Alternative Dispute Resolution in Contractual Matters

Langdon T. Owen, Jr.[1]
Cohne Kinghorn, pc
(801) 363-4300
lowen@cohnekinghorn.com

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lowen@cohnekinghorn.com

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Alternatives to court litigation have a significant place in a contractual relationship. These alternatives are sometimes grouped under the term "Alternative Dispute Resolution" or "ADR." ADR techniques may be used in any contractual context from small consumer matters to large scale commercial agreements. The methods of ADR range from variations on a negotiated resolution to an alternative to court if no negotiated resolution occurs. The hope is that a process designed to facilitate negotiation will result in a flexible agreed resolution where all major interests are taken into account at an acceptable level (a win-win solution) or, failing this, that a process to have a resolution imposed by an outside authority other than a public court will prove quicker, cheaper, and, with expert decision makers and more flexible authority, perhaps better, than a resolution imposed by a court. Let's review some selected issues involving ADR in matters involving contracts, including those relating to goods, services, or real property sales or leases. The resolution of contract and other state law issues will vary state by state; for purposes of this outline we mostly will use Utah law as an example of how state law may affect ADR.

1. **Types of ADR**. There are a number of techniques which may provide (nonviolent) alternatives to litigation, such as:

a. Negotiation: discussions designed to lead to an agreement among the affected parties. Negotiation may be as informal or as formal as the parties desire. It may be conducted through the traditional model where counsel for each party remains free to litigate the case if a negotiated resolution fails, or it may be conducted through a voluntary "collaborative law" model of the sort pioneered in family law cases (discussed below). Mediation (discussed further below) is also a version of negotiation.

b. Colaborative Law: the clients agree to a collaborative law process of negotiation and counsel at the outset of the negotiation agree (with informed client consent) not to participate in the litigation or other dispute resolution process (generally excepting mediation, which is itself a variation on negotiation) if the negotiation fails to resolve the matter. A collaborative law process may be used in any kind of proceeding, including those in court or in arbitration, and is not limited to family law matters. If the matter is pending before a tribunal, a notice of the collaborative law agreement needs to

be filed with the tribunal. The tribunal involved may grant stays, require reports of progress, and issue emergency orders.

c. Mediation: using a third-party neutral to help the affected parties negotiate an agreement, often through a firm of "shuttle diplomacy" where the parties are segregated in separate rooms in order to cool the emotional temperature. Mediation typically does not involve the mediator in providing an evaluation of the overall merits of the parties' positions, although the mediator may well suggest strengths and weaknesses to a party as part of a private caucus with that party. Mediation is sometimes referred to as "conciliation." It may involve a full settlement agreement, a partial agreement, or just getting the parties to come to the negotiating table. A variation is the judicial settlement conference offered by the American Arbitration Association where former judges provide substantial feedback on the merits of the parties' positions as part of a mediation process. See www.JudicialSettlement.com. Mediation can be on specific issues rather than the entire dispute. For example, mediation can be used to help comply with meet and confer rules relating to litigation discovery, particularly in large cases with many electronic records in different formats.

d. Early neutral evaluation: using a third-party neutral to provide the parties with an independent evaluation of their positions, sometimes after a nonbinding hearing and sometimes using a straw panel of jurors, with the hope of narrowing the distance between the positions of the parties so that a negotiated agreement may be reached. Various forms of early neutral evaluation go by such names as "independent evaluation," "nonbinding arbitration," "summary jury trial," and so on, but all share the feature of providing to all parties a nonbinding evaluation of the merits of the parties' positions.

e. Facilitation: A pilot project in Utah's West Valley City Justice Court provides for required online dispute resolution (ODR) of small claims cases (unless a party is exempted for undue hardship) using a facilitator. Ut. S. Ct. Standing Rule 13, effective 9/19/2017. The facilitator guides the parties through the process and assists them in reaching a settlement, and it provides information regarding procedure. If the case does not settle, the facilitator provides the court with a description of the issues and other relevant information. The facilitator may require parties to provide information to each other not to be disclosed beyond the facilitation phase without the consent of the providing party.

f. Arbitration: using a panel of one or more neutral persons to impose a binding decision on the parties, usually after a hearing, which decision will be enforceable by a court. As a creature of contract, arbitration can be very flexible. There are a number of variations to arbitration, such as:

i. In some, usually smaller, cases, decisions may be based on written submissions without an in-person evidentiary hearing.

ii. Arbitrators who are neutral may be appointed by the parties, or they may be selected by a procedure under the rules of an arbitration administrative body, usually by striking persons from a list of panel members supplied by the administrator, or some arbitrators who are nonneutral may be appointed by the parties, and those arbitrators (or an administrative body) name one or more neutrals to the arbitration panel. If nonneutral arbitrators are part of the panel, their duties are somewhat different from those of the neutral members of the panel (see *Westgate Resorts, Ltd. v. Adel*, 289 P.3d 420 (Ut. 2012) (different duties of disclosure; non-neutrality determined at time of appointment).

iii. The scope of arbitration may be broad, such as any dispute among the parties, or narrow, such as determination of fair market rent for a continued lease term. Appraisal provisions in closely held company buy-sell agreements or in property insurance contracts are a form of quite limited arbitration. In another narrow type of arbitration, the arbitrator may be required to only choose between the last offers of the parties from a negotiation or a mediation.

iv. Procedures may be specifically negotiated by the parties or, much more commonly, the rules of an administrative body may be selected. Occasionally, such rules of a body are selected (with some adjustment) even where the body itself will not act as administrator. Sometimes specific processes or issues are negotiated while the rest are left to a chosen set of rules. Some areas regularly negotiated include the qualifications of the arbitrators, discovery issues (broader or narrower, ability to take depositions, etc.), place of arbitration, the form of decision (simple award, reasoned award, findings of fact and conclusions of law), sharing of costs, etc.

v. The agreement to arbitrate may be conditioned on an earlier or concurrent mediation process. Occasionally, as part of a mediation-arbitration process, the agreement will provide that the arbitrator must decide the issues left unagreed through the mediation but limit the award to the last offer of the parties in the mediation.

vi. The agreement to arbitrate may be entered into before there is a dispute, for example, as part of the originally executed lease agreement, or may be entered into after the dispute has arisen.

vii. In some very large construction projects the parties agree to a dispute resolution (or review) board which handles disputes as and when they arise and visits the job site as needed. They have been used, for example, in large transportation projects in Colorado, Idaho, California, Boston and elsewhere. Florida has set them up on a regional basis for cost savings. Michael T. Kamprath, The Use of Dispute Resolution Boards for Construction Contracts, The Urban Lawyer, Vol. 46, No.4, p. 807, Fall 2014.

2. Applicable Rules of Law. The law relating to the various forms of ADR is largely general contract law, but subject to federal and state statutes and to the case law

interpreting and applying those statutes. The legal rules largely are generally favorable (or at least not unfavorable compared to rules applicable to any other contract provision) to the use of various forms of ADR. *Giannopulos v. Pappas*, 15 P.2d 353, 356 (Utah 1932) ("..arbitration is favored in the law as a speedy and inexpensive method of adjudicating differences..")

The U. S. Arbitration Act, known as the Federal Arbitration Act ("FAA") applies to matters affecting interstate commerce. 9 USC § 1, *et seq.* (The parties, however, could agree that state law governs.) Where it applies, the FAA preempts certain state law rules, including court made law. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (state actions having a "disproportionate impact" (no longer intentional discrimination against) on arbitration agreements are preempted under Section 2 of the FAA); *Kindred Nursing Centers L.P. v. Clark*, 137 S. Ct. 1421 (2017) (overturns a state supreme court ruling that a power of attorney must specifically grant authority to enter into an arbitration agreement where such requirement was not applicable to contracts generally).

If there is an agreement dealing with both mediation and arbitration (*e.g.*, mediation is a condition to arbitration), a number of cases have found the FAA to apply to both the mediation and arbitration provisions, and some may apply the FAA to mediation alone. See, *American Tech. Serv., Inc. v. Universal Travel Plan, Inc*., 2005 WL2218437 (E.D. Va. 2005). On the other hand, some courts find that arbitration is covered but mediation is not arbitration and thus is not covered. See, *Advanced Bodycare Solutions, LLC v. Thione International, Inc*., 524 F.3d 1235 (11th Cir. 2008).

For international transactions, the U.S. is a signatory to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the "New York Convention"), June 10, 1958, 21 U.S.T. 2517. Chapter 2 of the FAA gives effect to the New York Convention. 9 USC §§201-208. (We will not deal further here with international arbitration.)

Utah has adopted a version of the Uniform Arbitration Act (UCA § 78B-11-101 *et seq* .) and has had a version of it since at least 1927, and some form of arbitration act since at least 1907; see *Bivans v. Utah Lake Land, Water & Power Co*., 174 P. 1126 (1918). Utah also has adopted a version of the Uniform Mediation Act (UCA § 78B-10-101 *et seq.*), an Alternative Dispute Resolution Act (UCA § 78B-6-201 *et seq.*), and a version of the Uniform Collaborative Law Act (UCA § 78B-19-101 *et seq*., which applies to proceedings before tribunals including courts, administrative agency proceedings, and arbitrations, and provides some duties on counsel with respect to ensuring the appropriateness of the process (see UCA §§ 78B-19-110 through 112)).

The parties may desire to specify the arbitration law to apply (in addition to the substantive law) because there are some differences between the FAA and state arbitration laws, for example, on third-party discovery, unique provisions of state laws

(California has some special rules, e.g.), consolidation, interim remedies availability, and disclosure.

Utah has a special opt-in arbitration scheme for personal injuries arising from motor vehicle accidents. UCA § 31A-22-321. It combines certain court procedures with arbitration on a fast track basis with a damage cap of $50,000. The election is filed with the court, and discovery and certain other matters are governed by the Utah Rules of Civil Procedure and the court is not divested of jurisdiction, but in other ways the Utah Arbitration Act applies. Discovery must be completed within 150 days after the date arbitration is elected or the date the answer is filed, whichever is longer. Rescission of the election to arbitrate must be made if at all within 90 days after the election to arbitrate and no less than 30 days before any scheduled arbitration hearing; this period is not avoided by subsequent amendments to the claims raised. *Zeller v. Nixon*, 355 P.3d 991 (Ut. 2015) (amendment to complaint for a neurosurgical procedure after the 90 days did not change the election to arbitrate subject to the damage cap). The election may cover all claims, but it is not required to cover all potential defendants in one proceeding. *Zeller v. Nixon*, *op. cit*.

Pursuant to the ADR Act, the Judicial Council has promulgated rules relating to court- annexed ADR programs. See Rule 4-510, in Part I of the Utah Code of Judicial Administration, the Utah Rules of Court-Annexed Alternative Dispute Resolution adopted by the Utah Supreme Court, and Ut. Rul. App. Proc. 28A.

For lawyers acting as neutral mediators or arbitrators, Rule 2.4 of the Ut. Ruls. Prof. Cond. applies, allows service as a third party neutral as an arbitrator, mediator, or in a similar capacity, and, among other things, requires that the lawyer inform unrepresented persons that he or she does not represent them. A mediator may under the rule assist in memorializing an agreement arising from the mediation in certain circumstances, including advising the parties to seek independent legal advice.

Some areas of interest in ADR proceedings include:

a. Required Writing. Normally, agreements to arbitrate must be in writing (see UCA § 78B-11-107(1) (requires a "record")), but in some cases, part performance of an oral agreement may make the oral agreement enforceable if the part performance is done in reliance on the oral agreement and the agreement and the part performance are sufficiently clear and definite. *Jenkins v. Percival*, 962 P.2d 796 (Utah 1998). Agreements to mediate also need to be written. *Reese v. Tingey Constr.*, 177 P.3d 605 (Utah 2008). Collaborative law agreements need to be in a signed record, including written or electronic media. UCA §§ 78B-19-104 and 78-19-102(12) and (14). Although generally a creature of contract, in Utah an arbitration provision in a will, trust, or power of attorney can validly require arbitration among beneficiaries and fiduciaries. UCA § 75-1-312.

A typical simple pre-dispute arbitration provision in an agreement would be:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the arbitration law of the State of ____ in [city, state], administered by the American Arbitration Association under its Commercial Arbitration Rules (except as to obtaining testimony and documents from nonparties which shall be governed by the Federal Arbitration Act), and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

b. Modification of Agreement to Arbitrate. The court of appeals concluded that a written arbitration agreement may be implicitly modified merely by the parties' actions in bringing evidence of matters outside the scope of the agreement, but the Utah Supreme Court disagreed. *Pacific Development, L.C. v. Orton*, 23 P.3d 1035, 1040 (Ut. 2001) ("…because the authority of the arbitrator derives from the arbitration agreement itself, see *Buzas Baseball*, 925 P.2d at 949, it follows that the scope of an agreement to arbitrate cannot be modified except by proper concurrence of the parties to the arbitration.")

c. Enforcing Mediation or Collaboration. What if an order to mediate is issued by the court but the mediation is unsuccessful or does not occur? The court could award the costs of mediation to the prevailing party in the case. See *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508 (Ut. App. 1999) (award of mediation fees to personal injury plaintiff as costs did not abuse court's discretion); *In re A.T. Reynolds & Sons*, 424 B.R. 76 (Bankr. S.D.N.Y. 2010) (mere presence not sufficient for good faith participation in court ordered mediation; fees and costs imposed as sanction for civil contempt), *rev'd by* 452 B.R. 374 (S.D.N.Y. 2011) (may enter mediation with position not to make settlement offer). Query: are contempt powers applicable where a party refuses to mediate despite a court order to participate? Should they be? Can, or should, a court try to force one to do a voluntary thing? How far can or should a court go? See Fed. Rul. Civ. Proc. 16. See also, Neutral to Take "Mediation Gone Wild" on Tour, *Daily Journal Newswire*, August 29, 2008, http://www.dailyjournal.com. The process termination provisions as to collaborative law agreements in UCA § 78B-19-105 make termination easily available at the option of a party and specifically precludes a tribunal from ordering participation over the objection of a party. The disqualification of counsel remains enforceable, however, despite termination of the process. See UCA § 78B-19-114(2)(b).

d. Settlement Agreements. The purpose of various forms of negotiation, mediation, and collaborative law is to reach an enforceable settlement agreement. Such agreements may need to be in writing but exceptions to the statute of frauds may apply. See UCA § 78B-19-114(2)(a) (enforcement of recorded agreements from collaborative law process). The principles relating to the enforceability of settlement agreements in Utah has been summarized by the court in *LD III, LLC v. BBRD, LC*, 221 P.3d 867 (Ut. App. 2009) as follows:

> "The decision of a trial court to summarily enforce a settlement agreement will not be reversed on appeal unless it is shown that there was an abuse of discretion." *Goodmansen v. Liberty Vending Sys., Inc.*, 866 *P*.2d 581, 584 *(*Ut. App. 1993*) (*internal quotation marks omitted*).* "Issues of formation, construction, and enforceability of a settlement agreement are governed by state contract law," *Brighton Corp*. v. *Ward*, 31 P.3d 594 (Ut. App. 2001), and "[t]he [underlying] issue of whether a contract exists may present both questions of law and fact, depending on the nature of the claims raised," *Cal Wadsworth Constr. v. City of St. George*, 865 *P*.2d 1373, 1375 *(*Utah Ct. App. 1993*), aff'd*, 898 *P*.2d 1372 *(*Utah 1995*).* Whether the parties had a meeting of the minds sufficient to create "a binding contract is ... an issue of fact," *O'Hara v. Hall*, 628 *P*.2d 1289, 1291 *(*Utah 1981*)*, which "[w]e review ... for clear error, reversing only where the finding is against the clear weight of the evidence, or if we otherwise reach a firm conviction that a mistake has been made," *Cowley v. Porter*, 127 P.3d 1224 [(Utah App. 2005)](internal quotation marks omitted). On the other hand, "[t]he applicability of the statute of frauds is a question of law to be reviewed for correctness." *Bennett v. Huish*, 155 P.3d 917 [(Utah App. 2007)] (internal quotation marks omitted). "Thus, we affirm the granting of a motion to compel settlement if the record establishes a binding agreement and the excuse for nonperformance is comparatively unsubstantial." *Zions First Nat'l Bank* v. *Barbara Jensen Interiors*, 781 P.2d 478, 479 (Utah Ct. App. 1989) (internal quotation marks omitted).

e. Arbitration Generally. Arbitration provisions have long been enforceable. *Lutz v. Linthicum*, 33 U.S. (8 Pet.) 165 (1834); *Jensen v. Deep Creek Farm & Live Stock Co*., 74 P. 427, 429 (Utah 1903) (Ut. 1903) ("The modern doctrine of juridical law tends strongly to favor the settlement of controversies by arbitration…"). See also the FAA, 9 USC § 1, *et seq*. Arbitrators have wide latitude in conducting the proceedings in a manner the arbitrator considers appropriate for a fair and expeditious disposition. UCA § 78B-11-116(1). For example, the arbitrator has authority whether or not to consider dispositive motions. UCA § 78B-11-116(2). See also, *Sherrock Brothers, Inc. V. Daimler Chrysler Motors Company*, LLC, 260 Fed. Appx. 497, 502 (3d Cir. 2008) (authority to grant summary judgment even where rules and agreement silent on point).

f. Trust and Estate Issues. Trust issues may be arbitrated by consent of the parties. UCA §§ 75-7-110, 75-7-814(w). The issue of whether arbitration provisions contained in wills, trusts, powers of attorney, or other dispositive instruments will bind the beneficiaries of the person executing the instrument containing the arbitration provision was an open question in Utah, but as of May 14, 2013 such provisions are binding among beneficiaries and fiduciaries. UCA § 75-1-312. The American Arbitration Association has special rules for will and trust alternative dispute resolution. Wills and Trusts Arbitration Rules and Mediation Procedures Rules, Amended and Effective June 1, 2012. Utah courts regularly refer estate and trust disputes to mediation through the court annexed ADR program.

g. Some Statutory and Regulatory Limits. The federal Dodd-Frank Act (P.L. 111-203, 2010) provides that the Securities and Exchange Commission, as to securities matters, and the Consumer Financial Protection Bureau as to consumer financial products, have authority to investigate and may prohibit or condition predispute arbitration provisions and protects with respect to such arbitration provisions, by making them inapplicable to certain matters, whistleblowers as to certain securities matters and borrowers under residential mortgage loans or extensions of credit under an open end consumer credit plan secured by the principal dwelling. See Act sections 1028 (12 USC § 5518), 748 (7 USC § 26), 921 (15 USC § 80b-5), 922 (18 USC § 1514A), and 1414 (15 USC § 1339c). Joint Resolution 111 (H.J. Res. 111) signed by the President 11/1/2017, overturned a rule issued by the Consumer Financial Protection Bureau which would have prohibited arbitration clauses waiving class-action lawsuits. H.J. Res. 111 was passed under the Congressional Review Act, 5 U.S.C. §§ 801 et seq.

Some industries are subject to special rules relating to allowable arbitration provisions. For example, a Utah insurer may not have the option to require arbitration if the insured does not, but an insured can have the option even if the insurer does not; and certain statements are required to be made in policy related documents. *See* Ut. Admin. Code R590-122 and R590-215.

As another example, the National Labor Relations Board has held that a mandatory waiver of class action arbitration is a violation of Section 8(a)(1) National Labor Relations Act and is an unfair labor practice in that it interfered with concerted action rights under Section 7 of the Act. But see *D.R. Horton*, 357 NLRB No. 184 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir 2013). Despite the loss in the Fifth Circuit, and others, the NLRB continued to so hold. *Great Lakes Restaurant Management, LLC*. All Circuits that had considered the matter, except the Seventh, in *Lewis v. Epic Systems Corp*., 823 F.3d 1147 (7th Cir. 2016), had ruled in favor of the waivers of class arbitration; the Tenth Circuit had not ruled on the matter. This matter was granted *certiorari* to the U.S. Supreme Court for decision in three cases, the *Horton* and *Epic Systems* cases and another case. *Cert. granted* 137 S. Ct. 809 (2017). In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) the Court held in favor of arbitration agreements waiving collective action procedures under the Fair Labor Standards Act and class action procedures under state law, and that the National Labor Relations Act did not displace the Federal Arbitration Act.

The Department of Health and Human Services has by regulation made it a condition to participation in Medicare and Medicaid programs that long term care facilities do not enter agreements with residents for pre-dispute binding arbitration citing concerns that the confidentiality of arbitration may prevent substandard care from coming to light. The rule also requires post-dispute arbitration agreements and decisions be maintained for 5 years for inspection. 43 CFR § 483.70(n). Similarly, an Executive Order mandates that companies with federal contracts of $1 million or more cannot require their employees to enter into pre-dispute arbitration agreements for any disputes

arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment. E.O. 13673, Section 6, 79 FR 45309 (July 31, 2014).

h. Confidentiality. The Utah Uniform Mediation Act provides a privilege against disclosure for mediation communications and also has a confidentiality provision applicable to parties (UCA § 78B-10-104 through 108); the Utah ADR Act has confidentiality provisions not described in terms of privilege (UCA § 78B-6-208) but applicable to persons attending a covered ADR proceeding, and the Utah Uniform Arbitration Act makes arbitrators not competent to testify or produce records as to proceedings (UCA § 78B-11-115). The Utah courts take mediation confidentiality seriously. See *Reese v. Tingey Constr.*, 177 P.3d 605 (Utah 2008). Note, however, that privilege and confidentiality are not always the same, and under the different acts, different classes of persons are subject to the rules. The rules of the ADR administrative bodies also contain confidentiality provisions which are adopted and become binding by the contract of the parties to use such rules. The collaborative law statute makes collaborative law communications as confidential as the parties agree in writing or as provided by other law (*e.g*., for settlement negotiation). UCA § 78B-19-113.

Is the confidentiality of mediation proceedings sufficient to prevent a client disappointed by a mediated settlement from using statements made by the client's own counsel in mediation against that counsel in a later malpractice case concerning the advice given in connection with the mediated settlement? At least some courts in some situations under particular statutes have held the mediation statements may not be used by the client in such cases. See *Cassel v. Superior Court*, 244 P.3d 1080 (Cal. 2011); *Fehr v. Kennedy*, 387 F. App'x 789 (9th Cir. 2010). How this issue plays out in other jurisdictions under other statutes and circumstances will bear watching.

i. Contract Defenses to Arbitration. Arbitration, as a creature of contract, is subject to the limits on enforceability of any contract. See UCA § 78B-11-107(1), which provides that arbitration agreements are "valid, enforceable, and irrevocable except on grounds that exist at law or in equity for the revocation of a contract." In some cases, defenses to the assertion that the contract requires arbitration may be successfully raised. Such defenses may include such things as fraud in the inducement of the contract, contract termination (*e.g.*, lapse of time, superseding agreement, release, etc.), unconscionability of the agreement (see *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996) (unconscionable arbitration provision between patient and physician)), waiver (see *Cedar Surgery Ctr., L.L.C. v. Bonelli, 96 P.3d 911 (Utah 2004)*), or the nonarbitrability of certain issues as a matter of public policy.

A party to an arbitration agreement can waive its right to arbitrate if the opposing party can "demonstrate (1) that the party seeking arbitration substantially participated in the underlying litigation to a point inconsistent with the intent to arbitrate; and (2) that this participation resulted in prejudice to the opposing party." *Cedar Surgery Ctr., L.L.C. v. Bonelli*, 96 P.3d 911 (Utah 2004); see also *ASC Utah, Inc. v. Wolf Mt. Resorts, L.C.*, 245 P.3d 184 (Utah 2010); *Educators Mut. Ins. Ass'n v. Evans*, 258 P.3d

598 (Utah Ct. App. 2011). A waiver of arbitration may, however, be nullified if the scope or theory of the claims in the proceeding unexpectedly changes materially. See *Krinsk v. SunTrust Banks, Inc*., 654 F.3d 1194 (11th Cir. 2011). A waiver in one case may be a waiver as part of the "underlying litigation" in another related case. *Nelson v. Liberty Acquisitions Servicing*, 374 P.3d 27 (Ut. App. 2016) (waiver found in later case under Fair Debt Collection Practices Act based on having brought the original dismissed (time barred) credit card collection case in court thus waiving the arbitration provision).

Normal contract principles could apply to disallow all or part of a grossly one-sided and unfair arbitration provision. Such principles could disallow remedy provisions which are so limited as to fail of their essential purpose (see generally, discussion of Uniform Commercial Code limitations on remedies in *Schurtz v. BMW of North American, Inc.*, 814 P.2d 1108 (Ut. 1991) which may apply by analogy to situations outside the context of the Uniform Commercial Code), or which impose costs that are so excessive as to constitute penalties (see Restatement 2d Contracts § 356; *Madsen v. Anderson*, 667 P.2d 44 (Ut. 1983) (real estate contract forfeiture is unenforceable penalty)) or as to render the agreement unconscionable (see, *Kam-co Bio-Pharm Trading Co., Ltd. – Australasia v. Mayne Pharma (USA), Inc.*, 560 F.3d 935 (9th Cir. 2009) (high deposit, $110,000, required by International Chamber of Commerce did not render agreement unconscionable)), or which attempt to deprive a court of its equity powers (see, *e.g.*, *Reese v. Reese*, 984 P.2d 987 (Ut. 1999)), or which are unconscionable on some other basis (see general discussion of illusory contracts and of unconscionability in *Knight Adjustment Bureau v. Lewis*, 228 P.3d 754 (Ut. Ct. App. 2010), *Resource Management Livestock Co. v. Weston Ranch and Livestock Co., Inc.*, 706 P.2d 1028 (Ut. 1985) and Restatement 2d Contracts § 208), and so on.

A similar analysis could apply to dispute resolution provisions as well as remedy provisions, particularly in the case of nonnegotiated contracts of adhesion. See the *Sosa v. Paulos*, 924 P.2d 357 (Ut. 1996) case also cited above and the *Homa v. American Express*, 496 F.Supp. 2d 440 (D.N.J. 2007) case also cited and discussed (with its reversal on appeal) at 4.c.viii. below. In order to overcome the normal and important deference of courts to the sanctity of contracts, even contracts of adhesion, as a free market mechanism, and to overcome the general acceptance of private arbitration as a valid and positive choice for dispute resolution, the conscience of the court must be shocked. However, a court's conscience is generally not so easily shocked in most jurisdictions; thus, crossing this threshold is not easy. See *Knight Adjustment Bureau v. Lewis*, 228 P.3d 754 (Ut. Ct. App. 2010), also cited above. Further, in some consumer contexts, the consumer is given a window period, such as 60 days, to elect out of the arbitration provision, and this may be effective to prevent a finding of unconscionability. See, *e.g.*, *Fluke v. Cashcall, Inc*, 2009 WL 1437593 (E.D. Pa. 2009) (a class action waiver with a 60 day opt-out provision is not unconscionable).

However, under the FAA, where it applies, unconscionability rules may be preempted. See, *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (state actions having a "disproportionate impact" on (no longer intentional discrimination

against) arbitration agreements are preempted under Section 2 of the FAA, such as an unconscionability analysis applied to arbitration agreements, in this case involving class action waivers).

Although non signatories may be bound by the arbitration agreement of someone else, such as successors being bound by their predecessors in interest (see *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, (2009)), an agreement by a decedent to arbitrate might not be binding on a wrongful death claimant with respect to that decedent. *Ping v. Beverly Enters., Inc*. 376 S.W.3d 581 (Ky. 2012) (wrongful death claimants are not bound by arbitration agreements that a decedent entered into because their claim is statutorily distinct from any claim held by the decedent). Such decisions relating to wrongful death may not be preempted since they relate to who is bound by a decedent's agreement and do not categorically prohibit arbitration of wrongful death claims. *Richmond Health Facilities v. Nichols*, 811 F.3d 192 (6th Cir. 2016).

j. Arbitrability Decision. Generally, under the U. S. Arbitration Act (known as the FAA), the issue of contract validity is for the arbitrator to decide, for example, in the case of a claim of fraudulent inducement. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967), *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010) (cannot challenge validity of agreement as a whole in court on unconscionability grounds to avoid arbitration provision, but any such challenge in court must be to the validity of the particular arbitration provisions). See also *Layne-Minnesota Co. v. Regents of Univ. of Minnesota*, 123 N.W.2d 371 (Minn. 1963). In Utah, pursuant to the Utah Uniform Arbitration Act, at UCA § 78B-11-107(3), "An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." The court decides only whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate. UCA § 78B-11-107(2). See *Belnap v. Iasis Heathcare*, 844 F.3d 1272 (10th Cir. 2017) (applying Utah law; court does not analyze each cause of action for arbitrability under agreement but sends them all to arbitrator to decide arbitrability). Some states have taken the contrary view, however.

In Utah and other states adopting the Uniform Arbitration Act, the arbitration may continue despite a challenge in court to the existence of the agreement to arbitrate or whether the controversy is subject to an agreement to arbitrate, unless the court orders otherwise. UCA § 78B-11-107(4).

If a court action is brought in a dispute governed by an arbitration provision, the court should stay rather than dismiss the action when referring the matter to arbitration. UCA §78B-11-108(7); *Mariposa Express, Inc. v. United Shipping Solutions, LLC*, 295 P.3d 1173 (Ut. App. 2013). Such a stay is, under Utah procedural rules, a final order allowing appeal (even if under the FAA and even if federal procedural rules differ) if only compelling arbitration is at issue. *Zions Management Services v. Record*, 305 P.3d 1062 (Ut. 2013). *McGibbon v. Farmers Insurance Exchange*, 345 P.3d 550 (Ut. 2015) (petition for interlocutory appeal insufficient for appellate jurisdiction

where only issue was to compel arbitration). If, however, the district court orders a stay of litigation pending the completion of arbitration, the order is not final if the court retains jurisdiction to resolve any remaining issues after the conclusion of arbitration proceedings. *Powell v. Cannon*, 179 P.3d 799 (Ut. 2008); *American Family Insurance v. S.J. Louis Construction, Inc*., 2015 Ut. App. 115.

k. Court Involvement. A court need not be involved to initiate arbitration, but it may be involved to enforce the agreement to arbitrate or (as described above) determine the existence of the agreement, or to provide provisional remedies (injunction, interim award, gag orders, etc.) pending the arbitration. See UCA § 78B-11-106, 107(2), 108, 109, 110. A temporary restraining order can be issued before an arbitration is initiated to preserve the status quo. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211 (7th Cir. 1993); *WPC III, Inc. v. Benetech, L.L.C*., 2012 WL 3253186 (E.D. La. Aug. 7, 2012). The panel itself could also issue provisional remedies. *Mount Holly Partners, LLC v. AMDS Holdings, LLC*, 2009 WL 1507148, at *2 (D. Utah May 27, 2009) ("[T]he question of whether the status quo should be preserved pending arbitration was submitted to and considered by the arbitration panel. The arbitration panel unquestionably had the power to grant the relief sought if it so chose."); *CSA-Credit Sols. of Am., Inc. v. Schafer*, 408 F. Supp. 2d 503, 511 (W.D. Mich. 2006). But the panel's decision would need to be confirmed by the court.

If a party fails to pay required fees of the arbitrator, the arbitration can be terminated without an award. In such a circumstance, at least where the failure to pay was not willful, and the other party does not pay the fees to maintain the arbitration proceeding (where allowed under applicable forum rules) the dispute can proceed in court. Although typically a court stays proceedings on issues subject to arbitration "until such arbitration has been had in accordance with the terms of the agreement" under 9 U.S.C. § 3, a terminated proceeding in such circumstances has been in accordance with the agreement. *Pre-Paid Legal Services, Inc. v. Cahill*, 786 F.3d 1287 (10th Cir. 2015), *cert denied* 136 S. Ct. 373 (Oct.19, 2015). *Tillman v. Tillman*, 825 F.3d 1069 (9th Cir. 2016) (claimant ran out of funds to pay fees, respondent law firm did not cover fees and sought dismissal of court case after the court ordered arbitration terminated; the court remanded to proceed in court).

Courts also confirm and enforce arbitration awards.

l. Challenge to Awards. The grounds to challenge awards and seek a vacatur are narrow.

i. Federal. Under Section 10(a) of the FAA, the only grounds are these: (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

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

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

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

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

ii. State. State statutory rules are generally similar. See UCA § 78B-11-124; *Youngs v. Am. Nutrition, Inc*., 537 F.3d 1135, 1145 (10th Cir. 2008). Common law is also similar. *Salt Lake Pressmen and Platemakers, Local Union No. 28 v. Newspaper Agency Corp.*, 485 F.Supp. 511 (D.C. Utah, 1980).

iii. General Standard. The burden is on the party seeking to vacate an arbitration award. *Youngs v. Am. Nutrition, Inc*., 537 F.3d 1135, 1141 (10th Cir. 2008). That burden is very great. *Federated Department Stores v. J.V.B. Industries*, 894 F.2d 862, 866 (6th Cir.1990). The standard is rather deferential toward the arbitration award. In the case of *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1147 (10th Cir. 1982) (confirming an arbitration award in favor of a lessor) it was stated:

> A court, therefore, is not entitled to judge an arbitration award independently. *Campo Machining Co. Inc. v. Local Lodge No. 1926*, 536 F.2d 330 (10th Cir. 1976). Arbitrators are, of course, obligated to disclose possible bias. *Sanko S.S. Co. Ltd. v. Cook Industries, Inc*., 495 F.2d 1260 (2d Cir. 1973), citing to *Commonwealth Coatings v. Continental Cas. Co*., *supra* [393 U.S. 145 (1968)]. However, it is only clear evidence of impropriety which justifies the denial of summary confirmation of an arbitration award. *National Bulk Carriers v. Princess Management*, 597 F.2d 819 (2d Cir. 1979). For an award to be set aside, the evidence of bias or interest of an arbitrator must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative. *Tamari v. Bache Halsey Stuart, Inc*., 619 F.2d 1196 (7th Cir. 1980), *cert. denied*, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93.

See also *Hicks v. UBS Financial*, 226 P.3d 762 (Ut. App. 2010) (reversing trial court's vacating of an arbitration award where although the trial court disagreed with the arbitrator's discovery rulings, the party's rights to fairly present its case were not substantially prejudiced; specific identification of any injustice and relationship to clearly identifiable discovery decisions is required; UCA § 78B-11-116 examined. Note: *Hicks*

was overruled but only on a right of appeal issue concerning what constitutes a final order, by *Westgate Resorts, Ltd. v. Adel*, 289 P.3d 420 (Ut. 2012)); *Denison Mines (USA) Corp. v. KGL Associates, Inc*., 381 P.3d 1167 (Ut. App. 2016) (small harmless timing and procedural issues did not render award beyond the authority of the arbitrator or show impartiality). Parties have some duty to check on the arbitrators up front and may waive a vacatur if they fail to find matters easily found. *Goldman, Sachs & Co. v. Athena Venture Partners, L.P*., 803 F.3d 144, 150 (3d Cir.2015) ("a party [should not] wait until it loses and then almost immediately begin scouring the internet for anything that might suggest one arbitrator or another was biased against it").

iv. Manifest Disregard of Law. Most courts have recognized a manifest disregard of the law as a species of the arbitrator's going beyond his or her authority and thus as being a basis to vacate an award. See *Pacific Development, L.C. v. Orton*, 23 P.3d 1035 (Ut. 2001) (A party is not entitled to review of the correctness of an arbitrator's legal reasoning; 'manifest disregard' is much more than mere error as to the law); *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 951 (Ut. 1996); *Evans v. Nielsen,* 347 P.3d 32 (Ut. App. 2015) (stating that prior cases discussing manifest disregard had not held it applicable in Utah but deferred such a decision); *Westgate Resorts, Ltd. v. Adel and Consumer Protection Group,* 378 P.3d 93 (Ut. 2015) (applying manifest disregard standard where not requested to abandon it (ftn. 3) and noting that it is an extremely deferential standard)*; Comedy Club, Inc. v. Improv Rust Assocs.*, 553 F.3d 1277 (9th Cir. 2009) (manifest disregard of law is subsumed in Section 10(a)(4) of the FAA allowing vacatur where arbitrators exceed powers); *Stolt-Nielsen SA v. AnimalFeeds Intern. Corp.*, 548 F.3d 85 (2d Cir. 2008).

The case of *Hall Street Associates, LLC v. Mattel Inc.*, 522 U.S. 576 (2008) has created some confusion in that its holding that the vacatur provisions of the FAA are the exclusive means to vacate an arbitration award governed by the FAA (further grounds such as legal error may not be added by agreement) has been interpreted by some courts, contrary to the *Comedy Club*, the *Stolt-Nielsen*, and similar decisions, to find that manifest disregard is not grounds to vacate an award. See, *e.g., Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009); *Imos-Santiago v. United Parcel Serv.*, 524 F.3d 120 (1st Cir. 2008). However, in reversing the Second Circuit decision in *Stolt Nielsen* above as to class arbitrations, the Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S. Ct. 1758, 1770 (2010) said that "instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers." The Court nevertheless refused to answer whether *Hall Street* eliminates manifest disregard as a standard. 130 S. Ct. 1758 at ftn. 4.

The Circuit courts are split on the issue; the Second Circuit and others have stated that manifest disregard continues to be a ground to challenge awards (see *e.g., Goldman Sachs Execution and Clearing L.P. v. Official Unsecured Creditors' Committee of Bayou Group, LLC*, 491 Fed. Appx. 201, 2012 WL 2548927 (2d Cir. 2012)) while other Circuits have disagreed (see *e.g., Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc*., 660 F.3d

281 (7th Cir. 2011)). The Tenth Circuit has avoided the issue. See *Hicks v. Cadle Co*., 355 F. App'x 186 (10th Cir. 2009) and *DMA Int'l, Inc. v. Qwest Communications Int'l., Inc*., 585 F. 3d 1341 (10th Cir. 2009).

In response to the *Hall Street* decision disallowing appeals by agreement to a court beyond the FAA vacatur provisions, the American Arbitration Association has instituted a rule for an appeal within the arbitration process with a similar standard for an appeal from a trial court, i.e., that an award is based on errors of law that are material and prejudicial or on determinations of fact that are clearly erroneous. This rule can be adopted by the parties by agreement, typically in a complex case. The appellate arbitrators will likely be former judges, particularly appellate judges, or attorneys with strong appellate experience, who will generally decide on the briefs without oral argument. The appellate rules can be adopted whether or not the underlying arbitration was under the AAA rules.

Even where the manifest disregard standard is used, a Utah court need not defer to the arbitration panel's construction of the Utah Uniform Arbitration Act sections that govern the panel's own powers. *Westgate Resorts, Ltd. v. Adel and Consumer Protection Group*, 378 P.3d 93 (Ut. 2015) (de novo review of the scope of the arbitrator's authority).

v. Appeals. Under the Utah Uniform Arbitration Act there is a list of actions for which an appeal of right applies which are (a) an order denying a motion to compel arbitration; (b) an order granting a motion to stay arbitration; (c) an order confirming or denying confirmation of an award; (d) an order modifying or correcting an award; (e) an order vacating an award without directing a rehearing; or (f) a final judgment entered pursuant to the Act. UCA § 78B–11–129(1). If not on the list, an appeal of right does not apply. Even if there are other listed grounds which may apply, if the trial court vacates an award and directs a rehearing, the appeal of right does not apply. *Westgate Resorts, Ltd. v. Adel*, 289 P.3d 420 (Ut. 2012) (combined orders denying confirmation of an arbitration award and vacating an award while directing a rehearing do not create an appeal of right under Utah Uniform Arbitration Act, and thus an interlocutory appeal under Ut. Rul. App. Proc. 3 rather than an appeal under Rule 5, was the proper procedure): *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 204 P.3d 1262 (Nev. 2009) (follows majority view that combined order including a requirement for rehearing is not appealable).

m. Other Parties. A problem can arise where some parties are bound by an arbitration agreement but there are other potential parties who have not agreed to arbitrate. For example, in a claim against a company for fraud relating to the performance of an agreement containing an arbitration provision, can the individual who made the misrepresentation, but who is not a signatory to the agreement, be made a party to the arbitration without consent? This can be particularly important where, for example, one party (e.g., the company) is insolvent but the other party (e.g., the individual) is not. This problem is solved in some situations by arbitration requirements in membership organizations, such as FINRA in the securities industry. Otherwise, in any situation

where a third party might be brought into litigation but has not signed an arbitration agreement, there will be an issue of whether arbitration can be imposed so as to get all the potential parties before the same tribunal, and if not, there is a risk of multiple proceedings with inconsistent rulings. See *DK Joint Venture 1 v. Weyand*, 649 F.3d 310 (5th Cir. 2011) (CEO and CFO not bound by corporation's arbitration agreement). Guarantors may not be bound to arbitrate where the guaranteed agreement contains an arbitration clause unless the guarantee and the agreement are sufficiently interconnected (perhaps by incorporation by reference). Compare *Grundstad v. Ritt*, 106 F.3d 201 (7th Cir. 1997) (guaranty did not unambiguously bind guarantor personally to arbitrate under guaranteed agreement) with *Maxum Foundations, Inc. v. Salus Corp*., 779 F.2d 974 (4th Cir. 1985) (subcontract sufficiently incorporated arbitration provision by reference).

n. Construction Contracts and Multiparty Projects. Arbitration provisions have long been contained in many construction contracts. Some leases contain construction provisions. It is important where construction or some other multiparty, multiple contract operation or project is contemplated to coordinate the dispute resolution provisions of all contracts among the applicable parties (architect and engineer, contractor and subcontractor, landlord and tenant, bonding company, etc.). See *e.g.*, *Shah v. Monpat Construction Inc.*, 884 N.Y.S.2d 116 (A.D. 2009) (arbitration as to some persons, not as to others); *Osguthorpe v. Wolf Mountain Resorts, L.C*, 322 P.3d 620 (Ut. 2013) (arbitration provision may not apply to all disputes between all parties to multiple party agreement, and party to agreement not a party to the dispute may not compel arbitration among parties to the dispute). Without such coordination, there is a risk of inconsistent results among the participants in a project. The analysis in such multi-participant project situations can be very complex and the courts struggle with the issues and often have not reached consistent results. For example, some cases involving the issue of whether a surety is bound by an arbitration against the principal in a construction project covered by the federal Miller Act (40 U.S.C.A. §§ 270a *et seq*.) include *U.S. ex rel. Aurora Painting, Inc. v. Fireman's Fund Ins. Co*., 832 F.2d 1150 (9th Cir. 1987) (the state court confirmed arbitration award determined the surety's liability); *U.S. ex rel. Skip Kirchdorfer, Inc. v. M.J. Kelley Corp*, 995 F2d 656 (6th Cir. 1993) (an unconfirmed award might determine surety's liability); *U.S. Fidelity & Guaranty Co. v. Hendry Corp*., 391 F.2d 13 (5th Cir. 1968) and *Pennsicola Constr. Co. v. St. Paul Fire & Marine Ins. Co*., 705 F. Supp. 306 (W.D. La. 1988) (only federal court can determine surety's liability, unconfirmed award did not do so); *Greg Opinskei Constr., Inc., v. Braswell Constr., Inc*., 2011 U.S. Dist Lexis 132774 (E.D. Cal 2011) (California law separates surety's liability from that of principal so award could not determine liability of surety which must have opportunity to raise separate defenses).

o. Estoppel. Although the general rule requires an agreement to arbitrate, a nonsignatory to an arbitration agreement might enforce or be bound by an agreement between other parties through estoppel. The nonsignatory estoppel exception applies to a nonsignatory who is suing on the contract or who has received direct benefits from the contract. The rationale behind this exception is to prohibit a nonsignatory from having it both ways—seeking to benefit from an agreement while attempting to avoid the

duties imposed by that same agreement. *Ellsworth v. American Arbitration Ass'n*, 148 P.3d 983 (Ut. 2006). See also *Solid Q Holdings v. Arenal*, 362 P.3d 295 (Ut. App. 2015) (related signatory party's arbitration agreement insufficient to bind a different nonsignatory party under a separate agreement; estoppel is to prevent a signatory's attempt to avoid arbitration, or to prevent a nonsignatory's attempt to benefit from an agreement while seeking to avoid that same agreement's arbitration provision). See 127 Am. Jur. Trials 107 (Originally published in 2012), Binding Nonsignatories to Arbitration—Beware of Foot in Door (describing various theories for binding non-signatories in addition to estoppel, such as agency, assignment, assumption, third party beneficiary, close affiliation, etc.). In analyzing any situation, the position of the non-signatory needs to be borne in mind because different policies govern whether the non-signatory can compel arbitration as opposed to whether the non-signatory can resist arbitration.

p. Governmental Immunity. A contract with a governmental agency or Indian tribe containing an arbitration provision may leave the other party without the bargained-for dispute resolution process where governmental immunity has not been specifically waived. See, *e.g.*, *Envirotest Systems Corp. v. Com'r of Motor Vehicles*, 978 A.2d 49 (Conn. 2009); *U.S. v. Park Place Assoc., Ltd.* 563 F.3d 907 (9th Cir. 2009). Even a specific, contractual waiver of immunity may not be effective if not properly approved. *Memphis Biofuels, LLC v. Chicksaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009). If a provision allowing judgment on the award in any court with jurisdiction (such as AAA Commercial Rule 48(c)) is stricken in negotiations, governmental immunity may not have been effectively waived. See *California Parking Services, Inc. v. Soboba Band of Luiseno Indians*, 128 Cal.Rptr.3d 560 (Cal. App. 2011). Otherwise an agreement to arbitrate under AAA Commercial Rules may waive the immunity. *C&L Enterprises v. Potawatami Indian Tribe,* 532 US 411 (1998).

3. Rules of Administrative Bodies. The administrative bodies most likely to be involved in mediations, arbitrations, or other forms of ADR in Utah contract-related issues include the court-annexed ADR program, the American Arbitration Association (AAA), and the National Arbitration Forum (NAF). Some parties like the Judicial Arbitration and Mediation Service (JAMS) in the states in which it operates because its roster of neutrals mostly consists of retired judges; it does not operate in Utah, but sometimes parties agree to mediation or arbitration outside of Utah in areas in which JAMS has operations. ADR through other administrative bodies, or through no such bodies at all, is also possible. For example, disputes relating to securities broker-dealers, typically between the broker dealers and customers or between the broker-dealers and registered representatives, are administered by FINRA, the Financial Industry Regulatory Authority, the rules of which are subject to SEC, Securities and Exchange Commission, supervision.

a. AAA. The AAA has special consumer and small case rules. Small claims court use remains an option for the consumer under these special rules. The AAA also has special rules for large complex cases which include an enhanced neutral

selection process allowing parties to, essentially, *voir dire* the potential arbitrators. See Jeffrey P. Aiken, "Due Diligence in Arbitrator Selection: Using Interviews and Written '*Voir Dire'*," Disp. Res. Journ., p. 28, May-June 2009. The AAA is also trying out a flexible fee schedule to allow for lower up-front fees; if the case goes to full hearing and decision, the fees over all may be a bit larger, but the lower up front cost may be useful, for example, if a settlement or failure to respond is expected. As described above, the AAA also has optional appellate rules allowing an appeal in the arbitration process itself for qualifying cases.

b. NAF. The NAF, the National Arbitration Forum, also sometimes referred to as the FORUM, is the provider of ADR administration for the American Land Title Association. Thus, in addition to other sorts of cases, it may provide administration where a title issue implicates title insurance, which may include not only cases between a buyer and seller but also cases involving the asserted violation of a landlord's covenant of quiet enjoyment. Thus, in such a case, it may be most efficient if all persons, including the tenant, can be in the same ADR proceeding and be bound by it with but one hearing. The FORUM also has special programs relating to the Internet Corporation for Assigned Names and Numbers (ICANN) for domain name disputes, and relating to the American Moving and Storage Association (AMSA) for household goods transport disputes.

c. Overlap of Rules. Each administrator's rules are different in many respects from those of other administrators, but since all are designed to provide a fair process in light of Anglo-American notions of fair jurisprudence, there is a great deal of commonality among the rules as to fundamental matters. Also, the codes of conduct for any particular sort of neutral (*e.g.*, mediators or arbitrators) are either the same among administrators or share common substantial features. Full disclosure of potential conflicts and relationships are required, and are of particular importance in arbitrations because the award will bind the parties with little room for appeal.

4. Benefits; Detriments. The potential benefits of ADR procedures need to be evaluated. Not every benefit is relevant to each case, and even if relevant, a particular hoped-for benefit may or may not materialize in a given case, or may be outweighed by detriments. However, on balance, a great many parties choose to use at least some formal ADR techniques, particularly mediation and arbitration.

a. Mediation. Mediation is subject to strong rules of confidentiality (see 2.i. above) and the communications made are treated as settlement negotiations relating to compromise and offers in compromise not admissible in evidence. Ut. Rul. of Evid. 408. Mediation may occur while a court or arbitration proceeding is in process. Thus, there is usually little to lose, other than time, legal fees, and the mediator's fee, from participating in mediation.

i. Advantage. Some parties are concerned with the possibility of the use of mediation as an informal fact discovery device to gain advantage

by the other side, but, given the ability of the party to control disclosures, and given the strength of the formal discovery devices available, this risk is generally quite minor.

ii. Effort. Also, some parties view mediation as a waste of time and effort because they believe the other side is acting in bad faith or is unbudging. Nevertheless, a very high percentage of cases settle if mediation is tried.

b. Collaborative Law. The benefits and detriments of collaborative law are largely the same as with mediation. However, there may be more disclosure involved in the collaborative law process on the request of a party without formal discovery, including a duty to update disclosures made; nevertheless, the scope of disclosure may be defined by the parties. UCA § 78B-19-109.

c. Arbitration. Arbitration is more of a mixed bag of potential benefits and potential detriments. Let's review the key concerns.

i. Finality. Parties with ongoing relationships may want to put an end to a dispute and move on. Thus, the finality of an arbitration award subject to very limited grounds for review, may be quite appealing. On the other hand, an error of law by the arbitrators while trying to apply known law is not a basis for appealing or overturning an award; thus, if a party wants to establish precedent, arbitration would not be desirable. At least as to matters governed by the Federal Arbitration Act, the parties cannot by agreement broaden the grounds on which an award may be appealed or overturned. See *Hall Street Associates, LLC v. Mattel, Inc.*, 522 U.S. 576 (2008); compare to *Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Cal. 2008) (allowing contractual provisions to alter usual scope of review where governed by state law).

Some parties like arbitration because an adverse award will not create the sorts of collateral estoppel risks which would exist in court proceedings. The reduction in such risk to one party may be seen as a disadvantage by the other party seeking a more favorable settlement based on the risks of litigation.

ii. Speed. Arbitration proceedings can usually be started and completed more quickly than court proceedings. Speed may be a significant matter in controlling cost, or if there is an adverse ruling, in timely adjusting rates or making other changes to business operations to meet the situation, which may have broader ramifications than just the immediate case. However, if one or more parties decide to engage in delay tactics or tries to prevent the arbitration by court action, or if the case is very complex, the arbitration proceedings could end up taking about the same time as court proceedings. This is more of an issue in one-shot bet-it-all disputes than it is where parties need to maintain a relationship despite recurring disputes or where the size of the case provides no particular incentive for delay. The usual speed of arbitration often is obtained by more limited discovery and simpler procedures with fewer motions. Also, the crowded dockets of the courts makes arbitration with a panel dedicated to only the particular case or a few cases, look very good in comparison

If an eviction or possession of property is an issue, a court proceeding subsequent to an arbitration may still be needed to evict the tenant who does not timely vacate or to regain possession of an asset. These proceedings as to leases, under Utah's unlawful detainer statute (UCA § 78B-6-801 *et seq.*), are generally summary in nature and relatively quick; other issues not involving possession may be arbitrated. Which issues are subject to arbitration and which are not may be specified in the lease.

iii. Simplified Procedure. The strict rules of evidence don't apply and the procedures under the rules of the arbitration administrators are simpler than court procedures. This is particularly true under special small claims arbitrations rules which are even simpler. This allows some parties the realistic choice of appearing without counsel. However, in larger matters, the simplicity of procedures may be a detriment and the parties may find a need to agree on or ask for more extensive discovery or motion practice to prepare for a more expeditious final hearing. The process, however, can be tailored by the parties or by the arbitrator to meet legitimate needs. There are some limits to the tailoring of procedures prior to the dispute arising or, as to some matters, even after the dispute arises, but these limits will seldom create practical problems. See *e.g.*, UCA § 78B-11-105 as to certain statutory matters not being waivable.

There are special arbitration rules available for certain industries which provide some built in tailoring in comparison to general commercial arbitration rules and also some additional tailoring opportunities where the parties can agree. See *e.g.*, AAA Health Care Industry Payor- Provider Arbitration Rules.

A court's ability to tailor proceedings is largely constrained by extensive procedural rules. Although in small cases within the jurisdictional limits of small claims courts, the procedures are greatly simplified and the strict rules of evidence don't apply, the rules of court still constrain the proceedings so that there is little room to tailor a proceeding. If a party feels that the tailoring done in the arbitration agreement is not to its liking, it may better like the less tailored court process.

Among other things, the type of the award may be specified by party agreement in arbitration and may range from a simple one-line award (for example, "X is awarded $____," or "X's case is dismissed with prejudice"), to a short statement of reasons for an award, to a full-scale findings of fact and conclusions of law of the sort prepared in trials to the judge in court litigation. The choice is driven by balancing considerations of cost against a desire to know what the arbitrator was thinking, either to prevent arbitrariness and force a reasonably based decision, or to obtain some level of guidance as to how similar issues may fare. In contrast, in a trial to the judge, the judge is required by the rules of court to prepare full findings and conclusions, and in trials before juries, the judge provides formal legal instructions and the jury provides a simple verdict, or in some cases, a verdict based on special interrogatories, *i.e.*, answers to specific, factual questions.

The less formal pleading standards may be a benefit to claimants in cases which would otherwise be covered by enhanced pleading requirements, such as those under *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), or *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) (nonconclusory and plausible fact pleading), or the securities laws designed to discourage claims such as the Private Securities Litigation Reform Act (1995) (15 USC § 78u-4(b)), or similar standards in securities cases such as *Lormand v. US Unwired, Inc*., 565 F.3d 228 (5th Cir. 2009) relating to pleading damages. Very quick upfront disclosure of documents by a claimant required under some court rules (see Ut. Rul. Civ. Proc. 26) may make arbitration more attractive to a claimant in some cases where timely compliance would be difficult or a minimal defense is expected.

There is a split among the Circuits concerning the ability of arbitrators under Section 7 of the FAA to subpoena ("summon") testimony or, more usually, records, prior to a final hearing. Compare *Amer. Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999) and *In re Security Life Insur. Co. of Amer*., 228 F.3d 865 (8th Cir. 2000) (allowing subpoenas before final hearing) with *Hay Group, Inc. v. E.B.S. Acquisition Corp*. 360 F.3d 404 (3d Cir. 2004) and *Life Recievables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008) (restricting subpoenas prior to final hearing) and with *COMSTAT Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999) (restriction with special need exception possible). If records from third parties are at issue, one way to avoid a disallowance is to request some testimony, too, for example by phone. Depending on a party's location and need for third party evidence, this factor could be deemed an advantage or disadvantage where such evidence is highly important to a party's claim or defense and requires extensive analysis prior to the hearing. The risk that a party may be denied the time to provide the needed analysis could provide an incentive to try to avoid arbitration or to select non FAA arbitration law to apply. The RUAA (Revised Uniform Arbitration Act) applicable in some states makes no distinction between parties and nonparties for the purpose of discovery. On the other hand, the FAA allows nationwide service of process under FRCP 45.

Although something of an overstatement, the general approach of arbitration rules is to get to a final hearing on the entire matter as expeditiously as possible, while the approach of court rules is to get to the most limited hearing possible after the case has been narrowed by discovery and motion practice. Which approach a party deems most advantageous will depend on what it believes is, or is likely to be, its position after a dispute arises.

iv. Lower Cost. Arbitrations often involve lower overall costs to the parties. One or both parties may see this as a distinct advantage. The less wealthy party may be especially happy about this as it tries to avoid a war of attrition by a wealthier party. However, filing and forum fees, arbitrator compensation, and similar costs often will be considerably more than with the taxpayer subsidized court system. Nevertheless, the largest costs are usually attorneys' fees, deposition expenses, expert witnesses, and so on; these are usually, but not always, less in arbitration due to the

simpler, speedier procedure and more limited discovery and motion practice. On the other hand, truly big cases will be expensive no matter what the forum is, particularly as the unavoidable attorneys' fees to prepare the case proportionately dwarf every other element into insignificance.

The cost issue is stronger in the smallest cases where a financially weak party (typically, a consumer) may be disadvantaged compared to the taxpayer subsidized court system, particularly with respect to upfront costs and perhaps as to overall costs where small claims court proceedings may be available. As a matter of policy, some arbitration administrators have rules and procedures to protect the weaker party in such cases from heavy up-front costs. The AAA, for example, has a consumer protocol, which if not met will prevent the AAA from administering a case. Some courts have been concerned with the potential for unconscionable abuse (see, *e.g.*, *Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.*, 325 F. Supp. 2d 1252 (D. Utah 2004)), and many parties (typically, businesses) have revised their predispute arbitration provisions to meet these concerns by bearing much, or even all, of the up-front cost themselves. Such costs may later be allocated among the parties (*e.g.*, against a nonprevailing party) to the extent allowed by the agreement. Under some consumer agreements, forum costs may be limited to those which would have applied in a court of competent jurisdiction, and the option to elect small claims court may be provided.

However, in arbitration, up-front fees and deposits may be required, so that even in a non-consumer case where the overall cost may be lower, the up-front cost may be higher. Some ADR agencies such as the AAA, have programs to reduce up-front administrative fees; usually the fees to be paid later will be higher to cover the difference. Deposits are still required to cover later arbitrator fees, etc. If a party is required to pay the deposit or up-front fees, but fails to do so, the other party may need to do so or the arbitration may be dismissed and the parties left to seek remedies in court. See, *e.g.*, *Dealer Computer Services, Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884 (5th Cir. 2009); *Medcom Contracting Services, Inc. v. Shepardsville Christian Church Disciples of Christ, Inc.*, 290 S.W.3d 681 (Ct. App. Ky. 2009).

The following quote from the American Arbitration Association concerning a study of its consumer arbitrations is instructive:

> [O]n March 11, 2009, an independent study by the Searle Civil Justice Institute (SCJI) at the Northwestern University School of Law found that the majority of consumer arbitration cases administered by the American Arbitration Association (AAA) are cost efficient, expeditious and in full compliance with Due Process Protocols.
>
> SCJI reviewed a sample of 301 AAA cases involving consumer arbitrations closed by an award between April and December of 2007. This sample was analyzed for approximately 200 variables in the arbitration process.

> The study revealed that consumer claimants paid an average of $96 ($1 in administrative fees and $95 in arbitrator fees) in cases seeking less than $10,000 and $219 ($15 in administrative fees and $204 in arbitrator fees) for claims between $10,000 and $75,000.
>
> The average time from filing to final award for the consumer arbitrations studied was 6.9 months, SCJI found.

Although sometimes forgotten by the parties, one of the biggest costs is the loss of management time and focus during disputes, with the resultant loss of revenues or opportunities. The more quickly a dispute can be resolved, the less such loss is likely to be.

v. Fairness or General Desirability. In an arbitration proceeding, the parties can select the kind of arbitrator they desire; for example, someone with extensive real estate lease experience where a lease is involved. In court, the trial will be to a generalist judge, likely without industry experience, or to a jury, highly likely to lack any relevant experience. On the other hand, arbitrators may be selected from panelists also without a great deal of industry experience if the level of experience is not specified in the agreement; but in such cases, at least where a level of general business experience is desirable, the panelists are generally no worse than judges and likely better than jurors. From a contrary perspective, however, some disputants desire the lowest level of experience and knowledge in the hope that some visceral reaction in the fact finder (*e.g.*, jury) will provide them an advantage which otherwise may be negated by a more rational or knowledgeable decision maker more likely to be aware of and to feel some respect for the traditions or customs of trade and business.

Some people argue that arbitrators may favor the "repeat player," large companies with many pending cases before the forum, against other parties who likely will never appear before the forum again. This does not seem to actually be the case to any significant extent, since not many arbitrators handle more than a few cases as a sideline to their normal job, and thus are in no way financially dependent on the "repeat players." Judges see repeat litigators much more often than does a typical arbitrator; for example, collection cases are often filed in court by the score. Even though a judge's compensation is not directly tied to any given case, judicial budgets are often quite affected by the filing and other fees paid by repeat litigators. The same would be the case for the ADR administrative bodies. Also, parties in arbitration usually have considerably more ability to strike a potential arbitrator than they have to disqualify a judge. There doesn't seem to be any real basis to suspect any systemic unfairness in either the litigation or arbitration setting.

At best, the repeat players may get to know the temperament of a given arbitrator on a panel, after having appeared before him or her several times, better than the one-time player. However, this is true in court, too, as parties and counsel who appear before

a judge get a feel for his or her judicial temperament. In either setting, a party may be well advised to engage experienced counsel or check out the background of the decision maker in other ways. The AAA enhanced neutral selection process, where it applies, generally would give the advocate as much or more information about the decision maker than would be available for a juror, and, other than prior decisions, about as much as would be available for a judge. Judicial decisions are generally public records, arbitral decisions are private, but general information about the kinds of cases in which an arbitrator participated may be available.

Courts are not always perceived as fair, particularly to litigants from another jurisdiction who may fear being served a heaping helping of home cooking. This can be exacerbated by the judicial selection processes of some jurisdictions where judicial independence is compromised, as where an unpopular decision may ruin a judge's career. These concerns have driven many international businesses to arbitration, and are why the U.S. federal courts have diversity jurisdiction. Parties may be more comfortable with the neutrality of arbitrators, and the hearing can be held in a neutral location to help eliminate fears of subtle, or not so subtle (*e.g.*, riot), sources of influence on decisions.

The limited grounds to vacate an arbitration award have caused some to wonder whether the incentives for fair decision making are adequate in arbitration. The limited right to challenge an award is a trade-off for finality, speed, and cost savings. Yet the grounds to vacate an award appear sufficient to prevent corruption and abuse, and arbitration is not allowed to be arbitrary. The agreement of the parties must not be ignored, and the arbitrators are not free (under most court decisions) to ignore the law (see 2.m.iv. above). When the limited ability to vacate an arbitration award is compared to the limited ability to upset a jury award, there does not appear to be any significant disadvantage to arbitration. Where the trial is to a judge rather than a jury, the appeals court will have only a little more flexibility to deal with findings of fact not supported by substantial evidence, but will, of course, have a great deal of ability to correct errors of law and to establish precedent whether the trial is with or without a jury.

Although lawyers often serve on arbitration panels (allowable pursuant to Rule 2.4 of the Ut. Ruls. Prof. Pract.) and generally provide a strong protection of procedural fairness when they do serve, parties may well desire in some controversies that some or all panel members have particular technical expertise (and thus probably not be law trained) in order to obtain what they consider a fairer final result. This opportunity is available in arbitration, but not in litigation where a law-trained judge will always preside (other than for certain small claims matters in some jurisdictions), even if the judge is not the ultimate fact finder, and the fact finders will not have any particular industry or technical expertise; the only way to get the expertise in court is through expert witnesses (usually a rather expensive process) and spending a good deal of time trying to educate the judge and jury (if there is one).

vi. Flexibility of Remedy. The parties may by agreement expand or contract remedies, within broad limits allowable at law. Also, in an arbitration,

the arbitrator may in some cases have more leeway to provide a more tailored or unusual remedy than would a court. This can be an important advantage of arbitration in the right case. Of course, where a party may have such a remedy imposed against it, it may consider such flexibility to be a disadvantage. As an example, in some cases a "Baseball Arbitration" or last offer agreement is used pursuant to which agreement the parties each name an amount or the last offer in mediation is used, and the arbitrators decide which of the two is closest to what they believe is justified, the closest being the winner.

vii. Confidentiality. If a confidential airing of a dispute for binding decision is desired, arbitration is the only available means. Courts are public. In many disputes, whether the matter is public or not won't much matter because no one other than the parties is likely to care. However, where confidentiality does matter, arbitration has a very strong advantage because courts have only a very limited ability to impose protective orders, seal cases, and take other steps to protect matters a party may desire to be kept confidential. Confidentiality may be important in order to prevent important business data from leaking, to prevent future claims on similar issues, or to avoid loss of good will or reputation.

One of the great disadvantages of any dispute is that the other side may make a confidential matter public, and for this a court's gag order may provide relatively strong protection. This kind of extraordinary or provisional relief may well be available from a court even if a matter is, on other issues, in arbitration, and an arbitrator's decision as to secrecy may well be enforced by a court if it is consistent with the rather broad authority usually available to an arbitrator to provide a flexible remedy. The problem of nonparties' making public statements about a matter would be about the same in arbitration or in court proceedings.

i. Class Actions. If a waiver of class actions or class arbitrations is important to a party, the best way to accomplish the waiver with a good chance at success under the FAA and at least some chance of success under state law, may be through an arbitration clause and waiver. The ability of a party to prevent class actions through the use of predispute arbitration provisions is controversial. See, *Fiser v. Dell Computer Corp*., 188 P.3d 1215 (NM 2008) (consumer class action waiver unconscionable); and compare *Gay v. CrediInform*, 511 F.3d 369 (3d Cir. 2007) (state law on matter preempted by Federal Arbitration Act) with *Lowden v. T-Mobile USA, Inc*., 512 F.3d 1213, 1221 n. 3 (refusing to follow *Gay* and not allowing preemption despite state law not invalidating all (including nonarbitration) contractual waivers of class actions, finding unconscionability to be a generally applicable contract defense); see also, *Cicle v. Chase Bank USA*, 583 F.3d 549, (8th Cir. 2009) (not unconscionable; applying Missouri law). See, further, *Homa v. American Express Corp*., 496 F.Supp. 2d 440 (D.N.J. 2007) (Utah law applied; class action waiver not unconscionable and is enforceable under FAA; contract also prohibited class arbitration) which was reversed on all points by 558 F.3d 225 (3d Cir. 2009) (finding, among other things, that the choice of Utah law which allowed waiver would violate fundamental public policy of New Jersey against such waivers); *Italian Colors Restaurant v. American Express Travel Related*

Services Co., 554 F.3d 300 (2d Cir. 2009) (waiver of class action not enforced where to do so would effectively grant antitrust immunity where there is no feasible means of recovery). More generally, for agreements under the FAA the controversy perhaps may have been, to at least some extent, resolved by the US Supreme Court in a divided opinion. The Court held state law restrictions on class action waivers, particularly the unconscionability rule of *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005), cannot apply to arbitration agreements subject to the FAA because state actions having a "disproportionate impact" on (no longer intentional discrimination against) arbitration agreements are preempted under Section 2 of the FAA. *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011). See also *DIRECTV, Inc. v. Imburgia*, No. 14-462 136 S.Ct. 463 (2015) (class action waiver in an arbitration provision is valid even where the agreement chooses the application of state law that would have voided the waiver at the time the contract was entered into).

Other law may have an effect on the issue, too. In *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012) the National Labor Relations Board decided that a requirement as a condition of employment to waive the right to bring class or collective actions violated employees' rights to engage in concerted, protected activity pursuant to Section 8(a)(1) of the National Labor Relations Act (NLRA) (*enf. denied in relevant part*, 737 F.3d 344 (5th Cir 2013)), but the Supreme Court in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018) decided that the NLRA does not displace the Federal Arbitration Act's support for arbitration agreements waiving collective action procedures.

Whether preventing class proceedings is an advantage or a disadvantage very much depends on the perspective of the party; even the courts are rather ambivalent about such class proceedings in general and may see them more as presenting a way to conserve judicial resources than as presenting a fairness issue.

In a case where an agreement could give rise to a class action, instead of a full waiver, class arbitration may also be a possibility worth exploring. See *Green Tree Finance Corp. v. Bazzle*, 539 U.S. 444 (2003) (class arbitrations are allowable); see also *Stolt Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S.Ct. 1758 (2010), *rev'g* 548 F.3d 85 (2d Cir. 2008), (class arbitrations are not allowable under the FAA where the agreement is silent on the matter); *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir. 2012) (allowing class action of dispute under broad arbitration agreement which was not specific about class treatment ("civil action concerning any dispute") applying deferential standard to arbitrators finding that class procedure was necessarily included under the broad agreement and was not improperly inferred from a failure to preclude it) But see also *In re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012) (invalidating an arbitration provision requiring class arbitration on the grounds that it would preclude an antitrust action). The American Arbitration Association's Supplementary Rules for Class Arbitrations allows for "judicial review" within 30 days of a class determination award.

ii. No Juries. Naturally, arbitration eliminates the possibility of a jury trial where one may otherwise be available. This is likely to be seen as an advantage by a party which desires to avoid the extra expense of trial preparation and presentation where a jury is involved or wishes to avoid the sometimes strange decisions made by juries but which decisions are generally strongly protected by the courts. On the other hand, a party which desires to take advantage of the uncertainty of jury decisions or of the perceived broader, but less expert, experience of the jury panel, will find this aspect of arbitration a disadvantage. There is no particular reason to believe jury awards are somehow fairer than those produced through arbitration or trials to the court.

iii. Scope Limitations. Arbitrators can only decide matters within the scope of the arbitration agreement. See *Pacific Development, L.C. v. Orton*, 23 P.3d 1035, 1040 (Ut. 2001); *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 949 (Ut. 1996). This often includes the entire dispute, but this is not always the case, particularly where there are numerous parties and potential issues. If arbitration proceeds as to some parties to a disputed situation, but not all, or as to some issues, but not all, there is a risk of inconsistent decisions or time delays in resolving the larger situation. However, it is often the case that parties want a discrete resolution to part of an overall situation and do not want everything thrown in the mix, for example for cost savings or for setting a predicate for later negotiated or imposed resolutions. In court, the rules may well require that all potential claims and defenses be raised at once in a single proceeding, but in arbitration the scope of the proceeding, whether narrower or broader, may be determined by agreement.