# American Law Institute
# Current Developments in Employment Law
# Santa Fe, New Mexico
# July 23, 2015

# Arbitration

## by


## Richard T. Seymour*



* Law Office of Richard T. Seymour, P.L.L.C., 900 Brawner Bldg., 888 17th Street N.W., Washington, D.C. 20006-3307. Telephone: 202-785-2145. Cell: 202-549-1454. Facsimile: 800-805-1065. E-mail: rick@rickseymourlaw.net.



Many of my papers can be downloaded from www.rickseymourlaw.com. Many of my other CLE papers are also downloadable from this site.

## Table of Contents

## I. Who Decides What Issue?

### A. Validity of the Contract Containing the Arbitration Clause, as Opposed to Validity of the Arbitration Clause Itself

*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 **U.S.** 395, 403-04 (1967), held that under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, where the arbitration agreement encompasses all disputes arising under the contract in question, it is for arbitrators to determine questions of fraud in inducement of the contract, and for the court to determine questions of fraud in the inducement of the arbitration clause. The court explained:

> With respect to cases brought in federal court involving maritime contracts or those evidencing transactions in 'commerce,' we think that Congress has provided an explicit answer. That answer is to be found in s 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration agreement. Under s 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a s 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

(Footnotes omitted.)

*Nitro-Lift Technologies, L.L.C. v. Howard*, __ **U.S.** __, 133 S.Ct. 500, 503, 184 L.Ed.2d 328, 34 IER Cases 961 (2012), reversed the Oklahoma Supreme Court and held that courts may not review the validity of noncompetition agreements subject to a valid arbitration clause. The Court held that the determination of validity is for the arbitrator to determine. The Court discussed the Federal Arbitration Act, and continued:

> And when parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved "by the arbitrator in the first instance, not by a federal or state court." . . . For these purposes, an "arbitration provision is severable from the remainder of the contract" . . . and its validity is subject

to initial court determination; but the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide.

(Citations omitted.)

*American Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 537-39 (**5th Cir.** 2003), involved the validity of stand-alone arbitration agreements signed by an illiterate individual who claimed he had never been informed that the agreements he was signing were arbitration agreements. The court held that under Mississippi law his illiteracy did not by itself make the agreements unconscionable. However, the dispute went to the validity of the arbitration agreement itself, and was for the court to determine. The court stated:

> Normally, doubts must be resolved in favor of arbitration . . . but the "federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties" or to "the determination of who is bound" by the arbitration agreement. . . . Instead, this Court determines whether there is a valid agreement to arbitrate and who is bound by it based on "ordinary contract principles." . . .
>
> * * *
>
> Second, the dispute in question does not fall within the scope of the arbitration agreement. Lang contends that he was fraudulently induced into signing the arbitration agreements. . . . "Under *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), and its progeny, the central issue in a case like this is whether the plaintiffs' claim of fraud relates to the making of the arbitration agreement itself or to the contract as a whole." . . . The Supreme Court held that
>
> > [i]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language [of the FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally.
>
> *Prima Paint*, 388 U.S. at 403–04, 87 S.Ct. 1801.

(Citations omitted.)

**B. <u>Side Note: High Standard for Determination of Unconscionability</u>**

*Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378, 96 Fair Empl.Prac.Cas. (BNA) 1367, 23 IER Cases 1212, 10 Wage & Hour Cas.2d (BNA) 1842 (**11th Cir.** 2005), *cert. denied*, 547 U.S. 1128 (2006), stated: "Under Georgia law, an unconscionable contract is 'such an agreement as no sane man not acting under a delusion would make and that no honest man would take advantage of.'" (Citation omitted.)

## C. Whether the Agreement Permits Class or Collective-Action Arbitration

### 1. Where the Agreement Specifies

*American Express Co. v. Italian Colors Restaurant*, __ **U.S.** __, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013), upheld a class-action waiver in a commercial case, notwithstanding evidence that the plaintiff merchants did not individually have enough at stake to warrant proceeding with their challenge to petitioner's fees, and that class treatment was the only effective means for the enforcement of their rights. The Court summarized its holding:

> The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

*Id.* at 2312. Justice Kagan's dissent, joined by Justices Ginsburg and Breyer, is remarkable. It begins:

> Here is the nutshell version of this case, unfortunately obscured in the Court's decision. The owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract's arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.
>
> And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.

*Id.* at 2313.

*Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336, 22 Wage & Hour Cas.2d (BNA) 310 (**11th Cir.** 2014), affirmed the district court's order compelling the arbitration of plaintiffs' FLSA claims, enforcing a class-action waiver to prevent collective treatment, and dismissing the Complaint. The court stated: "Congress's decision to specifically include the procedural right to a collective action in the FLSA does not somehow transform that procedural right into a substantive right. Rather than expand a plaintiff's substantive rights, Congress's decision to enact the collective action provision actually limited a plaintiff's existing procedural rights set forth in Rule 23. Were it not for § 16(b), a plaintiff could bring a representative FLSA action even without the prior consent of similarly situated employees."

### 2. Where the Agreement is Silent

*Oxford Health Plans LLC v. Sutter*, __ **U.S.** __, 133 S.Ct. 2064, 2066 (2013), unanimously held that the arbitrator did not exceed his authority in deciding that the parties' arbitration agreement allowed for class arbitration. The first paragraph of the Court's decision summarized the case:

> Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them. See *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). In this case, an arbitrator found that the parties' contract provided for class arbitration. The question presented is whether in doing so he "exceeded [his] powers" under § 10(a)(4) of the Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 et seq. We conclude that the arbitrator's decision survives the limited judicial review § 10(a)(4) allows.

The Court explained the limited review of arbitral decisions for the sake of promptness and finality, noted that Oxford Health Plans had not challenged the arbitrability of class treatment in court, and held that it chose arbitration and must now live with that choice.

> Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). That limited judicial review, we have explained, "maintain[s] arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008). If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial review process." *Ibid.*

*Id.* at 2068. The court concluded at 2071:

> In sum, Oxford chose arbitration, and it must now live with that choice. Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration. The arbitrator did what the parties requested: He provided an interpretation of the contract resolving that disputed issue. His interpretation went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court. Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not "exceed his powers," we cannot give Oxford the relief it wants. We accordingly affirm the judgment of the Court of Appeals.

### 3. What Happens Next?

The result of barring class arbitrations and collective-action arbitrations is that an employer may face multiple individual arbitrations. Under the AAA's Employment Rules for employer-promulgated arbitration programs, the employee pays only a filing fee and the employer is responsible for all AAA and arbitrators' fees, and these may not be re-allocated if the employer wins.

In one case in which I served as arbitrator, three employees had identical claims, the employer had an individual-claims-only clause in the arbitration agreement, and this meant that three arbitrations occurred on the same issue. Three Case Management Conferences, three motions to compel the same discovery, three responses, three hearings, and three different orders with which to comply. The risk of inconsistent results increases as the issues become closer. I have heard of such cases with more than 1,600 claims in more than 1,600 arbitrations, before large numbers of arbitrators—perhaps before more than 1,600 arbitrators—and one would give a great deal to be a fly on the wall when the employer asks its counsel why it recommended such a financially ruinous strategy.

The question is whether individual employment cases will still be pursued if group treatment is denied. This is hard to predict in advance because it depends in part on the claim, and in part on the facts, and in part on the employees' mood and their perceptions of the employer. Yet it's "one size fits all" in the arbitration agreement.

A case in point is *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 2012 WL 3757486 (N.D.Calif. July 5, 2012) (No. 06-0715-SC). There, the district court initially approved a nationwide collective action and later decertified it. This is what happened next:

> This matter originated as a putative Fair Labor Standards Act ("FLSA") collective action centered on allegations that Defendants 24 Hour Fitness USA, Inc., and Sport and Fitness Clubs of America, Inc. (collectively, "24 Hour") had improperly denied overtime pay to certain employees outside California. Following this Court's preliminary certification of two plaintiff classes totaling nearly 1,200 employees and its subsequent decertification of the classes in 2011, both the employees and 24 Hour have evinced agreement that the next step in adjudicating each employee's claims should be private arbitration via hundreds of individual proceedings.
>
> What they cannot agree on is where these proceedings should take place. 24 Hour says that each employee's arbitration should be held in the place where the employee's claims arose. To further this position, 24 Hour has filed Petitions to Compel Arbitration in more than twenty district courts spread over a dozen states (the "out-of-district Petitions"). Plaintiffs, on the other hand, say all the arbitrations should occur within the geographic boundaries of the Northern District of California. Accordingly, Plaintiffs have brought 273 individual Petitions to Compel Arbitration (the "273 Petitions") before this Court. In sum, an FLSA collective action seeking substantive relief in the form of money damages has, following decertification, splintered into hundreds of individual cases seeking procedural relief in the form of an order compelling arbitration, with each side vying for its preferred location.

*Id.* at p. *1 (footnotes omitted). It got worse:

> In the Decertification Order, the Court noted that 24 Hour professed a willingness to arbitrate each former class member's claims, which would allow the class members to pursue their claims without filing individual suits. *Id.* at 40. 24 Hour represented that if the class were decertified, then it "would arbitrate each individual claim [and] the courts

would not be overburdened with 400 separate claims-any claims would be handled easily and efficiently through arbitration." ECF No. 410 at 14.

Unfortunately, the arbitration process has been anything but easy and efficient. More than sixteen months have passed since decertification, yet not a single claim has been arbitrated. Instead, counsel's meet-and-confer process has devolved into a volley of mutual recriminations and allegations of bad faith. Each side accuses the other of drawing out the proceedings with procedural games aimed solely at gaining leverage for settlement. Counsel's dysfunctional relationship eventually culminated in a declaration of "war." ECF No. 463–5 at 34 (Dec. 9, 2011 emails). Their war, with its predictable collateral damage to the judicial system, has unfolded as follows.

When the classes were decertified in February 2011, they did not disperse. Instead, in March 2011, former class counsel filed demands for arbitration on behalf of 983 individual Claimants (the "983 Claimants") at the San Francisco location of JAMS, a private dispute resolution service. *See* Dec. 2, 2011 Order at 2. The 983 Claimants consisted of former opt-in class members and some named Plaintiffs. *Id.* Their demands sought arbitration pursuant to an arbitration clause contained in the 2001 version of 24 Hour's employee handbook (the "2001 Agreement"). *Id.* at 3.

24 Hour refused to proceed with arbitration in San Francisco, insisting that it should take place elsewhere. *See id.* They argued, for the first time, that not every former class member's claim was governed by the 2001 Agreement and that three different arbitration agreements were in play. . . . Their position has since evolved further. Now 24 Hour contends that, because the decertified classes encompass persons who had worked for 24 Hour as far back as 1998, *five* different arbitration agreements may apply, depending on when the particular employee worked for 24 Hour. . . . In addition to the 2001 Agreement, 24 Hour now points to two earlier versions of the arbitration agreement (respectively, the "1998 Agreement" and the "2000 Agreement"), as well as subsequent amendments to the 2001 Agreement that 24 Hour published in 2005 and 2007 (respectively, the "2005 Amendment" and the "2007 Amendment").

The 1998 and 2000 Agreements provide that disputes shall be settled according to the arbitration laws of the state where the employee last worked for 24 Hour, or, if there are no such laws, by the rules of the American Arbitration Association ("AAA"). The 2001 Agreement moves away from state law by providing that any disputes will be settled according to the Federal Arbitration Act ("FAA"). The 2005 and 2007 Amendments add a provision stating that the arbitrator shall be selected from the geographic vicinity of the place where the dispute arose or where the claimant last worked for 24 Hour.

*Id.* at pp. *2-*3. The court ultimately held that all the arbitrations should take place in the Northern District of California.

## II. Special Problems with Post-Dispute Imposition of Arbitration Agreements

*Russell v. Citigroup, Inc.*, 748 F.3d 677, 22 Wage & Hour Cas.2d (BNA) 483 (**6th Cir.** 2014), affirmed the district court's refusal to compel plaintiff to arbitrate a class action pending at the time he signed the arbitration agreement, because the court construed the agreement as contemplating only prospective disputes. The court suggested there would be problems under Ethics Rule 4.2 if either outside counsel or in-house counsel intended the pending dispute, in which plaintiff was represented by counsel, to be included and arranged for an employee to give the agreement to plaintiff.

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1279 (**11th Cir.** 2008), affirmed the judgment on behalf of the Title VII and § 1981 racial discrimination and retaliation plaintiff, and held that defendant had failed to show a legitimate nonretaliatory reason for his termination, because the reason was plaintiff's refusal to sign an arbitration agreement that would have applied to his pending claim:

> Bagby Elevator contends that it was entitled to a judgment as a matter of law based on its legitimate nonretaliatory reason for Goldsmith's termination, but again this argument misses the mark. Bagby Elevator failed to prove a *nonretaliatory* reason for Goldsmith's termination. Bagby Elevator stated that its reason for Goldsmith's discharge was his refusal to sign the agreement, but that reason is retaliatory. The agreement would have affected Goldsmith's continued pursuit of his pending charge of discrimination.

(Emphasis in original.)

## III. Waiver of Arbitration Agreement

*Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 11-12, 95 Fair Empl.Prac.Cas. (BNA) 737 (**1st Cir.** 2005), held that the issue of waiver of a right to arbitration by proceedings in litigation or in another forum was for the court to decide. "The argument for waiver in this case is essentially that Allied's participation in the EEOC proceedings initiated by Marie without Allied having demanded arbitration during or after those proceedings constituted conduct inconsistent with the future desire to arbitrate its claims." *Id.* at 11. The court explained the inefficiency in sending this gateway issue to the arbitrator:

> Finally, sending waiver claims to the arbitrator would be exceptionally inefficient. A waiver defense is raised by one party to a lawsuit in response to another party's motion to compel arbitration or stay judicial proceedings on the basis of an arbitration agreement signed by the parties. If the arbitrator were to find that the defendant had waived its right to arbitrate, then the case would inevitably end up back before the district court with the plaintiff again pressing his claims. The case would have bounced back and forth between tribunals without making any progress. *See* 2 I.R. Macneil et al., *Federal Arbitration Law* § 21.3 (1994); RUAA § 6 cmt. 5, 7 U.L.A. 16 (Supp.2004).

*Id.* at 13-14. The court held that employers do not need to invoke their arbitration clauses before the EEOC, or prior to the plaintiff's actual assertion of s claim. *Id.* at 16-17.

*Ruiz v. Donahoe*, 784 F.3d 247 (**5th Cir.** 2015), denied the Postal Service's petition for rehearing of the court's reversal of the grant of summary judgment to it, based on its argument for the first time in the litigation that plaintiff was bound by an arbitration provision in a collective bargaining agreement. The USPS argued that the district court and the Fifth Circuit therefore lacked subject-matter jurisdiction. The court held that "agreements to arbitrate implicate forum selection and claims-processing rules not subject matter jurisdiction," and that defendant "has waived his argument regarding the CBA's mandatory grievance and arbitration procedures by failing to raise it before the district court or this court prior to the present petition for rehearing." *Id.* at p. *1 (footnotes omitted).

*Nicholas v. KBR, Inc.*, 565 F.3d 904, 908-09 (**5th Cir.** 2009), held that plaintiff waived her right to arbitrate by bringing suit and waiting ten months, during substantial judicial proceedings, before seeking arbitration. The court explained:

> We conclude that the act of a plaintiff filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process, unless an exception applies. Indeed, short of directly saying so in open court, it is difficult to see how a party could more clearly "evince[ ] a desire to resolve [a] ... dispute through litigation rather than arbitration" . . . than by filing a lawsuit going to the merits of an otherwise arbitrable dispute. We emphasize that the legal standard for waiver is the same regardless of which party is the party alleged to have waived arbitration. Differences between the two sides arise from the voluntariness and timing of their actions, not the legal standard.
>
> That is not to say there can be no exceptions. There are lawsuits that can be filed that would not be inconsistent with seeking arbitration. For example, a plaintiff might file suit solely to obtain a threshold declaration as to whether a valid arbitration agreement existed. . . . A plaintiff might also have to file suit to obtain injunctive relief pending arbitration. . . . . Other situations may arise justifying an exception; the list here should not be seen as exhaustive.

(Citations omitted.)

## IV. What is Being Arbitrated?

### A. The "Terra Incognita" of the Issues, Compared to Litigation

Demands in arbitration are supposed to be simple, to make it easy for the claims to be filed. Claims are to be fleshed out in a specification of claims, on a deadline set in the Case Management Conference, and the respondent files its response on a later such deadline.

Complaints in court are supposed to be detailed, to give fair notice of what the claim is. In Federal court, it is now common to see Complaints a hundred or more paragraphs long, to meet the pleading tests of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The practical consequence is that, if a claimant files in court first and is then compelled into arbitration, the arbitrator will have an idea what the claim is really about and can prepare properly for the Case Management Conference, where discovery and the other necessary steps

are to be scheduled. If the claim is filed first in arbitration, the arbitrator may have only a couple sentences to go on, and have no real idea of the issues or their complexity before tackling the arrangements that are to govern the life of the dispute in arbitration. Arbitrators have to ask the parties what the case is about, and about the legal and factual issues they see. Counsel for the parties are often at a loss how to respond, since the case is clear in their minds and they have not realized how little information they have imparted in the claim.

***Practice Tip:*** Please keep your friendly arbitrator in mind, and file a claim that *explains* the case and identifies the relevant law.

## B. Scope of the Arbitration

### 1. Where the Plaintiff is Not a Signatory

#### a. Suits by the Government Seeking Relief for the Employee

*EEOC v. Waffle House, Inc.*, 534 **U.S.** 279, 12 AD Cases 1001 (2002), held 6–3 that the EEOC could not be bound by a charging party's arbitration agreement because the EEOC was not a party to it, that the EEOC exercised a power to sue in furtherance of the public interest that is independent of the charging party's personal rights, and that the EEOC does not act as the attorney for the charging party when it sues on the charging party's behalf. It therefore retains its full right to seek victim-specific relief—compensatory and punitive damages, back pay, and an order of reinstatement or instatement—just as if the charging party had never signed the "agreement." The Court found the Fourth Circuit's distinction between general relief and victim-specific relief unworkable because relief running to the victim's direct benefit, such as an award of punitive damages, may serve the broad deterrent purposes of the EEOC and thus help enforce the statute generally.

#### b. Suits by the Employee's Survivors

*Graves v. BP America, Inc.*, 568 F.3d 221, 223-24 (**5th Cir.** 2009), held that the survivors of an employee are required to arbitrate their wrongful-death claims and may not pursue them in court, because their rights are derivative of the decedent's, and the decedent had agreed to arbitration:

> This case does not require us to decide the choice-of-law issue because we, like other courts before us, can simply note that federal and state law dovetail to provide the same outcome. Regarding Texas law, the Texas Supreme Court—explicitly applying Texas law—held that "[w]hile it is true that damages for a wrongful death action are for the exclusive benefit of the beneficiaries and are meant to compensate them for their own personal loss, the cause of action is still entirely derivative of the decedent's rights." Because the nonsignatory plaintiffs "stand in [the decedent's] legal shoes," they are bound by his agreement.
>
> Regarding federal law, the federal common law of contracts binds nonsignatories to arbitration agreements under various theories of contract and agency law, including incorporation by reference, assumption, agency, veil piercing or alter ego, estoppel, and third-party beneficiary. The "direct benefits" version of estoppel applies in this case; it

prevents a nonsignatory from knowingly exploiting an agreement containing the arbitration clause. In other words, a nonsignatory cannot sue under an agreement while at the same time avoiding its arbitration clause.

Here, then, we must decide if the Appellees' statutory wrongful death actions are premised, at least in part, on the decedent's employment agreement with the signatory defendants. Wrongful death being a state cause of action, the nature of the suit is defined by Texas law. In re Labatt defined a Texas wrongful death action as "entirely derivative of the decedent's rights." Accordingly, just as any suit by Ronnie Graves against his employer for a work-related injury would be premised on his employment agreement, the wrongful death actions brought by his statutory beneficiaries must also be premised on that agreement—which is the agreement bearing the arbitration clause. Thus, under the federal common law of contracts, the statutory beneficiaries of a wrongful death action in Texas are bound by an arbitration agreement between the decedent and his employer.

(Footnotes omitted.)

### c. Equitable Estoppel

The general rule in many States and in Federal courts is that, where a non-signatory to an arbitration agreement makes a claim dependent on the contract of which the agreement is a part, it is bound by the arbitration clause un that agreement.

#### (1) Claim Not Based on Contract with Arbitration Clause

*Brantley v. Republic Mortg. Ins. Co*., 424 F.3d 392, 396 (**4th Cir.** 2005), affirmed the denial of defendant's motion to compel arbitration of plaintiffs' claims under the Fair Credit Reporting Act, because those claims were distinct from any claims under the mortgage agreement containing the arbitration clause:

The lawsuit in the current case deals with Republic Mortgage's insurance premiums, and an allegation that these premiums were increased due to information contained in the plaintiffs' credit histories. This claim is a statutory remedy under the Fair Credit Reporting Act and is wholly separate from any action or remedy for breach of the underlying mortgage contract that is governed by the arbitration agreement. Although the mortgage insurance relates to the mortgage debt, the premiums of the mortgage insurance are separate and wholly independent from the mortgage agreement. The district court correctly found that the mere existence of a loan transaction requiring plaintiffs to obtain mortgage insurance cannot be the basis for finding their federal statutory claims, which are wholly unrelated to the underlying mortgage agreement, to be intertwined with that contract.

*Auto Parts Mfg. Mississippi, Inc. v. King Const. of Houston, L.L.C.*, 782 F.3d 186, 197-98 (**5th Cir.** 2015), held that equitable estoppel did not bind the non-signatory plaintiff to an arbitration agreement, because its claims did not depend on the contract containing the arbitration clause:

> Appellants argue that APMM can establish the existence of "conflicting claims"—a prerequisite to its interpleader action—only by reference to the Engagement Agreement. However, APMM can establish—and has established—the existence of conflicting claims necessary for interpleader by referencing the dispute between King and Noatex alone, without reference to the Engagement Agreement. Statutory interpleader requires the assertion of two or more claims to the same fund. *See* 28 U.S.C. § 1335(a)(1) . . . . Here, claims were asserted by Noatex and King; interpleader did not depend on including Kohn's claims to the fund. Thus, while the language of the Engagement Agreement may have been *sufficient* to establish conflicting claims—of Noatex and Kohn—it was not *necessary.* Appellants concede this point by arguing that "APMM and King Construction are bound to arbitrate, *even though the amended interpleader complaint is also pleaded and disputed on alternate grounds that do not reference the engagement agreement.*" Claims cannot be inextricably intertwined with, directly dependent on, or based on a contract if they can be shown without reference to the contract.
>
> We also note that this case does not fit the rationale of the equitable estoppel exception. APMM is not trying to "hav[e] it both ways" by seeking to hold Noatex and Kohn liable pursuant to a contract that contains an arbitration provision and, at the same time, deny arbitration's applicability. . . . We see no unfairness in refusing to compel a non-signatory party to arbitrate a dispute based on an arbitration clause contained in an attorney engagement agreement signed by two other parties. Because APMM has not agreed to arbitrate disputes with Noatex and Kohn, and is not required by equitable estoppel to arbitrate, we affirm the district court's denial of appellants' motion to compel arbitration and to stay the proceedings. . . .

(Citations omitted; emphases in original.)

### (2) Intertwined Claims

*Brantley v. Republic Mortg. Ins. Co*., 424 F.3d 392, 395-96 (**4th Cir.** 2005), affirmed the denial of the nonsignatory defendant's motion to compel arbitration of plaintiffs' claims under the Fair Credit Reporting Act, because those claims were not intertwined with claims involving the signatory:

> The district court determined that Republic Mortgage could only estop the plaintiffs from avoiding arbitration if the case met the intertwined claims test. . . . The Eleventh Circuit has provided a clear statement of the intertwined claims test, which we apply here:
>
> > Existing case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must "rely on the terms of the *396 written agreement in asserting [its] claims" against the nonsignatory. When each of a signatory's claims against a nonsignatory "makes reference to" or "presumes the existence of" the written agreement, the signatory's claims "arise[ ] out of and relate [ ] directly to

> the [written] agreement," and arbitration is appropriate. Second, "application of equitable estoppel is warranted ... when the signatory [to the contract containing the arbitration clause] raises allegations of ... substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Otherwise, "the arbitration proceedings [between the two signatories] would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."

*MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir.1999) (citations omitted).

In the present case, as the district court correctly concluded, Republic Mortgage can satisfy neither of these requirements.

Likewise, the plaintiffs' claim does not raise allegations of collusion or misconduct by SouthStar necessary to satisfy the second means of obtaining equitable estoppel. Instead, the plaintiffs' claim is based entirely on actions taken by Republic Mortgage, a nonsignatory to the arbitration agreement. The plaintiffs' claims against Republic Mortgage do not implicate SouthStar in any wrongdoing.

**(3) <u>Claim Based on Contract with Arbitration Clause</u>**

*Hughes Masonry Co., Inc. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 838-39 (**7th Cir.** 1981), involved the signatory, Hughes Masonry Co., suing another signatory, Clark County, but opposing arbitration with Clark because it claimed the actions of a non-signatory Construction Manager, J.A., caused the problems in question, and the non-signatory could not compel arbitration. The court relied on equitable estoppel to reject the defense, and vacated the district court's denial of Clark's motion to compel arbitration:

> Whatever the merit of this argument, we believe Hughes is equitably estopped from asserting it in this case, because the very basis of Hughes' claim against J.A. is that J.A. breached the duties and responsibilities assigned and ascribed to J.A. by the agreement between Clark and Hughes.
>
> Hughes has characterized its claims against J.A. as sounding in tort, i. e., intentional and negligent interference with contract. In substance, however, Hughes is attempting to hold J.A. to the terms of the Hughes-Clark agreement. Hughes' complaint is thus fundamentally grounded in J.A.'s alleged breach of the obligations assigned to it in the Hughes-Clark agreement. Therefore, we believe it would be manifestly inequitable to permit Hughes to both claim that J.A. is liable to Hughes for its failure to perform the contractual duties described in the Hughes-Clark agreement and at the same time deny that J.A. is a party to that agreement in order to avoid arbitration of claims clearly within the ambit of the arbitration clause. "In short, (plaintiff) cannot have it both ways. (It) cannot rely on the contract when it works to its advantage, and repudiate it when it works to (its) disadvantage." . . . ("To allow (defendant) to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.").

(Footnote and citations omitted.)

#### d. Agreement Explicitly Applies to Nonsignatories

*Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381-82 (5th Cir. 2008) (*per curiam*), held that nonsignatory Green Tree could compel arbitration because the agreement explicitly required arbitration as to disputes involving any "arrangements" resulting from the underlying contract. There was thus no need to rely on theories like equitable estoppel. The court explained:

> "Who is actually bound by an arbitration agreement is a function of the intent of the parties, as expressed in the terms of the agreement." . . . When the agreement's terms do not expressly state whether a signatory may be compelled to arbitrate with a nonsignatory, we have drawn on various theories of contract and agency law, including equitable estoppel,[2] to determine a nonsignatory's rights and duties under an arbitration clause. . . . ("Ordinary principles of contract and agency law may be called upon to bind a nonsignatory to an agreement whose terms have not clearly done so."). Here, although the district court held that it must apply equitable estoppel to determine whether Green Tree may compel arbitration, we do not need to apply such a theory because the terms of the Loan Agreement clearly identify when Sherer may be compelled to arbitrate with a nonsignatory.
>
> According to the broad terms of the Loan Agreement, Sherer has agreed to arbitrate any claims arising from "the relationships which result from th[e] [a]greement." A loan servicer, such as Green Tree, is just such a "relationship." Indeed, without the Loan Agreement, there would be no loan for Green Tree to service, and no party argues to the contrary. Sherer's FDCPA and FCRA claims arise from Green Tree's conduct as Sherer's loan servicer and, therefore, fall within the terms of the Loan Agreement's arbitration clause. Based on the Loan Agreement's language, Sherer has validly agreed to arbitrate with a nonsignatory, such as the loan servicer Green Tree, and the language is sufficiently broad to permit Green Tree to compel arbitration.

(Citations omitted.)

### 2. Where a Complained-Against Entity is Not a Signatory

#### a. Parent/Subsidiary and Agency Relationships

A nonsignatory parent or subsidiary may be bound by an arbitration agreement entered into by its subsidiary or parent, where the claimant shows sufficient evidence to pierce the corporate veil. Similarly, a nonsignatory may be bound by an arbitration agreement entered into by an agent, where the claimant shows sufficient evidence to establish the agency relationship with respect to the agreement.

*World Rentals and Sales, LLC v. Volvo Const. Equipment Rents, Inc.*, 517 F.3d 1240, 1248 (**11th Cir.** 2008), recognized these theories but held that plaintiff had not made the necessary showings:

Under Section 4 of the Federal Arbitration Act, the district court (or a jury as the case may be) must resolve any disputed facts and determine whether the applicable agency or veil-piercing tests have been met prior to compelling a non-signatory to arbitrate. *See* 9 U.S.C. § 4; *Thomson-CSF*, 64 F.3d at 778 (refusing to compel arbitration because the moving party failed to present sufficient facts in support of its veil-piercing argument); *see also Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851, 854 (11th Cir.1992) ("If a party has not signed an agreement containing arbitration language ... *the district court itself* must first decide whether or not the non-signing party can nonetheless be bound by the contractual language.").

Here, the World Parties presented no evidence supporting the claims that Volvo Rents acted as the agent or alter ego of Volvo Finance. Indeed, the only relevant evidence we can find in this record is an affidavit—provided by Barry Natwick, President and Chief Executive Officer of Volvo Rents—that squarely refutes the World Parties' allegations. Thus, even if the World Parties' agency and veil-piercing arguments had been adequately presented to the district court (and they were not), there is no evidentiary basis for compelling arbitration under either.

**b. <u>Claims Against Nonsignatories</u>**

*Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 127-28, 108 Fair Empl.Prac.Cas. (BNA) 781 (**2d Cir.** 2010), affirmed an order compelling arbitration of the plaintiff's Title VII, New York State Human Rights Law (NYSHRL), New York Executive law, and New York City Human Rights Law (NYCHRL) employment discrimination claims against ESPN as well as her signatory employer, AVI. The court explained:

We agree with the district court that the relationship between Ragone, AVI, and ESPN supports the application of equitable estoppel. It is true, as we have already said, that ESPN is not mentioned in the arbitration agreement, or in any other document relating to Ragone's initial employment that is contained in the record. This is therefore not a case where ESPN is "linked textually" to Ragone's claims. . . . Nevertheless, as set forth in her complaint, it is plain that when Ragone was hired by AVI, she understood ESPN to be, to a considerable extent, her co-employer. As we have detailed above, Ragone asserts that she "was hired by [AVI] as a make-up artist for one of [its] significant clients, Defendant ESPN. Specifically, [she] was hired to provide make-up artistry and other services to ESPN's Cold–Pizza talent." (¶ 13) Further, while "she reported to [AVI management]," she "was also required to follow the instructions and directives of ESPN talent and ESPN supervisors on the set...." (¶ 17)

* * *

In this case, there is likewise no question that the subject matter of the dispute between Ragone and AVI is factually intertwined with the dispute between Ragone and ESPN. It is, in fact, the same dispute: whether or not Ragone was subjected to acts of sexual harassment which were condoned by supervisory personnel at AVI and ESPN. Moreover, in contrast to . . . . there is the presence of the further necessary circumstance of a relationship between Ragone and ESPN that justifies sending this entire dispute to arbitration. Ragone admits that she knew from the date of her employment by AVI that

she would work with and be supervised by ESPN personnel in the ordinary course of her daily duties. This knowledge that she would extensively treat with ESPN personnel is sufficient to demonstrate the existence of a relationship between Ragone and ESPN that allows the latter to avail itself of the arbitration agreement between Ragone and AVI. Accordingly, we affirm the district court's conclusion that Ragone is properly estopped from avoiding arbitration with ESPN.

(Citations omitted.)

*Gambardella v. Pentec, Inc.*, 218 F.Supp.2d 237, 241-42 (D.Conn. 2002), held that nonsignatory individual co-employee defendants in a pregnancy discrimination case. The court explained:

> The first issue is whether the individual defendants may compel plaintiff to arbitrate the claims against them where they were admittedly not signatories to the arbitration agreement. Under Second Circuit law, claims against non-signatories to an arbitration agreement may also be subject to mandatory arbitration, where "'the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'" . . . Thus . . . the court held that claims against an individual employee that arose out of the relationship between plaintiff and that individual's employer, which was the subject of a mandatory arbitration agreement, were also subject to mandatory arbitration. Here, the claims against Verrengia, Evon and Callahan are all directly related to their employment with Pentec and to Gambardella's claims against Pentec, which are indisputably within the scope of the arbitration agreement at issue here.
>
> Plaintiff argues that the Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002), impliedly overturned these decisions. In that case, the Supreme Court held that the EEOC could not be barred from seeking victim-specific relief under Title VII, even where the individual employee had signed a mandatory arbitration agreement. The Court noted that "nothing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement. The FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of a judicial forum." *Id.* at 761. The Court further observed that "[i]t goes without saying that a contract cannot bind a nonparty." *Id.* at 764. Thus, the Supreme Court concluded that the EEOC—a non-signatory—could not be bound by an employee's arbitration agreement.
>
> However, the issue here is not whether non-signatories to the agreement can be compelled to arbitrate; rather, it is whether these non-signatories may compel plaintiff, admittedly a party to the contract, to arbitrate. . . . *EEOC v. Waffle House* does not alter this analysis, and the claims against the individual defendants are subject to the arbitration agreement.

(Citations omitted.)

*Cicchetti v. Davis Selected Advisors*, 2003 WL 22723015 (S.D.N.Y. Nov. 17, 2003) (No. 02 CIV.10150 RMB), compelled plaintiff to arbitrate her sexual harassment and retaliation claims against KimMarie Zamot, her supervisor, who had not signed the arbitration agreement between plaintiff and her employer:

> Defendants argue that "although Zamot is not a signatory to the Arbitration Agreement between Plaintiff and DSA, Zamot is nevertheless entitled to enforce the Arbitration Agreement as to Plaintiff's claims against her ... [because] [b]ut for the allegations against Zamot, Plaintiff would have no claim against DSA, thus inextricably intertwining the Defendants and the causes of action alleged against them." (Defs.' Memo at 9). Plaintiff responds that Zamot may not compel arbitration because "Zamot is not a party to the Arbitration Agreement between Plaintiff and DSA, her 'Employer." ' (Pl.'s Memo at 11).
>
> A signatory, such as Plaintiff, may be estopped "from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 98 (2d Cir. 1999); *see also Gambardella v. Pentec, Inc.*, 218 F.Supp.2d 237, 242 (D.Conn. 2002) ("[C]laims against an individual employee that arose out of the relationship between plaintiff and that individual's employer, which was the subject of a mandatory arbitration agreement, were also subject to mandatory arbitration."). Here, Plaintiff's claims against DSA and Zamot involve the very same issues and circumstances and are "all directly related to [Zamot's] employment with [DSA] and to [Plaintiff's] claims against [DSA], which are indisputably within the scope of the arbitration agreement at issue here." *Gambardella*, 218 F.Supp.2d at 242. They should be resolved together.

(Footnote omitted.)

### 3. Where Not All Claims Are Covered by the Agreement

#### a. Effect of Dodd-Frank Arbitration Bar in a Multi-Claim Case

*Santoro v. Accenture Federal Services*, LLC, 748 F.3d 217, 223-24, 122 Fair Empl.Prac.Cas. (BNA) 1208, 22 Wage & Hour Cas.2d (BNA) 781 (**4th Cir.** 2014), affirmed defendant's motion to compel arbitration of plaintiff's FMLA, ADEA and ERISA claims. The court rejected plaintiff's argument that these claims could not be subjected to arbitration because the arbitration agreement failed to carve out claims covered by Dodd-Frank, even where the plaintiff did not bring a claim under that statute. The court stated:

> Dodd–Frank created causes of action for whistleblowers and then protected those causes of action by barring their *waiver* in "predispute arbitration agreements." Nothing in Dodd–Frank suggests that Congress sought to bar arbitration of every claim if the arbitration agreement in question did not exempt DoddFrank claims. Nothing in Dodd–Frank even refers to arbitration apart from this limited reference in these statutory provisions that are otherwise concerned solely with the creation of a cause of action for whistleblowing employees. To conclude otherwise would be to forget that "Congress ...

> does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not one might say, hide elephants in mouseholes." . . . But that is exactly what Santoro requests—concluding that in this mousehole, Congress essentially grafted a new section onto the FAA by requiring every employer's arbitration agreement to carve out an exception for whistleblowers. Given the statute's language and context, Santoro cannot meet his burden of showing that Dodd–Frank represents a contrary congressional command overriding the validity of arbitration clauses as to non-whistleblower claims.

(Footnote and citation omitted.)

### b. CBA Requiring Arbitration of Some, But Not All, Claims?

*Gilbert v. Donahoe*, 751 F.3d 303, 310, 199 L.R.R.M. (BNA) 3201 (**5th Cir.** 2014), affirmed in part and reversed in part the district court's grant of summary judgment to the defendant USPS. The court held that the arbitration provision of the CBA did not explicitly cover statutory claims, but the agreement as a whole made clear that Rehabilitation Act claims were covered, but did not make clear that FMLA claims were covered:

> Nonetheless, the ways in which the agreement identifies the respective statutes are distinct, and this difference guides our resolution of this case. Section 2.01(B) of the CBA specifically provides that it is incorporating into the agreement the prohibition of discrimination against handicapped employees contained in the Rehabilitation Act. It thus complies with the dicta of both *Ibarra* and *Wright* that the CBA "identify the specific statutes the agreement purports to incorporate." Combined with Article 15, this provision makes it clear and unmistakable that the Rehabilitation Act is part of the CBA and subject to the same grievance procedures. By contrast, the ELM only provides policies to comply with the FMLA. It does not purport to make the FMLA a part of the agreement. As our sister circuits have recognized, references to statutes that fall short of incorporation are insufficiently "clear and unmistakable" to bar access to federal court. There is no reason to treat this reference any differently. Accordingly, we hold that, while the CBA requires Gilbert to pursue her Rehabilitation Act claims through the specified grievance and arbitration procedures, its references to the FMLA are not sufficiently clear and unmistakable to deprive the district court of subject matter jurisdiction over claims arising under that statute.

(Footnotes omitted.)

### c. Agreement Covers Some But Not All Claims

*CardioNet, Inc. v. Cigna Health Corp.*, 751 F.3d 165, 172-73, 58 Employee Benefits Cas. 1001 (**3d Cir.** 2014), reversed the district court's order compelling arbitration, because the claims at issue were wholly unrelated to the matters covered by the arbitration agreement.

> But the fact that the parties have agreed to arbitrate some disputes does not necessarily manifest an intent to arbitrate every dispute that might arise between the parties, since "[u]nder the FAA, 'parties are generally free to structure their arbitration

> agreements as they see fit.'" .. . . Accordingly, "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." . . . (emphasis in original). Ultimately, then, whether a dispute falls within the scope of an arbitration clause depends upon the relationship between (1) the breadth of the arbitration clause, and (2) the nature of the given claim.
>
> We must resolve "any doubts concerning the scope of arbitrable issues ... in favor of arbitration." . . . However, the Supreme Court has repeatedly warned against "overread[ing its] precedent [ ]" concerning the presumption of arbitrability. . . . The presumption in favor of arbitration does not "take [ ] courts outside [the] settled framework" of using principles of contract interpretation to determine the scope of an arbitration clause. . . . Quite the contrary, the presumption "derives its legitimacy from" the judicial supposition "that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute." . . . Indeed, while the FAA "embodies a strong federal policy in favor of arbitration, ... the duty to arbitrate remains one assumed by contract." . . . Thus, the presumption of arbitrability applies only where an arbitration agreement is ambiguous about whether it covers the dispute at hand. . . . Otherwise, the plain language of the contract controls.
>
> In assessing whether a particular dispute falls within the scope of an arbitration clause, we "focus [ ] on the factual underpinnings of the claim rather than the legal theory alleged in the complaint." . . . In so doing, we "prevent[ ] a creative and artful pleader from drafting around an otherwise-applicable arbitration clause." . . .

(Citations omitted.)

### d. The "Necessary to a Resolution" Standard

*NCR Corp. v. Korala Associates, Ltd.*, 512 F.3d 807, 814 (**6th Cir.** 2008), affirmed in part and reversed in part the district court's order compelling arbitration. The court described the standard:

> Under this Court's precedent, the following standard emerges for determining which of NCR's claims must be resolved in arbitration: while we must bear in mind the presumption of arbitrability, the cornerstone of our inquiry rests upon whether we can resolve the instant case without reference to the agreement containing the arbitration clause. . . . If such a reference is not necessary to the resolution of a particular claim, then compelled arbitration is inappropriate, unless the intent of the parties indicates otherwise.

The court rejected the "touches upon" standard.

### e. The "Touches Upon" Standard

*Collins & Aikman Products Co. v. Building Systems, Inc.*, 58 F.3d 16, 20-21 (**2d Cir.** 1995), involved successive contracts. The first contract contained an arbitration clause, and the second did not. The court stated:

We have stated that a court should decide at the outset whether "the arbitration agreement [is] broad or narrow." . . . If broad, then there is a presumption that the claims are arbitrable. . . . The clause in this case, submitting to arbitration "[a]ny claim or controversy arising out of or relating to th[e] agreement," is the paradigm of a broad clause. . . . Thus . . . these claims are presumptively arbitrable.

Of course, there can be no such presumption in respect of the 1988 Agreement, which has no arbitration clause. However, although claims two and three seek relief under the 1988 Agreement, our analysis is not controlled by the characterization of them in the pleading. Instead, we look to the conduct alleged and determine whether or not that conduct is within the reach of the 1977 arbitration clause:

> In determining whether a particular claim falls within the scope of the parties' arbitration agreement, we focus on the allegations in the complaint rather than the legal causes of action asserted. *If the allegations underlying the claims 'touch matters' covered by the parties' ... agreements,* then those claims must be arbitrated, whatever the legal labels attached to them.

*Genesco*, 815 F.2d at 846 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 622 n. 9, 624 n. 13, 105 S.Ct. 3346, 3351 n. 9, 3352 n. 13, 87 L.Ed.2d 444 (1985)) (emphasis added).

**4. "Arising in Connection With" Language**

*J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (**4th Cir.** 1988), enforced an arbitration clause requiring arbitration for "All disputes arising in connection with the present contract . . . ." *Id.* at 318. This included counts for ":(II) unfair trade practices, (III) intentional and tortious interference with contract, (IV) conversion, (V) abuse of process, (VI) libel, (VII) defamation, and (VIII) injurious falsehood." *Id.* at 316.

*Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (**9th Cir.** 1999), stated:

> To require arbitration, Simula's factual allegations need only "touch matters" covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability. *See Mitsubishi Motors*, 473 U.S. at 624 n. 13, 105 S.Ct. 3346 (noting that "insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, [we] properly resolve[ ] any doubts in favor of arbitrability"); *Genesco, Inc. v. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir.1987) (holding that if factual allegations touch matters covered by agreements, then claims must be arbitrated). Accordingly, we must examine the factual allegations raised to determine which of Simula's causes of action are arbitrable. *See J.J. Ryan & Sons*, 863 F.2d at 319 (stating that court must determine whether factual allegations underlying claim are within scope of arbitration clause).

The court held that claims of "(1) violation of the Sherman Act, 15 U.S.C. § § 1 and 2; (2) violation of the Trademark Act of 1946 ("Lanham Act"), 15 U.S.C. § 1125; (3) misappropriation of trade secrets and breach of the non-disclosure agreements; (4) defamation; and (5) breach of the Arizona Trade Secrets Act" were arbitrable under the agreement.

### 5. Different Contracts, Some with Arbitration Clauses and Some Without

*Collins & Aikman Products Co. v. Building Systems, Inc.*, 58 F.3d 16 (**2d Cir.** 1995), illustrates the problems that can occur with successive contracts. Often, the first contract contains an arbitration clause, and the second contract, often dealing with a related but different subject matter, does not. In such a situation, some claims may be arbitrable, and some not. The court described the situation before it:

> C & A is in the business of marketing floor coverings. In 1977, C & A entered into two substantially similar contracts with BSI (the "1977 Contracts" or the "Contracts"), providing that BSI would be C & A's sales representative in respect of (1) sales to the Church of Jesus Christ of the Latter Day Saints, throughout the United States, and (2) all sales in a multi-state area referred to by the parties as the Rocky Mountain Region. BSI committed itself to use its best efforts to promote and sell C & A products and to avoid promoting or selling any competing products, and C & A in return agreed to pay commissions to BSI. The 1977 Contracts each contained an arbitration clause:
>
> > Any claim or controversy arising out of or relating to this agreement shall be settled by arbitration in the City of New York in accordance with the Rules then obtaining of the American Arbitration Association.
>
> The sole issue in the appeal is the scope of this clause.
>
> The commercial relationship between BSI and C & A was uneventful until early 1988; BSI promoted and sold C & A's products and C & A paid commissions, all in accordance with the Contracts. In or around January 1988, C & A initiated negotiations to acquire BSI in order to bring in-house the promotional and sales services provided by BSI under the Contracts. Supposedly in aid of that transaction, C & A sought information about BSI's business, including customer information and other matters that BSI deemed proprietary. At BSI's request, C & A executed a one-page confidentiality agreement on January 13, 1988 (the "1988 Agreement"), which provides that any business information furnished by BSI would be kept confidential and would not be used for any purpose other than the acquisition talks. The term of the Agreement was two years. The 1988 Agreement did not contain an arbitration provision, nor did it refer to or incorporate the 1977 Contracts.
>
> The acquisition talks lasted for some time, but the transaction never materialized. On July 11, 1990-several months after the 1988 Agreement terminated in accordance with its own terms-C & A gave 30 days' notice by letter of its intent to terminate the 1977 Contracts, and specifying the grounds for the termination. The Contracts were accordingly terminated on August 11, 1990.
>
> In its October 1993 demand for arbitration, BSI alleges that C & A never intended to acquire BSI, and that the 1988 negotiations were a ruse on C & A's part to obtain BSI's proprietary business information so that C & A could take over the roles that BSI performed under the 1977 Contracts. BSI contends that C & A's scheme also involved

enticing BSI employees to come to work for C & A, and that C & A defamed BSI's installer network in order to attract customers away from BSI.

In BSI's Statement of Claim, these allegations are expressed as seven causes of action, which we renumber for convenient reference in this opinion:

(1) wrongful termination of the 1977 Contracts, causing damages of $4,250,000;

(2) fraud in obtaining proprietary information through the 1988 Agreement, allowing C & A to obtain BSI's business without incurring the costs of a buyout;

(3) fraud in the inducement of the 1988 Agreement, for which BSI demands rescission of the Agreement;

(4) breach of C & A's implied duty of good faith and fair dealing in respect of both the 1977 Contracts and the 1988 Agreement, causing damages of $4,250,000;

(5) intentional misrepresentation by C & A in connection with both the 1977 Contracts and the 1988 Agreement, causing damages of $4,250,000;

(6) intentional interference with BSI's employment contracts, causing damages of $4,250,000; and

(7) trade libel of BSI's installer network, causing unspecified damages in addition to the $4,250,000 sought elsewhere.

The district court entered judgment compelling arbitration of the first claim-for wrongful termination of contract-and staying arbitration of the remaining claims. We affirm that part of the district court's judgment that compels arbitration of the first claim, as well as that part of the judgment that stays arbitration of claims two through six. We vacate that part of the judgment that stays arbitration of claim seven, and remand for entry of judgment consistent with this opinion.

*Id.* at 18-19. The court held that under the FAA there is no bar to "piecemeal litigation" where this reflects the limitations in the parties' agreement to arbitrate:

At the outset, we can quickly dispose of one argument: BSI contends that, because one of the claims is clearly arbitrable, and because all of the claims are related to a single set of facts, federal policy disfavors a bifurcation of proceedings in which some claims are presented to arbitrators and some are decided by a court of law. This argument is frivolous. The Supreme Court has directly addressed and soundly rejected it: "The preeminent concern of Congress in passing the [Arbitration] Act was to enforce private agreements ... and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation...." *Byrd*, 470 U.S. at 221, 105 S.Ct. at 1243. If some claims are non-arbitrable, while others are arbitrable, then we will sever those claims subject to arbitration from those adjudicable only in court. Indeed, there is no reason why, in a proper case, we cannot sever even a part of a claim, where that claim

raises both arbitrable and non-arbitrable issues. We will apply these principles to claims two through seven of the Statement of Claims.

*Id.* at 20. The court stated that the subsequent claims could be seen as stand-alone claims not subject to an arbitration agreement, or as steps leading to the wrongful termination and thus subject to the arbitration agreement in the 1977 contracts. It held that the issue was one of substance, not labels, and that the district court's broad definition of the arbitrable wrongful termination claim was sufficiently expansive to cover the same conduct, so that there was no need to have separate claims in arbitration. Its discussion of the second and third claims set the template:

> The question is not whether the second and third claims arise under the 1988 Agreement, which has no arbitration clause; the question is whether these claims plead conduct that "aris[es] out of or [is] related to" the 1977 Contracts, which does have such a clause. To the extent that these claims (no matter how they are labeled) allege conduct that violated the 1977 Contracts, they would be arbitrable (even if they are not arbitrable as separate causes of action) in the sense that the *allegations* embedded within the claims have potential bearing on a claim for wrongful termination of the 1977 Contracts. BSI points to these embedded allegations, and claims the right to arbitrate. If there were no wrongful termination claim, the district court would be required to compel arbitration of these claims, after sorting out allegations and claims for relief that are cast in terms of claims arising under the 1988 Agreement. However, the determinative fact is that the district court judgement compels arbitration of the wrongful termination claim. The Statement of Claim alleges that the 1988 negotiations, the 1988 Agreement, and other ensuing events, were part of a course of conduct leading to the wrongful termination, and show why and how C & A breached its obligations under the 1977 Contracts. Having paved the way for arbitration of that capacious claim, the district court had no need to edit the second and third claims, and cast them in terms of BSI's rights under the 1977 Contracts, so that they could be arbitrated as separate counts rather than as particulars of the wrongful termination of contract claim already deemed arbitrable.

*Id.* at 21.

*J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (**4th Cir.** 1988), enforced an arbitration clause requiring arbitration for "All disputes arising in connection with the present contract . . . ." *Id.* at 318. The court continued:

> The distribution contracts did not stipulate the price of imports or Ryan's compensation. They made no reference to security agreements. Instead, the distribution contracts simply provided: "The price and terms of all products listed above shall be by agreement of the parties simultaneous with or before confirmation of the purchase order." The importation of products, Ryan's compensation, and the affiliates' security interests were accomplished by separate purchase orders, compensation letters, and security agreements which do not contain an arbitration clause. Ryan argues that because these separately negotiated agreements have no arbitration clause, disputes involving them are not referable to arbitration.

* * *

> The district court properly applied these precepts to counts two through eight and held that they were referable to arbitration. It rejected Ryan's argument that because the purchase orders, compensation agreements, and security agreements did not contain arbitration clauses, disputes involving them were not subject to arbitration. It found upon reference to the distribution agreements and the manner in which the parties conducted their business that the purchase orders, compensation agreements, and security agreements implemented the distribution agreements. These findings are amply supported. Without the ancillary agreements pertaining to the details of actual importation of the affiliates' products, the exclusive distribution agreements would be largely illusory.

*Id.* at 319. Arbitration was therefore ordered over plaintiff's claims of "(II) unfair trade practices, (III) intentional and tortious interference with contract, (IV) conversion, (V) abuse of process, (VI) libel, (VII) defamation, and (VIII) injurious falsehood." *Id.* at 316.

### 6. Where the Obligations, By Contract, Go Beyond Contract

#### a. Tort Claims

*Collins & Aikman Products Co. v. Building Systems, Inc.*, 58 F.3d 16, 22-23 (**2d Cir.** 1995), held that a tort claim of trade libel was arbitrable, even though it was allegedly part of the process that led to the arbitrable wrongful termination claim, because additional remedies could be provided on the tort claim:

> The same reasoning applies in this case. To the extent that BSI's allegation of trade libel is in respect of conduct by C & A prior to the termination, or as part of C & A's efforts immediately following the termination to consolidate in its hands the contract benefits it had promised BSI, we hold that the tort claim is arbitrable. BSI's allegation, in effect, is that C & A approached BSI's customers and told them that the workmanship of BSI's installers was of a low quality. This clearly alleges conduct that would be wrongful in respect of the subject matter of the 1977 Contracts. Significantly, although the wrongs alleged implicate the contract termination claim, this libel claim could open C & A to liability for additional damages, as BSI asserts in its Statement of Claim. To the extent that C & A's defamation of BSI's installer network caused harm to BSI beyond its loss under the Contracts, C & A may be liable to BSI on the theory (and to the extent) that such conduct "relates to" the 1977 Contracts. The mere fact that this is a tort claim, rather than one for breach of the Contracts, does not make the claim any less arbitrable. *See, e.g.*, *Shearson/American Express v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (claims for violations of Securities Exchange Act of 1934 and RICO arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (antitrust claims arbitrable).

#### b. "Honorable Engagement" Provisions

*First State Ins. Co. v. National Cas. Co.*, 781 F.3d 7, 12 (**1st Cir.** 2015), held that "honorable engagement" language in the arbitration agreement allowed the arbitrators much

greater flexibility in the provision of equitable relief than would otherwise have been the case. The court explained:

> Each of the eight reinsurance agreements, as well as the agreement to consolidate the arbitrations, contains an honorable engagement provision. This language directs the arbitrators to consider each agreement as "an honorable engagement rather than merely a legal obligation" and goes on to explain that the arbitrators are "relieved of all judicial formalities and may abstain from following the strict rules of law."
>
> Until today, this court has not had occasion to address the operation and effect of an honorable engagement provision in an arbitration clause. We believe that an honorable engagement provision empowers arbitrators to grant forms of relief, such as equitable remedies, not explicitly mentioned in the underlying agreement. . . . This is a huge advantage: the prospects for successful arbitration are measurably enhanced if the arbitrators have flexibility to custom-tailor remedies to fit particular circumstances. . . . An honorable engagement provision ensures that flexibility.
>
> We therefore hold that the honorable engagement provisions in the arbitration clauses of the underlying agreements authorized the arbitrators to grant equitable remedies. We further hold that the reservation of rights procedure is such a remedy. Consequently, National's objection to that procedure is unavailing.

(Citations omitted.)

*PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*, 400 Fed.Appx. 654, 656 (**3d Cir.** 2010), affirmed the vacatur of the award. The court stated: "The arbitrators in this case, by ordering unrequested relief and rewriting material terms of the contract they purported to implement, went beyond the scope of their authority. That the honorable engagement clause permitted the arbitrators to stray from judicial formalities did not give them authority to reinvent the contract before them, or to order relief no one requested."

*U.S. Life Ins. Co. v. Insurance Commissioner of California*, 160 Fed.Appx. 559, 563 (**9th Cir.** 2005), confirmed an arbitration award, holding that the combination of "honorable engagement" language, excusing the arbitrators from strict judicial formalities, and the limited grounds for vacatur, made it very difficult to vacate their awards:

> . . . U.S. Life agreed that the arbitrators "shall consider th[e] [Reinsurance] Contract as an honorable engagement" and "may abstain from following the strict rules of law." The contract gave the arbitrators such wide latitude to resolve disputes that when combined with our inability to vacate even "erroneous legal conclusions" in an arbitral award . . . we conclude that the arbitrators did not exhibit a "manifest disregard of law" . . . and acted well within the powers granted to them under the contract. *See* 9 U.S.C. § 10(a)(4).

(Citations omitted.)

## V. The Role of State Arbitration Codes

### A. General

*Allied–Bruce Terminix Cos. v. Dobson*, 513 **U.S.** 265, 281 (1995), held that States may not use their powers to withdraw disputes from arbitration:

> In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent. . . .

(Citation omitted.)

*Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 **U.S.** 468, 477-79 (1989,

> The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. . . . But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." . . . The question before us, therefore, is whether application of Cal.Civ.Proc.Code Ann. § 1281.2(c) to stay arbitration under this contract in interstate commerce, in accordance with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA. We conclude that it would not.
>
> The FAA was designed "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate" . . . and to place such agreements "'upon the same footing as other contracts,'" . . . While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." . . . Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement . . . . It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. See *Prima Paint*, *supra*, at 404, n. 12, 87 S.Ct., at 1806 n. 12 (the Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so").
>
> In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts

state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." . . . But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, see *Mitsubishi*, *supra*, 473 U.S., at 628, 105 S.Ct., at 3353, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms . . . we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

(Citations omitted.)

### B. Provisions Barring Certain Relief, Like Punitive Damages

*Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995), stated:

> Relying on our reasoning in *Volt*, respondents thus argue that the parties to a contract may lawfully agree to limit the issues to be arbitrated by waiving any claim for punitive damages. On the other hand, we think our decisions in *Allied–Bruce*, *Southland*, and *Perry* make clear that if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration. Thus, the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages.

## VI. Conduct of the Arbitration

### A. Scheduling of Hearings

#### 1. Discovery Hearings

Sec. 7 of the Federal Arbitration Act, 9 U.S.C. § 7, authorizes process to compel the attendance of witnesses, with or without documents, at hearings before the arbitrator(s). There is no provision for compelling the attendance of witnesses at depositions, or the production of documents in the absence of a hearing.

In practice, most parties make witnesses available for deposition without the presence of the arbitrator(s), and produce documents without waiting for a hearing. That serves the "faster, cheaper, better" purpose of arbitration. If a party is recalcitrant, however, parties and arbitrators need to be prepared to have mini-hearings for every deposition, in the area to which the witness can be subpoenaed, to hold their depositions before the arbitrator(s), and to produce their

documents before the arbitrator(s). It would be extremely risky for a recalcitrant party to behave in this fashion, because even if it wins it may still be saddled with all the arbitrators' costs and forum fees for having indulged in such a monumental waste of time.

### 2. Merits Hearings

As in court, the hearing on the merits may have several sessions to accommodate the schedules of the parties, witnesses, and arbitrator(s). Difficulties of scheduling become greater when there is a panel of arbitrators, not just one.

It is common for the parties to agree that testimony of some witnesses may be received by telephone or videoconference, to save the need to suspend the hearing and travel to the location of a witness who will not otherwise come to the hearing.

### 3. Refusal to Postpone the Hearing on Sufficient Cause

Sec. 10(a)(3) of the FAA, 9 U.S.C. § 10(a)(3), allows vacatur of an award "(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown . . . ." In practice, this does not make arbitrations hostage to sudden schedule changes. Arbitrators may properly refuse to postpone the hearing for a multitude of reasons.

*El Dorado School Dist. No. 15 v. Continental Cas. Co.*, 247 F.3d 843 (**8th Cir.** 2001), held that the arbitrator did not commit misconduct by refusing to postpone the hearing to accommodate outpatient surgery for counsel's eighteen-month-old son, whereupon counsel failed to attend the three-day hearing and advised his clients not to attend either. It was an expensive decision. The court first set out the facts:

> On December 13, 1997, appellants' then-counsel moved for a continuance because his eighteen-month-old son had been scheduled for an outpatient surgical procedure to alleviate a recurrent ear infection problem. The district objected on the grounds that the arbitration had been scheduled for almost three months, that the outpatient procedure was relatively minor, that significant preparations had been made and airline tickets purchased on the assumption that the arbitration would take place when scheduled, and that a last-minute continuance on the eve of arbitration would prejudice the district. The arbitrator denied the continuance on December 14. Appellants' counsel did not attend the arbitration and advised his clients not to do so. The arbitrator conducted the hearing and found in favor of the district on both its claim and Thomas & Parker's counterclaim, awarding the district damages in the amount of $206,409. Thereafter, on the district's motion, the district court entered judgment on the arbitrator's award.

*Id.* at 846. The court then held that the legal standard for showing misconduct was extremely high:

> Courts will not intervene in an arbitrator's decision not to postpone a hearing if any reasonable basis for it exists. . . . To constitute misconduct requiring vacation of an award, an error in the arbitrator's determination "must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived

> of a fair hearing." . . . Although each party must be given the opportunity to present its arguments and evidence, an arbitrator is not guilty of misconduct merely because, in the face of a denial of a requested postponement, a party chooses to absent itself from a duly scheduled hearing. . . .
>
> We find nothing in the record before us to indicate that the arbitrator was guilty of misconduct in denying the motion for a continuance. The appellants have put forth no evidence of misconduct on the arbitrator's part, and their failure to participate in the hearing was the result of their decision not to attend the proceeding.
>
> That the arbitrator did not give specific reasons for the denial does not evidence misconduct. As we noted above, an arbitrator is not required to elaborate on the reasoning supporting his decision. . . . On the record before us, the arbitrator may have determined that postponement was inappropriate because the parties had expended considerable time, effort and money based on the hearing dates, because of the arbitrator's own schedule, or because appellants' counsel had made an insufficient showing that he was unable to attend any of the scheduled three-day hearing. Any or all of these explanations would provide a reasonable basis for the decision not to postpone. . . . Accordingly, we find no abuse of discretion in the district court's ruling that the arbitrator had not been guilty of misconduct in denying the motion for a continuance.

*Id.* at 847-48 (citations omitted).

Similarly, *Schmidt v. Finberg*, 942 F.2d 1571, 1574-75 (**11th Cir.** 1991), held that the arbitrators had not abused their discretion in failing to continue a hearing to permit the attendance of a defendant whom a party had described as critical, where the party had made no proffer of the testimony he could give that no one else could give, and where the party had agreed to numerous delays aggregating more than a year, and the panel may have felt that further delays would threaten the expeditious character of the arbitration.

### B. Role of Rules of Evidence and Objections

Sec. 10(a)(3) of the FAA allows vacatur of an award "(3) where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy . . . . Too many practitioners think that this means that anything goes.

Absent agreement of the parties, arbitrators are not required to follow any particular rules of evidence. They can hear and rely upon hearsay evidence, for example, and commonly accept objected-to evidence "for what it is worth."

What too many practitioners forget is that the rules of evidence are not really for purposes of cult identification, but have a great deal to do with the probative force of the evidence. Hearsay is actually not very persuasive. One can get it in, but it does no good if it just lies there on the ground, gasping for breath. A good practitioner in arbitration will cite any applicable exception to the hearsay rules, as a means of breathing life into the evidence and giving it persuasive force.

During the case management conference, I always ask the parties if they want rulings on discovery or evidence or both to be guided by any particular set of rules. The Federal discovery rules without the presumptive limits and the Federal Rules of Evidence are the most commonly chosen, with State rules next, as well as a contingent who just want to leave it in my discretion.

One bright-line rule I do follow is that I will not receive or rely upon evidence that should have been disclosed in discovery or in supplementations to discovery, but was not produced until the hearing. I will make findings on such evidence for the sake of finality, and commonly it does not matter to the result, but I will not let such games be played in arbitrations I am conducting.

In construing § 10(a)(3) of the FAA, courts have given great latitude to arbitrators' decisions not to allow evidence. *E.g.*, *Schwartz v. Merrill Lynch & Co., Inc.*, 665 F.3d 444, 453, 113 Fair Empl.Prac.Cas. (BNA) 1479 (**2d Cir.** 2011) ("We think it plain that the Panel's determination that acts performed more than six months prior to the period for which Schwartz could seek recovery were 'too remote' (Tr. 58) cannot be termed 'misconduct ... in refusing to hear evidence pertinent and material to the controversy' . . . ."); *Century Indem. Co. v. Certain Underwriters at Lloyd's, London, subscribing to Retrocessional Agreement Nos. 950548, 950549, 950646*, 584 F.3d 513, 558 (**3d Cir.** 2009) ("Moreover, inasmuch as arbitrators 'have wide latitude in how they conduct proceedings,' . . . it is well within an arbitrator's authority to refuse to hear evidence that is of little relevance.") (citation omitted).

By contrast, *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 850, 151 L.R.R.M. (BNA) 2017 (**5th Cir.** 1995), was a clear example of misconduct under § 10(a)(3):

> In the instant case, not only did the arbitrator refuse to consider evidence of the positive drug test, he prevented Exxon from presenting additional evidence by misleading it into believing that the SAR had been admitted as a business record. Exxon attempted to establish the SAR as a business record, but the arbitrator stopped it, stating that the test was already admitted. Further, Exxon had no reason to have Ferdinand testify as to how he conducted the DLR test, because neither the arbitrator nor the Union objected to Farmer's testimony that the cigarette stub found in Chamblin's vehicle tested positive for marijuana. The arbitrator used Exxon's failure to present evidence that he told Exxon not to present as a predicate for ignoring the test results. Such misconduct falls squarely within the scope of Section 10, and is grounds for vacatur.

### C. Differences in Presentation of Evidence, Between Litigation and Arbitration

The most important thing to remember about the presentation of evidence in arbitration is its misleading informality.

The setting is informal, with the parties sitting across from each other at a conference table. Courtroom-style jousting, raised voices, sarcasm, and theatrics come across very poorly in such a setting and can seriously damage the credibility of the party engaging in antics. A conversational style, even an intense conversational style, are far more effective.

Courtroom graphics do not come across as well in a setting like arbitration. They need to be much more informative than splashy. Think of the kind of PowerPoint you can usefully show

to your family at dinner, and you will understand. Graphics like timelines can still be very useful; I sometimes construct my own when the parties have not offered one.

The setting can be misleadingly informal, if counsel forget they are in the middle of an adversarial hearing and are tempted by the deposition-type setting into showing off for their clients and getting into chest-bumping with their adversaries. Clients are sometimes much quicker than their counsel to sense my reaction, and pull back their counsel before I have a chance to say something. If I have to say something, I remind the parties that I have to decide the matter within thirty days of closing the record, and neither side is persuading me of anything with their present adversarial modes. The usual reaction is a quick jolt, and a rapid change of approach.

The informality also allows a greater chance to focus the parties on the kinds of things I most need to hear, and to save time by bypassing things that are not seriously disputed and on which I am already satisfied. This is necessary because counsel are often allergic to stipulations narrowing the issues. I will apologize to counsel for interrupting their questions, and ask the other side if the point in question is really being contested. I often hear that it is not, and we can then shorten the hearing.

## VII. Obstacles to Arbitration

### A. Attempted Frustration of Arbitration by Failure to Pay Fees

*Pre-Paid Legal Services, Inc. v. Cahill*, __ F.3d __, 2015 WL 3372136 (**10th Cir.** May 26, 2015), held that the defendant employee's demand for arbitration, and subsequent failure to pay arbitration fees and allow the arbitration to move forward. The arbitrator and the AAA declared the arbitration over. The court also held that the employee was in default of arbitration and justified lifting the stay and proceeding in court on Pre-Paid's claims against the employee. On both grounds, § 3 of the FAA allowed the lifting of the stay and allowed the litigation to proceed:

> The AAA determined the arbitration had gone as far as it could due to Mr. Cahill's repeated refusal to pay the fees. Under the AAA rules, the panel terminated the proceedings. As such, the arbitration "ha[d] been had in accordance with the terms of the agreement," 9 U.S.C. § 3, removing the § 3 requirement for the district court to stay the proceedings.
>
> Our holding is consistent with decisions of other courts that have determined a party's failure to pay its share of arbitration fees breaches the arbitration agreement and precludes any subsequent attempt by that party to enforce that agreement. *See, e.g., Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1011 (9th Cir.2005) (explaining the defendant "breached the arbitration agreement by refusing to participate in properly initiated arbitration proceedings" and that the "breach was tantamount to a repudiation of the arbitration agreement"); *Sink*, 352 F.3d at 1201 ("[F]ailure to pay required costs of arbitration was a material breach of its obligations in connection with the arbitration."); *Garcia v. Mason Contract Prods., LLC*, No. 08–23103–CIV, 2010 WL 3259922, at *3 (S.D.Fla. Aug.18, 2010) (unpublished) (holding "[b]y failing to timely pay its share of the

arbitration fee, Defendant materially breached its obligations, thereby 'scuttling' [its] opportunity" to insist on arbitration).

* * *

Alternatively, lifting the stay was permissible under § 3 because Mr. Cahill was "in default in proceeding with [the] arbitration." 9 U.S.C. § 3. Section 3 does not require a stay when the applicant for the stay is in default. Because only Mr. Cahill wanted a stay and because he was in default, § 3's mandate to issue a stay did not apply.

* * *

The parties agree and the record shows Mr. Cahill failed to pay his share of the arbitration fees. The AAA repeatedly asked him to pay. In the arbitration proceeding, Mr. Cahill did not show he was unable to afford payment, ask the arbitrators to modify his payment schedule, or move for an order requiring Pre–Paid to pay his share for him so that arbitration could continue. Instead, by refusing multiple requests to pay, he allowed arbitration to terminate.

Failure to pay arbitration fees constitutes a "default" under § 3. Because Mr. Cahill failed to pay his arbitration fees, he was in "default." *See Garcia*, 2010 WL 3259922, at *4 ("[T]his default was ... an intentional and/or reckless act because the AAA provided repeated notices to the Defendant that timely payment of the fee had not been received.... There is no other description the Court can find for this self-created situation other than 'default.' "); *Rapaport v. Soffer*, No. 2:10–cv–00935–KJD–RJJ, 2011 WL 1827147, at *2 (D.Nev. May 12, 2011) (unpublished) (finding the defendant was in default under § 3 because the AAA "closed" or "terminated" the case because of his failure to pay fees); *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828, 837–38 (Miss.2003) (finding the defendant refused to pay its one-half of the costs pursuant to an arbitration agreement and that this constituted "default" under § 3). Because Mr. Cahill was in default, the district court was not obligated under § 3 to maintain the stay so that arbitration could proceed.

(Footnotes and citations omitted.)

### B. A Party's Refusal to Cooperate

See the discussion above of *El Dorado School Dist. No. 15 v. Continental Cas. Co.*, 247 F.3d 843 (**8th Cir.** 2001). Counsel's decision not to participate on any day of the three-day hearing, and his advice to his clients not to attend, was an expensive decision.

## VIII. Arbitrator's Authority to Award Sanctions

### A. Explicit Sources of Authority

*Seagate Technology, LLC v. Western Digital Corp.*, 854 N.W.2d 750, 165 Lab.Cas. ¶ 61,529, 39 IER Cases 345 (Minn. 2014), a case involving misappropriation of trade secrets, held that the arbitrator had authority to receive all of the respondents' evidence, but then refuse to consider it, as a sanction for knowingly introducing falsified exhibits into evidence. The court first held that the language of the agreement authorizing the award of "relief" allowed an award of punitive sanctions:

> We look first at the language in the arbitration agreement authorizing the arbitrator to "grant injunctions or other relief" in "any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach" of the employment agreement. "Relief" is defined as "[t]he redress or benefit, esp[ecially] equitable in nature (such as an injunction or specific performance), that a party asks of a court." *Black's Law Dictionary* 1482 (10th ed. 2014). Here, the punitive sanctions issued were requested by Seagate as a redress for the wrong committed by Western Digital and Mao when Mao fabricated evidence. In addition, although punitive sanctions are issued in large part to punish one party, because they also benefit the other party, they are appropriately categorized as a form of relief. The Legislature has also categorized *punitive* measures as a form of *relief*, such as when discussing the authority of an arbitrator to award "punitive damages or other exemplary relief." … These sources confirm that punitive sanctions qualify as "injunctions or other relief" as authorized by the arbitration agreement.

*Id.* at 762-63 (emphasis added by court to statutory language; statutory citation and footnote omitted).

### B. Incorporated Sources of Authority

*Seagate Technology, LLC v. Western Digital Corp.*, 854 N.W.2d 750, 762-63, 165 Lab.Cas. ¶ 61,529, 39 IER Cases 345 (Minn. 2014), a case involving misappropriation of trade secrets, held that the arbitrator had authority to receive all of the respondents' evidence, but then refuse to consider it, as a sanction for knowingly introducing falsified exhibits into evidence. The court first held that the language of the agreement authorizing the award of "relief" allowed an award of punitive sanctions, and supported its construction by reference to the language of the Minnesota arbitration code, although it did not rely directly on the code. The agreement also referred to the AAA's Employment Rules, and the court held that these also allowed the imposition of sanctions:

> The sanctions issued were also authorized by the AAA Employment Rules, which were incorporated into the arbitration agreement and allow the arbitrator to grant "any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs." AAA Employment R. 39(d). As we have established, punitive sanctions fall within the ordinary meaning of relief. Punitive sanctions can also be properly construed as a remedy. Remedy is defined as "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief" and "anything a court can do for a litigant who has been wronged or is about to be wronged." *Black's Law Dictionary* 1485 (10th ed.2014) (quoting Douglas Laycock, *Modern American Remedies* (14th ed.2010)). Here, the sanctions were issued in part to redress a wrong, the fabrication of evidence, which harmed Seagate during the arbitration. Thus, the sanctions constitute a remedy provided to Seagate.

*Id.* at 763.

### C. Inherent Sources of Authority

*Seagate Technology, LLC v. Western Digital Corp.*, 854 N.W.2d 750, 762-63, 165 Lab.Cas. ¶ 61,529, 39 IER Cases 345 (Minn. 2014), a case involving misappropriation of trade secrets, held that the arbitrator had authority to receive all of the respondents' evidence, but then refuse to consider it, as a sanction for knowingly introducing falsified exhibits into evidence. The court cited cases holding that dismissal was an appropriate sanction for a plaintiff, and a default judgment an appropriate sanction for a defendant, committing fraud on a court, satisfying the second element of AAA Employment Rule 39(d). *Id.* at 763-64. The court rejected respondents' argument that a court would never have awarded such a sanction, holding that arbitrators are not limited to the remedies a court would award, and are only limited to the remedies available to a court:

> Western Digital argues that it did not act with a level of culpability to warrant punitive sanctions and that the arbitrator exceeded the level of authority given to a court to issue punitive sanctions. Likewise, Mao argues that the arbitrator exceeded his authority by not applying sanctions law in the same way that a Minnesota court would have. But the arbitration agreement did not specify that the remedies or relief must be awarded utilizing judicial principles or limitations; instead, the agreement broadly authorized the arbitrator to grant "injunctions or other relief." In addition, although AAA Employment Rule 39(d) requires the relief to be one available to the parties in a court action, it does not require the arbitrator to employ the sanction using the same standards as any particular court. "Where the arbitrators are not restricted by the submission to decide according to principles of law, they may make an award according to their own notion of justice without regard to the law." …
>
> Furthermore, we have previously held that arbitrators have broad power to fashion remedies within the scope authorized by the language of the arbitration agreement. … And we have recognized that "an award will not be vacated merely because the court may believe the arbitrators erred." … In addition, the AAA Employment Rules do not limit an arbitrator's authority to forms of relief that would have been granted by a court; rather, Rule 39(d) references forms of relief that "would have been available " in a court. AAA Employment R. 39(d) (emphasis added). This language implies that while arbitrators may be limited to the types of relief available in a court, they are not limited in the manner of awarding these forms of relief by the same rules as a court would have been. Because punitive sanctions were a permissible form of relief and because the arbitrator had discretion in fashioning a remedy, we hold that the arbitrator did not clearly exceed his authority in violation of Minn.Stat. § 572.19, subd. 1(3), by issuing punitive sanctions against Western Digital and Mao.

*Id.* at 764 (citations and footnote omitted). The court continued:

> We recognize that entrusting an arbitrator with broad powers over forms of relief could theoretically lead to unfair results in arbitration. Certainly Mao and Western Digital, implicitly if not explicitly, argue that the award here was a result of an out-of-control arbitrator or was otherwise unjust. Some believe that arbitration has benefits, potentially including faster resolution and less expense than the judicial system as well as

> a high degree of confidentiality. … But the benefits come with costs, including significantly less oversight of decisions, evidentiary and otherwise, and very limited review of the final award. *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (stating that by agreeing to arbitrate, parties "trade[ ] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration").
>
> Here, despite the best efforts of experienced appellate counsel to argue otherwise, Mao and Western Digital's decision to demand arbitration necessarily limited the availability of the protections and advantages of the judicial system. *See Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1011 (10th Cir. 1994) ("Those who choose to resolve a dispute by arbitration can expect no more than they have agreed. One choosing arbitration should not expect the full panoply of procedural and substantive protection offered by a court of law."). In addition, we reiterate that the scope of arbitrator authority is a matter of contract … and parties are always free to fashion arbitration agreements in ways that limit the arbitrator's power to award certain types of relief.

*Id.* at 765 (citation and footnote omitted).

### D. Just How Big Can the Sanctions Be?

*Seagate Technology, LLC v. Western Digital Corp.*, 854 N.W.2d 750, 165 Lab.Cas. ¶ 61,529, 39 IER Cases 345 (Minn. 2014), a case involving misappropriation of trade secrets, held that the arbitrator had authority to receive all of the respondents' evidence, but then refuse to consider it, as a sanction for knowingly introducing falsified exhibits into evidence. Barring the respondents' defense resulted in an award of more than $500 million (a subsequent news account placed the award at $635 million). Respondents were the parties that had invoked Seagate's arbitration clause. The court rejected respondents' argument that the sanction barring their evidence required vacatur of the award. It stated that the arbitrator had heard all of respondents' evidence, and had simply refused to consider the evidence as a sanction, and that cases awarding vacatur for failure to hear evidence were not apposite. *Id*. at 766. The court continued:

> The scope of Minn.Stat. § 572.19, subd. 1(4), is properly limited to situations involving the presentation and admission of evidence at the hearing, not situations involving the use or weighing of evidence in constructing the final award or other form of relief. This conclusion is supported by the language of Minn.Stat. § 572.19, subd. 1(4), including the incorporation of Minn.Stat. § 572.12. Minnesota Statutes § 572.19, subd. 1(4), focuses on how an arbitrator should conduct a hearing. It addresses an arbitrator's refusal to postpone the hearing, an arbitrator's refusal to "hear evidence material to the controversy," and an arbitrator's violations of Minn.Stat. § 572.12, which again centers on how a hearing should be conducted. Minn.Stat. § 572.19, subd. 4 (emphasis added); see Minn.Stat. § 572.12 (detailing how to conduct a hearing, including that an arbitrator shall appoint a time and place for the hearing, notify the parties about the hearing, adjourn the hearing, and receive evidence at the hearing). Nothing in either Minn.Stat. § 572.19, subd. 1(4), or Minn.Stat. § 572.12, describes how an arbitrator is to fashion a

remedy for misconduct or the final award; the entire focus of these statutes is how the hearing itself should be conducted, not the deliberation process that happens after the hearing.

Based on an analysis of the statutory language, we conclude that it is appropriate to read Minn.Stat. § 572.19, subd. 1(4), as a provision concerned with the admissibility of evidence and the manner in which the hearing is conducted, not as a provision limiting the arbitrator's authority to use, or refuse to use, certain evidence when providing relief or fashioning an award after the hearing has been completed. In this case, Western Digital and Mao do not challenge any of the arbitrator's actions during the hearing, as Western Digital and Mao were allowed to present their case in full and the arbitrator received the evidence in question. But the arbitrator chose not to factor this evidence into the final award because of sanctions that were awarded and, as discussed above, were permissible as within the arbitrator's authority. In short, Western Digital and Mao's challenge, which is primarily about the arbitrator's refusal to use certain evidence in fashioning the final award, is outside the scope of Minn.Stat. § 572.19, subd. 1(4).

*Id.* at 766-67 (emphasis in original).

## IX. After the Arbitration

### A. Motions to Confirm or Vacate

#### 1. Reversing Vacatur

*Raymond James Financial Services, Inc. v. Fenyk*, 780 F.3d 59, 31 A.D. Cases 559 (**1st Cir.** 2015), reversed the district court's decision grant of vacatur of an arbitration award of $600,000 to a broker. The court described the issues and its holding at 60:

An arbitration panel awarded appellant Robert Fenyk $600,000 in back pay based on a claim that he was unlawfully terminated from his job as a stock broker because he is an alcoholic. The district court vacated the award, concluding that the arbitrators lacked authority to grant that remedy because Fenyk brought no claims under the state law the arbitrators applied. Fenyk now seeks reinstatement of the award, arguing that the district court failed to give due deference to the arbitrators' ruling.

We reverse the district court's judgment. Although the arbitration decision may have been incorrect as a matter of law, it was not beyond the scope of the panel's authority.

The law on the Florida statute of limitations was unclear at the time of the award, and was clarified by the Florida Supreme Court only two weeks after the award. The court of appeals stated: "Given the legal uncertainty reflected in the certified question presented to the Florida Supreme Court, and the fact that even 'serious error' by arbitrators will not invalidate their award, any error by the panel in refusing to dismiss Fenyk's claims as untimely does not rise to the level necessary to justify vacatur." *Id.* at 66. While the award was under Florida law, plaintiff's claim was filed under Vermont law and his motion to amend his claim was denied in

arbitration. However, the parties had treated Florida and Vermont law as the same in their submissions. The court stated:

> The panel's award of damages based on Florida law, despite its denial of Fenyk's request to amend his Statement of Claim to include a claim under the FCRA, troubled the district court. We understand its discomfort. Yet we cannot conclude, in the particular circumstances of this case, that the arbitrators' decision to impose liability on RJFS under Florida law "willfully flouted the governing law" or otherwise exceeded the bounds of the arbitrators' authority to resolve the parties' dispute. *Stolt–Nielsen*, 559 U.S. at 672 n. 3, 130 S.Ct. 1758 (internal quotation marks omitted). The reliance on Florida law would be a different matter if the pertinent statutes in Florida and Vermont materially diverged. RJFS acknowledged in its post-hearing brief, however, that the two states' anti-discrimination laws are substantially equivalent in covering disability discrimination. . . .

*Id.* The court described the deference owed to arbitration for the sake of finality:

> One might reasonably argue that the panel's decision to grant Fenyk a remedy under Florida law is incompatible with its denial of Fenyk's request to amend his arbitration complaint to include claims under the FCRA and, for that reason, was improper. In effect, the panel did what it told Fenyk it would not do: view his allegations of discrimination through the lens of Florida statutory law. Though the panel's unexplained reliance on the FCRA leaves us perplexed, and may have been erroneous, it does not render the award unsustainable. Importantly, the panel had the authority to allow the addition of Florida claims. *See* FINRA Rule 13309(b) (stating panel's authority to grant a motion to amend). As the principles governing arbitration awards recited above make clear, the question before us is not whether the arbitrators made the *correct* decision when they gave Fenyk a remedy under Florida law, but whether their decision was authorized by the parties' agreement. In the final analysis, the panel apparently decided that Fenyk's mistake in labeling his claims did not justify denying him relief. Where the arbitrators applied the substantive law that RJFS agreed would govern its conduct, that choice to apply Florida law falls within the category of judgments—even if erroneous—that we may not disturb.

*Id.* at 66. The court noted that Raymond James had traded the opportunities for review in judicial decisions for the simplicity and dispatch of arbitration. *Id.* at 67.

### B. Attorneys' Fees on Motions to Confirm or Vacate?

The FAA does not provide for attorneys' fees on a successful motion to confirm an arbitration award. *Menke v. Monchecourt*, 17 F.3d 1007 (**7th Cir.** 1994). However, the underlying statute or contract may do so. *E.g.*, *Brayton Purcell LLP v. Recordon & Recordon*, 487 F.Supp.2d 1124 (N.D.Calif. 2007) (awarding fees against one defendant under the Copyright Act for post-arbitration conduct).

If the successful motion is to vacate the award, there will be no final result and the matter will be remanded to arbitration.

The question then arises whether the arbitrator(s) or the court should award the fees. Sensible parties will work this out, but where there is a possibility of such fees the arbitrator(s) should be asked to make a partial final award, not a final award, reserving jurisdiction only for the purpose of a fee award. Otherwise, the *functus officio* doctrine means that the arbitrator(s) will have lost jurisdiction over the matter, and a new arbitrator or panel of arbitrators will need to be appointed to handle the fee application.

There may be a question whether the court can confirm or vacate a partial final award that reserves the question of fees.

### C. Effect of Arbitral Findings in Collateral Litigation or Arbitration

*Grimes v. BNSF Ry. Co.*, 746 F.3d 184 (**5th Cir.** 2014), reversed the lower court's grant of summary judgment to the Federal Railway Safety Act defendant. Plaintiff was fired after the defendant railway's investigation of an accident concluded that the accident occurred because an uncertified crew member was operating the train, and that plaintiff and the other two crew members it fired had dishonestly tried to cover up for each other. The court rejected the arguments of both sides, as to the effect of arbitral findings under the Railway Labor Act, as too extreme. It stated at 187-88:

> . . . The RLA makes the arbitral findings conclusive on the parties *in the dispute governed by the RLA.* Grimes does not disagree that the arbitral findings of fact are conclusive on his CBA claim that he pursued with the PLB. Those findings are not, however, necessarily conclusive in a suit brought under a different statute." (Emphasis in original.)

III

> The answer lies somewhere in the middle. As a general matter, arbitral proceedings *can* have preclusive effect even in litigation involving federal statutory and constitutional rights, and the decision to apply it is within the discretion of the district court. . . . As acknowledged in . . . the Court held in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985), that collateral estoppel may apply in federal-court litigation to facts found in arbitral proceedings as long as the court considers the "federal interests warranting protection." In *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1358–62 (11th Cir.1985), the court discussed *Byrd* and concluded that the determination of fact issues in the arbitration of state-law claims should have preclusive effect in a subsequent federal RICO suit where those fact issues determined the existence of predicate acts for purposes of RICO.
>
> A district court has "broad discretion" to decide whether to apply the doctrine, "at least when the arbitral pleadings state issues clearly, and the arbitrators set out and explain their findings in a detailed written opinion." . . . Additionally, "[a] district court in exercising its discretion must carefully consider whether procedural differences between arbitration and the district court proceeding might prejudice the party challenging the use of offensive collateral estoppel." . . . If the procedural differences

> "might be likely to cause a different result," then collateral estoppel is inappropriate. . . . The arbitrators also ought to be "experienced and disinterested individuals." . . .

(Citations omitted; emphases in original.) The court held that the arbitration in question did not meet this standard. It stated at 188-89:

> Here, on the other hand, the investigation and hearings were conducted by the railroad. The actual arbitrators—the PLB—only reviewed the record from that investigation. Collateral estoppel was inappropriate because the procedures of the PLB did not afford Grimes the basic procedural protections of a judicial forum. The fact that a subsequent panel of neutral arbitrators reviewed the record of the internal investigation and hearing and concluded that the railroad had reached the correct result is not enough to insulate the underlying, employer-conducted proceedings from scrutiny.

*Continental Holdings, Inc. v. Crown Holdings Inc.*, 672 F.3d 567, 575-76 (**8th Cir.** 2012), affirmed the application of collateral estoppel effect to an arbitral finding. The court stated:

> Under New York law, "[i]t is settled that the doctrine of *res judicata* is applicable to arbitration awards and may serve to bar the subsequent relitigation of a single issue or an entire claim." . . . The collateral estoppel doctrine, i.e., issue preclusion, "applies only if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action." . . . The burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding." . . . "[T]he fundamental inquiry is whether re-litigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of resources of the court and the litigants, and the societal interests in consistent and accurate results." . . . "Since the consequences of a determination that a party is collaterally estopped from litigating a particular issue are great, strict requirements for application of the doctrine must be satisfied to insure that a party not be precluded from obtaining at least one full hearing on his or her claim." . . .
>
> Applying this standard to the case at hand, we have little doubt Crown met its burden to prove the exact same issue—the meaning of "the Business" within Section 10.3(a)(iv) of the SPA—was before the arbitrator and the district court, and was necessary to both outcomes. There is only one indemnity provision within the SPA, and its meaning will determine the respective liabilities of the parties, whether it relates to environmental, occupational, or any other type of third-party claim which may arise. Continental cannot, and does not, dispute the identity or the decisiveness of the issue in the two proceedings.
>
> Continental does, however, dispute the district court's conclusion it had a full and fair opportunity to litigate the meaning of Section 10.3(a)(iv) before the arbitrator. New York courts have encouraged a common-sense approach to issue preclusion:

> A determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of the realities of the prior litigation, including the context and other circumstances which may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him. Among the specific factors to be considered are the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation.
>
> . . . ("The doctrine ... is a flexible one, and the enumeration of these elements is intended merely as a framework, not a substitute, for case-by-case analysis of the facts and realities.").

*Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1361-62 (**11th Cir.** 1985), affirmed the lower court's giving collateral estoppel effect to the findings of an arbitral panel. The court explained why:

> Furthermore, the arbitration procedure in the present case adequately protected the rights of the parties. The arbitration was conducted under the arbitration rules of the New York Stock Exchange. Both parties were represented by counsel, made opening and closing arguments, and were permitted every opportunity to examine and cross-examine witnesses and present relevant evidence. A complete record of the proceedings (transcript and documents) was preserved. In light of the above circumstances, it is entirely appropriate to give collateral estoppel effect to all of the factual determinations which were necessary and critical to the arbitration panel's ultimate award.
>
> The arbitration panel did not make specific factual findings. However, in order to conclude that Drexel Burnham was entitled to the entire debit balance and interest owed on the margin account, the arbitration panel necessarily had to determine that Drexel Burnham had properly calculated and charged interest on the account according to the terms of the agreement; that there was no fraud or deception in the calculation of interest charges; that the monthly account statements contained correctly computed interest charges; and that the interest rates charged were not usurious. Appellant presented evidence on all these issues during the arbitration proceeding, and clearly had a full and fair opportunity to litigate these issues in that proceeding. Therefore, these factual findings are binding on this court, and any contrary allegations in the pleadings will be insufficient to support appellant's RICO claim.