RECENT DEVELOPMENTS CONCERNING ENFORCEMENT OF ADR PROVISIONS

Suzanne H. Holly and Margaret E. Juliano*

Changes in courts' interpretations of Alternative Dispute Resolutions (ADR) provisions affect the predictability and use of those provisions. With the rise of mediation and the potential decrease in the use of arbitration it is also important to consider enforcement and use of mediation provisions. This article will address recent developments concerning mediation and arbitration provisions, principles applied by courts with regard to the enforcement of ADR provisions, and recent changes to model provisions and rules by the American Arbitration Association.

I. ENFORCEMENT OF MEDIATION AND OTHER NON-ARBITRATION ADR PROVISIONS

Although parties have begun to disfavor arbitration provisions, choosing other types of ADR provisions instead, there is a relative paucity of law instructing parties concerning the enforceability of such provisions. Unlike arbitration provisions, there is no statutory framework for analyzing mediation provisions,[1] nor is there as much case law addressing the specific issue of enforcement of mediation provisions.[2]

The relative lack of litigation over the enforcement of such provisions could be based on a variety of reasons. One reason is that a party that otherwise would wish to enforce a mediation provision does not see the utility in doing so because the other party refuses to participate, and mediation requires a willingness to settle.[3] Another reason could be the availability of mediation required by statute or court rule either before or during the pendency of a lawsuit, which will provide additional opportunities to mediate disputes.[4] Finally, although there has been a trend toward ADR provisions other than those involving only arbitration, historically, fewer contracts contain mediation provisions.

A. Recent Departure By Corporations Away From Arbitration Provisions

There has been a general shift by corporations away from litigation and towards ADR.[5] While corporations dealing with corporate/commercial, consumer and employment law litigation adopted arbitration with glee in the late

---

* Suzanne H. Holly, Esquire is a partner at Berger Harris LLP.; Margaret E. Juliano is an associate with Obermayer Rebmann Maxwell & Hippel LLP.

1. There are statutes requiring mediation; however, there is no statute comparable to the Federal Arbitration Act, which mandates enforcement of arbitration provisions.

2. Although this section applies primarily to mediation provisions, the same type of analysis applies to other forms of non-arbitration ADR provisions.

3. Sarah R. Cole, *et al*. (2013), 1 mediation: law, policy and practice § 6:2.

4. There are a number of reasons why a party desirous of mediation in accordance with an ADR provision might file suit. For example, that party might need to file to (i) avoid the expiration of a statute of limitations; or (ii) determine whether the court has subject matter jurisdiction over the dispute (i.e. determine whether their dispute fits within the scope of the mediation clause). *See generally*, Cole, *supra*, at § 612.

5. Stipanowich, Thomas and Lamare, J. Ryan, *Living with 'ADR': Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations* (2013). 19 Harvard Negotiation Law Review 1; Pepperdine University Legal Studies Research Paper No. 2013/16. Available at SSRN: http://ssrn.com/abstract=2221471 or http://dx.doi.org/10.2139/ssrn.2221471.

1990s, they now have turned towards mediation in nearly every area of law.[6] The only area reporting an increase in the use of arbitration is that of consumer disputes, notably in product liability cases where the use of arbitration jumped from 23.3% to 41.5%.[7] Almost half of all companies surveyed in the particular study stated that they use ADR in corporate and commercial disputes because of a contractual provision, indicating that contract drafting is vital.[8]

B. Mediation Provisions Are Likely To Be Interpreted In A Manner Consistent With Well-Settled Contract Interpretation Principles

The existing case law concerning mediation provisions indicates that courts typically enforce mediation provisions, and do so in a manner consistent with well-settled contract interpretation principles. While courts nationwide apply somewhat disparate approaches to enforce (and provide remedies for breach of) mediation provisions, Delaware courts follow the majority trend of analyzing mediation provisions under standard contract law.[9] Although it is not a very recent case, *Qwest Communications International Inc. v. National Union Fire Insurance Company of Pittsburgh, PA, et al.*,[10] provides a meaningful example of the approach Delaware courts are likely to take with regard to enforcement of mediation provisions. In that case, the Court of Chancery examined an ADR provision in the context of Qwest's action to enjoin its insurance carriers from maintaining an arbitration action.[11] The policy at issue allowed Qwest to reject its insurers' choice of ADR at any time prior to the commencement of that ADR process, and permitted Qwest to choose either mediation or arbitration. After a dispute arose, the insurers demanded arbitration. Qwest rejected the insurers' choice, and selected mediation instead. The insurers refused to withdraw their arbitration demand or participate in mediation. The Court of Chancery applied standard contract interpretation principles, found that Qwest was entitled to relief based on the unambiguous language of the policy, and ordered the insurers to withdraw or dismiss their demands for arbitration and submit to mediation.

---

6. *Id.* at *[need pinpoint]*. Corporate in-house counsel is not relying only on mediation. Surveys showed that they are placing emphasis now on early neutral evaluation, early case assessment, and other approaches aimed at deliberate management of conflicts, to control costs as well as time. *Id.* at [need pinpoint].

7. *Id.* at [need pinpoint].

8. *Id.* at [need pinpoint].

9. *See* Cole, *supra* at note 4 at § 6.1.; Qwest Commc'ns Int'l Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, et al., 821 A.2d 323, 328-29 (Del. Ch. 2002) (enforcing insured party's request to mediate under insurance policy provision allowing for choice of ADR method); Tekmen & Co. v. Southern Builders, Inc., C.A. No. 04C-3007-RFS, 2005 WL 1249035, *5-6 (Del. Super. Ct. May 25, 2005) (noting that contract contained a provision expressly stating that mediation was a condition precedent to arbitration or litigation and that parties might have waived that condition precedent by conduct, but finding that court lacked jurisdiction to decide the question of whether arbitration had been triggered because this was a question for an arbitrator to decide); SC & A Construction Inc. v. Potter, C.A. No. 12L-09-22-FSS, 2012 WL 6930317, *2 (Del. Super. Ct. Dec. 21, 2012) (noting that an agreement unambiguously required mediation followed by compulsory arbitration of disputes, when parties already were engaged in mediation and court was deciding issues relating to what claims and counterclaims had to be submitted to arbitration); Commonwealth Construction Co. v. Cornerstone Fellowship Baptist Church, Inc., C.A. No. 04L-10-101-RRC, 2006 WL 2567916, *22 (holding that failure to first submit claim to architect prior to filing suit was a material breach of contract, but finding that filing mechanics' lien claim prior to submitting to mediation was not a breach of agreement because agreement permitted filing of mechanics' lien claims prior to mediation).

10. 821 A.2d 323 (Del. Ch. 2000).

11. The Court of Chancery examined the ADR provision following a final hearing on the merits of Qwest's claims.

II. ENFORCEMENT OF ARBITRATION PROVISIONS

A. Applicable Sources Of Law

There are both state and federal statutes that apply to questions arising in Delaware concerning the enforceability of arbitration provisions. First, there is the Federal Arbitration Act ("FAA"),[12] which has broad application to arbitration provisions,[13] and will preempt conflicting state laws.[14] Second, Delaware has enacted the Delaware Uniform Arbitration Act ("DUAA"), which explicitly proclaims the enforceability of arbitration provisions under Delaware law.[15] The DUAA provides for the Court of Chancery to have jurisdiction over arbitration-related disputes.[16] Is also provides specific procedural rules that will apply only if parties to a contract explicitly incorporate them in their contract.[17] Otherwise, the DUAA expressly provides that disputes must be decided in a manner conforming to the FAA.[18] Finally, there is both federal and state case law that addresses enforcement of arbitration provisions.

B. Arbitration Provisions Will Be Rigorously Enforced As Drafted

It is both federal and Delaware law that arbitration provisions will be "rigorously enforced" as drafted.[19] The FAA's primary substantive provision requires that an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[20] Much like the FAA, the DUAA

---

12. 9 U.S.C.A. §§ 1, *et seq*.

13. *See* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 277 and 281 (1995) (interpreting § 2 as applying to any transaction "affecting commerce," and, if "the transaction in fact involve[d] interstate commerce, even if the parties did not contemplate an interstate commerce connection.") (quotations and editing in original omitted); *see also*, James & Jackson, LLC v. Willie Gary, LLC, 906 A.2d 76, 80 (Del. 2006) (citing Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 273-74 (1995)) ("Because the LLC Agreement involves interstate commerce, the Federal Arbitration Act (FAA) governs."); McLaughlin v. McCann, 942 A.2d 616, 621 (Del. Ch. 2008) (citing James & Jackson, 906 A.2d at 80)) ("Because the Purchase Agreement involves interstate commerce, calls for arbitration in Pennsylvania and is not subject to the Delaware Uniform Arbitration Act, the Federal Arbitration Act ("FAA") governs my consideration of this case.").

14. *Allied-Bruce*, 513 U.S. at 269.

15. 10 Del. C. § 5701, et seq.

16. *Id.* at § 5701.

17. *Id.* at § 5702(a) and (c).

18. *Id.* at § 5702(c).

19. *See* Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2309 (2013) ("courts must 'rigorously enforce' arbitration agreements according to their terms.") (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)); *see also* Medtronic Vascular, Inc. v. NanoMed Sys., Inc., C.A. No. 8888, 2014 WL 795077, *3 (Del. Ch. Jan. 27, 2014) (citing *Am. Express Co.*, 133 S. Ct. at 2309); DMS Props.-First, Inc. v. P.W. Scott Assoc., Inc., 748 A.2d 389, 391 (Del. 2000) ("This Court has recognized that the public policy of Delaware favors arbitration.") (citing SBC Interactive, Inc. v. Corp. Media Partners, 714 A.2d 758, 761 (Del. 1998)).

20. 9 U.S.C. § 2.

provides that contractual arbitration provisions are, "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract…."[21]

There are several vital overarching principles applicable to enforcement of arbitration clauses under the FAA. Of central importance is that, "arbitration 'is a matter of consent, not coercion.'"[22] Further, the central "purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'"[23] "Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties,'"[24] and, "'[a]s with any other contract, the parties' intentions control.'"[25] "This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution.[26]

1. Recent Supreme Court Decisions Highlight The Tension Between Rigorous Enforcement Of Arbitration Provisions With Other Important Policy Considerations

One recent example of the rigorous enforcement of arbitration provisions is found in the U.S. Supreme Court's decisions concerning the availability of class action arbitration when an arbitration provision is silent as to its availability or in the case of a consumer contract that waives the right. Prior to 2013, these issues already had been addressed in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[27] and *AT&T Mobility LLC v. Concepcion*.[28] The decisions in these cases

21. 10 *Del. C.* § 5701.

22. Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 681 (2010) (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

23. *Id.* at 682 (quoting Volt, 489 U.S. at 479, other citations omitted).

24. *Id.* at 682 (quoting Volt, 489 U.S. at 479).

25. *Id.* at 682 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)).

26. *Id.* at 682-83 (citing AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 648-49 (1986)).

27. 559 U.S. 662 (2010). The Supreme Court's decision in *Stolt-Nielsen* arose in the context of a review of an arbitration panel's decision to allow class arbitration in spite of a stipulation by the parties that their agreement was *silent* with regard to the issue of class arbitration. The Supreme Court vacated the arbitration panel's decision on the basis that the panel failed to construe the parties' agreement, instead relying on policy judgments. The Supreme Court then reached the issue of whether the agreement at issue could in any way be interpreted as allowing class arbitration, and held that it could not. The Supreme Court reasoned that because, "class-action arbitration changes the nature of arbitration to such a degree [,] it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 685. According to the Court, "[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.* . Class action arbitration would not necessarily provide the same benefits, thereby, "giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id.* at 685-86. Thus, the language of the agreement at issue in *Stolt-Nielsen* did not provide a basis to find that the parties had agreed to class action arbitration.

28. 131 S. Ct. 1740 (2011). In *AT & T Mobility LLC v. Concepcion*, the Supreme Court considered the enforceability of an arbitration clause that explicitly forbade arbitrators from consolidating more than one claim or presiding over any form of a representative or class proceeding. In that case, the lower court based its decision to deny a motion to compel individual arbitration of a consolidated consumer fraud case based on California Supreme Court precedent (the "*Discovery Bank* Rule"), finding that the class action prohibition was unconscionable because AT&T had failed to show that bilateral arbitration adequately substituted for the deterrent effects of

continued on page 59

left unresolved questions, however. For instance, *Stolt-Nielsen* left doubt as to whether an ADR provision could *ever* be interpreted as allowing class action procedures unless it explicitly authorizes them. Additionally, *Concepcion* left doubt as to whether courts could adopt any rules regarding the conscionability of class action arbitration waivers in consumer contracts without running afoul of Supreme Court precedent. Indeed, in *Concepcion*, the Supreme Court briefly addressed the need for some plaintiffs to enjoy the cost-sharing of class actions, but rejected that policy as insufficient to overcome the policies underlying the FAA.

In 2013, the Supreme Court published two opinions that further addressed the interplay between the goals of the FAA and the availability of class action arbitration to plaintiffs. In *Oxford Health Plans LLC v. Sutter*,[29] the Supreme Court reviewed an arbitrator's decision that class action was permitted under an arbitration provision. In that case, the parties agreed that the arbitrator would decide the issue of whether the contract at issue authorized class arbitration. The arbitrator determined that it did, focusing his determination on a construction of the parties' agreement. During the arbitration proceeding, the Supreme Court published *Stolt-Nielsen*. Based on this new precedent, Oxford asked the arbitrator to reconsider his decision. The arbitrator issued a new decision, holding that *Stolt-Nielsen* had no effect on the case because in that case, there was no dispute that the arbitration provision did not authorize class arbitration. The Supreme Court granted certiorari, "to address a circuit split on whether § 10(a)(4) [of the FAA] allows a court to vacate an arbitral award in similar circumstances," and held that it does not.[30]

The Supreme Court distinguished its earlier decision in *Stolt-Nielsen*, explaining that, "[t]he parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration," and, based on that stipulation, the arbitration panel exceeded its authority when it compelled class arbitration on policy-based reasoning.[31] In contrast, the arbitrator in *Oxford* looked directly to the parties' contract to reach his finding. Thus, the Supreme Court in *Oxford* clarified that an arbitrator could find that an agreement provides for class arbitration, so long as the arbitrator bases the finding on an interpretation of the contract language at issue.

Ten days after issuing its opinion in *Oxford*, the Supreme Court decided a case involving the enforceability of a class action waiver in an arbitration provision. In *American Express Co. v. Italian Colors Restaurant*,[32] Italian Colors

---

continued from page 58

class actions. After the Court of Appeals for the Ninth Circuit affirmed, also finding the waiver unconscionable, the Supreme Court reversed and remanded on preemption grounds. The Supreme Court concluded that although the *Discovery Bank* Rule was not *directly* in conflict with the FAA, it caused the doctrine of conscionability to be applied in a fashion that disfavored arbitration, and, "[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as expressed in the FAA. *Id.* at 1753. According to the Supreme Court's reasoning, while not *requiring* class arbitration, the *Discovery Bank* rule essentially allowed, "any party to a consumer contract to demand [class arbitration] *ex post*," even if it was not initially agreed to. This result was contrary to, "[t]he 'principal purpose' of the FAA[, which] is to 'ensur[e] that private arbitration agreements are enforced according to their terms,'" and a secondary purpose of the FAA, which is "efficient and speedy dispute resolution." *Id.* at 1749-50. The Supreme Court further elucidated its views on the profound differences between bilateral and class arbitration, stating its belief that class arbitration was more formal, slower and more costly than individual arbitration, as well as greatly increasing the risk to defendants in that the review available of arbitrators' decisions is so limited. *Id.* at 1750-52.

29. 133 S. Ct 2064 (2013).

30. 133 S. Ct. at 2068.

31. 133 S. Ct. at 2069-70.

32. 133 S. Ct. 2304 (2013).

brought a class action against American Express for alleged antitrust violations. After a somewhat involved history, which included a prior grant of certiorari,[33] the Supreme Court accepted certiorari again to consider the question: "[w]hether the Federal Arbitration Act permits courts … to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim."[34]

The Supreme Court held that it does not. The Supreme Court stated that the FAA,

> [R]eflects the overarching principle that arbitration is a matter of contract…. And consistent with [the FAA], courts must "rigorously enforce" arbitration agreements according to their terms…including terms that "specify *with whom* [the parties] choose to arbitrate their disputes,"…and "the rules under which that arbitration will be conducted,"….That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been "'overriden by a contrary congressional command.'"[35]

The Supreme Court then discussed two key arguments by Italian Colors. First, Italian Colors argued that requiring individual litigation of its claims—even though it had contractually agreed to it—would contravene the policies underlying antitrust laws. The Court rejected this argument, reasoning that the underlying policy of the antitrust laws did not guarantee an affordable procedural path to the vindication of every claim.[36] The Supreme Court thus held that the antitrust laws do not evince a Congressional intent to preclude waiver of class action arbitration procedure.[37]

Second, Italian Colors argued that the lower court's ruling served to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the "effective vindication" of a federal statutory right.[38] The Supreme

---

33. In the lower court, American Express filed a motion to compel individual arbitration based on an arbitration provision that waived any right to class arbitration. In spite of Italian Colors' presentation of an economist's estimate of the cost to prepare a report to prove the antitrust claims, and assertion that it could not bear the exorbitant cost alone, the district court granted American Express' motion and dismissed the lawsuits. The Second Circuit reversed and remanded, holding that the waiver of class arbitration was unenforceable and the arbitration could not proceed because Italian Colors had established that, "they would incur prohibitive costs if compelled to arbitrate under the class action waiver." 133 S. Ct. at 2308.

The Supreme Court vacated the judgment, and remanded for further consideration in light of the then newly-decided *Stolt-Nielsen*, "which held that a party may not be compelled to submit to a class arbitration, absent an agreement to do so." *Id*. The Second Circuit reconsidered its decision following *Stolt-Nielsen*, and maintained its reversal of the lower court on the basis that its earlier ruling did not *compel* class arbitration. It then *sua sponte* reconsidered its ruling again on the in light of additional new precedent, *Concepcion*. The Court of Appeals upheld its reversal again, finding *Concepcion* distinguishable because it dealt with preemption principles.

34. 133 S. Ct. at 2308.

35. 133 S. Ct. at 2309.

36. Congress had taken measures to facilitate antitrust litigation by, for example, enacting multiplied damages remedies. Simply because Congress demonstrated a willingness to go beyond the normal limits of law in that regard in order to advance the policies underlying antitrust laws, such willingness did not mean that Congress intended to allow for *any* departure whatsoever from the normal limits of the law in order to advance the policies underlying the antitrust laws.

37. In connection with this holding, the Supreme Court also rejected the argument that Congress's enactment of Rule 23 indicated an intent to preclude contractual waivers of class action litigation of federal antitrust laws.

38. The "effective vindication" exception arose out of prior Supreme Court precedent, in which the Court held that arbitration agreements that operated as a "prospective waiver of a party's right to pursue statutory remedies" could be invalidated on public policy grounds. *See, e.g., Mitsubishi Motors Corp.*, 473 U.S. 614; Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Vimar Securos v. Reaseguros v. M/V Sky Reefer, 515 U.S. 528 (1995); 14 Penn Plaza v. Pyett, 556 U.S. 247 (2009); Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).

Court rejected the "effective vindication" argument because the class action waiver was not a waiver of the right to *pursue* statutory remedies. Italian Colors still had the right under the arbitration provision to pursue its antitrust claims, just not by way of class action.[39] Finally, the Supreme Court noted that failing to enforce the class action waiver provision had the potential to undermine the prospect of efficient and speedy dispute resolution that arbitration - and bilateral arbitration in particular - was meant to secure.

In rejecting Italian Colors' arguments concerning effective vindication based on hardship, the U.S. Supreme Court made abundantly clear the supremacy of the goals of the FAA, and that courts must "rigorously enforce" arbitration agreements *as written,* regardless of harsh results. Justice Kagan disagreed with the majority's rejection of Italian Colors' assertion of the effective vindication exception. She noted that the effective vindication exception applies to situations where the proceedings will be "…'so gravely difficult' that the claimant 'will for all practical purposes be deprived of his day in court.'"[40] She further noted that the case in *Italian Colors differed from cases such as Concepcion, or Green Tree Financial Corp. –Ala. v. Randolph,*[41] in that the contract barred not only class procedures, but also cost-sharing, and the plaintiff in *Italian Colors* offered proof that litigation without cost-sharing was prohibitively expensive: a cost estimate from a prospective economic expert. Justice Kagan opined that *Italian Colors* is not necessarily to be read as a case broadening the right to arbitration or protecting the enforceability of arbitration provisions, but rather as another battle in the war against class actions.[42]

2. Recent Pushback To The Supreme Court's Rigorous Enforcement Of Arbitration Provisions Under Faa Principles To The Exclusion Of Public Policy Considerations

The issues raised by *Italian Colors* have not gone unnoticed.[43] Senator Al Franken introduced the Arbitration Fairness Act of 2013, which would significantly restrict the breadth of the FAA as described by the Supreme Court cases above.[44] On December 17, 2013, Senator Franken convened hearings before the Judiciary Committee concerning the

39. The Supreme Court noted also that this right solely to bilateral litigation of the antitrust laws was actually consistent with the rights of parties prior to the enactment of Rule 23.

40. *Am. Express Co.*, 133 S. Ct. at 2314.

41. 521 U.S. 79 (2000). In Green Tree, the Supreme Court held that if a case was prohibitively expensive, the effective vindication exception could apply. The plaintiff in that case, however, had not shown that a case was actually prohibitively expensive and thus failed to meet her burden of proof.

42. *Am. Express Co.*, 133 S.Ct. at 2020. This is also expressed by commentators such as Nicole Flatow, In Major Blow to Consumers, Supreme Court Protects Mega-Corporations From Liability, Think Progress, June 20, 2013, available at http://think-progress.org/justice/2013/06/20/2189061/even-small-businesses-cant-shake-mega-corporations-chokehold-on-access-to-the-courts/ (last visited January 23, 2014).

43. Not only does the decision in *Italian Colors raise concerns about the effective vindication of consumers' ability to assert their rights in antitrust suits, but its effect is broader and applies in other contexts. See, e.g.,* Porreca v. Rose Group, C.A. No. 13-1674, 2013 WL 6498392 (E.D. Pa. Dec. 11, 2013) (grudgingly granting motion to compel individual arbitration and rejecting unconscionability challenge in Fair Labor and Standards Act case Supreme Court precedent).

44. Specifically, the proposed bill amends the FAA to invalidate arbitration agreements if they involve employment, consumer, antitrust, or civil rights disputes. Senator Franken's position is that mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitration decisions. It also removes the jurisdiction from the arbitral panel to determine whether the issue is properly before them, and places that into federal (not state) courts. However, the proposed amendment leaves in place collective-bargaining arbitration agreements.

potential effects of the case in support of his proposed legislation. The title of the hearing evidences the concerns of congress: "The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?" Testimony by witnesses at this hearing further highlights the tension between enforcement of arbitration provisions and the practical effect of this case in the consumer context.[45]

Delaware legislators also seem to have responded to the *Italian Colors* decision. HB 230, introduced by Representative Keeley and Senators Peterson, McBride and Townsend, entitled "An Act to Amend Title 6 of the Delaware Code Relating to Consumer Protection," would prohibit consumer contracts[46] from containing waivers of the right to a jury trial, if applicable to any action brought by or against the consumer.[47] One of the effects of this provision would be to prevent the kind of decision rendered in *Concepcion*, whereby a consumer agrees to a boilerplate/shrinkwrap contract with a national business and in so doing is required to arbitrate even where doing so has the effect of denying his ability to make his case.

HB 230 would also address an issue raised by the decision in *Italian Colors* in that it would prevent "any aspect of a resolution of a dispute between the parties to the agreement to be kept confidential."[48] The inability to create a joint defense, noted by Justice Kagan, had the effect of keeping Italian Colors from trying their case as they could not create a joint expert report that would be a shared cost across several consumers.

C. Disputes Over Substantive Arbitrability

Disputes often arise concerning whether (1) the parties have entered into a valid arbitration agreement, or (2) a valid agreement applies to a specific controversy. These types of disputes are categorized as disputes over the substantive arbitrability.[49] Recent case law focuses primarily on questions relating to who — the court or an arbitrator — will decide disputes over substantive arbitrability.

---

45. At the hearing, the Committee heard testimony from witnesses concerning the potential effects of the *Italian Colors* decision as creating undue hardships on small businesses, including the plaintiff in *Italian Colors*, Alan S. Carlson. In contrast to testimony from small business owners, Professor Peter Rutledge provided an overview of his various statistical studies of the effect of arbitration. He stated that his research, "has vindicated arbitration – it has shown that arbitration yields results far faster than the civil litigation system; it has also shown that arbitration often achieves fair results for employees and consumers, at least as good as those in the civil litigation system; and it has shown that arbitration clauses typically do not contain the sorts of nefarious procedural provisions for which they were at one time roundly criticized." [CITE?] Professor Rutledge also addressed the concerns about the Supreme Court cases on the substance of arbitration provisions. He stated that *Concepcion* had little to no effect on the overall use of class action limiting clauses. "…The use of arbitration clauses following *Concepcion* increased only from 40.3% to 44.8%.... The use of class waivers in arbitration clauses has risen over time: from 51.6% in 1999 to 77.8% in 2011 (immediately before *Concepcion*) to 86.7% in 2013." The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing Before the Senate Committee on the Judiciary, 113 Congress (2013) December 17, 2013, Testimony of Peter Rutledge.

46. Consumer contracts are defined in the bill as a writing between a business and a consumer involving goods and services, including credit or financial services, primarily for personal, family, or household purposes, which contract has been drafted by the business for use with more than one consumer, unless a second consumer is the spouse of the first consumer. Section 2403D(b). House of Representatives HB 230, 147th General Assembly (Del. Jan. 23, 2014).

47. Section 2404D(e)(3). House of Representatives HB 230, 147th General Assembly (Del. Jan. 23, 2014).

48. Section 2404D(e)(7). House of Representatives HB 230, 147th General Assembly (Del. Jan. 23, 2014). This section does not prevent the parties from agreeing to keep trade secrets confidential.

49. *James & Jackson*, 906 A.2d at 79 (substantive arbitrability refers to the scope of an arbitration provision and its application to a particular dispute) (discussing and quoting from Howsam v. Dean Witter, 539 U.S. 79 (2002)); *see also* Legend Natural Gas II Holdings, LP v. Hargis, C.A. No. 7213-VCP, 2012 WL 4481303, *4 (Del. Ch. Sept. 28, 2012). Procedural questions affecting the arbitration (such as those concerning waiver, delay, or the procedural prerequisites to arbitration) are for arbitrators to decide. Langlais v. Pennmont Ben. Services, Inc., 527 Fed. Appx. 215, 218 (3d Cir. 2013).

1. Who Decides Issues Concerning Whether The Parties Have Entered Into A Valid Arbitration Agreement?

A court must determine whether there is a valid agreement to arbitrate prior to making a final determination concerning the substantive arbitrability of an issue.[50] There is a distinction, however, as to what challenges are to the validity of the parties' agreement to arbitrate, as opposed to the validity of the agreement as a whole, or the formation of the agreement. These distinctions are important, as challenges to the validity of the agreement to arbitrate must be decided by a court, but challenges to the validity of the agreement as a whole are for an arbitrator to decide.[51] Finally, challenges to the formation of the contract also must be decided by the courts.[52]

In *SBRMCOA, LLC v. Bayside Resort, Inc.*,[53] the Third Circuit clarified how courts must distinguish between challenges to a contract's formation or validity for purposes of determining whether a court or an arbitrator would decide the issue. Before the SBRMCOA decision, there had been some confusion over the continued viability of the Third Circuit's decision in *Sandvik AB v. Advent Int'l Corp.*,[54] which made the determination concerning jurisdiction based on state law

---

50. The FAA requires U.S. District Courts make the determination before making the final ruling regarding the arbitrability of a particular dispute, and specifically provides in § 4 that: "The court shall hear the parties, and *upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C.A. § 4 (emphasis added); *see also* Guidotti v. Legal Helpers Debt Resolution, L.L.C., 716 F.3d 764, 771 (3d Cir. 2013) (the FAA, "enables the enforcement of a contract to arbitrate, but requires that a court be 'satisfied that the making of the agreement for arbitration…is not in issue' before it orders arbitration."). If the making of the arbitration agreement is in issue, then, "the court shall proceed summarily to the trial thereof," and a party may demand a jury trial of the issue. 9 U.S.C.A. § 4; *Guidotti*, 716 F. 3d at 771.

51. SBRMCOA, LLC v. Bayside Resort, Inc., 707 F.3d 267, 271 (3d Cir. 2013) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967)).

52. SBRMCOA, 707 F.3d at 271 (quoting Granite Rock Co. v. Int'l Bhd. Of Teamsters, __ U.S. __, 130 S.Ct. 2847, 2855-56, 177 L.Ed.2d 267 (2010) and citing Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 444 n. 1 (2006)).

53. 707 F.3d 267 (3d Cir. 2013). In *SBRMCOA*, a condominium association filed suit in the U.S. District Court for the District of the Virgin Islands against its original sponsor, and its creditors. The condominium association asserted claims for, among other things, breach of contract and declaratory judgment, seeking to void the contract on the grounds that the condominium association's board lacked authority to enter into the contract (referred to by the Third Circuit as the "*ultra vires* argument"), and that the contract was procured by the creditor defendants' coercion of the condominium association's board.

The District Court made two disparate determinations regarding the arbitrability of the *ultra vires* argument. With regard to the application of the *ultra vires* argument to the breach of contract claim, the District Court considered the *ultra vires* argument on its merits and rejected it without leave for discovery. With regard to the application of the *ultra vires* argument to the declaratory judgment claim, the District Court found that the *ultra vires* argument was arbitrable. It also found that the coercion argument was subject to arbitration. The Third Circuit vacated the District Court's rulings concerning the *ultra vires* argument, holding that the District Court should have decided the *ultra vires* argument as to both claims to which it applied.

54. 22 F.3d 99, 100-01 (3d Cir. 2000). In *Sandvik*, a plaintiff sued a defendant for, among other claims, breach of contract. The defendant denied that it was bound by the agreement because its agent purportedly lacked authority to execute it. In an unusual move considering its position that it was not bound by the contract, the defendant moved in the U.S. District Court for the District of Delaware to compel arbitration pursuant to an arbitration provision in the contract. The defendant argued that the arbitration provision was severable from the rest of the agreement, and because it did not contest the agreement to arbitration (as opposed to the validity of the arbitration provision), then the arbitration provision could be enforced. The District Court denied the motion to compel arbitration, holding that the Court first had to consider whether the defendant was bound by the contract. The Third Circuit affirmed, and in so doing, espoused the approach of examining whether a challenge to a contract would result in it being void or voidable. The Third Circuit ultimately held that the defendant's argument concerning its agent lacking authority to enter into the agreement was one to the formation of the contract, and therefore, was to be determined by the district court, not an arbitrator.

principles of void versus voidable agreements. In *Buckeye Check Cashing, Inc. v. Cardegna*,[55] the Supreme Court rejected a lower court's application of state law principles concerning the distinction between void and voidable contracts instead of applying principles of federal arbitration law. The Supreme Court had expressly distinguished *Sandvik* in a footnote, thereby leaving unresolved the continuing application of the reasoning in *Sandvik* to certain disputes.

While addressing the question of whether a coercion argument was arbitrable, the Third Circuit explained, "[t]he question is not so straightforward, however, because it is unclear whether the void/voidable distinction noted in *Sandvik* survived the Supreme Court's subsequent decision in *Buckeye Check Cashing*." The Third Circuit concluded, however, that, "the relevant distinction is between challenges to a contract's validity, which are arbitrable, and challenges to a contract's formation, which generally are not," as opposed to state law principles of whether a contract would be void or voidable. The Third Circuit thus held that the coercion claim was arbitrable, because it dealt with a challenge to an agreement, not to its formation.

2. Who Decides Issues Relating To Whether A Particular Agreement To Arbitrate Applies To A Particular Controversy?

In general, unless there is clear and unmistakable evidence that the parties intended otherwise, courts — not arbitrators — determine whether a dispute is substantively arbitrable.[56] The Delaware Supreme Court has set out a two-prong test for arbitrability: that if an arbitration provision (1) generally provides for arbitration of all disputes; and (2) incorporates a set of arbitration rules that empowers arbitrators to decide arbitrability,[57] then it may be decided by an arbitrator (this test is commonly referred to as the "*Willie Gary* Test"). Although it has not yet been affirmed by the Delaware Supreme Court, Delaware courts have been applying what could be called a third prong to the *Willie Gary* Test: that if a party meets the *Willie Gary* Test, then a court must still make a preliminary evaluation of whether the party opposing arbitration has made a clear showing that its adversary has offered no non-frivolous argument that the claims are arbitrable.[58]

---

55. 126 S. Ct. 1204 (2006). In *Buckeye*, the Supreme Court decided the issue of, "whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality." The Supreme Court held that the arbitrator should decide that issue because it was a challenge to the agreement itself, not specifically the arbitration provision, and the arbitration provision was enforceable apart from the remainder of the contract. In reaching this decision, the Supreme Court stated that its prior decisions had established three propositions: (1) "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract"; (2) "unless a challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance"; and (3) "this arbitration law applies in state as well as federal courts." *Id.* at 1209. Thus, when the Florida Supreme Court relied on state law principles concerning the distinction between void and voidable contracts, and state law rules regarding severability, it erred because it should have applied the foregoing principles of federal arbitration law.

56. *Langlais*, 527 Fed. at 217-18 (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2001)); Granite Rock Co. v. Int'l Bro. of Teamsters, 130 S. Ct. 2847, 2856 (2010) (citing same); First Options of Chicago, Inc. v. Kaplan, 574 U.S. 938, 945 (1995) (citation omitted).

57. *See* James & Jackson, 906 A.2d 76. In that case, Willie Gary filed suit in the Court of Chancery, seeking injunctive relief, specific performance, and, in the alternative, dissolution. James & Jackson filed a demand for arbitration, and then a motion to dismiss or stay in favor of arbitration. The Court of Chancery denied the motion to dismiss, holding that Willie Gary did not have to arbitrate its claims. The Delaware Supreme Court affirmed the Court of Chancery's holding, but did not affirm in its entirety the Court of Chancery's reasoning.

58. *See, e.g.*, Legend Natural Gas II Holdings, LP, 2012 WL 4481303; McLaughlin v. McCan, 942 A.2d 616 (Del. Ch. 2008)); Julian v. Julian, 2009 WL 2937121 (Del. Ch. Sept. 9, 2009).

For example, in *Li v. Standard Fiber, LLC*,[59] Li filed suit against Standard Fiber for indemnification and advancement of fees incurred in connection with an arbitration in California in which several other agreements between the parties were at issue pursuant to an indemnification agreement. Standard Fiber moved to dismiss Li's complaint based on arbitration clauses in the agreements at issue in the California arbitration, but which were not at issue in Li's complaint. The Court of Chancery discussed the modification to the *Willie Gary* Test stating:

> Delaware courts have held that, even if the *Willie Gary* test is satisfied, a court must still "make a preliminary evaluation of whether the party seeking to avoid arbitration of arbitrability has made a clear showing that its adversary has made 'essentially no non-frivolous argument about substantive arbitrability.'…[T]his step was added to avoid situations in which the *Willie Gary* test is technically satisfied but there is no non-frivolous argument that the arbitration clause covers the underlying dispute."[60]

The Court reviewed the arbitration clauses at issue, and found that they met the *Willie Gary* test, in that they contained broad language concerning the disputes that would be arbitrated, and incorporated the rules of the Judicial Arbitration and Mediation Services ("JAMS"), which specifically empower arbitrators to decide issues of substantive arbitrability. Li argued that the indemnification agreement under which he sued contained an integration clause, and therefore, the arbitration clauses in the other agreements (executed prior to the indemnification agreement) were barred from consideration. The Court acknowledged that the *Willie Gary* test would not be satisfied if its review was limited solely to the indemnification agreement. The Court rejected Li's argument, however, because he had not made a clear showing that Standard Fiber had no colorable argument concerning substantive arbitration. The Court reasoned that, "[i]n the context of the limited inquiry permitted under *Willie Gary* and its progeny," the integration clause did not conclusively establish the termination of the valid arbitration clauses in the other agreements.[61] Under Delaware law, an integration clause provides only a *presumption* of integration, and there was authority in other jurisdictions that a standard integration clause in a later agreement without an arbitration clause did not overcome an earlier agreement that contained a valid arbitration provision. Thus, without deciding the ultimate issue, the Court could not find that the integration clause barred consideration of the arbitration provision in the arbitration agreement.

Li also argued that a review of other portions of the indemnification agreement weighed against arbitrability of the dispute. The Court rejected this argument, because it invited the type of review prohibited by *Willie Gary* in that, "Li subtly asserts that the claims asserted in the complaint do not relate to the prior agreements. Although he ultimately may be right, his reasoning essentially invites the Court to resolve the first-order issue of substantive arbitrability at the outset, contravening a central tenet of *Willie Gary*."[62] The Court found that Li's complaint would not have been filed but for the existence of the parties' prior agreements. In that sense, there was at least a colorable argument that the earlier agreements were implicated.

The Delaware Superior Court also recognized the so-called third prong to the *Willie Gary* Test in *Behm v. American International Group, Inc., et al.*[63] There, Behm sued Ernst & Young for gross negligence and accounting malpractice

---

59. C.A. No. 8191-VCN, 2013 WL 1286202 (Del. Ch. Mar. 28, 2013).

60. 2013 WL 1286202, at *5.

61. 2013 WL 1286202, at *7.

62. 2013 WL 1286202, at *7.

63. C.A. No. N10C-10-013-MJB, 2013 WL 3981663 (Del. Super. Ct. July 30, 2013).

in connection with the preparation and filing of US and Japanese tax returns. Ernst &Young moved to dismiss Behm's complaint based on arbitration provisions in two contracts executed on August 21, 2009, and March 27, 2010. The Superior Court held that, to the extent that they arose after the execution of the first Terms of Service Agreement, the substantive arbitrability dispute should be submitted to an arbitrator.

Both agreements contained an ADR provision, requiring voluntary mediation first, and then binding arbitration, to be conducted in accordance with the Rules for Non-Administered Arbitration of the International Institute for Conflict Prevention and Resolution. The Court found that the ADR provisions satisfied the prongs of the *Willie Gary* test, and explained:

> [I]n the developing case law since *Willie Gary* had been decided, a third factor, or prong had been added. Courts had addressed "a preliminary question of whether or not there is a colorable basis for the court to conclude that the dispute is related to the agreement." The *Legend* Court further noted a similar approach was reached in *McLaughlin v. McCann*, where "[t]he Court suggested that: [A]bsent a clear showing that the party desiring arbitration has essentially non *non-frivolous* argument about substantive arbitrability, to make before the arbitrator, the court should require the signatory to address its argument against arbitrability to the arbitrator." In line with these decisions, the *Legend* Court held that if the party seeking arbitration has presented a colorable, "non-frivolous argument that the underlying dispute is arbitrable," then the party seeking to avoid arbitration "must submit questions of substantive arbitrability to an arbitrator." The Court of Chancery called this a "low threshold."[64]

Following this discussion, the Superior Court found that Ernst &Young had a colorable, non-frivolous argument that Behm's claims were arbitrable based on the relationship between Behm's claims and the arbitration provisions.

In another Superior Court decision, the Court decided the question of who should determine the substantive arbitrability of a dispute without specific reference to the *Willie Gary* Test or the developing third prong to the test. In *Vituli v. Carrols Corp.*,[65] the former CEO of Carrols Corporation for breach of an amended and restated employment contract. Carrols Corporation sought to dismiss the complaint and compel arbitration based on a mandatory arbitration program subjecting all employees' claims to arbitration. The arbitration program first was implemented by memo in prior to the execution of Vituli's contract, and after its implementation, all newly-hired employees were required to sign an "Agreement for Resolution of Disputes Pursuant to Binding Arbitration Between Carrols Corporation and [Employee]." Vituli never signed such an agreement. Moreover, Vituli's contract neither referred to the mandatory arbitration program, nor did it contain a separate arbitration clause. The contract contained in integration clause.

Carrols Corporation argued that the mandatory arbitration program constituted a "valid, written agreement to arbitrate" thereby requiring the case to be sent to arbitration. Carrols Corporation further argued that the substantive arbitrability of the parties' dispute should be submitted to an arbitrator. The Superior Court there was absolutely nothing to demonstrate that Vituli was bound by the mandatory arbitration policy. Although the Court did not explicitly apply the *Willie Gary* test or the burgeoning "no non-frivolous argument" prong, it appears that not only did the mandatory arbitration policy in question not meet the second prong of the *Willie Gary* test, the court implicitly found that Carrols Corporation could not make even a colorable argument in favor of submission of the substantive arbitrability issue to an arbitrator.

64. 2013 WL 3981663, at *8.

65. C.A. No. 12C-08-224-FSS, 2013 WL 2423091 (Del. Super. Ct. Mar. 28, 2013).

3. Courts Will Apply Standard Rules Of Contract Interpretation To Determine The Ultimate Question Of The Substantive Arbitrability Of A Dispute.

Courts apply standard rules of contract interpretation in order to make the substantive arbitrability determination. The court first must determine whether the arbitration clause at issue is broad or narrow in scope.[66] Then, the court must apply the relevant scope of the provision to the asserted legal claim to determine whether the claim falls within the scope of the contractual provisions that require arbitration.[67] If an arbitration provision is narrow in scope, the court will determine whether the asserted legal claim is directly related to a right in the contract.[68] If the arbitration provision is broad, the court will defer to arbitration any issues that touch on a contract right or performance.[69]

For example, in *Medicis Pharmaceutical Corp. v. Anacor Pharmaceuticals, Inc.*,[70] the Court of Chancery construed an arbitration provision providing for arbitration of disputes, "arising under this Agreement," as narrow because it also provided for several exceptions, including one that allowed the parties to seek equitable relief in the courts. In *Medicis*, the plaintiff filed suit seeking specific performance and injunctive relief approximately two weeks following the defendant's initiation of arbitration proceedings concerning the same breaches of the parties' agreement. The defendant argued, among other things, that the language of the carve-out for equitable relief applied only to disputes arising under the arbitration provision. The Court found that the carve-out was broad enough to permit plaintiff to proceed. While the Court noted that the result was not "optimal" but to conclude otherwise would require a departure from the rules of standard contract interpretation.[71]

4 Recent Changes To The AAA Rules Reflect Changing Attitudes Toward Arbitration Andnmediation

In Fall 2013, the American Arbitration Association ("AAA") released two new sets of rules that change the arbitration landscape in dramatic ways. Of greatest import are the Optional Appellate Arbitration Rules ("Appellate Rules"), which became effective on November 1, 2013 and are available at www.adr.org. The Appellate Rules likely respond to the mounting disfavor towards arbitration among commercial lawyers and litigators.

Prior to the creation of the Appellate Rules, there were only two methods for setting aside or modifying an arbitration award. The first, under Delaware law, is to request that the arbitrator modify or correct the award, or to clarify it.[72] The only grounds to modify or correct an award, are that there was an evident miscalculation of figures or an evident

---

66. Medicis Pharmaceutical Corp. v. Anacor Pharmas., Inc., C.A. No. 8095-VCP, 2013 WL 4509652, *4 (Del. Ch. Aug. 12, 2013) (quoting Parfi Holding AB v. Mirror Image Internet, Inc., 817 A.2d 149 (Del. 2002)).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Compare with* Shareholder Representative Svcs. LLC v. ExlService Holdings, Inc., C.A. No. 8367-VCN, 2013 WL 4535651 (Del. Ch. Aug. 27, 2013) (Court of Chancery determined that carve-out for equitable relief did not apply in a given case because although the plaintiff had styled the complaint as one for equitable relief, its claims were, in fact, legal in nature).

72. Del. Code Ann. tit. 10, § 5711.

mistake in the description of any person, thing or property, the arbitrators ruled on a matter not submitted to them or that the award is imperfect in form, in a way that does not affect the merits of the controversy.[73] An award may be vacated, but only if the award was procured by fraud or corruption, there was "evident partiality by an arbitrator, the arbitrator exceeded their powers or executed them so poorly that a final and definite award was not made, or conducted the hearing in a way that substantially prejudiced the rights of a party."[74]

Similar to Delaware law, the FAA provides that an award may be vacated when (1) the award was procured by fraud or corruption or (2) there was evident partiality or corruption in the arbitrator's actions. However, the FAA also adds that (3) an award may be vacated when the arbitrators are guilty of misconduct in refusing to postpone the hearing, or refusing to hear evidence pertinent and material to the controversy or engaged in behavior that prejudiced the rights of a party or when (4) the arbitrators exceeded their powers or imperfectly executed them such that a mutual, final and definitive award was not made.[75]

The Appellate Rules provide that parties may now rely on an appellate arbitral panel but only under certain conditions. The first of these circumstances is that the parties must have agreed in advance to use the Appellate Rules.[76] As the Appellate Rules state "[t]he right to appeal an arbitration proceeding is a matter of contract. A party may not unilaterally appeal an arbitration award under these rules absent agreement with the other party(s)."[77] The Appellate Rules suggest sample language for use in contracts with arbitration clauses which names, specifically, the Appellate Rules, provides that the underlying award will not be final until the time for filing the notice of appeal has passed (30 days) and that the decision rendered by the appeal tribunal may be entered by any court having proper jurisdiction.[78] It's also worth noting that the Appellate Rules allow for use of the appeals process if the parties agree to that procedure by stipulation, yet provide no guidance as to the timing of that stipulation.

The grounds on which an arbitration award may be appealed are limited to only: (1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous.[79] A party cannot raise an issue or evidence that was not raised during the arbitration proceeding.[80]

The Appellate Rules are lengthy, weighing in at approximately 13 pages for just appeal information. A review of these rules notes a few key points. First, the appeal process does not change the rules related to modification, discussed above.[81] Second, the time for filing an appeal from the underlying award is limited to 30 days with a notice of cross appeal by the other parties limited to seven days.[82]

---

73. Del. Code Ann. tit. 10, § 5715.

74. Del. Code Ann. tit. 10, § 5714.

75. 9 U.S.C.A. § 10(a).

76. Optional Appellate Arbitration Rules ("Appellate Rules") page 3, available for download at: http://go.adr.org/AppellateRules (last viewed Jan. 6, 2014).

77. *Id.*

78. *Id.* at 3-4.

79. *Id.* at 8; Rule A-10.

80. *Id.* at 10; Rule A-16.

81. *Id.* at 5; Rule A-2(b).

82. *Id.* at 5-6; Rules A-3(a)(i) and (c).

Third, the appellate process is not without its costs, which are assessed to the losing party.[83] Additionally, an appellant must pay a deposit to cover any anticipated fees and expenses. Failure to pay the deposit will automatically hold the appeal in abeyance for seven days. [84] In addition to these fees, there is a $6,000 administrative fee that has to be paid to the AAA, and does not include fees and expenses for AAA costs of hearing rooms or other additional costs.[85]

Unless otherwise requested, all appeals will be based on written documents.[86] Those written documents can include excerpts of the transcript of the arbitration hearing, expert reports, deposition transcripts or any other documentary evidence.[87]

The second set of new rules the AAA released in Fall 2013 were the updated Commercial Rules. The key change to those rules include, and are discussed below, the addition of a mediation step to arbitration, as well as allowing for discovery methods, a pre-trial process, emergency measures, access to dispositive motions, and sanctions. AAA explained that they sought to create a "more streamlined, cost-effective, and tightly-managed arbitration process…."[88]

In addition to the Appellate Rules, the AAA has set forth specifics on the new various procedures to be added to arbitration in the updated Commercial Rules ("Updated Rules"). The Updated Rules now provide a method for mediating any case, valued at $75,000 or greater, provided that any party has the right to opt out of the mediation.[89] Unlike with the new appellate procedure, the mediation option does not require an additional filing fee.[90] However, as with the appellate procedure, the mediation option should be including in contract provisions addressing ADR or via stipulation at some other time.[91] The new rules provide that this mediation should take place concurrently within the arbitration process.[92] They further provide that unless agreed to by all parties, the individual used to mediate the case shall not be appointed as an arbitrator in the case.[93]

Parties to an AAA arbitration now also shall have a pretrial-like hearing, called a Preliminary Hearing, where the parties agree to the conduct of the arbitration and procedures for exchanging documents will be set.[94] This pretrial hearing

---

83. *Id.* at 9; Rule A-11.

84. *Id.*; Rule A-12.

85. *Id.* at 13, "Administrative Fee Schedule."

86. *Id.* at 10; Rule A-15.

87. *Id.*; Rule A-16.

88. American Arbitration Association ("AAA") News Alert, dated September 9, 2013, available at: http://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2016416 (last visited January 6, 2014).

89. AAA Commercial Rules, at 8, available at http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased (last viewed Jan. 6, 2014).

90. *Id.* at 9.

91. *Id.*

92. *Id.* at 14, R-9.

93. *Id.*

94. AAA Commercial Rules, supra, note 91 at 18-19; Rule R-21.

also includes discussing the possibility of mediation.[95] Other matters to be discussed at the pretrial hearing include: whether all necessary parties have been included; whether any party will seek a more detailed statement of claims; whether there are any anticipated amendments to claims; discovery exchanges; confidentiality requests; and identification of witnesses; and whether there are any threshold or dispositive issues that could be decided without considering the entire case.[96]

While the new rules allow for hearing dispositive motions, they are subject to the discretion of the arbitrator who may decide to hear them if "they are likely to succeed and dispose of or narrow the issues in the case."[97]

The Updated Rules also now provide for what they term emergency measures. In the past, arbitrators could take whatever interim measures they deemed necessary including injunctive relief to preserve or protect party property.[98] The new Emergency Measures provide that they apply only to agreements entered *after October 1, 2013*.[99] They require notice to the AAA and all parties, after which the AAA will appoint a single arbitrator within one day. That arbitrator then, within two days, sets a schedule for hearing from the parties, either live or by other means, including telephone and video conferencing or based only on written submissions.[100] The arbitrator may award relief based upon a showing of immediate and irreparable loss or damage.[101] That award may be modified if circumstances change.[102] The emergency arbitrator can be named as a panel, but only on request of the parties.[103]

Finally, the Updated Rules also provide that upon request, with evidence and a legal argument, an arbitrator can issue sanctions for failure to comply with the obligations set out in the arbitration agreement.[104] These sanctions cannot amount to default judgment, and there must be an opportunity for the opposing party to respond.[105]

---

95. *Id.* at 31, P-2.

96. *Id.*

97. *Id.* at 22; Rule R-33.

98. *Id.* at 23; Rule R-37.

99. AAA Commercial Rules, supra, note 91 at 24; Rule R-38(a).

100. *Id.*; Rule R-38(b)-(d).

101. *Id.*; Rule R-38(e).

102. *Id.*; Rule R-38(f).

103. *Id.*

104. AAA Commercial Rules, supra, note 91 at 30, Rule R-58.

105. *Id.*