REINSURANCE ARBITRATION

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A. Choosing Arbitration

Arbitration is a creature of contract, and parties will not be compelled to arbitrate disputes unless they have agreed to do so. Once parties elect to refer disputes to arbitration, however, courts will hold them to it. Courts have long since shed their distrust of arbitration as a means of dispute resolution. Indeed, most courts embrace arbitration as a valuable tool to ease the burden of case backlogs. And federal public policy, as embodied in the Federal Arbitration Act, 9 U.S.C. §1 et seq., strongly favors arbitration over litigation.

The starting point for discussing reinsurance arbitration is the arbitration clause – the provision by which parties agree to submit their disputes to arbitrators. The arbitration clause, and in particular the provision within that clause defining what the parties have agreed to submit to arbitration, determines whether the parties can compel each other to arbitrate a particular dispute. The Supreme Court has held that the business of insurance is commerce and, therefore, that interstate insurance transactions (including, by implication, interstate reinsurance transactions) constitute interstate commerce subject to federal substantive law, including the Federal Arbitration Act. *See United States v. Southern-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); s*ee Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322, 2329 (1996) (citing *Allied Bruce Terminex v. Dobson,* 115 S.Ct 834 (1995).). The Supreme Court has repeatedly emphasized the strong federal public policy in favor of arbitration:

> any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Memorial Hosp. v. Mercury Constr: Corp., 460 U.S. 1, 24-25 (1983). *See also Shearson/American Express v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

Typically, arbitration clauses in reinsurance contracts are phrased broadly enough to encompass any disputes involving the interpretation of the contract and the parties' rights thereunder, even implied contract terms. *Selcke v. New England Insurance Co.* 995 F.2d 688, 689 (7th Cir. 1993). Broadly-worded arbitration clauses will also normally be construed to

encompass extra-contractual claims, such as fraud in the inducement. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-04 (1967).

Based upon the strong federal policy favoring arbitration, some courts hold that claims brought by a liquidator and arising out of a reinsurance contract with an arbitration clause are subject to arbitration, even if there is only a reference to arbitration in a slip. *Tulsa Gen. Ins. Agency, Inc. v. CIGNA Reins. Co.* (E.D. Okla. 1993).

B. Waiving The Right To Arbitrate

Most courts are reluctant to find that a waiver of a right to arbitration has occurred. *See, e.g., Sevinor v. Merrrill Lynch, Pierce, Fenner & Smith, Inc.*, 807 F.2d 16 (1st Cir. 1986) (no waiver even though discovery proceeded in court action for seven months before defendants moved to compel arbitration); *Brener v. Becker Paribas Inc.*, 628 F. Supp. 442, 451-52 (S.D.N.Y. 1985) (no waiver where defendant did not assert right of arbitration for nine months following commencement of litigation and participated in discovery during that time); *General Sec. Assurance Corp. of N.Y. v. Capital Assurance Co., Inc.*, No. 110807/93 (Sup.Ct. N.Y. County June 8, 1994) (no waiver of arbitration by party who did not raise right to arbitration in answer and waited seven months after complaint was filed to move to compel arbitration). The party asserting waiver bears the burden of demonstrating that it has suffered prejudice as a result of the opposing party's failure to seek arbitration sooner. *Menorah Ins. Co., Ltd. v. INX Reins. Corp.*, 72 F.3d 218 (1st Cir. 1995); *Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra,* 807 F.2d at 19; *Rush v. Oppenheimer & Co.*, 779 F.2d 885 (2d Cir. 1985); *Brener v. Becker Paribas, Inc., supra,* 628 F. Supp. At 452; *Britton v. Co-op Banking Group,* 916 F.2d 405, 1412 (9th Cir. 1990); *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 981-82 (4th Cir. 1985).

A finding of waiver requires "the litigation of substantial issues going to the merits. . . ." *Sweater Bee by Banff v. Manhattan Indus.*, 754 F.2d 457, 461 (2d Cir. 1985); *Jones Motor Co. v. Chauffeurs, Teamsters & Helpers Local Union* No. 633, 671 F.2d 38, 44 (1st Cor.), *cert. denied,* 459 U.S. 943 (1982); *Kramer v. Hammond,* 943 F.2d 176, 179 (2d Cir. 1991) (Finding waiver where defendant had engaged in "extensive pretrial litigation" before raising arbitration clause including filing of counterclaims, serving notice to depose plaintiff, and filing motion for summary judgment, denial of which defendant appealed to highest state court); *United States ex rel. DMI, Inc. v. Darwin Constr. Co.*, 750 F. Supp. 536, 538 (D.D.C. 1990) (finding waiver where plaintiff "actively participated" in lawsuit by "filing eight motions . . . requesting preliminary relief, and attempting to manipulate discovery boundaries.").

C. Commencing The Arbitration

The Federal Arbitration Act does not prescribe how an arbitration must be commenced. A demand for arbitration can be in the form of a pleading or letter. Several states, however, have enacted statutes governing an arbitration demand. New York's procedural rules require that a demand for arbitration or a notice of intention to arbitrate must:

> specify[] the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stat[e] that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time.

N.Y. Civ. Prac. L.R. § 7503(c). New York law also requires that a demand for arbitration or notice of intention to arbitrate be served "in the same manner as a summons or by registered or certified mail, return receipt requested." *Id.*

In addition to checking the procedural rules in effect in the jurisdiction where the arbitration will take place, a party seeking to commence an arbitration should review the arbitration clause itself to determine whether a certain form of notice or method of service is required. For example, an arbitration clause may require that the notice advise the respondent to designate an arbitrator within a specified period. In the absence of a contractual or statutory provision prescribing a method of service, a claimant may need to serve the arbitration demand through delivery to the reinsurance intermediary. This means is particularly useful for cedents seeking arbitration against numerous participating reinsurers because it avoids the burden and expense of personally serving each reinsurer.

D. The Arbitration Panel

The typical arbitration clause will contain a provision detailing how the arbitrators will be selected. A common formulation is for each side to designate its own party arbitrator and for the two arbitrators to then appoint a third, neutral arbitrator or umpire. Other clauses provide that the umpire be drawn by lots from a slate of candidates proposed by the parties or their respective arbitrators. Under § 5 of the Federal Arbitration Act, a district court is obligated to honor contractual provision regarding the selection of arbitrators. *See ATSA of California, Inc. v. Continental Ins. Co.*, 702 F.2d 172 (9th Cir. 1983), *amended*, 754 F.2d 1394 (9th Cir. 1985).

At least one court has sustained a challenge to a selection by lots provision in an arbitration clause on the theory that "the procedure for the appointment of the arbitrator should be a matter of choice, not chance." *Midland Ins. Co. v. Calvert Fire Ins. Co.*, No. 80 Civ. 1112 (DES) (S.D.N.Y. July 22, 1990) (invalidating portion of arbitration clause that provided for choosing umpire by lots and holding that court would appoint umpire pursuant to 9 U.S.C. § 5). Other courts, however, have found such provisions to be valid and enforceable. *See Pacific Reins. Management Corp. v. Ohio Reins. Corp.*, 814 F.2d 1324, 1326 n. 1 (9th Cir. 1987) ("Despite its random nature, there is nothing inherently improper with [a] lot drawing procedure."). *See also Action Corp. v. Borden, Inc.*, 670 F.2d 377, 378 n.1 (1st Cir. 1982); *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1207 n.2 (6th Cir. 1982). If an arbitration clause does not describe how the arbitrators should be selected, a court is authorized to appoint arbitrators and umpires under 9

U.S.C. § 5 when the parties reach an impasse. *See, e.g., Pacific Reins. Management Corp. v. Ohio Reins. Corp.,* 814 F.2d 1324 (9th Cir. 1987).

Arbitration clauses often require the respondent to designate an arbitrator within a specific amount of time. Some courts have strictly enforced these time limits. *Universal Reinsurance Corp. v. Allstate Insurance Co.,* 16 F.3d 125 (7th Cir. 1994). Other courts, however, have been reluctant to find that a party has forfeited its opportunity to choose an arbitrator. *Compania Portorafti Commerciale, S.A. v. Kaiser Int'l Corp.,* 616 F. Supp. 236, 238 (S.D.N.Y. 1985).

E. Arbitrator Qualifications

Arbitration clauses in reinsurance contracts often set forth objective qualifications for party-appointed arbitrators. Many arbitration clauses mandate that arbitrators must be present or former officers or directors of insurance or reinsurance companies. Courts may disqualify arbitrators who do not meet the agreed upon qualifications. *See Employers Ins. of Wausau v. Jackson*, 178 Wis. 2d 755, 505 N.W.2d 147 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 597, 527 N.W.2d 681 (1995) (arbitrator disqualified because he was not executive officer of insurance company as required by contract). Moreover, an award is subject to challenge if an arbitrator exhibits "evident partiality or corruption." 9 U.S.C. § 10. *See also* Del. Code Ann. Titl. 10 § 5714(a)(2) (providing for an award to be vacated based on "corruption in any of the arbitrators or misconduct prejudicing the rights of any party"). However, most courts hold that a challenge to an arbitrator designation under § 10 of the FAA cannot be made until after an award has been issued. *See Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) (the FAA "does not provide for pre-award removal of an arbitrator"); *Folse v. Richard Wolfe Med. Instruments Corp.*, 56 F.3d 603, 605 (5th Cir. 1995) ("By its own terms, § authorizes court action only after a final award is made by the arbitrator.").

Arbitrators are generally required to disclose to the parties all information that might bear on the issue of bias or partiality. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), a plurality of the Supreme Court held that an arbitrator must "disclose to the parties any dealings that might create an impression of possible bias." 393 U.S. at 149.

This issue of bias is typically analyzed by courts differently depending upon whether the arbitrator is party-appointed or a neutral. Unless an arbitration clause specifically requires that all of the arbitrators be neutral, it is normally anticipated that the party-appointed arbitrator will be predisposed to the positions of the party that appointed him or her. In contrast, court's view the role of a neutral as more analogous to that of a judge. *See Lozano v. Maryland Cas. Co.*, 850 F.2d 1470, 1472 (11th Cir. 1988) ("An arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial."), *cert. denied*, 489 U.S. 1018 (1989); *In re Certain Underwriters at Lloyd's v. Continental Cas. Co.*, No. 97 C 3638, slip. Op. (N.D. Ill. August 7, 1997) (holding "party-nominated arbitrators may be more partial than umpire arbitrators"); *Cia de Navegacion Omsil, S.A. v. Hugo Neu Corp.*, 359 F. Supp. 898, 899 (S.D.N.Y. 1973) ("As everyone knows, the party's named arbitrator in this type of tribunal is an amalgam of judge and advocate").

The distinction between an acceptable bias exhibited by a party arbitrator and evident partiality or corruption was described by the New York Court of Appeals in *Astoria Medical Group v. Health Insurance Plan of Greater New York*, *supra*, 11 N.Y.2d at 137, 182 N.E.2d at 89, 227 N.Y.S.2d at 407, as follows:

> Partisan he may be, but not dishonest. Like all arbitrators, the arbitrator selected by a party must (unless the requirement is waived) take the prescribed oath that he will "faithfully and fairly . . . hear and examine the matters in controversy and . . . make a just award according to the best of [his] understanding." And, if ether one of the party-appointed arbitrators fails to act in accordance with such oath, the wards may be attached on the ground that it is the product of "evident partiality or corruption." Such an attack, however, must be based on something overt, some misconduct on the part of an arbitrator, and not simply on his interest in the subject matter of the controversy or his relationship to the party who selected him.

(citation omitted).

F. *Ex Parte* Communications with Arbitrators

(1) Pre-Designation Contacts

Parties to an arbitration often meet with a potential party-arbitrator candidate before making a designation. The law is unsettled as to the extent to which such contacts affect the integrity of the arbitration process.

In *Employers Insurance of Wausau v. National Union Fire Insurance Co. of Pittsburgh*, 933 F.2d 1481 (9th Cir. 1991), the Ninth Circuit denied National Union's motion to set aside the arbitration award, holding:

> Nothing in the record indicates that [the challenged arbitrator] came to the arbitration hearings with a closed mind or a predilection to rule for Wausau. [He] thus approached the litigation, not as a predisposed partisan, but rather as an expert knowledgeable in the area.

933 F.2d at 1490.

In *Metropolitan Property & Casualty Insurance Co. v. J.C. Penney Casualty Insurance Co,* 780 F. Supp. 885 (D. Conn. 1991), the court held that disqualification based upon pre-designation contacts was warranted because such contacts:

> Call[] into question [the arbitrator's] ability to carry out his oath and ethical obligations as an arbitrator. [His] *ex parte* meetings with Penney at its Dallas headquarters to discuss the merits of Penney's defenses and to

> examine potential documentary evidence in the case prior to his selection as a member of the panel, as well as his efforts to discuss the case with the other appointed arbitrator prior to the selection of the third arbitrator, could be interpreted as inconsistent with the Code of Ethics and his duty to treat the parties fairly at all stages of the proceedings, exercise independent judgment throughout, and remain free form outside pressures.

780 F. Supp. at 893.

(2) Post-Designation Contacts

It is generally up to the parties and the arbitrators whether to permit ex parte contacts between parties and their designated arbitrators after the panel is in place. Although often such contacts are permitted for some period of time, most often they are cut off either once discovery is over or once the evidentiary hearing begins. Any *ex parte* communication during deliberations would be considered by most courts to be entirely improper. *Totem Marine Tug & Barge, Inc. v. North American Towing Inc.,* 907 F.2d 649, 653. (5th Cir. 1979) ("the *ex parte* receipt of evidence… constituted misbehavior by the arbitrators prejudicial to [party's] rights…").

G. Discovery in Arbitration

Whether, and to what extent, discovery is permitted in an arbitration is entirely with the discretion of the arbitration panel. *See 4 Moore's Federal Practice & Procedure* 26.51 (1993). As the Fourth Circuit has explained in *Burton v. Bush,* 614 F.2d 389 (4th Cir. 1980):

> When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with formal trial. One of these accoutrements is the right to pre-trail discovery.

614 F.2d at 390. *See also Foremost Yarn Mills, Inc. v. Rose Mills, Inc.,* 25 F.R.D. 9,11 (E.D. Pa. 1960) (discovery pursuant to Federal Rules of Civil Procedure not applicable to arbitrations).

In most instances, arbitrators tend to permit limited discovery. *Stanton v. Paine Webber Jackson & Curtis, Inc.,* 685 F. Supp. 1241, 1242 (S. D. Fla. 1988) (" arbitrators may order and conduct such discovery as they find necessary'); *Corcoran v. Shearson/American Express, Inc* , 596 F. Supp. 1113, 1117 (N.D. Ga. 1984); *Balfour, Guthrie Co. v. Commercial Metals Co.,* 607 P.2d 856, 858 (Wash. 1980) ("the arbitrators are the ones who should determined the nature and scope of the whole gamut of discovery"); *Mississippi Power Co. v. Peabody Coal Co.,* 69 F.R.D. 558 (S.D. Miss. 1976). Where necessary, arbitrators may even issue subpoenas to compel non-party witnesses to attend pre-hearing depositions. *Stanton v. Paine Webber Jackson & Curtis, supra,* 685 F. Supp. at 1242. In *Meadows Indemnity Co v. Nutmeg Insurance Co.,* 157 F.D.R. 42 (M.D. Tenn. 1993), the court held that an arbitrator's power to order the appearance of a witness with

documents included the power to order the production of documents with out requiring the appearance of the witness.

H. Summary Disposition

At least one court has determined that arbitrators may render decisions on documentary evidence alone, without hearing live testimony. *See InterCarbon Bermuda, Ltd. v. Caltex Trading & Transp. Corp.,* 146 F.D.R. 64 (S.D.N.Y. 1993). In *InterCarbon* the court rejected a party's attempt to vacate an adverse award decided without an evidentiary hearing, stating that:

> "Misconduct" within the meaning of Section 10 will not be found unless the aggrieved party was denied a "fundamentally fair hearing."…Like Rule 56 [of the Federal Rules of Civil Procedure] which precludes summary judgment if there is a "genuine issue as to any material fact," Section 10 requires an arbitrator to hear evidence that is "pertinent and material." Although the exact standards for a Rule 56 determination do not apply here, the propriety of the arbitrator's action does depend on the same underlying concern: the extent to which issues of fact were in dispute, so that a fuller hearing-including live testimony-would be required to reach a just decision… The Court is mindful of the factors weighing against the arbitrator's decision to render judgment on the documentary evidence alone: the importance of hearings to most arbitration proceedings; the weakness of affidavits as bases for summary determinations; and the repeated desire of InterCarbon to present live testimony. Despite these considerations the arbitrator's decision is reasonable and does not amount to misconduct.

146 F.R.D. at 72-74

I. The Award

Unless the parties specifically require in the arbitration clause that the panel issue a reasoned award, the panel need provide in the award any supporting discussion or rationale. *New York Stock Exchange Arbitration between Fahnestock & Co., Inc. v. Waltman,* 935 F.2d 512, 516 (2d Cir.) *cert. Denied,* 502 U.S. 942 (1991) ("[I]t is axiomatic that arbitrators need not disclose the rationale for their award"); *see also United Steelworkers of Am. v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 598, (1960). Whether an arbitration award may include punitive damages depends upon governing procedural law (absent specific language in the arbitration clause addressing punitive damages). When the federal arbitration statute applies, arbitrators may award punitive damages, even when the contract itself is governed by state law which prohibits punitive damages in arbitrations. *See Mastrobouno v. Shearson Lehman Hutton, Inc.,* 115 S. Ct. 1212 (1995); *Lee v. Chica,* 983 F.2d 883 (8th Cir.), *cert. denied,* 114 S. Ct. 287 (1993); *Todd Shipyards Corp v. Cunard Line,* 943 F.2d 1056 (9th Cir. 1991); *Raytheon CO. v. Automated Business Sys.,* 882 F.2d 6 (1st Cir. 1988). Otherwise, a court must defer to state law on the issue of whether punitive

damages are permissible. *New York Stock Exchange Arbitration Between Fahnestock & CO. v. Waltman,* 935 F.2d at 518 (2d Cir.)

J. Consolidation of Arbitration Proceedings

A majority of federal courts hold that parties cannot be compelled to arbitrate in a single, consolidated proceedings disputes arising under separate contracts with separate arbitration clauses. *Government of U.K. of Gr. Brit. v. Boeing Co.,* 998 F.2d 68 (2d Cir. 1993); *American Centennial Ins. Co. v National Casualty Co.,* 900 F.2d 1193 (8th Cir. 1990); *Protective Life Ins. Corp v. Lincoln Nat'l Life Ins. Corp.,* 873 F.2d 281 (11th Cir. 1989). *Accord Weyerhauser Co. v. Western Seas Shipping Co.,* 743 F.2d 635 (9th Cir.), *cert. denied,* 469 U.S. 1061 (1984); *PaineWebber, Inc. v. Fowler,* 791 F. Supp. 821 823 F. 2 (D. Kansas 1992); *Del E. Webb Constr. v. Richardson Hosp. Auth., Dailey & Co.,* Civ. A. Nos. 88-2060, 88-8062 (E.D. Pa. 1989); *Ore & Chem. Corp v. Stinnes Interoil, Inc.,* 606 F. Supp. 1510, 1515-16 (S.D.N.Y. 1985).

Some state courts have allowed consolidation of arbitrations in the absence of the parties' agreement. *See. E.g., Polaza Dev. Services v. Joe Harden Builder Inc.,* 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); *Exber, Inc. v Sletten Constr. Co.,* 92 Nev. 721, 558 P.2d 517 (1976); *Slutsky-Pletz Plumbing & heating, Co. v. Vincennes Community School Corp.,* 556 N.E. 2d 344 (Ind. Ct. App. 1990). In New York, courts will consolidate proceedings where the arbitrations share common questions of law and fact and where no party will be prejudiced by the consolidation. *Vigo Steamship Corp. v. Marship Corp.,* 26 N.Y.2d 157, 161-62, 257 N.E.2d 624 625-26, 309 N.Y.S.2d 165,167-68, *cert. denied sub nom. Federick Snare Corp. v. Vigo Steamship Corp.,* 400 U.S. 819 (1970). It remains to be determined whether *Vigo Steamship* is still good law with respect to arbitrations governed by the Federal Arbitration Act after *Government of the United Kingdom of Great Britain v. Boeing Co.,* 998 F.2d 68 (2d Cir. 1993) and *Mastrobouno v. Shearson Lehman Hutton, supra,* 175 S. Ct. 1212.

K. Enforcement of the Award

(a) Motion to Confirm

Federal courts have the authority to confirm arbitration awards under Section 9 of the Federal Arbitration Act. 9 U.S.C. § 9 ("…application [for confirmation] may be made to the United States court in and for the district within which such award was made"). State courts also have authority under analogous state statutes to confirm arbitral awards. *See, e.g.,* N.Y. Civ. Prac. L.R. §7510 ("the court shall confirm an award upon application of a party made within one year after its delivery to him…").

The confirmation of an arbitration award is a summary proceeding. *See United States Steel & Carnegie Pension Fund. v. Dickinson,* 753 F.2d 250, 252-53 (2d Cir. 198/5) (standard of review under Federal Arbitration Act is extremely narrow.); *American Nursing Home v. Service Employees Int'l Union, Local 144,* No. 89 Civ. 1904 (S.D.N.Y. Mar. 4, 1992) ("Absent a statutory

basis for modifying or vacating an award, a district court must summarily confirm an arbitrator's decision.")

(b) Motion to Vacate Arbitration Award

The bases upon which a party may obtain an order vacating an award are extremely narrow. *See Transit Cas. Co. v. Trenwick Reins. Co., supra,* 659 F. Supp. at 1351 (in insurance dispute "[e]xceptions to confirmation are strictly limited so as not to frustrate the basic purpose of arbitration to dispose of disputes quickly and to avoid the expense and delay of protracted court proceedings"); *Diapulse Corp. of Am. v. Carba, Ltd.,* 626 F.2d 1108, 1110 (2d Cir. 1980). Under Section 10 of the Federal Arbitration Act, a court may vacate an award:

> (1) Where the award was procured partially or corruption, fraud or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, or in refusing to hear evidence pertinent and material to the controversy, or any misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

9 U.S.C. § 10(a) (1990). The burden rests on the party seeking to vacate the award. *Transit Cas. Co. v. Trenwick Reins. Co.,* 659 F. Supp. 1346, 1351 (S.D.N.Y. 1987), *aff'd mem.,* 841 F.2d 1117 (2d Cr. 1998).

As the Supreme Court explained in *United Paperworkers International Union v. Misco, Inc.,* 484 U.S. 29, 38 (1987):

> [a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

The stringent standard for vacating awards is a necessary to promote the strong federal policy favoring arbitration. As the Fourth Circuit has noted, "[a] policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation." *Remney v. PaineWebber, Inc.,* 32 F.3d 143, 146 (4th Cir. 1994).

In addition to the grounds set forth in Section 10 of the Federal Arbitration Act, some courts have held that an arbitration award may be vacated if the court finds the arbitrators guilty of "manifest disregard" of the law. *Drayer v. Krasner,* 572 F.2d 348, 352 (2d Cir.), *cert. denied,* 436 U.S. 948 (1978); *Sperry Int'l Trade v. Government of Israel,* 689 F.2d 301, 305 (2d Cir. 1982); *Swift Indus., Inc. v. Botany Indus., Inc.,* 466 F.2d 1125 (3d Cir. 1972); *Todd Shipyards Corp. v. Cunard Line, supra,* 943 F.2d at 1060; *Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co.,* 44 F.3d 826, 832 (9th Cir. 1995) (recognizing the "manifest disregard of the law" standard but requiring that "[i]t must be clear from the record that the arbitrators recognized the applicable law and then ignored it"). Other courts have rejected the "manifest disregard of the law" standard as "reflect[ing] precisely that mistrust of arbitration…which the [United States Supreme] Court [has] criticized." *Baravati v. Josephthal, Lyon & Ross, Inc.,* 28 F.3d 704, 706 (7th Cir. 1994). *See Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 903 F.2d 1410, 1413 (11th Cir. 1990) (declining to adopt "manifest disregard of the law" standard); *Robbins v. Day,* 954 F.2d 679, 684 (11th Cir.), *cert. denied sub nom. Robbins v. PaineWebber, Inc.,* 113 S. Ct. 201 (1992) (same).

L. Preclusive Effect of an Arbitration Award

(a) Applicability of Res Judicata and Collateral Estoppel

Courts have uniformly held that the doctrines of *res judicata* and collateral estoppel apply to arbitration awards to bar subsequent consideration of previously considered claims and issues. *See, e.g., Dean Witter Reynolds v. Byrd,* 470 U.S. 213 (1985); *Clark v. Bear Stearns & Co.,* 966 F.2d 1318 (9th Cir. 1992); *Benjamin v. Traffic Executive Ass'n Eastern Railroads,* 869 F.2d 107 (2d Cir. 1989); *American Ins. Co. v. Messinger,* 43 N.Y.2d 184 (1977).

Courts typically apply *res judicata* or collateral estoppel to arbitration awards without discussing whether confirmation was essential to the outcome. *See, e.g., Schweitzer Aircraft Corp. v. Local 1752, Int'l Union, United Auto. Aerospace & Agricultural Implement Workers of Amer.,* 29 F.3d 83, 87 (2d Cir. 1994); *Universal Am. Barge Corp. v. J-Chem., Inc.,* 946 F.2d 1131, 1136 (5th Cir. 1991); *Khandhar v. Elfenbein,* 943 F.2d 244 (2d Cir. 1991); *Benjamin v. Traffic Exec. Ass'n Eastern Railroads,* 869 F.2d 107 (2d Cir. 1989); *Pujol v. Shearson/American Express, Inc.,* 829 F.2d 1201, 1206 (1st Cir. 1987); *Henry v. Farmer City State Bank,* 808 F.2d 1228, 1233-34 (7th Cir. 1986); *Greenblatt v. Drexel Burnham Lambert, Inc.,* 763 F.2d 1352, 1360 (11th Cir. 1985); *Blumberg v. Berland,* 678 F.2d 1068, 1070 (11th Cir. 1982).

A number of these cases contain language which can reasonably be read as not requiring confirmation of an award. *See, e.g., American Renaissance Lines v. Saxis S.S. Co., supra,* 502 F.2d at 678 (2d Cir. 1974) ("Ordinarily '[a] decision by arbitrators is as binding and conclusive…as the judgment of a court…'") (citation omitted); *Bismarck v. Toltz, King, Duvall, Anderson & Associates, Inc.,* 855 F.2d 580, 582-84 (8th Cir. 1988) (granting collateral estoppel effect to unconfirmed arbitration award); *Borches v. DBL Liquidating Trust,* 161 B.R. 902, 907 (S.D.N.Y. 1993) ("[I]f the other elements of collateral estoppel are met, the doctrine of collateral estoppel could be applied to the arbitration award, notwithstanding the fact that it is unconfirmed."); *Hana Heating & Air*

Conditioning Co. v. Sheet Metal Workers Int'l Ass'n, 378 F. Supp. 1001 (S.D.N.Y. 1974) (arbitration award was *res judicata* where no judicial action was taken against award).

These decisions are consistent with section 84 of the Restatement (Second) Judgments, which provides in pertinent part:

> (1) Except as stated in [subsections not relevant here], a valid and final award by arbitration has the same effect under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

See also 18 C. Wright, A. Miller and E. Cooper, FEDERAL PRACTICE AND PROCEDURE, § 4475 (1981) (discussing preclusive effect of administrative and arbitration proceedings).

(b) Deciding the Preclusive Effect of an Award or Judgment in a Subsequent Arbitration

Often, the issue of the preclusive effect of an award or judgment arises in the context of a subsequent arbitration under the same or similar contract. In those circumstances, a procedural question arises as to who decides the preclusion issue: a court or the panel in the subsequent arbitration. The federal circuit courts are divided on this procedural issue. Five circuits have held that the preclusive effect is for a court to decide because the issue addresses whether a dispute exists to refer to arbitration in the first instance. *See Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 985 F.2d 1067, 1069 (11th Cir.), *cert. denied*, 114 S. Ct. 600 (1993) ("We think the better rule is that courts can decide res judicata. Courts should not have to stand by while parties re-assert claims that have already been resolved."); *In re Y & A Group Secur. Litig.,* 38 F.3d 380, 382 (8th Cir. 1994) (same); *Miller Brewing Co. v. Ft. Worth Distrib. Co.,* 781 F.2d 494, 499 (5th Cir. 1986); *Telephone Workers Union v. N.J. Bell Tel. Co.,* 584 F.2d 31, 33 (3rd Cir. 1978); *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Café,* 566 F.2d 861, 862 (2d Cir. 1977) (an "adjudication of the merits may affect any decision to compel arbitration"); *Fremont Cake & Meal Co. v. Wilson & Co.,* 183 F.2d 57., 59 (8th Cir. 1950) ("The controversy itself having been adjudicated, the proceeding to determine the procedure came too late as there was no controversy to arbitrate").

In contrast, four circuits have determined that defenses based upon *res judicata* and collateral estoppel, like defenses such as laches and waiver, should be referred to the arbitrators. *National Union Fire Ins. Co. v. Belco Petroleum Corp.,* 88 F.3d 129 (2d Cir. 1996) ("the arbitration provision…is sufficiently broad to encompass disputes about what was decided in a prior arbitration."); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.,* 860 F.2d 1420, 1424 (7th Cir. 1988) ("Procedural issues, including the…*res judicata* effect of a prior arbitration award and the timeliness of filing a grievance, are for the arbitrator, so long as the subject matter of the dispute is within the arbitration clause"); *Local Union No. 370 of Int'l Union of Operating Engineers v. Morrison-Knudson,* 786 F.2d 1356, 1358 (9th Cir. 1986) ("matters that are 'extrinsic' to the process of interpreting the collective bargaining agreement, such as defenses of collateral estoppel and equitable estoppel, are subject to arbitration"); *Little Six Corp. v. United Mine*

Workers Local Union No. 8332, 701 F.2d 26, 29 (4th Cir. 1983) ("the district court correctly decided that the question of the preclusive effect of the 1980 arbitration award is itself arbitrable").

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