NYSBA SPRING 2010 | VOL. 3 | NO. 1

# New York Dispute Resolution Lawyer

A publication of the Dispute Resolution Section
of the New York State Bar Association

## Message from the Chair

Jonathan Honig

After a long period in which arbitration was seemingly in an unstoppable growth mode, aided by Supreme Court decisions which advanced the policy in favor of arbitration and brought it to a place of prominence by permitting securities, antitrust, RICO, statutory employment and punitive damages issues to be arbitrated, a counter revolution of sorts has now set in.

It is interesting to review this recent criticism with a historical perspective.

In earlier days, and particularly through the 1980s and 1990s, litigation costs began to accelerate in an unprecedented way. The result was a pushback by affected businesses. Part of this pushback was in the form of attacks on punitive damages that resulted in *BMW v. Gore*, 517 U.S. 559 (1996), limitations on punitive damages under a construction of the Due Process Clause of the 14th Amendment, and attacks on securities actions which resulted in passage of the PSLRA (Private Securities Litigation Reform Act of 1996, Pub. L. 104-67, 109 Stat. 737) and subsequent legislation, including the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332 (d), 1453 and 1711-1715. Attacks on pleading standards resulted in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which imposed a plausibility standard of pleading, and pushback from deep-pocketed peripheral litigants led to *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), and subsequent rulings rejecting aiding and abetting liability and other attacks on secondary parties.

The other major attack of relevance to the ADR community was a push for arbitration clauses that sought to avoid litigation in general and, in particular, class actions.

If these efforts had been limited to business interests, they may well have been sustained over time because of the cost driver discussed above. However, this effort included consumers and individuals in its reach and, specifically, employment and credit card disputes. The pushback was partly driven by a view that FINRA did not provide for a proper determination of disputes in connection with securities industry participants. The pushback was, however, much more general and produced both proposed legislation and litigation results.

Initially, various requirements for arbitration of employment disputes that impinged on statutory protections were repudiated in a series of holdings that an arbitration provision had to allow for statutory protections such as an award of attorneys' fees.

Later came a more sustained attack. First, this resulted in employment issues in the securities industry being removed through Rule 13201 from the scope of FINRA arbitration in 2007.

*(continued on page 5)*

## Inside



TO JOIN THE DISPUTE RESOLUTION SECTION, SEE PAGE 24 OR GO TO WWW.NYSBA.ORG/DRS

*Throw Down the Muskets, Seek Out the Town Elders*

# This Is a Brief History of Arbitration in the United States

By Steven A. Certilman

While in the 20th Century it may no longer be typical for people to resort to weapons as a means of resolving their disputes, most will agree that litigation is, to a lesser degree, aggression played out in the dignified theater of the courts with words as the weapon of choice. Ideally, as a means of dispute resolution, ADR represents a choice of peace over aggression. Regrettably, though, as the process of arbitration is re-cast by some lawyers and parties who may have lost sight of arbitration's historic character and benefits, arbitration appears to be morphing in some cases into a private forum for litigation practices. With that in mind, it is hoped that a historical look at the origins of arbitration in North America will aid in reminding stakeholders in the arbitration process of arbitration's intended benefits: simpler, faster, cheaper.

*"[L]itigation is, to a lesser degree, aggression played out in the dignified theater of the courts with words as the weapon of choice."*

## Colonial Times

Long before Europeans journeyed to America's Atlantic shores, Native Americans used arbitration as a means of resolving disputes within and between tribes.[1] The opportunity to learn from this experience may have initially been lost on the newcomers, however, and it appears that its benefits were first introduced to settlers here long before the Revolutionary War by early colonists who had had business experience in Europe. The use of arbitration in the ports of Europe was already commonplace at that time among maritime and trade businesses. The experience of arbitration as a means of dispute resolution which minimized conflict and allowed continuation of the business relationship was carried across the Atlantic by those coming to live and work in North America.

As early as 1632, Massachusetts became the first colony to adopt laws supporting arbitration as a means of dispute resolution. Historical documents dating to the 1640s tell of a case in New England involving the amount to be paid by a Mrs. Hibbens, "wife of a prominent Boston resident," to Mr. Crabtree, who provided carpentry services in her house. When the parties failed to agree on how much Mr. Crabtree was owed for his services, Mr. Hibbens suggested arbitration. He selected one carpenter and Crabtree selected another. The arbitrators determined a revised fee, but Mrs. Hibbens continued to refuse to pay, pronouncing Crabtree's work unsatisfactory and criticizing the skills of the two arbitrators, "which diminished their reputation in the community. Church elders approached Mrs. Hibbens, but she remained unmollified. After another arbitration attempt failed, the dispute moved into the First Church of Boston, where Reverend Cotton presided."[2]

It is quite remarkable that the Massachusetts Colony arbitration statute preceded that of Great Britain by more than sixty-five years, the latter having enacted in 1698 An Act for Determining Differences by Arbitration 1698 (9 & 10 Will. III c 15). One might assume that this statute, together with that of the Massachusetts Colony, became a model for those enacted by other colonies.

In 1705, the Pennsylvania colony became the second colony to adopt laws in support of arbitration. Despite the opportunity for more widespread use of arbitration created by the enactment of legislation supporting arbitration by two colonies, its use remained common only in maritime and trade disputes. Then, in 1768, the New York Chamber of Commerce broke ground by appointing what has been referred to as the oldest American tribunal for the resolution of commercial disputes. This organizational structure combined with the volume of trade passing through the colony of New York at that time brought more widespread understanding of the arbitral process and its benefits.

Arbitration came to play a role in the last efforts to avoid the American Revolution. The Olive Branch Petition of 1775 was the final attempt of moderate colonists to prevent further bloodshed and halt the seemingly unavoidable slide toward the Revolutionary War. Written by John Dickinson, the leader of the moderate party, the Olive Branch Petition expressed loyalty to the King, begging him to cease fire until an agreement could be reached. In November 1775, the colonists learned that King George III had refused even to read the petition and decided to continue fighting. This led, in June 1776, to the formation of a committee of the Continental Congress to formulate what we now know as the Declaration of Independence.

## From the Revolution to Reconstruction

As the port of New York grew and New York expanded its role as the center of trade on the North American continent, so did the use of arbitration in its precincts and its use spread beyond the maritime and trade industries.

George Washington himself gave credence to arbitration through his decision to include an arbitration clause in his last will and testament. The 1799 will provided that "all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants each having the choice of one and the third by the two of those. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their intent of the Testators intention; and such decision is to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."[3]

In the aftermath of the Civil War, claims of people and nations came to be resolved by arbitration. Disputes between former slaves and former slave-owners were quite common following the war and three-arbitrator panels were often used to settle such disputes. The war left a number of outstanding subjects of dispute between the United States and Great Britain unresolved for six years. Then, upon the signing of the Treaty of Washington in 1871, the so-called *Alabama Claims* were submitted to arbitration before multi-national tribunals.

The controversy began when agents of the Confederate States contracted for warships from British boatyards. Disguised as merchant vessels during their construction in order to circumvent British neutrality laws, the ships were actually intended as commerce raiders. The most successful of these ships was the *Alabama*, which captured 58 Northern merchant ships before it was sunk in June 1864 by a U.S. warship off the coast of France. When the parties finally agreed to arbitrate, it was agreed that one panelist each would be selected by the President of the United States, the Queen of England, the King of Italy, the President of the Swiss Confederation and the Emperor of Brazil. The five arbitrators met at Geneva and the award, issued in 1872, required England to pay $15,500,000 in gold to the United States in full and final settlement of all claims.[4]

In 1871, the New Orleans Cotton Exchange adopted arbitration for the resolution of its disputes. Somewhat surprisingly, this seemed to bring about an awakening of the benefits of arbitration for many industries, most notably the securities industry. The New York Stock Exchange adopted arbitration for claims between members and their customers in 1872.

In 1874 the New York State legislature created within the City of New York the office of "Arbitrator of the Chamber of Commerce of the State of New York," and thereafter fixed the salary at ten thousand dollars a year.[5]

Voluntary, binding arbitration of labor disputes was enacted by Maryland in 1878. Over the next ten years similar laws were passed in other states. In 1886, New York and Massachusetts each created permanent arbitration boards with mediation and arbitration authority.

The first federal labor dispute law, the Arbitration Act of 1888, was enacted into law. It provided for both investigative authority and voluntary arbitration but as its arbitration provision was voluntary, it was infrequently used. This short-lived law was superseded in 1898.

Another instance of diplomatic arbitration took place in 1892 with the Fur Seal Arbitration Proceedings in Paris. This tribunal was constituted to determine issues which had arisen between the United States and Great Britain concerning the jurisdictional rights of the United States in the waters of the Bering Sea and, in particular, regarding the fur seals of the Pribilof Islands.[4]

The Erdman Act was enacted by Congress in 1898 to strengthen the Arbitration Act of 1888. It retained the original act's voluntary arbitration provision but eliminated the investigative authority and provided for mediation by the Commissioner of Labor and the Chairman of the Interstate Commerce Commission at the request of either party.[6]

A key event in the use of ADR in labor disputes occurred in 1902. To try to bring an end to a long and acrimonious strike, President Theodore Roosevelt used the weight of his office to bring the principals together to resolve the Philadelphia & Reading Coal & Iron Company miners' strike. The conduct of the mine owner at these proceedings caused the President to lean in favor of the striking minors. The resulting settlement was achieved, for the mine owner, with significant pressure. Nevertheless, this miner strike and the railroad strikes of the same era ushered in a large-scale trend in the use of mediation and arbitration to resolve labor disputes.

## The 20th Century

Within the first decade of the 20th Century, major trade groups sought to apply arbitration's benefits of simplicity, speed and minimal enmity. When New York's The Association of Food Distributors, Inc. (originally known as the Dried Fruit Association of New York) was formed, its bylaws included an arbitration panel for the resolution of disputes. This was a choice which worked to minimize the risk that its disagreeing members would, after resolution of the dispute, find themselves unable to resume their business relationship.

The use of ADR in labor disputes was further refined by the creation in 1917 of the U.S. Conciliation Service as an agency of the Department of Labor, which had been created in 1913. The USCS was a mediation organization with no direct mandate for arbitration.

When the League of Nations was founded in 1919, its members committed themselves to the use of arbitration

through the Permanent Court of International Justice. Unfortunately, the United States Senate failed to approve the treaty creating the League of Nations so this early and inspired act of world support for the arbitration process did not include the United States.

Until the early 1920s, the only law governing arbitration proceedings in the United States came from court decisions, some dating back to the 17th and 18th Centuries. Lord Coke's opinion in Vynior's Case (Trinity Term, 7 Jac. 1), decided in 1609, formed the basis for the common law doctrine that "1) either party to an arbitration might withdraw at any time before an actual award; and 2) that an agreement to arbitrate a future dispute was against public policy and not enforceable." The precedent established in Vynior's case (from which it was extrapolated that the parties to a dispute "may not oust the court of its jurisdiction"-meaning that courts may not be deprived of their jurisdiction even by private agreement) became "the controlling decision in American arbitration law" until the New York State legislature abrogated the common law doctrine in 1920, and until a federal arbitration statute was passed in 1925. Other states soon followed suit, and for the first time in America, agreements to arbitrate future disputes were "legally binding and judicially enforceable." This was the pivotal moment for the widespread use of arbitration in America.[7]

In 1925, The Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) was enacted. Its enactment was a recognition of the benefits of arbitration and the statute established a national policy favoring arbitration. Functionally, the Federal Arbitration Act was designed to overcome existing judicial hostility toward arbitration which appears to have evolved from the English courts. It has been written that English judges were paid fees based on the number of cases they decided. Arbitration, then, would infringe on their livelihood. English courts were also strongly reluctant to surrender their jurisdiction over various types of disputes.[8]

As the nation became more industrialized and the number of disputes increased, the resistance to arbitration diminished with the increased number of disputes. Where the agreement at issue concerns "a transaction involving commerce," (9 U.S.C. § 1), the FAA continues to form the framework for arbitration cases.

The founding of The American Arbitration Association in 1926 by Moses Grossman, a New York lawyer, and Charles Bernheimer, a New York businessman, ushered in the modern era of ADR. Each of these men had formed an organization to promote the use of arbitration and by combining their efforts in 1926, they created what remains the dominant provider and promoter of ADR in the United States.

With the rapid industrialization of the U.S. in the 1930s and the passage of the National Labor Relations Act during that era, a steep rise in the use of arbitration and mediation in labor contracts began. When the United States entered the Second World War, the resulting economic boom and the unacceptability of shortages in war materials due to labor strikes resulted in a government requirement that grievance-arbitration clauses be placed into collective bargaining agreements. Now, though they are not actually required, approximately 75% of all collective bargaining labor contracts continue to retain an arbitration clause.

*"[I]t falls upon us as arbitrators and party advocates in arbitration to redouble our focus on securing for the parties the benefits of the arbitration process that they elected."*

In a further effort to ensure the availability of war materials, President Franklin Roosevelt created in 1941 the National Defense Mediation Board to handle disputes not resolved by the U.S. Conciliation Service. This board was replaced one year later by the War Labor Board, which was empowered to employ arbitration, mediation and policymaking dispute processes. Following the War Labor Board, the Federal Mediation and Conciliation Service was created in 1947. An outgrowth of the U. S. Conciliation Service, the FMCS was created as an agency independent of the Department of Labor to address the concern of its management constituency that the agency had been inherently biased as the USCS because it was an agency within the Department of Labor.[9]

A major milestone in the use of arbitration in international agreements involving businesses of the United States was achieved in 1970 when the Uniform Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) became law in the United States by the addition of Chapter 2 to the Federal Arbitration Act. To this day, the New York Convention provides a framework for enforcement of foreign arbitral awards in the United States which is more reliable and consistent than existing frameworks for enforcement of court judgments internationally. In 1990, the Federal Arbitration Act was expanded one step further by the enactment of Chapter 3 of the Act, the Inter-American Convention on International Commercial Arbitration.

## Conclusion

Litigation is the eight-hundred pound gorilla in dispute resolution. It is predictable that as litigation practices shift, so will those of arbitration. The shift from disclosure to discovery and the advent of e-discovery have both had a great effect on arbitration. After all, the advocates representing arbitration clients are generally the same

ones who represent litigants. Their training and practice methods cannot be expected to be materially different in the differing fora. The same can be said for the standards of thoroughness ("*leave no stone unturned*") demanded by their firms on behalf of their clients. As many now recognize that arbitration's core values of simpler, faster, cheaper are becoming more elusive, it falls upon us as arbitrators and party advocates in arbitration to redouble our focus on securing for the parties the benefits of the arbitration process that they elected.

## Endnotes


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9. Barrett, Jerome T. and Barrett, Joseph P., "A History of Alternate Dispute Resolution, The Story of a Political, Cultural and Social Movement," Jossey-Bass, a Wiley imprint, 2004.



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# Congressional Developments on Arbitration: Update

By Edna Sussman

There has been no formal activity in the House of Representatives or in the Senate on the Arbitration Fairness Act which would invalidate, *inter alia*, pre-dispute arbitration agreements for consumers, employees and franchisees, and was the subject of this Section's report published in the last issue of the *New York Dispute Resolution Lawyer* and of resolutions passed in August of 2009 by the American Bar Association's House of Delegates. But Congress has been busy on other legislation relating to arbitration.

The House of Representatives passed comprehensive financial regulatory reform legislation, H.R. 4173, which contains a number of significant arbitration provisions. The reform bill, known as the Wall Street Reform and Consumer Protection Act, includes many different provisions relating to arbitration, including the following. The bill would authorize the director of a new consumer financial protection agency to issue regulations prohibiting or imposing conditions on the use of any pre-dispute arbitration agreement between consumer and providers of consumer financial products or services if the director finds that such a prohibition or imposition of conditions or limitations are in the public interest and for the protection of consumers. The bill would grant the Securities and Exchange Commission the authority to issue rules prohibiting or imposing conditions or limitations on the use of agreements that require customers or clients of any broker, dealer, municipal securities dealer, or investment advisor to arbitrate any future dispute between them arising under the federal securities laws or rules if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors. The bill would require the Comptroller General to conduct a study of FINRA arbitration. The bill would amend the Truth in Lending Act to prohibit pre-dispute agreements to arbitrate any controversy involving residential mortgage loans or lines of credit. The draft Senate version of the financial reform package contains many similar provisions.

While these provisions have not yet been enacted into law, in December of 2009 two laws were enacted relating to arbitration.

## Auto Dealer Arbitration

Congress passed legislation signed into law[1] to protect the automobile dealers who were terminated in the wake of the bankruptcies of GM and Chrysler by creating a right to a streamlined arbitration against the manufacturers at the election of the dealers. Ironically in 2002 Congress passed a law providing that automobile dealers have to consent to arbitration after the dispute arises before an arbitration can be conducted.[2]

The new statute is very specific and provides that arbitrations by the dealers who claim their termination was unlawful under state law are to take place pursuant to the American Arbitration Association's (AAA) Commercial Arbitration Rules. Arbitrators are to be selected by mutual agreement of the parties from a list of arbitrators provided by the AAA. In the event the parties are unable to agree, the AAA makes the appointment.

While not granted the authority to award damages, the arbitrator is authorized to order a dealer to be returned to the dealer network but must consider in the determination a balance of the economic interests of the dealer, the manufacturer and the public at large. In so doing, the arbitrator is specifically obligated to consider the dealer's profitability in 2006-09, the dealer's overall business plan, the dealer's economic viability, the demographic and geographic characteristics of the covered dealership's market territory, and the dealer's satisfaction performance.

All of the arbitrations are required to be completed by mid-June and the arbitrator is required to issue a written determination no later than 7 business days after the arbitrator determines that the case has been fully submitted. The AAA has received almost 1600 filings for arbitration by dealers. With the reinstatement by General Motors of approximately 600 of its dealers as its business improved, the number of cases has now been reduced to a number less than 1000, still a large number. The AAA has developed tools to streamline the process for the parties and create uniformity in the procedural mechanisms employed to comport with the statutory requirements.

## Arbitration Agreements by Federal Contractors

On December 22, President Obama signed into law an amendment to the Department of Defense Appropriations Act[3] that was introduced by Senator Al Franken of Minnesota, prohibiting enforcement of arbitration for specified employment-related claims by certain government contractors. The amendment provides that defense contractors competing for contracts in excess of $1 million and other entities receiving funds pursuant to the DOD Appropriations Act must, as a condition of receiving such funds, refrain from entering into any agreement with their employees or independent contractors that contains a mandatory arbitration clause for claims under Title VII of the Civil Rights Act of 1964 or for certain torts related

to sexual assault or harassment. Such contractors must also refrain from enforcing such arbitration provisions in existing employment agreements.

Concerns have been raised as to the precise application of this legislation. Many companies have federal government contracts. Whether this law will impact arbitration agreements and contracts other than those with the Department of Defense funded with 2010 dollars remains to be seen.

This legislation is an outgrowth of the Jamie Leigh Jones case. Ms. Jones alleges she was gang raped in Iraq by fellow employees at Halliburton after she asked to be put in all-female housing and was refused. She said Halliburton kept her locked up and not allowed to call home the day after the incident and then tried to make her pursue her remedies in arbitration pursuant to her contract. The 5th Circuit Court of Appeals reversed a trial court decision that had prohibited her from bringing her claims in court (on the ground that the trial court had erred because her bedroom was not her place of employment even though provided by her employer). Ms. Jones has testified extensively in Congress about what happened to her and that she was not aware of the arbitration provision in her employment agreement. Her testimony was widely reported in the press and has undoubtedly affected the perception of arbitration by the public and members of Congress.

### Conclusion

It is impossible to predict what measures relating to arbitration will ultimately be enacted by Congress. But it is clear that it is a subject that continues to attract attention and action in Congress.

### Endnotes

1. Consolidated Appropriations Act 2010 (HR 3288) § 747.
2. 15 U.S.C.A. § 1226.
3. 2010 Department of Defense Appropriations Act, § 8116 of the Act (H.R. 3326)..

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# Traps for the Unwary: Major Differences Between New York and Federal Arbitration Law

By Charles J. Moxley, Jr.

Parties who include an arbitration clause in their contract also typically include a choice of law clause, designating the law applicable to the contract. A typical clause might read, "This agreement shall be governed by and interpreted in accordance with the law of the State of New York."

In making this selection, parties often assume they are adopting the law that will apply not only to their rights and obligations under their contract but also to any arbitration that may ensue between them under the contract.

This is not necessarily the case. General choice of law clauses are generally understood to designate the substantive law applicable to the parties' dispute, the contract, tort, statutory or other such law, but not the law applicable to any arbitration between the parties under the contract.[1]

There will often be substantial differences between the various bodies of arbitration law that could apply to any potential arbitration. By only designating the substantive law, parties miss the valuable opportunity to designate the arbitration law that best suits their purposes. They also potentially subject themselves to expensive and time-consuming side disputes as to applicable arbitration law in any arbitration that may ensue between them and in collateral court cases.

This article will explore significant differences between New York and federal arbitration law and suggest the advisability of designating the applicable arbitration law in arbitration clauses.[2]

## Areas of Conflict Between New York and Federal Arbitration Law

New York arbitration law is primarily set forth in New York CPLR Article 75 and case law, although there are rules of law in other statutes that apply to arbitration, typically within limited contexts.[3] Federal arbitration law is generally set forth in the Federal Arbitration Act[4] (FAA) and case law.

The central thrust of the FAA is Section 2, which establishes the enforceability of all arbitration agreements relating to interstate commerce, save upon such grounds as exist at law or in equity for the revocation of any contract.[5] Any state law that purports to restrict the arbitrability of a dispute affecting interstate commerce is preempted.

The FAA was enacted in 1925, five years after New York CPLR Article 75 (as originally enacted). The text of the FAA was largely based on Article 75. New York arbitration law and the FAA remain quite similar, although there are a number of significant areas where they diverge.

### Challenges to the Validity of the Parties' Overall Agreement, Including Challenges Based on Alleged Fraud in the Inducement

Under New York arbitration law, a challenge to the parties' overall agreement on the ground that it is permeated with illegality is generally to be decided by the court.[6] Under the FAA, that is a question for the arbitrator.[7] Challenges to the validity of the arbitration clause itself are generally decided by the court under both New York arbitration law and the FAA.[8]

### The Extent to Which a Party's Appearance in an Arbitration Waives Its Jurisdictional Objection

CPLR 7503(b) provides that, by participating in an arbitration, a party waives the right to apply to a court to stay the arbitration based on the invalidity of the arbitration agreement or statute of limitations. By participating in the arbitration, the party becomes subject to the decision of the arbitrator on such issues; if the party wants to contest arbitrability, it must make an application in court to stay the arbitration without first contesting the matter before the arbitrator. In contrast, the Second Circuit has held that the FAA imposes no such waiver: A party may oppose arbitrability in the arbitration (or even potentially participate more broadly in the arbitration) and thereafter dispute arbitrability in court.[9]

### Statute of Limitations

CPLR 7502(b) provides that a party may submit to a court the question of whether an arbitration is barred by a statute of limitations.[10] The U.S. Supreme Court has reached the opposite result under the FAA, finding that such objections are generally to be decided by the arbitrator when the parties have agreed to submit their dispute to arbitration.[11]

There is a further conflict of state and federal case law as to whether a court or arbitrator should determine limitations issues in cases where the FAA is applicable but the parties' agreement includes a choice of law clause designating New York arbitration law.

The New York Court of Appeals has suggested in dictum that, even in cases where the FAA is applicable, limitations defenses should be heard by *the court* if the parties adopted New York arbitration law (which, in its view, they would do by providing that New York law would apply to the "enforcement" of their agreement).[12] The basis for

this conclusion is that, under the FAA, party autonomy in choosing arbitration is paramount: If the parties, through selecting New York arbitration law, chose to have the court determine limitations questions, that choice should be respected. In contrast there are local federal cases providing that, even in such circumstances, the FAA requires that arbitrators determine limitations questions.[13]

### Punitive Damages

New York arbitration law generally prohibits arbitrators from awarding punitive damages, even if the parties agreed that the arbitrators would have such a power. The Supreme Court in *Mastrobuono* found that the FAA permits arbitrators to award punitive damages.[14] The New York state courts have been inconsistent after *Mastrobuono*, with some courts following the decision[15] and at least one not following it and sticking to the strong New York public policy against punitive damages.[16]

### Attorneys' Fees

CPLR 7513 generally precludes arbitrators from awarding attorneys' fees, unless otherwise provided in the parties' agreement to arbitrate.[17] Federal law contains no such prohibition.[18]

## Consolidation of Arbitrations

New York courts have held that they have the power to consolidate arbitrations upon the same general bases applicable to the consolidation of actions[19] and indeed have suggested that arbitrators have this same power to consolidate.[20] In contrast, the Second Circuit, along with most federal circuits, has held that the courts do not have the power under the FAA to consolidate arbitrations absent the parties' agreement.[21]

### Pre-Award Removal of Arbitrator

There is authority to the effect that New York permits the pre-award removal of an arbitrator by a court, whereas the FAA does not.[22]

### Unenforceability of New York's Heightened Burden of Proof Requirement to Establish That an Arbitration Clause Had Been Added to an Existing Contract

The Second Circuit, reviewing the New York Court of Appeals' rule that the addition of an arbitration clause to an existing contract had to be proved by "express, unconditional" evidence rather than by the preponderance standard applicable to other amendments, found the rule to be preempted as discriminating against arbitration.[23]

### Whether Arbitrators Have Authority to Issue Subpoenas to Non-Parties for Production of Documents Pre-Hearing

CPLR 7505 provides that an arbitrator and any attorney of record in an arbitration proceeding have the power to issue subpoenas. While the case law is sparse and inconsistent,[24] there is some authority in New York that arbitrators can issue subpoenas to non-parties for discovery purposes.[25] While the issue of whether the FAA permits arbitrators to subpoena non-parties for discovery purposes, as opposed to for purposes of calling the witnesses to the hearing, has divided the Circuit Courts, the Second Circuit has found that arbitrators do not have such a power, *i.e.*, that they may only subpoena non-parties' documents to a hearing.[26]

### Precluding Parties from Applying in Court to Stay Arbitrations

CPLR 7503(c) provides a procedure whereby a party, by its demand for arbitration or notice of intention to arbitrate, may notify another party that, unless the party applies to stay the arbitration within twenty days after such service, it shall thereafter be precluded from asserting 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. The FAA contains no such provision. The law is unsettled whether CPLR 7503(c) is applicable to proceedings in state and federal court in New York, respectively, with respect to arbitrations to which the FAA is applicable.[27]

### Prerequisites to Having Judgment Entered Upon an Arbitral Award

FAA Section 9 requires that, for a party to obtain judgment on an arbitration award, the party's agreement must provide that a judgment shall be entered upon the award. CPLR 7510, the analogous New York provision, contains no such requirement. It appears to be questionable but unsettled whether this requirement of FAA Section 9 is applicable in New York state courts to cases to which the FAA is applicable or whether federal courts sitting in diversity in New York in such cases could issue judgment on an award under CPLR 7510 where Section 9 had not been complied with.[28]

### Challenges to Arbitral Award Based on Arbitrators' Refusal to Grant Adjournment

Unlike FAA Section 10(a), CPLR 7511(b)(1) does not specify that an arbitrator's refusal to postpone a hearing upon sufficient cause is misconduct constituting a ground for vacating an award, instead relying on the general language of "misconduct" to address the issue. Interestingly, New York Civil Practice Act (CPA) 1461(3), the predecessor to CPLR 7511(b)(1), contained the same language as FAA Section 10(a).[29]

### Time for Making an Application to Vacate an Award

Under CPLR 7511(a), an application by a party to vacate an award must be commenced within 90 days after the delivery of the award to him. Under FAA Section 12, notice of motion to vacate an award must be served on the adverse party within three months after the award is filed or delivered.[30]

### Availability of Interim Appeals

Under the CPLR, a party may file an interlocutory appeal to the Appellate Division from any ruling of the Supreme Court. Under FAA Section 16 (b), the federal "final judgment rule" applies, *inter alia*, to foreclose an interlocutory appeal from a District Court order compelling arbitration.[31]

## Beyond Preemption: Areas Where New York Courts Have Applied the FAA Where Ostensibly Not Constitutionally Required to Do So

Discussed above are respects in which New York and FAA arbitration law differ. There are also a number of areas where New York state courts, generally without elaboration, have applied FAA arbitration law where ostensibly federal courts would not have applied it, specifically with respect to various FAA provisions that appear by their terms to apply only in federal courts.[32]

### Enforcing Agreements by Their Terms Without Adding New Terms, Even if the New Terms Are Supported by State Law and Not Inconsistent with the Parties' Agreement

CPLR 7506(b) empowers the New York courts to direct an arbitrator to proceed promptly with the hearing and determination of the controversy. The New York Court of Appeals has held that, absent a choice of law clause explicitly adopting this provision (or perhaps New York arbitration law generally), this provision of the CPLR does not apply to an arbitration to which the FAA is applicable, since it would involve the court in effectively adding to the parties' agreement something to which they had not agreed.[33]

### New York State Courts' Application of FAA § 7 to Subpoenas Issued by Arbitrators in Cases Involving Interstate Commerce

As noted above, CPLR 7505 empowers arbitrators to issue subpoenas in arbitrations over which they preside. Correspondingly, FAA Section 7 empowers arbitrators, or a majority of them in a particular case, to issue subpoenas and provides for the enforcement of such subpoenas by the federal district court in which the arbitrators are sitting.

Since FAA Section 7 on its face provides only for enforcement in federal court, but disputes relating to arbitrations affecting interstate commerce may be litigated in state court, one might expect CPLR 7505 to apply to such disputes litigated in state court. Nonetheless, the First Department in at least one case has reflexively applied FAA Section 7 to issues relating to subpoenas in arbitrations to which the FAA is applicable.[34]

### Application by New York State Courts of the Provisions of FAA §§ 9, 10, and 11 to Issues as to the Review of Awards Issued by Arbitrators in Cases Involving Interstate Commerce

CPLR 7510 and 7511 set forth standards for confirming, vacating, and modifying arbitration awards. FAA Sections 9, 10, and 11 set forth the corresponding federal standards for confirming, vacating, and modifying arbitration awards.

FAA Section 10 refers specifically to vacating arbitration awards in federal district courts, without reference to state courts. Section 9 refers to confirming awards in federal court, although it also refers to the possibility of the parties specifying the court in which judgment on an award shall be entered, without specifying what that court might be, or whether it might be a state court. Section 11 refers to modifying awards in federal district court.

Accordingly, one might expect that a New York state court hearing such a motion in an arbitration to which the FAA is applicable would apply the standards set forth in CPLR 7510 and 7511, as applicable, unless the parties' agreement provided otherwise.

Yet the New York courts, including the Court of Appeals, have often proceeded, seemingly automatically and reflexively, from the determination that the FAA is applicable to the application of the standards of FAA Sections 10 and 11 for modifying and vacating awards.[35]

## Legal Determination of Arbitration Choice of Law

The FAA governs arbitration agreements that involve interstate or maritime commerce, preempting state law as to such matters. The Supreme Court has interpreted the term "commerce" as used in the FAA very broadly as extending as expansively as the Commerce Clause to any dispute affecting interstate commerce.[36] This means that most arbitrations affect interstate commerce and are therefore subject to the FAA.

### Parties Who Want New York Arbitration Law to Apply

The fundamental rule of the FAA is that parties' arbitration agreements are to be enforced as written, except upon such grounds as exist at law or equity for the revocation of any contract. This includes parties' agreements that their arbitrations shall be governed by a particular arbitration law, as long as that law does not conflict with the FAA.[37]

The New York Court of Appeals has reached essentially the same conclusion, finding that, where the parties agreed that New York law would apply to the "enforcement" of their agreement, they thereby adopted New York arbitration law, including the rule that statute of limitations issues should be determined by the court, not the arbitrator.[38]

Accordingly, even though an arbitration involves interstate commerce, so that the FAA would otherwise be applicable to it, state arbitration law will generally be applicable if the parties by their arbitration agreement so provide. Therefore, parties who want New York or other state arbitration law to apply to potential arbitrations between them should so provide in their agreement. Where there appears to be a risk that the particular rule of New York arbitration law could be said to conflict with the FAA, the enforceability of the parties' selection of that rule of law might be more certain if the rule were explicitly adopted rather than through a general adoption of New York arbitration law.

In addition, as noted above, courts in New York have tended to apply the FAA in an overly preemptive way: they have tended to apply portions of the FAA that are not necessarily applicable in state courts. This is another reason why parties who want New York arbitration law to apply should so provide in their agreements.

### Parties Who Want Federal Arbitration Law to Apply

Parties who want federal arbitration law to apply also need to be careful and should specify the FAA as the governing arbitration law. State arbitration law will generally apply if the arbitration does not involve interstate commerce. Even though interstate commerce is broadly defined in this respect, uncertainties can still arise as to whether a particular dispute involves interstate commerce, and courts in New York in cases ostensibly involving interstate commerce have applied New York arbitration law without consideration of the FAA.[39] At a minimum, there is a risk of expensive and time-consuming disputes between the parties in the arbitration and in court over choice of arbitration law if they do not provide for the matter in their agreement.

There is also the issue of the scope of the FAA even in cases affecting interstate commerce. As noted above, the Supreme Court has repeatedly noted that only certain provisions of the FAA are applicable in state courts. Accordingly, absent agreement by the parties to the contrary, New York arbitration law may be found to be applicable in some respects by New York courts with respect even to arbitrations subject to the FAA. Parties should be able to avoid this by providing in their agreement that the FAA shall apply to any arbitration between them under the agreement.

## Conclusion

Given potentially significant differences between New York and federal arbitration law and the uncertainties as to how arbitrators and courts will determine which body of arbitration law is applicable to a particular arbitration, it is important for parties to provide in their contracts what arbitration law will be applicable to any arbitrations that arise between them.

Determining such matters by contract not only accords the parties the arbitration law they want but also presumably decreases the likelihood of expensive and time-consuming disputes between the parties as to such matters in any ensuing arbitration and in collateral litigation.

## Endnotes

1. *See Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62-64, 115 S. Ct. 1212, 1218-19, 131 L. Ed. 2d 76, 87-88 (1995); *see also*, 5 N.Y. Jur.2d Arbitration and Award § 64.
2. *See generally*, William T. Brown, *The Dark Before the Dawn: The Revised Uniform Arbitration Act*, 2 N.Y. Disp. Res. Lawyer 43 (Spring 2009); 13-75 New York Civil Practice: CPLR ¶ 7501.03, "The Federal Arbitration Act and Other Statutory Sources of Arbitration in New York"; T. Barry Kingham, 2 N.Y. Prac., Com. Litig. in New York State Courts, § 11:19, *Enforcement of Forum Selection and Arbitration Clauses* (2d ed. 2008); George K. Foster, *Confusion among Courts over the Interplay of State, Federal, and International Arbitration Law*, Nat. L. J. (Dechert on Choice of Law); 21 Williston on Contracts § 57:5 "Federal Arbitration Act—Preemption of State Law"; 5 N.Y. Jur. 2d Arbitration and Award § 64, *Effect of Federal Arbitration Act—Where Agreement Contains Provision Choosing New York Law* (2008).
3. *See*, *e.g.*, N.Y. General Business Law § 399(c) (consumer contracts); Gen. Bus. Law § 198-a(k) (New Car Lemon Law) and other laws described in 13-75 New York Civil Practice: CPLR ¶ 7501.03, "The Federal Arbitration Act and Other Statutory Sources of Arbitration in New York."
4. 9 USC §§ 1 *et seq*.
5. The Supreme Court has stated repeatedly that § 2 is the only section of the FAA that it has applied in state court. *See*, *e.g.*, Brown, *supra* n. 2 at 41, *citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 477 n. 6, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

   However, the Supreme Court has stated in dictum that state courts, as much as federal courts, are obliged to grant stays of litigation under FAA § 3. The Court characterized it as less clear but an open question as to whether the same is true of an order to compel arbitration under FAA § 4. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26-27, 103 S. Ct. 927, 942-43, 74 L. Ed. 2d 765, 786-87 (1983). Responding to objections that FAA § 2 is the only section of the FAA that the Supreme Court has applied in state court and §§ 3 and 4 do not apply in state court, the Court, focusing on § 4, has also noted that that section "ultimately arises out of § 2." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 1209, 163 L. Ed. 2d 1038, 1044 (2006).
6. *Utica Mut. Ins. Co. v. Gulf Ins. Co.*, 306 A.D.2d 877, 762 N.Y.S.2d 730 (4th Dep't 2003); *Teleserve Sys. v. MCI Telcoms. Corp.*, 230 A.D.2d 585, 659 N.Y.S.2d 659 (4th Dep't 1997); *see also,* David Elsberg, *Validity of Pacts with Arbitration Clauses: Courts Split*, N.Y.L.J., Dec. 18, 2006 (reporting that New York courts have been resistant to enforcing the FAA rule that arbitrators, not courts, should decide challenges to the parties' overall agreement).
7. *Buckeye Check Cashing*, 546 U.S. at 445-46; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).
8. *Buckeye Check Cashing*, 546 U.S. at 445-46; *Utica Mut. Ins.*, 306 A.D.2d at 762.
9. *Penrod Mgmt. Group v. Stewart's Mobile Concepts, Ltd.*, 2008 U.S. Dist. LEXIS 11793 (S.D.N.Y. Feb. 16, 2008).
10. *See* 13-75 New York Civil Practice: CPLR ¶ 7502.14.
11. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).