA Commercial Arbitration Rules R.35.
\item \textsuperscript{156} See, e.g., \textit{Stolt-Nielsen SA v. Celanese AG} (“\textit{Celanese}”), 430 F.3d 567 (2d Cir. 2005); \textit{Alliance Healthcare Servs., Inc. v. Argonaut Private Equity, LLC}, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011).
\item \textsuperscript{157} \textit{Id.}; see also \textit{COMSAT Corp. v. Nat’l Sci. Found.}, 190 F.3d 269 (4th Cir. 1999); \textit{SchlumbergerSema, Inc. v. Xcel Energy, Inc.}, Civ. No. 02-43004-PAM/JSM, 2004 WL 67647 (D. Minn. Jan. 9, 2004).
\item \textsuperscript{158} See, e.g., discussion in \textit{Life Receivables Trust v. Syndicate 102 at Lloyd's of London}, 549 F.3d 210, 216-218 (2d Cir. 2008) and \textit{Alliance Healthcare Servs., Inc. v. Argonaut Private Equity, LLC}, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011).
\item \textsuperscript{159} \textit{In re the Subpoena Issued to Beck's Superior Hybrids, Inc.}, 940 N.E.2d 352 (Ind. App. 2011).
\end{itemize}
motion, it will be important to articulate to the panel early what that motion will be, and to explain how deciding this motion can make the arbitration proceedings fairer or more efficient.

Claimants frequently wish to avoid dispositive motions, in order to have the matter heard and decided on the broadest possible record. Respondents may urge the Panel to bifurcate and decide, early in the process, dispositive issues like the enforceability of statutes of limitations or contractual limitation periods, or a full or partial motion for summary judgment. Under most arbitration rules, the arbitrators have the authority to consider dispositive motions and to dispose of some or all of the case prior to an evidentiary hearing. Under certain Rules, they are cautioned to allow motions only in limited circumstances. For example, the AAA Commercial Rules provide, “The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.”

Experienced arbitrators are well aware that although they have broad discretion, their awards may be vacated only if they exclude material evidence from consideration. Although the cases are clear, they “need only hear enough evidence to make an informed decision,” the FAA does provide that courts may vacate an award if arbitrators refuse to hear “evidence pertinent and material to the controversy.” Accordingly, Arbitrators will be most likely to allow a motion to decide an issue, or to exclude proof, if it is likely to focus the hearing on a key factual dispute, will save the parties and the panel substantial time and expense, and if it is solidly grounded in undisputed facts.

C. Conducting the Hearing Itself

With the increasing experience of clients, lawyers and arbitration services, many experienced arbitrators expect and welcome a polished presentation, similar to a courtroom proceeding. Many arbitrations last for multiple days, and even for multiple weeks.

The hearing itself is likely to resemble an administrative hearing. Proceedings are generally conducted in a conference room, with the advocates, witnesses and arbitrators seated around the table. As in any trial, the most effective presentations will reflect careful preparation of the witnesses and organized presentation of exhibits, frequently in tabbed notebooks. It is not uncommon for the parties to present opening statements, unless the parties have already provided the arbitrators with hearing briefs. In some cases, direct examination may be replaced by written declarations, followed by live cross-examination and redirect. Objections are unlikely to be sustained.

In international arbitrations, it is more common for the arbitrators to decide whether they need to hear oral argument or witnesses, or prefer instead to decide the dispute solely on the documents submitted. It will be critically important to understand the preferences of your panel, well in advance of scheduling witnesses for appearance.

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160 Id., R. 33 (emphasis supplied).
162 Id.
If a litigant wishes to examine a witness who is outside the jurisdiction, some service provider rules and arbitrators will permit witnesses to appear by Skype or Facetime. A number of arbitration services have established rules governing such an appearance, and are careful to require that the witness be subject to cross-examination. For example, the AAA Commercial Rules provide:

> When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.164

If a key witness is uncooperative, and likely to refuse to be available in person or by video, a party may need to obtain a subpoena for hearing testimony, either for the date and place already set, or in another location in which the witness is subject to subpoena. The AAA Rules are representative in providing: "[E]ither party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination."165 Alternatively, a party may seek a subpoena for the witness to appear for a deposition in advance of the hearing. If the rules of the jurisdiction permit and the parties agree, the resulting testimony can be presented in paper or video form, or both.

Some arbitrators are active questioners themselves. Counsel should consider any question from an arbitrator to be of the utmost importance. Although arbitrators do not arrive at a hearing quite as uninitiated as jurors are, they may be unfamiliar with many of the facts and legal points you believe to be critically important to your client’s position. An arbitrator’s inquiry will provide a window into the thinking of the panel, and allows you to present the most relevant facts and legal arguments in the most effective way. Questions may also prompt the parties to seek additional time to brief an issue.

Counsel should inquire early and often regarding whether the arbitrators want closing argument, closing briefs, or some combination of both. Closing arguments are often extremely useful for arbitrators, particularly those who have been asked to issue a reasoned award rather than simply a one-line ruling. In some cases, the arbitrator and the parties will agree that there is no need for closing. If counsel for a party asks to give a closing argument, however, most arbitrators will accommodate that request. In more complex cases, the parties will prepare post-hearing briefs and/or findings and conclusions, and perhaps provide a closing argument as well. Where the parties have arranged for a transcript, it can be helpful to provide citations in the post-hearing submission, at least on key factual points.

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164 AAA Commercial Rules R-32(c).
165 AAA Commercial Rules R-35(b).
Finally, the arbitrator(s) will usually conclude the proceedings by asking if any party wishes to submit any further evidence. That closing inquiry is sometimes set by rule. For example, the AAA Rules provide, “The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard.” Once satisfied that there is no further evidence to be heard, the arbitrator will declare the proceedings closed. Under most rules, the arbitrator will be required to prepare and submit the Award to the arbitration service provider within a defined period of time, usually 30 days.

CONCLUSION

Private arbitration has become an established feature of the dispute resolution landscape. It offers some significant advantages over proceedings conducted under state and federal procedural rules, but has a potential dark side as well. Arbitration can be faster, efficient, and more economical than litigation, particularly where arbitrators limit the amount of discovery and focus the proceedings on the key issues the parties need assistance in deciding. For disputes other than putative class actions, proceedings can be largely confidential. Arbitration can allow parties to choose decision makers who are skilled and experienced in the field in which the dispute arises.

Alternatively, though, arbitration can be slow and expensive. It may prolong a dispute, imposing the kinds of discovery burdens, hearing requirements and legal fees that arise in litigation. The lists of potential arbitrators from some of the service providers can include a mix of skill and inexperience. Until the arbitrators complete their Award, the time they spend in understanding and hearing a matter will be unrestricted, and charged on an hourly basis. The result of that work will be essentially unreviewable, lacking the appellate protections that exist for parties who address their disputes in a judicial system.

The field of arbitration law is evolving rapidly. There are almost daily legal opinions explaining and affecting the legal standards that will apply when parties ask the courts to compel, intervene in, vacate or confirm the results of arbitrations. In order to represent clients effectively, counsel will need to be familiar with those judicial decisions as well as with the service provider rules that will govern the conduct of proceedings under a particular arbitration clause. Clients will need clear explanations, before signing such a clause, what those rules will mean in the event of a future dispute. Counsel also will need to prepare their clients for the expenses of arbitration, including the costs imposed by arbitration services, the hourly rates required for lawyers and arbitrators, and the likelihood that those costs will not be limited by the use of dispositive motions.

With all its expense and complexities, private justice appears to be here to stay. The role of counsel will therefore remain a significant one, in shaping individual clauses and in applying the law and the rules for the most effective protection of their clients’ interests.

166 AAA Commercial Rules R-39(a).
Michael Dady

Michael Dady is widely regarded as one of the most prominent franchisee attorneys in America. He and the other lawyers in his firm, Dady & Gardner, P.A. of Minneapolis, Minnesota, limit their nationwide practice to helping franchisees and dealers preserve and enhance the value of their businesses as effectively and as efficiently as possible. They are credited with having tried and won more cases on behalf of franchisees and dealers than any other firm in America. Michael and his partners have successfully represented franchisees and dealers in more than 350 different franchise and supplier organizations, and currently represent 52 different franchisee and dealer associations.

Michael is a frequent national speaker and writer on franchise law topics, and was an adjunct professor at the University of St. Thomas Institute for Franchise Management. Michael is listed in the Best Lawyers in America, is a member of the Million Dollar Advocates Forum, was selected by the Minnesota Lawyer as one of its ten “Attorneys of the Year” for the year 2000, has been recognized by his Minnesota lawyer peers for more than ten years as one of Minnesota’s Top 100 Super Lawyers, and has been consistently recognized by Franchise Times as one of the top 100 franchise lawyers in America. Chambers USA has ranked Dady & Gardner as the top franchisee law firm in America.

Michael is active in supporting several service organizations. He formerly served as both the Chair of the Board of Directors of Catholic Charities of St. Paul and Minneapolis and the Chair of the Board of Regents of St. John’s University. He has been honored by both his university, Saint John’s University, and his high school, Sisseton High School, as their Alumnus of the Year. He is currently a member of the National Advisory Council of the American Creativity Association and the Boards of Directors of the C.M. Russell Museum of Western Art and Ecumen. A native of Sisseton, South Dakota, Michael is a rancher in his spare time, and considers “doing cowboy work” his favorite recreational pursuit.

Paula J. Morency

Paula J. Morency is a partner with Schiff Hardin LLP in Chicago, in the Firm’s Litigation and Intellectual Property groups. She concentrates her practice in the litigation, mediation and arbitration of commercial disputes, including franchise and distributor issues, protection of trademarks and trade secrets, class actions and antitrust issues. Ms. Morency teaches for the National Institute for Trial Advocacy, and is an Adjunct Professor of Trial Advocacy at the Northwestern University School of Law. She is a former
member of the Governing Committee of the ABA Forum on Franchising, co-chaired the 2003 Forum, and has been a frequent speaker and author on franchise and distribution topics.

Ms. Morency received her undergraduate degree (A.B., magna cum laude, 1977) from Princeton University and her law degree (J.D., 1980) from the University of Virginia School of Law.