Chapter 1

Overview of Arbitration in the Dispute Resolution Process[1]

1-1 HISTORY

Arbitration is one of several methods to resolve a dispute. From the biblical reference in Genesis to Moses asking for assistance in resolving disputes among the Israelites and being told to appoint judges, history is replete with methods to make peace between adversaries. King Solomon was reported to have arbitrated disputes. Land disputes in ancient Greece were arbitrated. Although trial by combat or ordeal were once accepted as methods of dispute resolution, these were replaced by decisions of judges of some sort. The king, nobles, political leaders, professional judges, respected members of communities such as religious advisors, and others have been sought out to render decisions that both sides would accept as binding. From ancient Rome (and earlier[2]) through the Middle Ages, there had been parallel systems of resolution: the

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[1.] Throughout this Handbook, the authors have attempted to provide leading cases and the latest citations, including (for their reference to fact patterns and legal principles, though not citation) Appellate Division cases that were not listed as for publication for which citation in opinions or briefs may be restricted, *see* N.J. Ct. R. 1:36-3. The authors also have attempted to distinguish (or not cite) state cases decided under statutes other than the current New Jersey Revised Uniform Arbitration Act, N.J.S.A. 2A:23B-1, *et. seq*. Where there is no New Jersey law on the subject, or the authors have perceived issues that have not yet been considered by New Jersey or local federal courts, the authors have cited relevant out-of-state authority. Labor law and international cases are cited for purposes of illustration only, as these are not the focus of this Handbook and may be governed by separate bodies of law. If the reader believes additional issues should be included in future editions, the authors welcome such suggestions.

[2.] *See* Gary B. Born, International Commercial Arbitration, Ch. 1 (3d ed. 2021) (discussing the history of arbitration from the earliest days).

public courts and private arbitration. Arbitration, in fact, is older than the common law.

In the commercial world, the law merchant—the customary law of the marketplace—provided for representatives of the guilds and merchant associations to have those familiar with the practices of the marketplace pass on disputes.[3] The authorities of these associations could dictate that the booths of defaulting members be broken and their rights terminated when they could not meet their obligations.[4]

Some religious organizations, such as Quaker Meeting and the Jewish Beit Din, adopted a preference for non-judicial dispute resolution (often but not always called arbitration), in order to maintain internal cohesion and the privacy of their disputes and to enforce norms of expected behavior—personal, familial, and business.[5] The obligation to arbitrate or mediate may be found in by-laws and religious texts. The caselaw in this area is fairly sparse, in part because organizations' doctrines often require expulsion of members who do not comply with demands for arbitration or fail to honor an award.

Another prime historical reference to arbitration is the will of George Washington, which directed that a panel of three arbitrators should resolve any dispute under his will and that the decision would be as binding as a decision of the United States Supreme Court.

Although there had been considerable judicial antipathy toward arbitration,[6] that largely has been overcome by enactment of the

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3. *See* William Catron Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. Chi. L. Rev. 445 (1958).

4. Thus, the term "bankrupt" or "broken table."

5. *See, e.g.*, F. Peter Phillips, *Ancient and Comely Order: The Use and Disuse of Arbitration by New York Quakers Symposium*, 2016 J. Disp. Resol. (2016), *available at* https://scholarship.law.missouri.edu/jdr/vol2016/iss1/8 (last visited Nov. 30, 2023); William M. Offutt, Jr., Of Good Laws and Good Men: Law and Society in the Delaware Valley, 1680-1710 (U. of Ill. Press 1995); Michael C. Grossman, Note, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 Colum. L. Rev. 169 (2007); Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 Yale L.J. 2994 (2015). Some of the New Jersey cases are discussed later in this chapter and in Chapter 9, below. *See Elmora Hebrew Ctr. v. Fishman*, 125 N.J. 404 (1991).

6. As noted in the articles cited in in footnote 8, below, English and other common law courts had viewed arbitration agreements as executory contracts, from which a party was privileged to withdraw; courts therefore declined to order specific performance at least until the time of an award. However, parties to pre-dispute and post-dispute arbitration agreements, courts, and legislatures had developed several "work-arounds": the arbitration

Federal Arbitration Act (FAA)[7] and similar state statutes (discussed below). Today, arbitration is used as a private, consensual dispute resolution process in commercial, construction, consumer, labor, employment disputes as well as a wide variety of other contexts.

New Jersey has a rich history of arbitrating a variety of disputes, going back to Colonial times.[8] Following the Quaker tradition of arbitration in neighboring Philadelphia,[9] West Jersey is said to have adopted the first arbitration statute (in 1682) in the Colonies.[10] After the Revolution, an arbitration statute was adopted in New

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agreement could be made a "rule" of a court; the agreement could include arbitration as a precondition to a court action; a bond could be required; and refusal to honor an agreement could be viewed as a breach for which damages might be awarded. Statutes regulating trade within an industry might include an arbitration requirement. Where arbitration was part of a guild's or other organization's charter, *see, e.g.*, Lisa Bernstein, *Private Commercial Law in the Cotton Industry*, 99 Mich. L. Rev. 1724 (2001), members who refused to honor the arbitration requirements of the group could be expelled. Although the issue has been couched as a matter of "remedies", some have said that judges did not like arbitrators taking fees and commissions from the local judiciary. An Act in England in 1889 altered the common law, thereby making pre-dispute arbitration agreements enforceable, *see* S. Whitney Landon, *Commercial Arbitration in New Jersey*, 1 N.J. L. Rev. Univ. of Newark 65, 78-79 (1935), but this change was not adopted in the U.S. until 1920 (New York) and 1923 (New Jersey). The United States Supreme Court discussed the pre-FAA hostility to arbitration in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1917 n.3 (2022) (describing ouster, revocability, and bars to specific performance).

7. 9 U.S.C. § 1 *et seq*. Not all courts have been convinced. *See, e.g.*, *CellInfo, LLC v. Am. Tower Corp*., 352 F. Supp. 3d 127 (D. Mass. 2018) (criticizing consumer arbitration), *appeal filed*, No. 20-02047 (1st Cir. Nov. 4, 2020) (docket checked Sept. 5, 2023).

8. Books and articles discussing the history of arbitration include Carl N. Conklin, *Transformed, not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 Am. J. of Legal Hist., No. 1, at 39 (Jan. 2006); James B. Boskey, *A History of Commercial Arbitration in New Jersey – Part I*, 8 Rutgers-Cam. L.J. 1 (1976); James B. Boskey, *A History of Commercial Arbitration in New Jersey – Part II*, 8 Rutgers-Cam. L.J. 284 (1977); S. Whitney Landon, *Commercial Arbitration in New Jersey*, 1 N.J. L. Rev. Univ. of Newark 65 (1935); Jerome T. Barrett & Joseph P. Barrett, A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement, Jossey-Bass, a Wiley imprint (2004); Odiorne, *Arbitration under Early New Jersey Law*, 8 Arb. J. 117 (1953); and Steven A. Certilman, *A Brief History of Arbitration in the United States*, Vol. 3. No. 1, N.Y. Dispute Resolution Lawyer 10 (NYSBA Spring 2010), *available at* http://ssrn.com/abstract=1690512 (last visited Dec. 5, 2023); Jill Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. Disp. Resol. (U. Mo. School of Law, 2016), available at https://scholarship.law.missouri.edu/jdr/vol2016/iss1/11 (last visited Jan. 29, 2024). Additional sources are cited below in the sections regarding the enactment of the Federal Arbitration Act.

9. *See* Lawrence M. Friedman, A History of American Law 39 (1973) (1682 law of William Penn instituting "common law peacemakers" to hold "arbitrations" as alternative to judicial resolution).

10. Carl N. Conklin, *Transformed, not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 Am. J. of Legal Hist., No. 1, at 39, 79 (Jan. 2006), citing S. Whitney Landon, *Commercial Arbitration in New Jersey*, 1 N.J. L. Rev. Univ. of Newark 65 (1935). *Id*. at 41.

Jersey in 1790, restated in 1794 and reaffirmed periodically.[11] One historian characterized the 1794 Act as applying whether or not a court action was pending.[12] The cases followed suit, and some authors have gone so far as to say that New Jersey was more favorably inclined toward arbitration than the English courts even after their early pro-arbitration reforms.[13]

1-2 ARBITRATION AND ARBITRATOR DEFINED

1-2:1 Arbitration

Arbitration is not defined in either the FAA or the applicable New Jersey statutes. In *Barcon Assocs., Inc. v. Tri-County Asphalt Corp.*,[14] the New Jersey Supreme Court provided a broad, non-exclusive definition: "a substitution, by consent of the parties, of another tribunal for the tribunal provided by the ordinary processes of law" intended to provide a "final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner . . . ." Contrary to the current reality, arbitration is further described as intending to provide "a substitute for and not a springboard for litigation."[15] The Court Rules define court-annexed arbitration as presenting a case to "a neutral third party, who then renders a specific award."[16]

The arbitration process should involve a hearing or other means of taking evidence by sworn testimony and legal argument, rather than rendering a decision based on the fact-finder's own

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11. Carl N. Conklin, *Transformed, not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 Am. J. of Legal Hist., No. 1, at 39, 85 (Jan. 2006).

12. S. Whitney Landon, *Commercial Arbitration in New Jersey*, 1 N.J. L. Rev. Univ. of Newark 65, 71 (1935). Landon, at 74, n. 25, cites *Hoffman v. Westlecraft*, 79 A. 318 (N.J. S. Ct. 1911), as permitting a contempt order to be entered for failure to honor the agreement. Landon, at 75 describes an earlier case, *Stoll v. Price*, 21 N.J.L. 32 (Sup. Ct. 1847), and others.

13. *See* James B. Boskey, *A History of Commercial Arbitration in New Jersey – Part I*, 8 Rutgers-Cam. L.J. 1, 2-3 (1976), citing *Moore v. Ewing & Bowen*, 1 N.J.L. 167 (Sup. Ct. 1792).

14. *Barcon Assocs., Inc. v. Tri-Cnty. Asphalt Corp.*, 86 N.J. 179, 187 (1981) (quoting *Eastern Eng'g Co. v. City of Ocean City*, 11 N.J. Misc. 508, 510-11 (Sup. Ct. 1933)). *Barcon* also expressed approval of the ABA/AAA Code of Ethics. 86 N.J. at 190.

15. *Barcon Assocs., Inc. v. Tri-Cnty. Asphalt Corp.*, 86 N.J. 179, 187 (1981) (quoting *Korshalla v. Liberty Mut. Ins. Co.*, 154 N.J. Super. 235, 240 (Law Div. 1977)).

16. N.J. Ct. R. 1:40-2(a)(1).

expertise or investigation.[17] *Statewide Commercial Cleaning, LLC v. First Assembly of God*[18] concerns an appraisal "umpire" without discussing arbitration. Nor is an order for a "true-up" process to adjust the purchase price for a corporate transaction an arbitration,[19] but the report of an automobile repair "expert" may be allowed.[20]

The Third Circuit highlighted several differences between an "expert" process and an arbitration in *Sapp v. Indusrial Action Services, LLC*[21] and vacated the judgment the district court had entered based on an accountant's "award." The Court noted the differences between deciding only facts, not law or claims, the lack of rules or a forum (such as the AAA), the failure to use the word "arbitration" in the clause, the ambiguous inclusion of "mediation" in the process, and the lack of any adjudicative processes. Oddly, the Court stated that the FAA did not "necessarily" apply. On remand, the parties were to litigate the disputed issues.

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17. *See Levine v. Wiss & Co*., 97 N.J. 242, 248 (1984) (discussing cases involving appraisals and distinguishing discretionary actions of an arbitrator). *See also 151 Madison Ave. Invs., LLC v. Care One at Madison, LLC*, No. A-1288-19, 2020 N.J. Super. Unpub. LEXIS 1384 (App. Div. July 13, 2020) (problems with appraiser as an arbitrator). *Cf. Itzhakov v. Segal*, No. A-2619-17T4, 2019 N.J. Super. Unpub. LEXIS 1829 (App. Div. Aug. 28, 2019) (rabbi not necessarily acting as arbitrator).

18. *Statewide Com. Cleaning, LLC v. First Assembly of God*, No. A-3892-17, 2019 N.J. Super. Unpub. LEXIS 645 (App. Div. Mar. 21, 2019).

19. *Welsh Family Holdings, Inc. v. Addeo*, No. A-5688-18, 2020 N.J. Super. Unpub. LEXIS 988 (App. Div. May 26, 2020) (the order therefore was not appealable as of right). As noted later in this chapter, in § 1-5:2, below, though, religious bodies may conduct an arbitration. *See Veshnefsky v. Zisow v. Jewish Learning Ctr. of Monmouth Cnty., Inc.*, No. A-1306-18T4, 2020 N.J. Super. Unpub. LEXIS 1509 (App. Div. July 27, 2020). *But see Itzhakov v. Segal*, No. A-2619-17T4, 2019 N.J. Super. Unpub. LEXIS 1829 (App. Div. Aug. 28, 2019) (rabbi not necessarily acting as arbitrator).

20. *Maignan v. Precision Autoworks*, No. 13-3735, 2020 U.S. Dist. LEXIS 37803 (D.N.J. Mar. 4, 2020) (car "expert"). *See also Resch v. Catlin Indem. Co.*, No. 19-8699, 2020 U.S. Dist. LEXIS 50235 (D.N.J. Mar. 23, 2020) (insurance umpire evaluated under FAA); *Kamineni v. Tesla, Inc*., No. 19-4288, 2020 U.S. Dist. LEXIS 1329 (D.N.J. Jan. 6, 2020) (Lemon Law); *Sica Indus., Inc. v. Macedo*, A-3802-18T3, 2019 N.J. Super. Unpub. LEXIS 2667 (App. Div. Dec. 31, 2019) (home warranty). However, the hybrid concepts of a party- or court-appointed "neutral fact finder" or special master are not necessarily governed by arbitration statutes. *See generally* Brian Panka, *Use of Neutral Fact-Finding to Preserve Exclusive Rights and Uphold the Disclosure Purpose of the Patent System*, 2003 J. Disp. Resol. 531, 541-43 (2003), *citing* Richard H. Steen, *Innovative ADR Techniques for Managing Construction Disputes*, 835 (PLI Litig. & Amin. Prac. Course Handbook Series No. 481, 1993).

21. *Sapp v. Indus. Action Servs., LLC*, 75 F.4th 205 (3d Cir. 2023). The Court called expert determination as "close cousins" to arbitration. *Id*. at 211. *Cf. GPS of N.J. M.D. v. Horizon Blue Cross & Blue Shield*, No. 22-6614, 2023 U.S. Dist. LEXIS 159460 (D.N.J. Sep. 8, 2023) (expert "baseball" award).

The Third Circuit has described the nature of arbitration as typically private and consensual, though processes called arbitrations may be compelled, public, and non-binding.[22]

Various states and courts have made considered distinctions between arbitration and appraisal or accounting. For example, the Third Circuit has held that Pennsylvania's Lemon Law appraisal process is not arbitration.[23] The Second Circuit, looking at federal common law, analyzed factors to be considered in whether an appraisal was an arbitration.[24]

1-2:2 Arbitrator

The term "arbitrator" is defined in the New Jersey Revised Uniform Arbitration Act by circular reference to "an agreement to arbitrate,"[25] and the definition of arbitration in Court Rule R-1:40-2(a)(1) necessarily refers to a neutral who receives evidence and renders an award. The term is not defined in the FAA. The term "umpire" is used in the 1987 Alternate Procedure for Dispute Resolution Act[26] without any apparent difference intended. A highlight of the arbitration process, as was key to the final holding in *Barcon Associates*, is the impartiality of the arbitrators; hence the term "neutral" may be described in other regimes.[27] An arbitrator is said to provide a "quasi-judicial" function, rather than one calling for the exercise of particular expertise in a subject area, as would be the case for an appraiser,[28] though that is not necessarily determinative—as parties may designate as an arbitrator a person with expertise in the subject matter of the arbitration; and some industry forums highlight the subject-matter expertise of their arbitrators, who often are not attorneys. However, professionals can perform services similar to an arbitrator or umpire without

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22. *See Delaware Coal. for Open Gov't v. Strine*, 733 F.3d 510, 517-18 (3d Cir. 2013).

23. *Harrison v. Nissan Motor Corp. in USA*, 111 F.3d 343 (3d Cir. 1997).

24. *Milligan v. CCC Info Servs*., 920 F.3d 146 (2d Cir. 2019) (neither the terms arbitrate nor final need be in a contract to evidence the parties' intent to arbitrate disputes subject to the FAA.) *See also Milligan,* 920 F.3d at 152 n.3.

25. *See* N.J.S.A. 2A:23B-1.

26. N.J.S.A. 2A:23A-13(c)(5).

27. *But see* Chapter 2, § 2-3:5 (Non-Neutral Arbitrators), below.

28. *See Levine v. Wiss & Co.*, 97 N.J. 242, 248-49 (1984). *See also 151 Madison Ave. Invs., LLC v. Care One at Madison, LLC*, No. A-1288-19, 2020 N.J. Super. Unpub. LEXIS 1384 (App. Div. July 13, 2020) (problems with appraiser as an arbitrator).

the person being designated as such or the process being an "arbitration."[29]

These distinctions are not academic. The designation of a process or the professional can make a difference in enforcement and whether the protections (such as immunity or replacement) of the FAA or state arbitration statutes apply. A hearing officer is not an arbitrator.[30] An arbitrator under the Spill Act is governed by a separate statute and rules.[31] The differences between a special master and an arbitrator are explored in *Baker Industries, Inc. v. Cerberus, Ltd*.[32] There are many other examples set out in this Handbook.[33]

In *Capparelli v. Lopatin*,[34] an attorney initially served as one of three "arbitrators" to resolve disputes between business partners. When problems arose with his continued service as an arbitrator, the parties reached another agreement in which he was designated to decide a limited carve-out of issues, but–in contrast to the initial agreement–he was not designated an arbitrator and the process was not designated arbitration. When he elected to terminate his services, the courts held that the court did not have the authority to appoint his successor using Section 11 of the 2003 New Jersey Revised Uniform Arbitration Act (NJRUAA)[35] applicable to appointing successor arbitrators. Instead, the court found that the parties' contractual intent had been frustrated by the attorney's resignation, his agreement was void, and the parties had to resort to the earlier agreement or other processes. Notably, had the

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29. *See, e.g.*, *Frowlow v. Wilson Sporting Goods Co*., No. 05-4813, 2006 U.S. Dist. LEXIS 17209 (D.N.J. Apr. 4, 2006) (distinguishing between different functions) (citing *McDonell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825 (2d Cir. 1988)).

30. *See Teamsters Loc. Union No. 469 v. Stafford Twp.*, No. A-4344-15, 2018 N.J. Super. Unpub. LEXIS 1842 (App. Div. Aug. 1, 2018).

31. *See US Masters Residential Prop. (USA) Fund v. N.J. Dep't of Envt'l Prot. - Fin. Servs. Element*, 239 N.J. 145 (2019).

32. *Baker Indus., Inc. v. Cerberus, Ltd.*, 764 F.2d 204, 207, 210 (3d Cir. 1985) ("hybrid").

33. *E.g*., section 1-4:4 (Limitations), below. *Cf. Itzhakov v. Segal*, No. A-2619-17T4, 2019 N.J. Super. Unpub. LEXIS 1829 (App. Div. Aug. 28, 2019) (rabbi not necessarily acting as arbitrator). The "arbitrator" under the "No Surprises" Act, 42 U.S.C. § 300gg-111 *et seq*., and attendant regulations, was a certified IDR entity; any "natural person" serving as arbitrator at the entity was anonymous. *See GPS of N.J. M.D. v. Horizon Blue Cross & Blue Shield*, No. 22-6614, 2023 U.S. Dist. LEXIS 159460 (D.N.J. Sep. 8, 2023).

34. *Capparelli v. Lopatin*, 459 N.J. Super. 584 (App. Div. 2019).

35. N.J.S.A. 2A:23B-11. *See also* 9 U.S.C. § 5.

parties used the terms "arbitration" and "arbitrator" in the second agreement, the result may have been the same, given his non-adjudicatory function; but as indicated above, those terms may not be necessary in order to take advantage (or bear the burdens) of the protections of the statutes, so long as the process and the functions are *consistent* with the parties' intent to require arbitration.

Given the importance of the procedures and standards of the NJRUAA and FAA in confirming, modifying, or vacating an "arbitration" award, parties appointing professionals to non-standard decision-making positions should be conscious of the distinctions and the consequences of their choice, just as they should be wary of having or selecting a particular statute or "law" to govern the process.

1-3 BENEFITS OF ARBITRATION

Having previously extolled the virtues of mediation,[36] the authors next recommend arbitration with its many benefits over litigation. Be proud of these benefits and advance them in practice. In one word, it might be summed up as party *autonomy*. The parties have the flexibility to control their process and provide as much flexibility (or otherwise) as they think is appropriate within the arbitral framework of fairness and cost-effectiveness. More particularly, benefits include:

(1) The ability of the parties to choose their own arbitrator, knowing in advance his or her special qualifications to decide a particular case; or, if the parties wish, they may even choose a panel of arbitrators, each bringing some special skill to the proceeding. Where the parties do not themselves select the arbitrator(s) in the agreement or as in a statutory or court-rule arbitration,[37] they still may have a role in the process; they may receive a list of several who are willing to serve, and the parties or court may identify conflicts or indicate a

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[36] *See* the Preface to this volume, above. The sequencing of mediation and contractually-required arbitration is discussed in Robert Bartkus, *Mediate Before Arbitrate?*, Just Resolutions (ABA Dispute Res. Section Summer 2023).

[37] *See* § 1-4, below.

preference as to experience, diversity, or technical background.

(2) In contrast to litigation with open courtrooms and dockets, arbitration proceedings may be conducted privately and under confidentiality rules and agreements the parties may adopt. As indicated below, the rules regarding confidentiality vary among providers, among subject-matter rules, and between domestic and international cases.[38] Confidentiality also may be lost if the parties file in court to compel or stay arbitration or to confirm, modify, or vacate an award.[39]

(3) The parties and arbitrator can formulate the rules for the arbitration before agreeing to proceed or later. Setting the location and time constraints are common parameters. The best-known arbitration providers (or forums) such as the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR), JAMS (formerly the Judicial Arbitration & Mediation Services), the International Institute for Conflict Prevention and Resolution (CPR), and the International Chamber of Commerce Court of Arbitration (ICC), have extensive rules governing the arbitration process, including baselines for discovery, evidence, and timing. Commencing the arbitration may use simplified procedures rather than formal service of process (though that is not necessarily the case—see Chapter 2, below). The parties may agree on other reasonable limits or procedures to be followed by the arbitrator, such

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[38] *See, e.g.*, §§ 1-5:4.8a & 3-3, below; Appendices 1, 3 & 4, below. Court annexed arbitrations may require public access where the process mimics a court trial. *Delaware Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013) (reviewing history and nature of arbitration).

[39] *CAA Sports LLC v. Dogra*, No. 18-1887, 2018 U.S. Dist. LEXIS 214223 (E.D. Mo. Dec. 20, 2018) (analyzing applicability of arbitration confidentiality award to motion to seal in District Court; sealing only part); *Soligenix, Inc. v. Emergent Prod. Dev. Gaithersburg, Inc.*, 289 A.3d 667 (Del. Ch. 2023) (confidentiality denied). *See also* §§ 1-5:4.8a; 3-3; 7-2:1 & 8-3:2.1b, below.

as remote hearings, a sealed record, limitations on discovery, accepting affidavits as testimony, or a trip to view sites or to receive evidence in other states. Arbitration can be adapted to meet the parties' needs.

(4) The costs and wasted time that are endemic to litigation can be cut appreciably in arbitration. Often it is counsel who seek extensive discovery, motions, and adjournments; but if they and their clients do not wish to foster such practices, arbitration can be as speedy and inexpensive as the parties may desire. Thus the term: "muscular arbitration." It is the rare arbitration that should exceed six months from the date issue is joined, and many can be resolved in a shorter period. Some forum rules allow or encourage the parties to attend the preliminary session at which these parameters are discussed.[40]

(5) Arbitration can take many forms; some alternatives are discussed later in this book.[41] The usual form is a simple presentation of the parties' positions before the arbitrator through documents and witnesses, much as a judge would hear a case in a courtroom. But the procedure may be even simpler, and the case may be decided on documents alone or even over the telephone or Zoom (or other service), if that is what the parties had consented to in their arbitration agreement or after the dispute is filed or was ordered by the arbitrator.[42]

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[40] *See, e.g.*, 2022 AAA Commercial Arbitration Rules, R-22(a). The AAA Commercial Rules were amended effective September 1, 2022. The ICDR Rules were amended effective March 1, 2021. To help distinguish the *current* rules, the year of their effective date may be indicated in any footnote citations. Some opinions may refer to the then-current rules, in which case this Handbook may highlight the distinction. The preamble to the rules states that the amended rules govern cases filed on or after their effective date.

[41] *See, e.g.*, § 1-4 & Chapter 9, below.

[42] *See, e.g.*, 2022 AAA Commercial Arbitration Rules, R-33; 2021 ICDR Rules, Article 26.

(6) In most cases, the parties also can specify the type of decision they wish to receive, from a simple award to one side or the other, to a full opinion with findings of fact and conclusions of law, or anything in-between. The usual choice is a reasoned award, which is a short award with a brief statement of reasons, unless a statute or rule requires otherwise.

(7) When it's over, it's over. This means that, unless the parties initially have agreed that there may be review of the law applied by the arbitrator,[43] any review of the award, on a motion to confirm or vacate the award, is limited to matters of corruption, fraud, partiality, refusal to consider evidence, and other similar grounds. The nitpicking of appeals for minor evidence problems, with possible reversals and retrials and their attendant expense, are absent in procedures for confirmation or vacatur of an arbitration award. Interlocutory court applications generally are not permitted.[44]

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[43] In New Jersey, *if* the case is not subject to the FAA, then parties may be able to agree that there can be an appeal if the arbitrator has made a significant error in the law that he or she applied. Also, the AAA, JAMS and other fora have Appellate Arbitration programs. Usually, the lack of appeals is looked upon as a benefit of arbitration, but in specific cases the parties may want to reserve the right of limited judicial or forum review. The NJRUAA gives this option, but review may be limited in other statutes. Although the United States Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008), has stated in dictum that, under circumstances not presented, parties may agree to alternative standards for review of an award, the application of that dictum is as yet uncertain. The Third Circuit attempted to distinguish among enforcement standards under the FAA, the New York Convention, *i.e.*, 9 U.S.C. § 201 *et seq.*, and Pennsylvania law, requiring "clear intent" to vary the FAA standard, but parties cannot supplant the FAA. *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277, 293 (3d Cir. 2010) (citing *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001)); *Oberwager v. McKechnie Ltd.*, 351 F. App'x 708, 710-11 (3d Cir. 2009) (citing cases, *Roadway* still effective for proposition that generic choice of law clause cannot supplant FAA).

In *Strickland v. Foulke Management Corp.*, 475 N.J. Super. 27 (App. Div. 2023), the parties had agreed that the arbitrator was bound to apply the law and failure to do so could require vacatur, but the Appellate Division held that the FAA governed and provided the exclusive grounds for vacatur. *See, e.g.*, Chapter 1, § 1-5:4.11 and Chapter 8, §§ 8-3:7 to 8-3:10, below.

[44] *E.g.*, *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 270 (3d Cir. 2004) ("[T]he judicial system's interference with the arbitral process should end unless and until there is a final award," also noting exceptions); *Travelers Ins. Co. v. Davis*, 490 F.2d 536, 541 (3d Cir. 1974) (preliminary rulings are not appealable under the FAA); *Williams-Hopkins v. LVNV Funding*, No. A-3398-21, 2023 N.J. Super. Unpub. LEXIS 1787 (App. Div. Oct. 17, 2023) (interlocutory order on jurisdiction; court delegation to arbitrator was law of the case until final award).

However, the "complete arbitration rule" under the FAA has been held "prudential" rather than jurisdictional.[45]

(8) When the award is rendered, it may be confirmed and reduced to a judgment that can be enforced in any court in the country (with jurisdiction) and virtually anywhere in the world without complicated proceedings for the domestication of judgments.

(9) Arbitration is especially common in international disputes, where parties may desire to avoid the domestic courts of the other party. In these cases, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[46] permits enforcement of an award in domestic courts—often using a

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But cf. Union Switch & Signal Div. Am. Standard, Inc. v. United Elec. Workers of Am., Loc. 610, 900 F.2d 608 (3d Cir. 1990) (permitting court jurisdiction regarding partial labor award as to liability only); *Arista Mktg. Assocs., Inc. v. Peer Grp., Inc.*, 316 N.J. Super. 517 (App. Div. 1998) (removing party-appointed arbitrator for conflict "pre-arbitration"); *A Company v. X Y and Z,* [2020] EWHC 809 (TCC), Apr. 17, 2020, *available at* https://hsfnotes.com/construction/2020/04/17/english-court-restrains-expert-from-acting-in-arbitration-due-to-breach-of-fiduciary-duty-of-loyalty-a-company-v-x-y-and-z-2020-ewhc-809-tcc/ (last visited Dec. 1, 2023) (court intervening to enjoin testimony at arbitration of expert with a conflict). *Cf*. *Roselle Borough Bd. of Educ. v. Batts*, No. A-2530-19, 2021 N.J. Super. Unpub. LEXIS 1772 (App. Div. Aug. 20, 2021) (interlocutory injunction to adjourn arbitration and appoint arbitrator not proper); *Hook v. Senyszn*, No. A-1359-19T4, 2021 N.J. Super. Unpub. LEXIS 187 (App. Div. Feb. 3, 2021) (interlocutory motion to appoint a new arbitrator was outside the jurisdiction of court). An unusual "detour" was permitted outside the labor law context in *Sills Cummis & Gross, P.C. v. Matrix One Riverfront Plaza, L.L.C.*, No. A-3630-08, 2009 N.J. Super. Unpub. LEXIS 2944 (App. Div. Dec. 3, 2009) (court intervention "for instructions" admittedly not contemplated by the statute). But intervention regarding new claims was not. *In the Matter of the Estate of Athanasenas*, No. A-2532-18T2, 2020 N.J. Super. Unpub. LEXIS 300 (App. Div. Feb. 11, 2020). *See generally* Chapter 7, § 7-1:2.2a (drafting the award), below.

Certification of interlocutory issues is not favored. *See Brito v. LG Elecs. USA, Inc.*, No. 22-5777, 2023 U.S. Dist. LEXIS 137622 (D.N.J. Aug. 8, 2023) (denying motion).

See Chapter 3, § 3-6 and Chapter 7, § 7-1:2.2, below. N.J.S.A. 2A:23B-18 permits incorporating pre-award ruling into an interim award, which then may be confirmed. The APDRA provides for limited interlocutory court appeals. *See* N.J.S.A. 2A:23A-5(a); 2A:23A-6(b) & 2A:23A-7.

45. *See Shore Point Distrib. Co. v. Int'l Bhd. of Teamsters Loc. 701*, 756 F. App'x 208, 209 (3d Cir. 2019) (citing *Union Switch & Signal Div. Am. Standard, Inc. v. United Elec. Workers, Loc. 610*, 900 F.2d 608 (3d Cir. 1990)).

46. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, as codified in 9 U.S.C. § 201 *et seq*. (entered into force for the United States on Dec. 29, 1970).

process far easier than would be the case for a court judgment.

In short, when handled correctly—either privately or through a respected administrating body, such as the AAA, ICDR, JAMS, CPR, ICC, or some other arbitration program—arbitration frees the litigants from the effects of court congestion, poor judging, interminable discovery, motions, and the like.

A word or two of caution is necessary, however. First, lack of care or precision in drafting the arbitration clause and related paragraphs – including "boilerplate" – and documents can cause havoc. This handbook contains a multitude of examples where terms and language frustrated the drafters' purpose. Failing to update contracts as the law develops can be fatal.[47]

Second, the very attributes that may favor arbitration also have their downside. An arbitration process that is not properly thought out, or executed, may lead to unanticipated delays and costs. For example, disputes over the arbitrability of a matter, including the scope of the arbitration or delegation, may lead to trial court motions and appeals. Obtaining an early decision on a precondition may save the time of a hearing, but (as in a court) such motions are not automatically permitted. Discovery and the ability to call witnesses by subpoena may be limited. Additionally, despite an initial desire to avoid second-guessing an award, a disappointed party may regret its inability to appeal an award, unless limited statutory grounds exist or the parties have built an appeal process into their contract (if allowed or the provider rules permit).

Third, a court viewing the company drafter as attempting to "game" the process – *e.g.*, by giving the company excessive control or making the right ephemeral — may result in the entire arbitration being deemed unconscionable, and therefore denied.[48]

Parties to a dispute may be bound to an arbitration regime based on either a statute or their pre-dispute arbitration agreement. Most of the discussion regarding issues of scope and arbitrability

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47. *See Guc v. Raymours Furniture Co*., No. A-3452-20, 2022 N.J. Super. Unpub. LEXIS 395 (App. Div. Mar. 11, 2022). The shortened limitations period in the parties' contract was contrary to a Supreme Court opinion – involving the *same* defendant companies – and was so "intertwined" with the arbitration clause that the court declined to sever the offending terms, held the entire arbitration clause unconscionable, and denied the motion to compel.

48. *See Achey v. Cellco P'ship*, 475 N.J. Super. 446 (App. Div.), *certif. granted*, 255 N.J. 286 (2023).

in this Handbook involves such situations. However, parties also may agree to arbitrate once a dispute arises (and mediation either fails or is not appropriate). Each is discussed below, with principal focus on domestic, non-labor cases. Although many of the principles developed under the FAA or state law apply to international, labor, or other regimes, either by statute or court opinions, many do not. The New Jersey arbitration statutes have different provisions applicable to different situations or time periods. Cases decided under one act may not be applicable outside of that statute. This Handbook notes some of the differences, but New Jersey parties involved in such arbitrations should consult the appropriate treaties, statutes, rules, and treatises.[49]

1-4 STATUTORY AND COURT RULES-BASED ARBITRATION; BANKRUPTCY; LIMITATIONS

1-4:1 Statutory Mandates

Although the focus of this Handbook is contractual arbitration, a large proportion of arbitrations is the result of statutory or court-rules mandates. For example, in New Jersey some public employees are required by statute to present certain grievances and other disputes to a state-organized mediation or arbitration.[50] The arbitration awards rendered in these proceedings are subject to court and appellate review, the opinions from which occasionally are reported but generally are sufficiently unique not to warrant comment in this text; however, parties should be aware that the

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[49] *See, e.g.*, Gary B. Born, International Commercial Arbitration (3d ed. 2021); Gary B. Born, International Arbitration: Law and Practice (2016). In addition to the conventions that are referenced in Title 9 of the United States Code, the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, T.I.A.S. No. 6090, 17 U.S.T. 1270, establishes an international institution, the International Centre for Settlement of Investment Disputes, under whose authority arbitration panels may be convened to adjudicate disputes between international investors and host governments in Contracting States. What makes a case "international" is not always easy to determine. *See* Harout J. Samra, *What Makes an Arbitration "International"?*, ABA Dispute Resolution Section, *Just Resolutions* – Arbitration Committee (May 2021), *available at* https://www.americanbar.org/content/dam/aba/publications/just-resolutions/may-2021/what-makes-an-arbitration-samra.pdf (last visited Dec. 6, 2023).

[50] *See* N.J.S.A. 34:13A-8.2 (re: Public Employment Relations Commission). *See also* N.J.S.A. 40A:14-210 (public employee arbitration procedures).

standards and procedures under the different statutes and regimens may differ significantly.[51]

New Jersey's no-fault insurance statute also established a personal injury protection (PIP) hierarchy of automobile accident injuries that may in some instances require arbitration of such claims.[52]

Housing-related disputes between unit owners and condominium associations are governed by a section of the Condominium Act[53] requiring the use of "a fair and efficient procedure" to resolve certain disputes.[54] The Appellate Division in *Glens at Pompton Plains Condominium Ass'n v. Van Kleeff* held that this was a direction to use ADR to resolve such disputes.[55]

There are other arbitration statutes or rules in specialized areas.[56]

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[51] *E.g.*, *US Masters Residential Prop. (USA) Fund v. N.J. Dep't of Env't Prot.*, 239 N.J. 145 (2019).

[52] *See* N.J.S.A. 39:6A-5.1. *See also* N.J.S.A. 39:6A-25. *Endo Surgi Ctr. v. NJM Ins. Grp.*, 459 N.J. Super. 289 (App. Div. 2019) (PIP); *Liberty Mut. Ins. Co. v. Penske Truck Leasing, Co.*, 459 N.J. Super. 223 (App. Div. 2019) (non-PIP insurer). *Ambulatory Surgical Ctr. of Somerset v. Allstate Fire & Cas. Ins. Co.*, No. 16-5378, 2017 U.S. Dist. LEXIS 165021 (D.N.J. Oct. 4, 2017) (granting reconsideration and reversing prior ruling), held that, under the Deemer Statute, N.J.S.A. 17:28-1.4, PIP arbitration may be compelled regarding out-of-state insureds. *State Farm Guaranty Insurance Co. v. Hereford Insurance Co.*, 454 N.J. Super. 1 (App. Div. 2018), held that an in-person hearing is not required. *Allstate N.J. Ins. Co. v. Legome*, No. A-1886-20, 2022 N.J. Super. Unpub. LEXIS 1344 (App. Div. July 26, 2022), addressed allegations of fraud and excess attorneys' fees in consolidated PIP cases. In *Government Employees Insurance Co. v. Mount Prospect Chiropractic Center, P.A.*, No. 22-737, 2023 U.S. Dist. LEXIS 27296 (D.N.J. Feb. 17, 2023), *appeal filed* (Mar. 09, 2023) (No.23-1378), claims "arising out of" the PIP benefits were held arbitrable; *Gov't Emps. Ins. Co. v. Caring Pain Mgmt. PC*, No. 22-05017, 2023 U.S. Dist. LEXIS 95873 (D.N.J. May 31, 2023) (differentiating claims); *Hackensack Meridian Health v. Citizens United Reciprocal Exch.*, 2023 N.J. Super. Unpub. LEXIS 1088 (App. Div. Jun. 29, 2023) (appeal dismissed per APDRA).

[53] N.J.S.A. 46:8B-1 *et seq*. *See also MacFarlane v. Soc'y Hill at Univ. Heights Condo. Ass'n II*, No. A-2792-20, 2022 N.J. Super. Unpub. LEXIS 1221 (App. Div. July 6, 2022) (applicability of Condominium Act).

[54] N.J.S.A. 46:8B-14(k).

[55] *Glens at Pompton Plains Condo. Ass'n v. Van Kleeff*, No. A-0418-13T4, 2015 WL 9486151 (N.J. Super. Ct. App. Div. May 7, 2015). *See also Bell Tower Condo. Ass'n v. Haffert*, 423 N.J. Super. 507 (App. Div. 2012) (discussing N.J.S.A. 46:8B-14(k)), *certif. denied*, 210 N.J. 217 (2012). Subsequent orders in this matter confirmed the award and dealt with post-arbitration fees. In *Glogover v. Hudson Harbour Condominium Ass'n, Inc.*, No. A-3446-18, 2020 N.J. Super. Unpub. LEXIS 1784 (App. Div. Sept. 29, 2020), the court did not question the use of an internal "ADR Committee" to conduct the proceedings. *See also MacFarlane v. Soc'y Hill at Univ. Heights Condo. Ass'n II*, No. A-2792-20, 2022 N.J. Super. Unpub. LEXIS 1221 (App. Div. July 6, 2022) (applying Act).

[56] *See, e.g.*, Workers Compensation Arbitration (N.J.S.A. 34:13A-1 *et seq*.); Police and Fire Public Interest Arbitration Act (N.J.S.A. 34:13A-14a *et seq*.) (setting up review by the Public Services Relations Commission (PSRC)); teacher tenure hearing law (N.J.S.A. 18A:6-10 to -18.1); collective bargaining agreements (N.J.S.A. 2A:24-1 *et seq*.); Teachers, N.J.S.A.

1-4:2 Court Rules Mandates

Several statutes have authorized arbitration and mediation as part of Complementary Dispute Resolution (CDR) programs in New Jersey state and federal courts. These programs are implemented by detailed protocols in the New Jersey Court Rules[57] and the Local Civil Rules of the U.S. District Court for the District of New Jersey.[58] These court-annexed CDR programs are described in Chapter 9, below.[59]

The Court Rules also specify the process for resolving fee disputes between lawyers and clients,[60] including a limited ability to seek

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18A-6-117, *e.g.*, *Yarborough v. State Operated Sch. Dist. of Newark*, 455 N.J. Super. 136 (App. Div. 2018), *certif. denied*, 236 N.J. 631 (2019); Home Warranty Act, N.J.S.A. 46:3b - 1 to 20, *Sica Indus., Inc. v. Macado*, No. A-3802-18T3, 2019 N.J. Super. Unpub. LEXIS 2667 (App. Div. Dec. 31, 2019); Construction Lien Law, N.J.S.A. 2A:44A-21(b)(3), *see Rinaldo v. Schaad*, No. A-3788-08T3, 2010 N.J. Super. Unpub. LEXIS 2575 (App. Div. Oct. 25, 2010) (withdrawing a petition for arbitration under the CLL does not waive contractual arbitration), *certif. denied*, 206 N.J. 329 (2011). In 2022, the "Out-of-network Consumer Protection, Transparency, Cost Containment and Accountability Act," N.J.S.A. 26:2SS-9, *et seq.*, was amended to provide for arbitration of certain disputes.

Federal statutes and rules include the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1382 (discussed in *Steelworkers Pension Tr. v. Renco Grp., Inc.*, 694 F. App'x 69 (3d Cir. 2017)); *Manhattan Ford Lincoln, Inc. v. UAW Loc. 259 Pension Fund*, 331 F. Supp. 3d 365 (D.N.J. 2018) (ERISA MEPP withdrawal). In 2022, the Centers for Medicare and Medicaid Services issued revised guidance disfavoring mandatory standard arbitration agreements for residents in long-term care facilities. *See* https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/revised-long-term-care-surveyor-guidance (last visited Dec. 6, 2023). Federal law also governs some medical billing disputes. *See GPS of N.J. M.D. v. Horizon Blue Cross & Blue Shield*, No. 22-6614, 2023 U.S. Dist. LEXIS 159460 (D.N.J. Sept. 8, 2023) ("No Surprises" Act; baseball arbitration; summary award permitted).

57. *See* N.J. Ct. R. 1:40-1 *et seq*. & 4:21A-1 *et seq*. One court mediation program concerns residential mortgages. *See GMAC Mortg., LLC v. Willoughby*, 230 N.J. 172 (2017). Final Offer Arbitration has been considered as an adjunct to the court CDR program.

58. *See* L. Civ. R. 201.1 (arbitration) & 301.1 (mediation). The enabling statute is 28 U.S.C. § 651 (ADR Act).

59. *See also* Bartkus, Sher & Chewning, N.J. Federal Civil Procedure, Ch. 19 (Goodman, *Alternative Dispute Resolution*) (2022 ed.).

60. *See* N.J. Ct. R. 1:20A-1 *et seq*. (District Fee Arbitration). Cases discussing fee arbitration include *Kopec v. Moers*, 470 N.J. Super. 133 (App. Div. 2022) (arbitration clauses in attorney retainer agreements held unenforceable as ambiguous and, *e.g.*, not making proper distinctions between binding arbitration and fee arbitration); *Hood v. Iroka*, No. A-0508-19, 2021 N.J. Super. Unpub. LEXIS 2389 (App. Div. Oct. 1, 2021) (conflict of interest; defective "appeal"); *Genova Burns, LLC v. Jones*, No. A-5054-18, 2021 N.J. Super. Unpub. LEXIS 743 (App. Div. Apr. 28, 2021) (default), *certif. denied*, 249 N.J. 465 (2022); *Helmer, Conley & Kasselman, PA v. Montalvo*, No. A-806-15T3, 2017 N.J. Super. Unpub. LEXIS 2681 (App. Div. Oct. 25, 2017) (notice requirements and knowledge).

judicial relief [61] or adjudicate malpractice claims.[62] The importance of an attorney's maintaining a correct current address with the state, even after retirement, is illustrated by *Cardillo v. Neary.*[63] Proper service was an issue in *Rubin v. Tress*.[64] An "appeal" of a fee award is addressed in *Skene v. Kenney*;[65] any challenge to an award must go to the Disciplinary Review Board (DRB), not the court. Whether the (pro se) attorney may receive the costs of obtaining or collecting a fee arbitration award may depend on the attorney's retainer.[66]

1-4:3 Bankruptcy

The automatic stay provisions of the U.S. Bankruptcy Code[67] are applicable to arbitrations, but not necessarily to guarantors or sureties.[68]

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61. *See Weiner Lesnak LLP v. Darwish*, No. A-1588-16, 2018 N.J. Super. Unpub. LEXIS 1285 (App. Div. June 4, 2018) (appellate rights waived by electing fee arbitration). *Cf. Skene v. Kenney*, No. A-2636-20, 2022 N.J. Super. Unpub. LEXIS 1630 (App. Div. Sept. 13, 2022) (proper route of "appeal" is DRB); *Hunnell v. McKeon*, No. A-127-20, 2022 N.J. Super. Unpub. LEXIS 1414 (App. Div. Aug. 11, 2022) (delay in seeking relief in the arbitration).

62. *See, e.g.*, *Hunnell v. McKeon*, No. A-127-20, 2022 N.J. Super. Unpub. LEXIS 1414 (App. Div. Aug. 11, 2022), *citing, e.g.*, *Saffer v. Willoughby*, 143 N.J. 256, 266 (1996).

63. *Cardillo v. Neary*, 756 F. App'x 150 (3d Cir. 2018) (mailing fee arbitration papers to old address), *cert. denied*, 139 S. Ct. 2700 (2019).

64. *See Rubin v. Tress*, 464 N.J. Super. 49 (App. Div. 2020) (pre-action notice required by N.J. Ct. R. 1:20A-6).

65. *Skene v. Kenney*, No. A-2636-20, 2022 N.J. Super. Unpub. LEXIS 1630 (App. Div. Sept. 13, 2022).

66. *See, e.g.*, *Law Office of Rajeh A. Saadeh v. Bah*, No. A-2256-21, 2023 N.J. Super. Unpub. LEXIS 1167 (App. Div. July 13, 2023), *citing Hrycak v. Kiernan*, 367 N.J. Super. 237 (App. Div. 2004). *But see Law Offices of Bruce E. Baldinger, LLC v. Rosen*, No. A-2060-15T3, 2017 N.J. Super. Unpub. LEXIS 1152 (App. Div. Apr. 28, 2017) (attorneys' fees not permitted as part of fee arbitration without clear agreement in retainer). *See generally Segal v. Lynch*, 211 N.J. 230 (2012) (considering *pro se* attorneys receiving fees).

67. *E.g.*, 11 U.S.C. § 362.

68. *See National Westminster Bank NJ v. Lomker*, 277 N.J. Super. 491 (App. Div. 1994), *certif. denied*, 142 N.J. 454 (1995); *Seaboard Surety Co. v. Bd. of Chosen Freeholders*, 222 N.J. Super. 409 (App. Div. 1988); *Perkins v. Advance Funding, LLC*, No. 20-15708, 2021 U.S. Dist. LEXIS 168964 (D.N.J. Sept. 7, 2021); *Bay Harbor v. Shaili Mgmt. Corp.*, No. A-3869-18T1, 2020 N.J. Super. Unpub. LEXIS 1510 (App. Div. July 27, 2020). The interplay between the FAA and the Bankruptcy Code is discussed in cases such as *In re New Century TRS Holdings*, 407 B.R. 558, 570-71 (Bankr. D. Del. 2009) (discretion to enforce), and *In re Henry*, 944 F.3d 587 (5th Cir. 2019) (same). *FBI Wind Down Inc. Liquidating Tr. v. Heritage Home Grp. LLC*, 741 F. App'x 104 (3d Cir. 2018), noted the limitations of an arbitration clause to "disputed items." *See also Xuehai Li v. Yun Zhang*, No. A-2447-21, 2023 N.J. Super. Unpub. LEXIS 1050 (App. Div. June 26, 2023) (award confirmed for arbitration continued during bankruptcy).

1-4:4 Limitations

Arbitration is not unlimited, however, and limitations may vary from state to state and court to court. Statutorily-mandated binding arbitration is not permitted where there is a constitutional or common law right to a jury.[69] Appraisal has been held by some courts not a form of statutory arbitration.[70] Arbitrators do not have "inherent" authority; their ability to adjudicate disputes is governed by the parties' agreement, including the rules of the provider they have selected.[71] Some matters—such as granting a divorce, determining ethical issues, performing marriages, and appointing receivers—are specifically or by implication reserved for judicial officers.[72] Whether statutes of limitations apply in arbitrations has been questioned, though the reasoning appears to depend on the language of the state's statute.[73]

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69. *Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 212 N.J. 576 (2013) (ruling N.J.S.A. 48:2-80(d) unconstitutional). *Cf. MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018) (arbitration not compelled that would preclude federal statutory right).

70. *E.g.*, *Rastelli Bros. v. Netherlands Ins. Co*., 68 F. Supp. 2d 440 (D.N.J. 1999), citing N.J.S.A. 2A:24-1 *et seq*. and *Elberon Bathing Co., Inc. v. Ambassador Ins. Co*., 77 N.J. 1 (1978). Note: *Rastelli Brothers* cited the 1923 Arbitration Act in 1999. *Cap City Products Co. v. Louriero*, 332 N.J. Super. 499 (App. Div. 2000), seems to suggest a different standard. In *Adler Engineers, Inc. v. Dranoff Properties, Inc*., No. 14-921, 2016 N.J. Super. Unpub. LEXIS 86478, 2016 WL 3608810 (D.N.J. July 5, 2015), the court described the competing arguments and cases. *See also Penton Bus. Media Holdings, LLC v. Informa PLC*, No. 2017-0847, 2018 Del. Ch. LEXIS 223 (Del. Ch. July 9, 2018) (accountant). *See* § 1-2, above.

71. *Cf. Blaichman v. Pomeranc*, No. A-1839-15T2, 2017 N.J. Super. Unpub. LEXIS 1717 (App. Div. July 12, 2017) (attorneys' fees must be based on statute or agreement). *But see Reliastar Life Ins. Co. v. EMC Nat'l Life Co*., 564 F.3d 81 (2d Cir. 2009) (finding inherent authority under "broad arbitration clause" to sanction party for bad faith conduct). Some courts have held that only a court may adjudicate attorney disqualification applications. *See, e.g.*, *Bidermann Indus. Licensing, Inc. v. Avmar N.V*., 173 A.D.2d 401 (N.Y. Sup. Ct. 1st Dept. 1991); *accord Dean Witter Reynolds, Inc. v. Clements, O'Neill, Pierce & Nickens, L.L.P*., No. H-99-1882, 2000 U.S. Dist. LEXIS 22852 (S.D. Tex. Sept. 8, 2000) (comparing cases). *See* Chapter 2, § 2-2:3, below.

72. *See Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C*., 365 N.J. Super. 241 (App. Div. 2003) (receiver). *See* Chapter 2, § 2-2:3 (disqualification), below. Likewise, sitting judges may not "arbitrate" a dispute. *See Heenan v. Sobati*, 96 Cal. App. 4th 995 (2002) (hybrid not permitted; beware of unintended consequences).

73. *See* Lara K. Richards & Jason W. Burge, *Analyzing the Applicability of Statutes of Limitations in Arbitration*, 49 Gonzaga L. Rev. 213 (2013-14). New York may make statutes of limitations applicable in arbitration. *See* N.Y.C.P.L.R. § 7502 (McKinney 2016). Other states may have similar provisions; New Jersey does not, but a review of cases indicates that arbitrators in New Jersey regularly consider statute of limitations arguments without court comment. *E.g.*, *Strickland v. Foulke Mgmt. Corp.*, 475 N.J. Super. 27 (App. Div. 2023); *Griffin v. Burlington Volkswagen, Inc.*, No. A-3228-12, 2014 N.J. Super. Unpub. LEXIS 2269 (App. Div. Sept. 18, 2014).

1-5 CONTRACTUAL ARBITRATION

The overwhelming portion of court opinions regarding arbitration in New Jersey arise in the context of contractual arbitration, that is, arbitration to which parties to a dispute have agreed in "[a] written provision . . . or an agreement in writing"[74] or "in a record."[75] The terminology can lead to confusion.

1-5a "A Written Provision . . . or an Agreement in Writing"

The terms "written" or "writing" in the FAA refer to the document(s), defined broadly, containing or constituting the agreement. For example, the arbitration agreement in *Rent-A-Center, West, Inc. v. Jackson*[76] was free-standing.

"Writing" does not necessarily mean that signatures are required (in domestic cases). As stated in *Fisser v. International Bank*:

> It does not follow, however, that under the Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. For the Act contains no built-in Statute of Frauds provision but merely requires that the arbitration provision itself be in writing. Ordinary contract principles determine who is bound by such written provisions and of course parties can become contractually bound absent their signatures. It is not surprising then to find a long series of decisions which recognize that the variety of ways in which a party may become bound by a written arbitration provision is limited only by generally operative principles of contract law.[77]

New Jersey federal and state cases have applied these principles.[78]

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74. 9 U.S.C. § 2.

75. N.J.S.A. 2A:23B-6.

76. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010).

77. *Fisser v. Int'l Bank*, 282 F.2d 231, 233 (2d Cir. 1960) (footnotes omitted).

78. *E.g.*, *Richardson v. Coverall N. Am., Inc.*, No. 18-532, 2018 U.S. Dist. LEXIS 167240, at *5-7 (D.N.J. Sept. 27, 2018) (dual corporate signatures not required; plaintiff estopped from arguing signature issue, having operated under the franchise agreement for years), *rev'd on other grounds*, 811 F. App'x 100 (3d Cir. 2020); *Byrne v. K12 Servs.*, No. 17-4311, 2017 U.S. Dist. LEXIS 124734, at *7 n.3 (D.N.J. Aug. 4, 2017) (motion to compel granted).

However, the absence of a signature may be evidence of the lack of mutual assent.[79] Absence of a counter-signature may be an issue.[80] Where the documents indicate that a signature was required, estoppel arguments may not suffice.[81] Issues arising from electronic signatures and claims of forged signatures may require discovery and a plenary hearing.[82]

A 2023 Appellate Division opinion, *Barberi v. 1351 Old Freehold Rd. Operations LLC*,[83] delegated to the arbitrator the issue of whether the patient signed the container agreement. The arbitration clause was proper and required delegation of whether the proffered exemplar (which did not bear a signature) plus other evidence was sufficient.

The Third Circuit has noted special concerns regarding the formation of contracts governed by the Uniform Commercial Code (UCC).[84] The UCC's statute of frauds provision,[85] requires certain contracts to be signed; merchants may avoid that requirement if acknowledgements are not challenged. This has led to issues regarding "confirmation" of purchase orders that contain arbitration clauses.[86]

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79. *Leodori v. CIGNA Corp.*, 175 N.J. 293, 305 (2003); *accord Cordero v. Fitness Int'l, LLC*, No. A-1662-20, 2021 N.J. Super. Unpub. LEXIS 2740 (App. Div. Nov. 10, 2021) (remanding for evidence of notice and electronic signing). *See also, e.g.*, *Imperato v. Medwell, LLC*, No. A-2023-19T1, 2020 N.J. Super. Unpub. LEXIS 1994 (App. Div. Oct. 19, 2020); *Seriki v. Uniqlo N.J., L.L.C.*, No. A-5835-13T3, 2015 WL 4207263 (N.J. Super. Ct. App. Div. July 14, 2015) (remanding for determination of intent in absence of signature).

80. *Hampton v. ADT, LLC*, No. A-0172-20, 2021 N.J. Super. Unpub. LEXIS 764 (App. Div. Apr. 30, 2021).

81. *See PSEG Energy Res. & Trade, LLC v. Onyx Renewable Partners, LP*, No. A-3057-16, 2018 N.J. Super. Unpub. LEXIS 340 (App. Div. Feb. 14, 2018), *aff'g* 2017 N.J. Super. Unpub. LEXIS 524 (Ch. Div. Mar. 6, 2017).

82. *See, e.g.*, Section 1-5:3.2, below.

83. *Barberi v. 1351 Old Freehold Rd. Operations LLC*, No. A-3265-21, 2023 N.J. Super. Unpub. LEXIS 641 (App. Div. Apr. 28, 2023).

84. *Aliments Krispy Kernels, Inc. v. Nichols Farms*, 851 F.3d 283 (3d Cir. 2017).

85. N.J.S.A. 12A:2-201.

86. *See, e.g.*, *C. Itoh & Co. v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977) (relying on UCC § 2-207 as gap filler). In *Newark Bay Cogeneration Partnership, LP v. ETS Power Group*, No. 11-2441, 2012 U.S. Dist. LEXIS 141068 (D.N.J. Sept. 28, 2012), the court adopted the clause in referenced terms and conditions without discussing UCC § 2-207. *See generally* Timothy Davis, *U.C.C. Section 2-207: When Does an Additional Term Materially Alter a Contract?*, 65 Catholic U. L. Rev. 489, 511-15 (2016) (discussing arbitration).

The signature requirement in international arbitration is explored in *Standard Bent Glass Corp. v. Glassrobots Oy*[87] and *Jiangsu Beier Decoration Materials Co. v. Angle World LLC.*[88] The United States Supreme Court held that state estoppel arguments may be used in a case governed by the New York Convention to permit a non-signatory to demand arbitration.[89]

1-5b "In a Record"

"Record" is defined in the NJRUAA as information that is "inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in perceived form."[90]

The meaning of the term is explored in the unpublished opinion in *Bedrock Steel v. Raritan Urban Renewal.*[91] The plaintiff in *Bedrock Steel* had agreed to perform steel fabrication services for several defendants pursuant to written contracts, none of which had arbitration clauses. When problems arose, plaintiff availed itself of a traditional Jewish procedure: asking the local rabbi or rabbinical court to issue a "hazmana" or summons inviting the defendants to participate in the bias din (or beit din or beith din) process by signing a written agreement. As recognized in New Jersey, in cases such as *Bierig-Kiejdan v. Kiejdan*,[92] only a few weeks earlier (by a different panel), among other unreported cases, and as long ago as *Elmora Hebrew Center v. Fishman*,[93] a bias din is a private dispute resolution process that courts enforce similarly to arbitration.

The defendants did not sign and return the hazmana invitations, but their emails made two key concessions: that the money was owed and would be paid (to the extent not paid already); and that they would be "happy to come" to the invited session with the rabbinical

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87. *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003) (treaty terms require signed document or "an exchange of letters or telegrams").

88. *Jiangsu Beier Decoration Materials Co. v. Angle World LLC*, 52 F.4th 554 (3d Cir. 2022) (exploring "exchange of letters" language).

89. *GE Energy v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020).

90. N.J.S.A. 2A:23B-1. As with the domestic FAA, there is no signature requirement in the NJRUAA.

91. *Bedrock Steel v. Raritan Urban Renewal*, No. A-0410-22 2023 N.J. Super. Unpub. LEXIS 691 (App. Div. May 8, 2023).

92. *Bierig-Kiejdan v. Kiejdan*, No. A-2945-20, 2023 N.J. Super. Unpub. LEXIS 219 (App. Div. Feb. 16, 2023).

93. *Elmora Hebrew Ctr. v. Fishman*, 125 N.J. 404 (1991).

court. The record did not say, but apparently the hazmana did not provide that acceptance could only be manifested by signing. Thereafter, defendants' principal emailed interest in a different biet din rabbi (in New York rather than in New Jersey) and questions about the date to meet, but they never withdrew their agreement.

When the email exchanges did not result in a signed agreement, plaintiff sued to obtain a judgment via court process. Oddly, defendants then moved to compel submission to the biet din, which motion plaintiff opposed. The Law Division denied the motion.

On appeal, defendants argued that plaintiff had proposed the beit din so should be estopped from abandoning a process to which defendants already had agreed —"happy to come" they said. As might be recalled from Contracts 101, an offer once accepted normally cannot be withdrawn, except — to note one of the case's curious issues — that no one signed the proposed written agreement. There were only the hazmana and several emails. Defendant cited the Law Division to online summaries of the biet din process that explain how it would differ from a judicial process.

The Appellate Division first considered whether the exchange of the hazmana and emails satisfied the requirements of Section 6(a) of the NJRUAA,[94] that to be enforceable, an arbitration agreement must be in a "record." Reasoning from the legislative history of the model uniform act and similar language in the Uniform Commercial Code, applied to traditional contract principles, the Appellate Division held that the NJRUAA does not require a signed paper; indeed, it said, as long as recorded by audio or video, an oral agreement may be concluded in a "record." The Appellate Division then found that the exchange of hazmana and emails could constitute a record sufficient for Section 6(a), but it declined to order arbitration for other reasons. Citing *Mills v. J. Daunoras Construction Co.*,[95] it also noted that the absence of a "record" may not be fatal.

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94. N.J.S.A. 2A:23B-6(a).

95. *Mills v. J. Daunoras Constr. Co.*, 278 N.J. Super. 373 (App. Div. 1995) (estoppel and waiver applied to enforce award).

1-5c Other Issues

Parties may agree to arbitration either before the dispute arose or once the dispute has arisen. Many judicial opinions relate to the former; issues arise in these cases regarding jurisdiction and the enforceability of such pre-dispute agreements. However, issues also may arise (as with the former) regarding the enforcement and scope of post-dispute arbitration agreements and whether the award should be confirmed or vacated because of a defect in the conduct of the arbitration or arbitrator or the nature of the award. The unpublished Appellate Division opinion in *Jang Won So v. EverBeauty, Inc*.[96] held that the enforceability of an exchange between attorneys to dismiss an action in favor of arbitration should be evaluated using the same standard as a settlement agreement.

Court-ordered arbitration (not based on an existing contract) as part of a partial settlement presents separate issues. A relatively early discussion of a post-dispute arbitration so-ordered by a supervising court arose in the context of a dispute regarding a client's objection to fees billed by its attorney, finding no issue with arbitration being used to decide that dispute as well as basic principles supporting arbitration.[97] Where a trial court ordered arbitration of an existing litigation, without specifying the terms, the Appellate Division held that the NJRUAA provided the default "gap fillers" — after chiding future litigants to heed the problem created without a more detailed, written agreement in the dismissal order.[98]

In the remainder of this section, we explore the statutory authority for contractual arbitration, the nature of contracts subject to arbitration (or not), and the choices parties may make in drafting their agreements. However, it is also important to

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96. *Jang Won So v. EverBeauty, Inc*., No. A-3560-16T4, 2018 N.J. Super. Unpub. LEXIS 4 (App. Div. Jan. 2, 2018).

97. *Daly v. Komline-Sanderson Eng'g Corp*., 40 N.J. 175 (1963); *see also Frank K. Cooper Real Estate #1, Inc. v. Cendant Corp*., Nos. A-1482-16T3, A-1579-16T3, 2018 N.J. Super. Unpub. LEXIS 2677 (App. Div. Dec. 6, 2018) (arbitration of "split" of fees in class action settlement).

98. *Petersburg Regency, LLC v. Selective Way Ins. Co.*, No. A-2855-11T2, 2013 N.J. Super. Unpub. LEXIS 1116 (App. Div. May 10, 2013), *certif. denied*, 217 N.J. 53 (2014); *see generally Ward v. Ward-Gallagher*, No. A-1616-20, 2022 N.J. Super. Unpub. LEXIS 892 (App. Div. May 25, 2022) (confirming award).

recognize that arbitration clauses and agreements are, at their essence, contracts governed by legal principles governing all contracts in New Jersey. We address those elements in Chapter 2, Section 2-5, below.

1-5:1 The Principal Authorizing Statutes

1-5:1.1 Federal Arbitration Act

Arbitration may have ancient roots,[99] including under the common law, but courts jealous of their own jurisdiction were perceived as being hostile to, or disfavoring, arbitration. The Federal Arbitration Act (FAA)[100] was enacted in 1925 to reverse that hostility and "place arbitration agreements 'upon the same footing as other contracts.'"[101] Thus, section two of the FAA provides that arbitration agreements covered by the FAA[102] "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

An exception to the coverage of FAA's Section 2 is found in Section 1 for "contracts of employment of seamen, railroad employees, or any other class of workers *engaged* in foreign or interstate commerce."[103] The United States Supreme Court clarified this exception in *New Prime Inc. v. Oliveira*,[104] holding that independent contractors could be transport workers "engaged in foreign or interstate commerce." In 2022, *Southwest Airlines Co. v. Saxon*[105] held ramp supervisors exempt. On remand, the parties

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99. *See* § 1-1, above.

100. 9 U.S.C. § 1 *et seq*. The original title of the act was the United States Arbitration Act; it was re-codified in 1947 and is now known as the Federal Arbitration Act. *See Florasynth v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984). Title 9 was subsequently expanded to conform with treaties joined by the United States regarding international arbitration. *See* 9 U.S.C. §§ 201 *et seq*. & 301 *et seq*. The FAA was amended in 2022 to limit pre-dispute arbitration of claims of sexual abuse and harassment arising or accruing after its effective date, March 3, 2022. 9 U.S.C. § 401, *et. seq*. Appendix 5, below contains the text of the FAA governing domestic disputes (and the 2022 amendment).

101. *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 510 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Session, 1, 2 (1924)).

102. Coverage extends to any "contract evidencing a transaction *involving* interstate commerce . . . ." 9 U.S.C. § 2 (emphasis added).

103. 9 U.S.C. § 1 (emphasis added).

104. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

105. *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 142 S. Ct. 1783 (2022).

were required to arbitrate under state law.[106] This was to be expected; courts typically say that, unless waived, exempt transport workers still may be bound by state arbitration or other labor laws.[107]

In 2023, the Third Circuit held that the Section 1 exemption did not apply to Uber drivers whose trips crossed state lines only "incidentally" to an intrastate fare.[108]

The FAA is said to "reflect[ ] an emphatic public policy in favor of" arbitration.[109] Thus, once an agreement is found to contain an arbitration clause, courts have said "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[110] This "presumption of arbitrability" has been said to mean that arbitration "may not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[111] Although these principles often were articulated first in cases involving labor collective bargaining agreements, they are based on the language of the FAA and are equally applicable in commercial and other arbitration contexts.[112] For example, the U.S. Supreme Court reaffirmed in *Kindred Nursing Centers* that the FAA "displaces any

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106. *Saxon v. Sw. Airlines Co*., No. 19-00403, 2023 U.S. Dist. LEXIS 40579 (N.D. Ill. Mar. 10, 2023).

107. *E.g.*, *Singh v. Uber Techs., Inc*., 939 F. App'x 210 (3d Cir. 2019); *Arafa v. Health Express Corp.*, 243 N.J. 147 (2020); *Colon v. Strategic Delivery Sols., LLC*, 459 N.J. Super. 349 (App. Div. 2019), *citing Palcko v. Airborne Express, Inc*., 372 F.3d 588 (3d Cir. 2004), *aff'd by Arafa v. Health Express Corp.*, 243 N.J. 147 (2020). *See* Chapter 2, § 2-4:1a, below.

108. *Singh v. Uber Techs., Inc*., 67 F.4th 550 (3d Cir. 2023).

109. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 631 (1985); *see also, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983) ("healthy regard" for arbitration); *Beery v. Quest Diagnostics, Inc*., 953 F. Supp. 2d 531, 537 (D.N.J. 2013) ("liberal policy favoring arbitration agreements") (simplified).

110. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983). As noted in this Handbook, the *formation* issue is governed by traditional state contract principles.

111. *AT&T Techs. Inc. v. Commc'ns Workers of Am*., 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)); *Harris v. Credit Acceptance Corp*., No. 22-1404, 2022 U.S. App. LEXIS 27143 (3d Cir. Sept. 28, 2022) (per curiam).

112. *See, e.g.*, *Century Indem. Co. v. Certain Underwriters at Lloyd's*, 584 F.3d 513, 524 (3d Cir. 2009).

rule . . . covertly . . . disfavoring contracts that (oh, so coincidently) have the defining features of arbitration agreements."[113]

More recent cases advise reading these pro-arbitration pronouncements with care. *Badgerow v. Walters*[114] addressed one of the quirks of the FAA: the absence of a direct jurisdictional grant for motions to confirm or vacate an award pursuant to Sections 9 or 10.[115] Distinguishing *Vaden v. Discover Bank*,[116] which allowed courts to "look through" the motion papers to the underlying claims for purposes of a motion to compel arbitration under Section 4,[117] *Badgerow* held that the different language in Sections 4, 9, and 10 required that motions under Sections 9 and 10 be treated differently than motions under Section 4. The "preeminent" purpose of the FAA to overcome bias against arbitration did not justify over-riding the different legislative text.

The Court later that year was asked to apply a "pro-arbitration" policy analysis in *Morgan v. Sundance, Inc.*,[118] regarding waiver of the right to compel arbitration based on litigation conduct. In an opinion by Justice Kagan (who also authored *Badgerow*), the Court held that requiring a party opposing a motion to compel arbitration to show prejudice from any delay improperly imposed an "arbitration specific" rule at variance from waiver analysis generally in federal court. The Court thus upended the rule followed in the majority of circuits, including in the Third (as discussed later in this Handbook). As *Morgan* explained:

> [The] FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. Our frequent use of that phrase connotes something different. "Th[e] policy," we have explained, "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's

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113. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (holding preempted state court ruling regarding powers of attorney and arbitration agreements).

114. *Badgerow v. Walters*, 142 S. Ct. 1310 (2022). *Badgerow* is discussed in more detail in Chapter 8, below.

115. 9 U.S.C. §§ 9, 10.

116. *Vaden v. Discover Bank*, 556 U.S. 49 (2009).

117. 9 U.S.C. § 4.

118. *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022).

> longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." Or in another formulation: The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.[119]

The Third Circuit has cited *Morgan* for this principle.[120] The principle has been applied in other contexts.[121] Whether courts relying on earlier use of language such as "strong preference of arbitration" will continue to do so, even while acknowledging the result in *Morgan*, is yet to be seen.

These principles are equally applicable to contracts governed by the FAA regardless of whether litigation is pending in federal or state court.[122]

The Third Circuit has explained that state contract law governs not only issues of contract *formation* but also the interpretation of the terms defining the *scope* of the arbitration. *In re Remicade (Direct Purchaser) Antitrust Litigation* states: "while federal law may tip the scales in favor of arbitration where state interpretive principles do not dictate a clear outcome, may displace state law

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119. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022) (simplified).

120. *See White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334, 338-39 (3d Cir. 2023).

121. For example, *Zirpoli v. Midland Funding, LLC*, 48 F.4th 136, 142 (3d Cir. 2022), says as much in the context of a delegation analysis: "The policy favoring arbitration is not intended to force arbitration where the parties to a contract did not agree to it . . . . Rather, [the FAA] is merely intended to ensure that courts honor and enforce contractual undertakings to entrust agreed upon questions to arbitrators rather than to courts. By expressly 'plac[ing] arbitration agreements on equal footing with other contracts,' the [FAA] merely 'requir[es] courts to "enforce such agreements according to their terms."'

122. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984); *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (requiring severance of arbitrable from non-arbitrable claims).

through preemption, or may inform the interpretive analysis in other ways, applicable state law governs the scope of an arbitration clause—as it would any other contractual provision—in the first instance."[123]

New Jersey courts have accepted these principles.[124]

1-5:1.2 New Jersey Arbitration Acts

Although New Jersey traces its arbitration roots to Colonial times,[125] and enacted one of the first modern arbitration acts in 1923,[126] arbitration currently is governed by two principal state statutes.

The NJRUAA[127] by its terms supersedes common law arbitration[128] and is the default governing law in a New Jersey

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123. *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 522 (3d Cir. 2019) (citations omitted). Cases relying on federal presumptions to override state law interpretive principles such as *contra proferentem* may need to be rethought. The history of the FAA and the importance of state law interpretive principles is discussed in the opinions in *Harper v. Amazon.com Servs., Inc.*, 12 F.4th 287 (3d Cir. 2021).

124. *E.g.*, *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020); *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020); *Arafa v. Health Express Corp.*, 243 N.J. 147 (2020); *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 440-41 (2014). *Accord, e.g.*, *Roach v. BM Motoring, LLC*, 228 N.J. 163, 173-74 (2017); *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 92 (2002) (New Jersey "favors arbitration . . ."); *Fastenberg v. Prudential Ins. Co. of Am.*, 309 N.J. Super. 415, 420 (App. Div. 1998) ("positive assurance").

125. *See Barcon Assocs., Inc. v. Tri-Cnty. Asphalt Corp.*, 86 N.J. 179, 186 (1981) (citing James B. Boskey, *A History of Commercial Arbitration in New Jersey*, 8 Rutgers-Camden L.J. 15 (1975)).

126. *See* § 1-1, above.

127. N.J.S.A. 2A:23B-1 *et seq*. The present act *currently* applies, as the default, to commercial contracts regardless of when formed other than certain collective bargaining or collective negotiated agreements. N.J.S.A. 2A:23B-3. The text of the act is contained in Appendix 6, below. Care in terminology is warranted here, since the 1923 Act restated in 1951 sometimes is also called the New Jersey Arbitration Act. In January 2020, the governor signed an amendment to the NJRUAA regulating arbitration forums and (prospectively) pre-dispute consumer arbitrations. *See* N.J.S.A. 2A:23B-33 to 36 (in Appendix 6, below). Useful histories of the NJRUAA and the Model Act are found in Laura Kaster, *The Revised Uniform Arbitration Act at 15: The New Jersey Story*, 38 Disp. Res. Mag. 38 (ABA DRS, Winter 2016); Bruce Meyerson, *The Revised Uniform Arbitration Act: 20 Years Later*, 76 Disp. Res. J., No. 1, 1 (AAA, 2022).

128. In *Heffner v. Jacobson*, 185 N.J. Super. 524 (Ch. Div. 1982), *aff'd o.b.*, 192 N.J. Super. 199 (App. Div. 1983), *aff'd*, 100 N.J. 550 (1985), the court determined that a parallel common law remedy permitted confirmation after the statutory period to confirm an arbitration award. This principle was again applied and reiterated in *Policeman's Benevolent Ass'n v. Borough of North Haledon*, 158 N.J. 392, 398, 403 (1999), in a statutory grievance arbitration. The NJRUAA, in § 22, uses the permissive "may" rather than mandatory terms for summary proceedings to confirm an arbitration award and has no time limit, unlike the 120-day limits for applications to vacate or modify an arbitration award. Furthermore, as § 3 of the Act makes it clear that the Act governs "all agreements to arbitrate" from 2003 on, there should be no need to resort to a common-law action.

arbitration if the FAA does not apply and the parties have not agreed to contrary rules (or a statute requires otherwise). *Flanzman v. Jenny Craig, Inc.*[129] held that, where no particular procedure is specified and the matter is not being administered under the rules of the AAA, CPR, JAMS, or other provider, an agreement to arbitrate will still be enforced, with the court applying the general rules set forth in the NJRUAA.[130]

The second primary New Jersey statute is the 1987 Alternative Procedure for Dispute Resolution Act (APDRA).[131] The APDRA was enacted in response to criticisms of the then-existing arbitration statute, which had greatly limited comprehensive and adaptive arbitration and precluded review of an award, for example for misapplication of the law, even when both parties sought such review.[132] The neutral in an APDRA arbitration is termed an "umpire;" his or her award may be reversed, for example, upon "the umpire's committing prejudicial error by erroneously applying law to the issues and facts presented for alternative resolution."[133] The parties must explicitly adopt the APDRA for its provisions to apply; review may be limited to the trial court.[134]

Differences in the two New Jersey statutes, and with the FAA, are discussed in the relevant text sections below. Notably, though,

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129. *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020).

130. The Court overruled *Flanzman v. Jenny Craig, Inc.*, 456 N.J. Super. 613 (App. Div. 2018), which had taken an outlier position with respect to both Section 11 of the NJRUAA and Section 5 of the FAA. *See Petersburg Regency, LLC v. Selective Way Ins. Co.*, No. A-3855-11T2, 2013 N.J. Super. Unpub. LEXIS 1116 (App. Div. May 10, 2013) (where the parties have specified arbitration without agreement concerning its terms, the New Jersey Arbitration Act can operate as a "gap filler" to remedy the parties' omission) *certif. denied*, 217 N.J. 53 (2014). *But cf. NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404 (App. Div. 2011) (discussing formation issue when there are competing arbitration clauses). *Flanzman* leaves open the question of the continuing effect of the broad language in *Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545 (App. Div. 2016), on which the *Flanzman* Appellate Division opinion had relied.

131. N.J.S.A. 2A:23A-1 *et seq*. *See generally Mt. Hope Dev. Assocs. v. Mt. Hope Waterpower Project, L.P.*, 154 N.J. 141, 145-46 (1998) (describing the legislative history of the APDRA). *Mt. Hope* held that the APDRA's limit on appeals to the Appellate Division was not unconstitutional.

132. The New Jersey statute has since been amended (see below).

133. N.J.S.A. 2A:23A-13(c)(5).

134. N.J.S.A. 2A:23A-18(b). *See Sheth v. Morris Boulevard, II, LLC*, No. A-3057-20, 2022 N.J. Super. Unpub. LEXIS 543 (App. Div. Apr. 5, 2022) (dismissed appeal from order confirming award); *Max v. Great Am. Sec. Ins. Co.*, No. A-0042-19, 2021 N.J. Super. Unpub. LEXIS 394 (App. Div. Mar. 11, 2021) (dismissing appeal); *DiMaggio v. DiMaggio*, No. A-2055-15T1, 2016 WL 7665921 (N.J. Super. Ct. App. Div. Dec. 30, 2016) (dismissing for lack of appellate jurisdiction; noting public policy exceptions).

because the 2003 NJRUAA permitted parties to agree to limited appeal,[135] the APDRA is little used today, except where required in PIP, UM, and UIM cases by regulations adopted under N.J.S.A. 39:6A-5 and in some matrimonial matters.

The 1923 Arbitration Act as restated in 1951[136] was largely replaced by the subsequent acts, except for specific labor matters.[137] Cases before 2003 under the 1951 act must be read carefully; references to statutory terms, such as the timing for motions, are not relevant for the current acts and may be misleading.[138]

The New Jersey Court Rules contain Appendices discussing the NJRUAA and APDRA and forms of agreement and notice that may be used in connection with each.[139]

1-5:1.3 Choice of Law Issues; Alternative Law Designations

1-5:1.3a Choice of Law

Determining the arbitration law applicable to a given arbitration agreement is not merely a matter of designating a specific statute or state law to supplant the default FAA or 2003 NJRUAA.

First, the designation must specifically relate to arbitration, as in the arbitration clause; a general choice of law provision is inadequate,[140] though a general clause may suffice if it refers to "or

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135. *See* N.J.S.A. 2A:23B-4(c) ("nothing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a record"). The rules of a number of arbitration forums provide for limited appeal processes, *see* Chapter 7, § 7-5, below however, the FAA and statutes in other states do not have the same flexibility regarding appeals as does the New Jersey Act.

136. N.J.S.A. 2A:24-1 *et seq*. The full language of the 1923/1951 Act is no longer in the codified N.J.S.A, but it is quoted in S. Whitney Landon, *Commercial Arbitration in New Jersey*, 1 N.J. L. Rev. Univ. of Newark 65, 79-81 (1935).

137. *See* N.J.S.A. 2A:24-1.1 (2003 amendment limiting application); N.J.S.A. 2A:23B-3. The history is set out in *Port Auth. of N.Y. & N.J. v. Port Auth. of N.Y.*, 459 N.J. Super. 278 (App. Div. 2019).

138. *See, e.g.*, *Heffner v. Jacobson*, 100 N.J. 550 (1985) (prior act referred to permissive "may" regarding motions to vacate; current NJRUAA uses the mandatory, limiting term "shall." That distinction has been cited in other jurisdictions to indicate legislative purpose in the differing usage in the FAA).

139. N.J. Ct. R. Appendix XXIX-A to XXIX-C. The part discussing forms used in matrimonial matters also is said to be useful in drafting commercial and other arbitration contracts governed by the NJRUAA. The Appendices note some of the differences in the applicable statutes.

140. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-60 (1995). Nevertheless, cases may refer to the general choice of law clause in a contract where there is no designation in the arbitration clause without undertaking a separate choice of law

enforcement." The Third Circuit requires a separate designation,[141] though the rule is inconsistently acknowledged.

Second, by reason of the Supremacy Clause in Article VI of the United States Constitution, the FAA is said to preempt application of other statutes where the FAA applies (*e.g.*, in disputes "involving" interstate and foreign commerce[142]) except for specific federal statutory exemptions.[143] Efforts to draft a contract to avoid the FAA standards of review may meet a similar fate.[144]

Third, the arbitration clause may designate the FAA to govern the arbitration, though the effect of this is unclear. Although state courts have accepted FAA standards based on the FAA being designated the law of the arbitration,[145] or lead to preemption,[146] specifying that the FAA applies to the arbitration has not always avoided New Jersey law. In *Grandvue Manor, LLC v. Cornerstone Contracting Corp.*,[147] the Appellate Division affirmed an order compelling arbitration where the AIA contract chose New York law generally and the FAA for the arbitration. The court noted that New Jersey public policy required a mutual understanding

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analysis referencing the arbitration clause. *See generally Fin Assocs. LP v. Hudson Specialty Ins. Co*., 741 F. App'x 85 (3d Cir. 2018); *Koons v. Jetsmarter, Inc.*, No. 18-16723, 2019 U.S. Dist. LEXIS 117332 (D.N.J. July 15, 2019); *Rizzo v. Island Med. Mgmt. Holdings, LLC*, No. A-0554-17T2, 2018 N.J. Super. Unpub. LEXIS 1225 (App. Div. May 25, 2018) (N.Y. law in forum selection clause).

141. *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001); *see also Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277, 293 (3d Cir. 2010) (citing *Roadway*); *Oberwager v. McKechnie Ltd.*, 351 F. App'x 708, 710-11 (3d Cir. 2009).

142. *See, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (inter-state debt restructuring, but secured by out-of-state parts and raw materials). In 2022, the Supreme Court held that the FAA mostly preempted enforcement of California's Private Attorneys General Act (PAGA), Cal. Lab. Code § 2698; *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022).

143. In *Robertson v. Intratek Comput., Inc.*, 976 F.3d 575 (5th Cir. 2020), *cert. denied*, 142 S. Ct. 2708 (2022), the Fifth Circuit held that the FAA preempted a "no arbitration" provision of the Enhancement of Whistleblower Protection for Contractor and Grantee Employees Act.

144. *See Strickland v. Foulke Mgmt. Corp.*, 475 N.J. Super. 27 (App. Div. 2023) (declining to enforce contract language requiring vacatur of award for arbitrator's failure to follow New Jersey law).

145. *See, e.g.*, *West Rac Contr. Corp. v. Sapthagiri*, No. A-2355-20, 2022 N.J. Super. Unpub. LEXIS 490 (App. Div. Mar. 28, 2022).

146. *See Cangiano v. Doherty Grp.*, No. A-3082-19, 2022 N.J. Super. Unpub. LEXIS 569 (App. Div. Apr. 8, 2022) (selecting FAA in contract meant LAD limits on arbitration were preempted).

147. *Grandvue Manor, LLC v. Cornerstone Contracting Corp.*, 471 N.J. Super. 135 (App. Div. 2022).

that the right to court and a jury had been waived, and that this differed from New York law. After hinting that the lack of a jury waiver requirement in New York law might make the choice of New York law unenforceable, because it might violate a fundamental New Jersey public policy, the court ordered arbitration: these were sophisticated parties and the form AIA contract contained a sufficient waiver.[148] In *Arafa v. Health Express Corp.*,[149] the New Jersey Supreme Court reversed an unpublished Appellate Division opinion[150] holding that the exemption in FAA Section 1 for transportation workers rendered the contractual choice of the FAA void. In another case, the reference to the FAA was limited to "the arbitrability of all disputes . . .," which the court (questionably) held did not encompass the *standard* for determining whether to vacate for an error of law. [151]

Choosing the FAA caused problems in *Strickland v. Foulke Management Corp*.[152] The agreement called for the strict application of New Jersey substantive law, and that a "mere error of law" would be grounds for a vacatur. Error of law is not a ground for vacatur under the FAA,[153] and the award was confirmed.

Cases in this Handbook illustrate how designating a state's law without knowing its arbitration law, or not making a designation, thereby allowing the court to choose its forum law or to conduct a conflict-of-laws analysis, may have unhappy consequences.

Specifying the FAA as the governing law for the arbitration raised issues in *Harper v. Amazon.com Services, Inc*.[154] The arbitration clause designated the FAA, but the general choice of law clause designated Washington State law with a specific proviso

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148. The AIA contract provides parties the option checking boxes for arbitration, litigation or "other." The waiver language, found sufficient, said: "If the [o]wner and [c]ontractor do not select a method of binding dispute resolution, or do not subsequently agree in writing to a binding resolution method other than litigation, [c]laims will be resolved by litigation in a court of competent jurisdiction."

149. *Arafa v. Health Express Corp.*, 243 N.J. 147 (2020).

150. *Arafa v. Health Express Corp.*, No. A-1862-17T3, 2019 N.J. Super. Unpub. LEXIS 1283 (App. Div. June 5, 2019), *rev'd*, 243 N.J. 147 (2020).

151. *Gagliostro v. Fitness Int'l*, No. A-667-18, 2019 N.J. Super. Unpub. LEXIS 2118 (App. Div. Oct. 16, 2019).

152. *Strickland v. Foulke Mgmt. Corp.*, 475 N.J. Super. 27, 33 (App. Div. 2023).

153. *See* 9 U.S.C. § 10.

154. *Harper v. Amazon.com Servs., Inc*., 12 F.4th 287 (3d Cir. 2021).

that Washington law would *not* govern the arbitration. When the defendant moved to compel arbitration, the plaintiff argued that Section 1 of the FAA exempted plaintiff from arbitration as a transportation worker.[155] The district court ordered discovery to determine facts relevant to the Section 1 exemption, but the Third Circuit reversed, holding that the court must first solve the choice of law quandary – the FAA, Washington State, or New Jersey (the default arbitration law in a contract formed and performed in New Jersey[156]). On remand, the district court ordered arbitration under state law.[157]

Designating the law to govern the arbitration clause may mean that the designated law governs the formation and interpretation of the arbitration clause, as well as the rules that govern the arbitration process. As just noted, under a standard conflict-of-laws analysis and N.J.S.A. 2A:23B-3, the NJRUAA may provide the default arbitration law to govern a dispute.

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155. By its terms, the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Labor arbitration is regulated by the National Labor Relations Board and other agencies and statutes. *Cf. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (NLRA does not counter FAA re class action waiver). The Supreme Court has held that independent contractors may be exempt from the FAA as transportation workers under Section 1, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019), and it remanded for further factual development. *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 142 S. Ct. 1783 (2022), held that airline supervisors could be exempt. *See also Singh v. Uber Techs., Inc*., 67 F.4th 550 (3d Cir. 2023) (Uber drivers crossing state borers only incidentally to an intrastate trip not exempt), *aff'g* 571 F. Supp. 3d 345 (D.N.J. 2021); *Singh v. Uber Techs., Inc.*, 939 F.3d 210 (3d Cir. 2019) (Section 1 not limited to goods), *rev'g* 235 F. Supp. 3d 656, 668-70 (D.N.J. 2017); *Colon v. Strategic Delivery Sols., LLC*, 459 N.J. Super. 349 (App. Div. 2019) (remanding for factual development; noting that other law may apply when workers are exempt under Section 1, citing *Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004) (Section 1 exclusion merely means that the parties' agreement should be enforced as if the FAA never existed.), *aff'd*, 234 N.J. 147 (2020). *Harper v. Amazon.com Servs., Inc.*, 12 F.4th 287 (3d Cir. 2021), discussed the history.

The FAA also may be "reverse-preempted" by subsequently enacted federal statutes, such as the 1945 McCarran-Ferguson Act, which provides, in part, "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance," 15 U.S.C. § 1012. *See also* § 1-4:3 (Bankruptcy), above.

156. *See* N.J.S.A. 2A:23B-3; *Flanzman v. Jenny Craig, Inc*., 244 N.J. 119, 134 (2020); *Arafa v. Health Express Corp.*, 243 N.J. 147, 172 (2020) (finding that arbitration in one case exempt from FAA arbitration by reason of Section 1, may be governed by NJRUAA).

157. *Harper v. Amazon.Com Servs. Inc.*, No. 19-21735, 2022 U.S. Dist. LEXIS 228118 (D.N.J. Dec. 19, 2022) (Washington and New Jersey law similar), *appeal filed*, Jan. 18, 2023 (No. 23-1073).

1-5:1.3b Alternative Designations

Parties may select procedural rules or statutes to govern their arbitration even though otherwise bound by the FAA.[158] However, a rule or state law or policy that is unfavorable to arbitration, or that restricts, limits, or conditions agreements to arbitrate, is not permitted.[159] Nor is a choice that would prospectively waive federal statutory rights.[160] As the U.S. Supreme Court held in *Kindred Nursing Centers*, the FAA preempts any state rule discriminating against arbitration directly or indirectly, including Kentucky's rule that required a "clear statement" or express proviso authorizing a power of attorney to waive the right to a jury by arbitration.[161] Arbitration agreements must be judged on an equal footing with, and according to the same principles as, all other contracts.[162] To the extent New Jersey policy suggests otherwise, the supremacy of the FAA "renders that state policy irrelevant."[163] Specific issues regarding preemption, such as unconscionability and class action waivers, are discussed below.[164]

In *Strickland v. Foulke Management Corp.*[165] the parties had agreed that the arbitrator was bound to apply the law, and failure to do so could require vacatur, but the Appellate Division held that the FAA governed and provided the exclusive grounds for vacatur.

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158. *See, e.g.*, *Volt Info. Scis., Inc. v. Bd. of Trs., Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989). *See also* §§ 1-3 above, n.41 and 1-5:4.4a, below.

159. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Doctor's Assocs., Inc. v. Casrotto*, 517 U.S. 681, 688 (1996); *Perry v. Thomas*, 482 U.S. 483, 489-90 (1987).

160. *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020) ("prospective waiver" doctrine; arbitration contract violated federal policy by waiving substantive statutory rights). *But see Brice v. Plain Green, LLC*, 13 F.4th 823 (9th Cir. 2021) (describing circuit split; court must determine delegation first), *rehearing en banc granted*, No. 19-15707, 2021 U.S. App. LEXIS 33152 (9th Cir. Nov. 8, 2021). *See also MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018) (distinguishing *Khan*; terms of clause made nonexistent tribal forum integral).

161. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426-27 (2017).

162. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426-27 (2017). The Kentucky Supreme Court has considered the issue anew on remand in *Kindred Nursing Centers L.P. v. Wellner*, 533 S.W.3d 189 (2017). Recent cases have emphasized that arbitration contracts are on an *equal* footing. *E.g.*, *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022).

163. *Glamorous Inc. v. Angel Tips, Inc.*, No. A-985-16T1, 2017 N.J. Super. Unpub. LEXIS 1526, at *3 (App. Div. June 23, 2017) (citing *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017)). The New Jersey Supreme Court declined to address preemption in *Kernahan v. Home Warranty Administrator of Florida, Inc.*, 236 N.J. 301 (2019) (holding that the clause was confusing and unenforceable).

164. *See* Chapter 2, § 2-5, below.

165. *Strickland v. Foulke Mgmt. Corp.*, 475 N.J. Super. 27 (App. Div. 2023).

1-5:1.3c A Word of Caution

Parties must understand the extent to which the chosen law – whether the law of the contract generally or only the law governing the arbitration clause (or the default law based on a conflicts-of-laws analysis) – may frustrate or assist their intentions. A body of state law that may provide favorable provisions regarding usury, for example, may create issues for enforcing third-party beneficiary or estoppel principles. Some states' law may require a heightened burden for some arbitration-specific issues, such as paying fees[166] or incorporation by reference. Some states may have statutes or rules that allow attorneys' fees for simple contract disputes, or a higher standard prejudgment interest rate, which must be applied by the arbitrators, rather than what one generally might expect in New Jersey federal or state courts. Case law in a particular state or federal circuit may allow upsetting an award based on manifest disregard of the law, contrary to New Jersey law.

State law also may vary on counsel-specific issues, such as unauthorized practice of law rules and other ethical questions.

A general choice-of-law section in the so called "container" agreement often also contains a two-part "venue" provision. The first will waive personal jurisdiction defenses as to a given forum, which should be consistent with the state or site of the arbitration. The second, more problematic, may say that all controversies shall be determined "exclusively" in the (state or federal) court in a given county or state. Although courts may read this as being of a piece with the arbitration clause,[167] meaning that arbitration related motions to compel or confirm/vacate must be brought in that venue, courts have seized upon this dual dispute resolution designation as contradictory to and overriding arbitration.[168] A similar problem may occur with multiple documents that ostensibly are part of a single agreement or are part of a series of

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166. *See, e.g.*, *Doe v. Superior Ct.*, No. A167105, 2023 Cal. App. LEXIS 694 (Ct. App. Sept. 8, 2023) (30-days limit for paying fees strictly construed; arbitration waived).

167. *See, e.g.*, *Singh v. Uber Techs., Inc.*, 67 F.4th 550, 563 (3d Cir. 2023) (The language in the two provisions is easily reconciled, and any conflict is "artificial."); *Divalerio v. Best Care Lab.*, No. 20-17268, 2021 U.S. Dist. LEXIS 194896, at *33-35 (D.N.J. Oct. 8, 2021) (multiple documents).

168. *See, e.g.*, *Pei Chuang v. OD Expense LLC*, 742 F. App'x 670 (3d Cir. 2018).

agreements.[169] The language must be carefully chosen. These issues are discussed further in this Handbook.

1-5:2 Contracts in Which Arbitration is Permitted

Subsequent to a number of decisions, such as *Wilko v. Swan*,[170] holding that arbitration in certain industries or certain matters was inconsistent with the underlying substantive statutes, federal and state courts gradually overruled such prohibitions. Today, virtually every type of contract with an arbitration provision "in writing" or "in a record," using the federal and state statutory language, will be subject to arbitration providing certain conditions are met. Indeed, as identified below, some arbitration provisions may be enforced in contexts perhaps not obvious. Arbitration in international transactions appears especially favored.[171]

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA) added as a new section of Title 9[172] and effective March 9, 2022, precluded enforcement of pre-dispute arbitration or joint-action waiver agreements regarding sexual assault or sexual harassment under any law.[173] So far, at least four issues have arisen. Although the Act states it is effective only as to disputes or claims that arose or accrued after the effective date, a not-for-publication Law Division opinion has held that public policy warranted applying the non-enforcement provisions to pre-March 2022 claims in an existing lawsuit.[174] Other cases have

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169. *See, e.g.*, *Field Intel. Inc. v. Xylem Dewatering Sols. Inc.*, 49 F.4th 351 (3d Cir. 2022) (integration clause did not include "express" language required by prior contract with arbitration clause; arbitration ordered); *cf. Abdurahman v. Prospect CCMC LLC*, 42 F.4th 156 (3d Cir. 2022) ("parties" definition in one created problem; court will not "stretch" language chosen).

170. *Wilko v. Swan*, 346 U.S. 427 (1953) (certain securities arbitration not permitted), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

171. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Issues in international arbitrations are discussed in, *e.g.*, Gary B. Born, International Commercial Arbitration (3d ed. 2021); Gary B. Born, International Arbitration: Law and Practice (2016).

172. 9 U.S.C. § 401, *et seq*. The text is in Appendix 5, below. 9 U.S.C. § 1 also was modified to match.

173. The act "shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA), Pub. L. No. 117-90, 136 Stat. 26 (2022).

174. *Sellino v. Galiher*, No. ESX-L-8519-21 (N.J. Super. Ct. Law Div. May 25, 2022). The case apparently is now being litigated in court. The opinion has not been reported or followed so far in any case located. The Act's effective date precluded arbitration in

concluded otherwise.[175] Second, courts have questioned whether the injury or a relevant act must take place after March 3, 2023, or the continuing violation doctrine applies.[176] Third, relatedly, courts have considered the meaning of "dispute or claim."[177] Fourth, where the Act applies,[178] does it preclude arbitration of all alleged acts or claims or only those arising or accruing after March 3, 2023?[179] The question is non-delegable.

One must remember that "arbitration is a matter of contract and a party may not be required to submit to arbitration any dispute which he has not agreed so to submit."[180] This requires a two-step analysis. First, is there a contract that includes an arbitration clause? This is in part whether an arbitration contract has been *formed* or is otherwise enforceable. Second, does the arbitration clause encompass the issue at hand? This is considered a *scope* issue in most cases.[181] New Jersey courts have adopted the same

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Woodruff v. Dollar Gen. Corp., No. 21-1705, 2022 U.S. Dist. LEXIS 227578, at *7 (D.N.J. Dec. 19, 2022).

175. The Act's effective date precluded arbitration in *Zuluaga v. Altice United States*, No. A-2265-21, 2022 N.J. Super. Unpub. LEXIS 2356 (App. Div. Nov. 29, 2022), *certif. denied*, 253 N.J. 377 (2023), and *Woodruff v. Dollar Gen. Corp.*, No. 21-1705, 2022 U.S. Dist. LEXIS 227578, at *7 (D.N.J. Dec. 19, 2022).

176. *Watson v. Blaze Media LLC*, No. 23-0279-B, 2023 U.S. Dist. LEXIS 135694 (N.D. Tex. Aug. 3, 2023).

177. *Barnes v. Festival Fun Parks, LLC*, No. 22-165, 2023 U.S. Dist. LEXIS 112915 (W.D. Pa. June 27, 2023).

178. *Levy v. AT&T Servs.*, No. 21-11758, 2022 U.S. Dist. LEXIS 50758 (D.N.J. Mar. 22, 2022) (does not apply to age discrimination claims) (dictum).

179. *Johnson v. Everyrealm, Inc.*, No. 22-6669, 2023 U.S. Dist. LEXIS 31242 (S.D.N.Y. Feb. 24, 2023).

180. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)). *See also Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022) (discussed earlier this chapter); *Bel-Ray Co., Inc. v. Chemrite Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980). *But cf.* Chapter 2, § 2-5:5 (non-signatories), below.

181. *See Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005) (identifying "two-step inquiry"); *accord MHA, LLC v. UnitedHealth Grp., Inc.*, No. 15-7825, 2017 U.S. Dist. LEXIS 42144, at *11 (D.N.J. Mar. 23, 2017). *Pearson v. Valeant Pharmaceuticals International, Inc.*, No. 17-1995, 2017 U.S. Dist. LEXIS 209102 (D.N.J. Dec. 20, 2017), describes the relative burdens at each step: contract and agency principles under state law at the first, *formation* step; the federal policy favoring a presumption of arbitrability at the second, *scope* step. That is not to say that federal law governs the scope issue. As clarified in *In re Remicade (Direct Purchaser) Antitrust Litigation*, 938 F.3d 515, 522 (3d Cir. 2019), the scope of the arbitration should be analyzed under state law contract principles, with federal law "tip[ing] the scale" when state law does not dictate a clear outcome, preempting state law, or otherwise informing the interpretation.

two-step inquiry.[182] In other cases, including *Moon v. Breathless Inc.*,[183] courts add an additional three-part analysis to determine whether the clause properly waives statutory or other rights that may (or may not) take precedence over the governing arbitration statute.

Several unusual issues arose in 2022 and 2023:

First, the New Jersey Supreme Court held that, under the state's Direct Action Statute,[184] the duty to arbitrate may arise as a "statutory claim" from an insurance policy.[185] Where coverage may apply by "operation of law," not the policy contract, the carrier may be bound to arbitrate certain claims with non-policy-holders.[186]

Second, a Chancery Division opinion[187] declined to enforce an arbitration clause in a will on grounds that (1) a will does not satisfy the contract requirements of the NJRUAA and (2) the benefits of the will were not extended to plaintiff under traditional contract or agency principles. Additionally, it noted that New Jersey does not enforce *in terrorem* clauses.[188]

Third, questions arose regarding enforcing agreements to have a dispute resolved by a Biet Din (sometimes using alternative English terms or spelling). In *Bedrock Steel v. Raritan Urban*

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182. *See*, *e.g.*, *26 Flavors, LLC v. Two Rivers Coffee, LLC*, No. A-5291-14T4, 2017 N.J. Super. Unpub. LEXIS 2252, at *9 (App. Div. Sept. 12, 2017), citing *Martindale v. Sandvik, Inc*., 173 N.J. 76, 92 (2002); *Marjam Supply Co. v. Columbia Forest Prods. Corp*., No. A-2520-11T3, 2012 N.J. Super. Unpub. LEXIS 2723, at *11 (App. Div. Dec. 13, 2012), citing *Trippe Mfg. Co. v. Niles Audio Corp*., 401 F.3d 529 (3d Cir. 2005); *Fastenberg v. Prudential Ins. Co. of Am*., 309 N.J. Super. 415, 420 (App. Div. 1998).

183. *Moon v. Breathless Inc.*, 868 F.3d 209, 214-15 (3d Cir. 2017); s*ee Harper v. Amazon. Com Servs. Inc*., No. 19-21735, 2022 U.S. Dist. LEXIS 228118 (D.N.J. Dec. 19, 2022).

184. N.J.S.A. 17:28-2.

185. *Crystal Point Condo. Ass'n v. Kinsale Ins. Co*., 251 N.J. 437 (2022). The Court did not base its decision on third party beneficiary law or other common law bases for enforcing an arbitration agreement to a non-signatory as discussed in the Appellate Division's opinion, *see Crystal Point Condo. Ass'n, Inc. v. Kinsale Ins. Co.*, 466 N.J. Super. 471 (App. Div. 2021).

186. *See Freeman v. Makanash*, No. A-2177-21, 2022 N.J. Super. Unpub. LEXIS 1942 (App. Div. Oct. 19, 2022), citing *James v. New Jersey Mfrs. Ins. Co*., 216 N.J. 552, 568 (2014).

187. *In re Estate of Hekemian*, No. P-479-21, 2022 N.J. Super. Unpub. LEXIS 191 (Ch. Div. Feb. 7, 2022), *aff'd*, No. A-1774-21, 2023 N.J. Super. Unpub. LEXIS 60 (App. Div. Jan. 13, 2023) (also discussing direct estoppel). The court distinguished a Texas opinion, looking to Texas law, holding otherwise. *See Rachal v. Reitz*, 403 S.W.3d 840 (2013).

188. *See Haynes v. First Nat'l State Bank*, 87 N.J. 163 (1981).

Renewal,[189] the Appellate Division found the parties had met the standards for a "record" agreement, as governed by ordinary contract principles, but raised questions about their "meeting of the minds." When the Beit Din process floundered, the party proposing the Biet Din arbitration went to court; the defendant moved to compel arbitration, which the plaintiff oddly opposed. Likely seeing a bit of game-playing, the court denied the motion but did not remand for discovery regarding the parties' intentions. Other courts resolved motions involving religious tribunals based on a particularized analysis of the parties' actions.[190]

Where a remand to permit discovery on arbitration contract formation did not resolve several issues, the Appellate Division remanded for further discovery and a plenary hearing at which several identified questions were to be resolved.[191]

Two cases are now on appeal to the New Jersey Supreme Court regarding bellwether mass arbitration clauses (among other issues)[192] and the authority of an arbitrator, acting under the Tenured Employees Hearing Law,[193] to demote or dismiss an employee under the circumstances presented.[194]

Thus, as a general matter, courts will enforce properly drafted arbitration provisions in labor agreements, employment contracts,[195]

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189. *Bedrock Steel v. Raritan Urban Renewal*, No. A-0410-22 2023 N.J. Super. Unpub. LEXIS 691 (App. Div. May 8, 2023).

190. *E.g.*, *Satz v. Satz*, 476 N.J. Super. 536 (App. Div. 2023); *Bierig-Kiejdan v. Kiejdan*, No. A-2945-20, 2023 N.J. Super. Unpub. LEXIS 219 (App. Div. Feb. 16, 2023).

191. *See Porcelli v. Green Power Sol., LLC*, No. A-1109-22, 2023 N.J. Super. Unpub. LEXIS 1885 (App. Div. Oct. 24, 2023).

192. *Achey v. Cellco P'ship*, 475 N.J. Super. 446 (App. Div.), *certif. granted*, 255 N.J. 286 (2023). *County of Passaic v. Horizon Healthcare Servs., Inc.*, 474 N.J. Super. 498 (App. Div. 2023), *certif. granted*, 254 N.J. 69, *appeal dismissed*, 2023 N.J. LEXIS 1167 (2023) concerning the sophistication of the parties, was dismissed in the Supreme Court by the parties before argument. The precedential Appellate Division opinion (discussed elsewhere in this Handbook) therefore remains good law.

193. N.J.S.A. 18A:6-10 and N.J.S.A. 18A:16.

194. *Sanjuan v. Sch. Dist. of W. N.Y.*, 473 N.J. Super. 416 (App. Div. 2022), *certif. granted*, 254 N.J. 90 (May 22, 2023).

195. *E.g.*, *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020) (enforcing), *rev'g*, 456 N.J. Super. 613 (App. Div. 2018); *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124 (2001) (declining to enforce); *Leodori v. CIGNA Corp.*, 175 N.J. 293, 302 (2003); *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 88-89 (2002); *Jaworski v. Ernst & Young U.S. LLP*, 441 N.J. Super. 464 (App. Div. 2015) (enforcing). In *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), the United States Supreme Court held that the Section 1 Exemption in the FAA did not apply to ordinary (*i.e.,* non-"transportation") workers. FAA Section 1 is discussed further in § 1-5:1.3, above.

employee handbooks, emailed employment policies,[196] consumer transactions,[197] auto purchase contracts,[198] utility contracts,[199] construction, architectural or engineering contracts,[200] franchise agreements,[201] commercial leases[202] and sales transactions including accompanying or referenced "terms and conditions,"[203] and partnership and operating agreements (for an L.L.C., for example)[204]

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196. *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020) (enforcing).

197. *Curtis v. Cellco P'ship*, 413 N.J. Super. 26 (App. Div. 2010) (consumer fraud claims); *Gras v. Assocs. First Capital Corp.*, 346 N.J. Super. 42 (App. Div. 2001) (consumer fraud claim); *Hoover v. Sears Holding Corp.*, No. 16-4520, 2017 U.S. Dist. LEXIS 91081 (D.N.J. June 14, 2017) (warranty in Terms and Conditions), *reconsideration denied*, 2017 U.S. Dist. LEXIS 144792 (D.N.J. Sept. 7, 2017); *Kamensky v. Home Depot U.S.A., Inc.*, No. A-0930-14T4, 2015 WL 5867357 (N.J. Super. Ct. App. Div. Sept. 29, 2015) (same); *but see Noble v. Samsung Elecs. Am., Inc.*, No. 15-3713, 2016 WL 1029790 (D.N.J. Mar. 15, 2016), *aff'd*, 682 F. App'x 113 (3d Cir. 2017) (hidden warranty).

198. *See Aguilar v. Payless Auto Wholesale & Les Agboh*, No. A-150-22, 2023 N.J. Super. Unpub. LEXIS 1042 (App. Div. June 23, 2023) (court would appoint alternative forum); *Kamineni v. Tesla, Inc.*, No. 19-14288, 2020 U.S. Dist. LEXIS 1329 (D.N.J. Jan. 6, 2020) (New Jersey Lemon Law claim).

199. *James v. Glob. Tel*Link Corp.*, No. 13-4989, 2016 WL 589676 (D.N.J. Feb. 11, 2016), *aff'd*, 852 F.3d 262 (3d Cir. 2017) (utility/phone contracts).

200. *Arbor Green Condo. Ass'n v. Start 2 Finish Restoration & Bldg. Servs.*, 2023 N.J. Super. Unpub. LEXIS 620 (App. Div. Apr. 24, 2023); *Grandvue Manor, LLC v. Cornerstone Contracting Corp.*, 471 N.J. Super. 135 (App. Div. 2022) (check box in AIA contract was sufficient evidence of waiver) (*see* text at fn.123, above); *Tedeschi v. D.N. Desimone Constr., Inc.*, No. 15-8484, 2017 U.S. Dist. LEXIS 69695 (D.N.J. May 8, 2017); *Sand Castle Dev., LLC v. Avalon Dev. Grp., LLC*, No. A-3325-16T1, 2017 N.J. Super. Unpub. LEXIS 2701 (App. Div. Oct. 26, 2017); *Kassis v. Blue Ocean Holdings, L.L.C.*, No. A-5200-14T1, 2016 WL 6440650 (N.J. Super. Ct. App. Div. Nov. 1, 2016); *Columbus Circle N.J. LLC v. Island Constr. Co.*, No. A-1907-15T1, 2017 WL 958489 (N.J. Super. Ct. App. Div. Mar. 13, 2017); *Kensington Park Owners Corp. v. Architectura, Inc.,* No. BER-L-2055-19, 2019 N.J. Super. Unpub. LEXIS 1601 (Law Div. June 28, 2019). Not all courts agree the AIA form satisfies *Atalese. See Epstein v. Conboy*, No. A-2135-15T3, 2016 WL 3600251 (N.J. Super. Ct. App. Div. July 6, 2016) (AIA home construction). One author characterizes the *Epstein* case as a "cautionary tale." Adreinne L. Isacoff, *Navigating the Landmines in Home Construction Dispute Resolution*, N.J. Lawyer 66, at 68 (No. 305, Apr. 2017). However, *Epstein* is a not-precedential, unpublished opinion and preceded the published opinion in *Grandvue*, above.

201. *Glamorous Inc. v. Angel Tips, Inc.*, No. A-985-16T1, 2017 N.J. Super. Unpub. LEXIS 1526 (App. Div. June 23, 2017) (franchise); *Case Med. Inc. v. Advanced Sterilization Prods. Serv., Inc.*, No. A-0567-15T4, 2016 WL 3369414 (N.J. Super. Ct. App. Div. June 20, 2016); *Paul Green Sch. of Rock Music Franchising, LLC v. Smith*, 389 F. App'x 172 (3d Cir. 2010); *Central Jersey Freightliner, Inc. v. Freightliner Corp.*, 987 F. Supp. 289 (D.N.J. 1997); *Allen v. World Inspection Network Int'l, Inc.*, 389 N.J. Super 115 (App. Div. 2006); *B & S Ltd., Inc. v. Elephant & Castle Int'l, Inc.*, 388 N.J. Super. 160 (Ch. Div. 2006) (distribution and franchise agreements).

202. *Frick Joint Venture v. Vill. Super Mkt., Inc.*, No. A-1441-15, 2016 WL 3092980 (N.J. Super. Ct. App. Div. June 3, 2016) (commercial leases).

203. *Emcon Assocs., Inc. v. Zale Corp.*, No. 16-1985, 2016 WL 7232772 (D.N.J. Dec. 14, 2016) (sales transactions, accompanying or referenced "terms and conditions").

204. *Ames v. Premier Surgical Ctr., L.L.C.*, No. A-1278-15T1, 2016 WL 3525246 (N.J. Super. Ct. App. Div. June 29, 2016) (partnership and LLC operating agreements); *Victory Entm't, Inc. v Schibell*, No. A-4334-14T1, 2016 WL 4016634 (N.J. Super. Ct. App. Div.

and insurance.[205] Retirement or securities accounts,[206] credit cards,[207] car rental agreements,[208] and other financial agreements also may contain arbitration clauses, but in some cases (*e.g.*, securities) they may be governed by federal regulatory provisions. The Third Circuit also clarified the meaning of employer for ERISA arbitration[209] and distinguished between a non-signatory plaintiff's claims on behalf of an ERISA plan (arbitrable) and himself (non-arbitrable) and compelled arbitration.[210]

Arbitration clauses in attorney fee retainers and related contexts, regarding both fee disputes and malpractice claims, raise somewhat distinct problems at the intersection of ethics and FAA preemption. The New Jersey Supreme Court approved arbitration clauses – for fee or malpractice disputes – in retainers in *Delaney v. Dickey*,[211] but required that attorneys meet the disclosure rules of RPC 1.4(c), including a reasonable explanation of the pros

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July 28, 2016) (shareholders' agreement) (remanded); *after remand*, No. A-3388-16, 2018 N.J. Super. Unpub. LEXIS 1467 (App. Div. June 21, 2018) (enforcing arbitration).

205. *Jade Apparel, Inc. v. United Assurance Inc.*, No. A-2001-14T1, 2016 WL 5939470 (N.J. Super. Ct. App. Div. Oct. 13, 2016) (insurance), *certif. denied*, 229 N.J. 151 (2017). Reinsurance and insurance arbitration is common. *Cf. Crystal Point Condo. Ass'n v. Kinsale Ins. Co*., 251 N.J. 437 (July 18, 2022) (arbitration derived from a "statutory right" under the Direct Action Statute).

206. *E.g.*, *Jansen v. Salomon Smith Barney, Inc.*, 342 N.J. Super. 254 (App. Div. 2001).

207. *E.g.*, *Dalal v. Costco Wholesale*, No. 22-05593, 2023 U.S. Dist. LEXIS 52622 (D.N.J. Mar. 27, 2023); *Ellin v. Credit One Bank*, No. 15-2694, 2015 WL 7069660, at *3 (D.N.J. Nov. 13, 2015) (citing, *e.g.*, *MBNA Am. Bank, N.A. v. Bibb*, No. A-4087-07T2, 2009 WL 1750220 (N.J. Super. Ct. App. Div. June 23, 2009) (line of credit); *Novack v. Cities Serv. Oil Co.,* 149 N.J. Super. 542 (Law Div. 1977) (general contract principles), *aff'd*, 159 N.J. Super. 400 (App. Div.), *certif. denied*, 78 N.J. 396 (1978); *but see Katsil v. Citibank, N.A*., No. 16-3694, 2016 WL 7173765 (D.N.J. Dec. 8, 2016) (insufficient evidence), *appeal filed*, No. 17-1077 (3d Cir. Jan. 11, 2017); *Midland Funding LLC v. Bordeaux*, 447 N.J. Super. 330 (App. Div. 2016) (insufficient documentation).

208. *Bacon v. Avis Budget Grp., Inc.*, 959 F.3d 590 (3d Cir. 2020) (declining to enforce based on lack of notice), *aff'g* 357 F. Supp. 3d 401 (D.N.J. 2018).

209. *J. Supor & Son Trucking & Rigging Co. v. Trucking Emps. of N. Jersey Welfare Fund*, 30 F.4th 179 (3d Cir. 2022) (Disputes between the parties are subject to the MPPAA's statutory arbitration mandate, 29 U.S.C. § 1401(a).).

210. *Berkelhammer v. ADP Totalsource Grp., Inc*., 74 F.4th 115 (3d Cir. 2023).

211. *Delaney v. Dickey*, 244 N.J. 466 (2020), *aff'g as modified* No. A-1726-17, 2019 N.J. Super. Unpub. LEXIS 1814 (App. Div. Aug. 23, 2019) (JAMS rules must be physically provided). The Supreme Court emphasized the role of an attorney as a fiduciary; it did not comment on whether the provider's rules must be given to the client in paper form, as required by the Appellate Division. The disclosures were to be studied and a recommendation for any rule changes or formal Committee Opinion was to be made by the applicable Supreme Court committee. The Committee Report is at https://www.njcourts.gov/sites/default/files/sccr/reports/acpe22.pdf (last visited Jan. 5, 2024). *Cf. Micro Tech Training Ctr., Inc. v. DeCotiis Fitzpatrick & Cole, LLP*, No. A-143-20, 2021 N.J. Super. Unpub. LEXIS 3159 (App. Div. Dec. 27, 2021) (declining to apply *Delaney* retroactively).

and cons of arbitration. This explanation, either oral or written, "may" cover the private nature of arbitrations, the lack of a jury, the limited "appeals" or court review of an award, that the client may be responsible for the costs of the arbitration, and that discovery may be more limited. Since the heightened duty of disclosure in RPS 1.4(c) was applicable to all aspects of a retainer, not only the arbitration clause, it arguably is not preempted by the FAA (where the FAA is applicable). This disclosure rule is to be applied prospectively, except with regard to the litigants in this case.

Drafters of attorney retainer agreements face the additional challenge of clarifying the client's right to file for fee arbitration compared to the mandatory arbitration clause in the retainer. The Appellate Division declined to require arbitration where that distinction was not made clear – and in fact lead to confusion.[212]

Non-traditional contexts in which arbitration provisions have been sustained include bylaws for religious societies,[213] funeral

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Earlier cases include *Smith v. Lindemann*, 710 F. App'x 101 (3d Cir. 2017) (permitting arbitration fee agreement, citing ABA Comm'n on Ethics & Prof'l Responsibility Formal Op. 02-425 (2002); *Raia v. Cohnreznick, LLP*, No. A-1365-19T1, 2020 N.J. Super. Unpub. LEXIS 1207 (App. Div. June 22, 2020), *aff'g* No. BER-L-2262-18, 2019 N.J. Super. Unpub. LEXIS 2054 (Law Div. Sept. 23, 2019). *But see Kamarotos v. Palias*, 360 N.J. Super. 76 (App. Div. 2003) (discussing competing positions and distinctions between arbitrating fee disputes and malpractice claims, questioned by *Smith* district court).

An early case supporting court-ordered arbitration is *Daly v. Komline-Sanderson Engineering Corp.*, 40 N.J. 175 (1963). Rules-mandated fee-arbitration is noted briefly in § 1-4:4, above and *Frank K. Cooper Real Estate #1, Inc. v. Cendant Corp.*, Nos. A-1482-16T3; A-1579-16T3, 2018 N.J. Super. Unpub. LEXIS 2677 (App. Div. Dec. 6, 2018) (arbitration of the "split" of attorneys' fees to be awarded in a class action settlement).

212. *Kopec v. Moers*, 470 N.J. Super. 133 (App. Div. 2022) (ambiguous arbitration clause unenforceable, *e.g.*, not making proper distinctions between binding arbitration and fee arbitration).

213. *See Matahen v. Sehwail*, No. A-4312-14T1, 2016 N.J. Super. Unpub. LEXIS 647 (App. Div. Mar. 24, 2016). Arbitration before a rabbinical panel has been sustained. *Litton v. Litton*, No. A-0750-15T2, 2017 N.J. Super. Unpub. LEXIS 392 (App. Div. Feb. 17, 2017), *certif. denied*, 230 N.J. 569 (2017). *See also Torah v. Aryeh*, No. A-3344-16T2, 2018 N.J. Super. Unpub. LEXIS 1752 (App. Div. July 23, 2018) (rabbinical court); *Itzhakov v. Segal*, No. A-2619-17, 2019 N.J. Super. Unpub. LEXIS 1829 (App. Div. Aug. 28, 2019); *Veshnefsky v. Zisow v. Jewish Learning Ctr. of Monmouth Cnty., Inc.*, No. A-1306-18T4, 2020 N.J. Super. Unpub. LEXIS 1509 (App. Div. July 27, 2020). However, requiring referral to a Bies Din was not required where the language was ambiguous, *e.g.*, as between mediation or arbitration, and may have violated *Atalese*. *Bedrock Steel v. Raritan Urban Renewal*, No. A-0410-22, 2023 N.J. Super. Unpub. LEXIS 691 (App. Div. May 8, 2023), discussed earlier in this chapter.

contracts,[214] settlement agreements,[215] employment applications,[216] play sites,[217] lease valuations,[218] home warranties,[219] and freight tariffs.[220]

Play sites regularly have difficulty with their arbitration agreement because of authority, infancy, and agency issues, but selecting JAMS as the forum can be corrected.[221]

Arbitration clauses in unilateral contracts such as separate limited warranties may not be enforced,[222] unless "not hidden."[223] Some courts have declined to enforce unilateral arbitration amendments in "bill stuffers," but others have disagreed.[224]

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214. *Palladino v. Michael Hegarty Funeral Home, Inc*., No. A-0946-15T1, 2016 N.J. Super. Unpub. LEXIS 986 (App. Div. Apr. 29, 2016).

215. *See, e.g.*, *Satz v. Satz*, 476 N.J. Super. 536 (App. Div. 2023) (marital litigation settlement); *Jang Won So v. EverBeauty, Inc*., No. A-3560-16, 2018 N.J. Super. Unpub. LEXIS 4 (App. Div. Jan. 2, 2018) (enforcing agreement between attorneys to dismiss employment litigation in favor of arbitration); *see also* Chapter 9, § 9-4 (Matrimonial Arbitration), below.

216. *Martindale v. Sandvik, Inc*., 173 N.J. 76 (2002). Courts have distinguished *Martindale* in a variety of ways. *See, e.g*., *Espinal v. Bob's Discount Furniture, LLC*, No. 17-2854, 2018 U.S. Dist. LEXIS 83705 (D.N.J. May 18, 2018); *Defina v. Go Ahead & Jump 1, LLC*, No. A-1861-17T2, 2019 N.J. Super. Unpub. LEXIS 1400 (App. Div. June 5, 2019); *Griffoul v. NRG Residential Solar Sols., LLC*, No. A-5535-16T1, 2018 N.J. Super. Unpub. LEXIS 1051 (App. Div. May 4, 2018), *certif. denied*, 236 N.J. 456 (2019).

217. *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 341-42 (2006); *but see Defina v. Go Ahead & Jump 1, LLC*, No. A-1861-17T2, 2019 N.J. Super. Unpub. LEXIS 1400 (App. Div. June 13, 2019) (*Atalese* not satisfied by language waiving "trial").

218. *Sills Cummis & Gross P.C. v. Matrix One Riverfront Plaza, LLC*, No. A-2160-10, 2013 N.J. Super. Unpub. LEXIS 138 (App. Div. Jan. 22, 2013), *certif. denied*, 213 N.J. 537 (2013).

219. *Citron v. Cinch Real Est.*, No. 1221-22, 2023 N.J. Super. Unpub. LEXIS 772 (App. Div. May 22, 2023).

220. *E.g.*, *Alfa Adhesives v. A. Duie Pyle, Inc*., No. 18-3689, 2018 U.S. Dist. LEXIS 85511 (D.N.J. May 22, 2018) (Carmack Amendment satisfied).

221. *Matullo v. Sky Zone Trampoline Park*, 472 N.J. Super. 220 (App. Div. 2022) (infant signature insufficient); *Perez v. Sky Zone LLC*, 472 N.J. Super. 240 (App. Div. 2022) (arbitration not permitted as to non-signatories; JAMS could be replaced by court); *Checchio v. Fitness*, 471 N.J. Super. 1 (App. Div.) (non-parent signature insufficient), *certif. denied*, 252 N.J. 85 (2022); *Gayles v. Sky Zone Trampoline Park*, 468 N.J. Super. 17 (App. Div. 2021) (non-parent signature insufficient).

222. *Noble v. Samsung Elecs. Am., Inc*., No. 15-3713, 2016 WL 1029790 (D.N.J. Mar. 15, 2016), *aff'd*, 682 F. App'x 113 (3d Cir. 2017). *Cf. In re Volkswagen Timing Chain Prod. Liab. Litig*., No. 16-2765 2017 U.S. Dist. LEXIS 70299, at *28 (D.N.J. May 8, 2017) (in a suit based on separate warranty, manufacturer cannot rely on arbitration clause in sales contract).

223. *Brito v. LG Elecs. USA, Inc.*, No. 22-5777, 2023 U.S. Dist. LEXIS 53789 (D.N.J. Mar. 29, 2023).

224. *E.g.*, *Discover Bank v. Shea*, 362 N.J. Super. 200 (Law Div. 2001), *appeal dismissed on other grounds*, 362 N.J. Super. 90 (App. Div. 2003), *distinguishing MBNA Am. Bank, N.A. v. Cohen*, No. A-5484-07T2, 2010 N.J. Super. Unpub. LEXIS 2039 (App. Div. Aug. 18, 2010); *FIA Card Servs., N.A. v. Cohen*, No. A-3026-07T2, 2009 N.J. Super. Unpub. LEXIS 1565 (App. Div. June 17, 2009).

Computer contracts continue to have enforcement problems, both because of the design of the web page[225] and the process for "signing" electronically.[226] A company may not be able to rely on the arbitration clause in its standard computer contract to compel arbitration of an ADA claim, where the plaintiff did not enter into the contract (because it would not offer a ride to a disabled person).[227]

Although New Jersey courts had held that certain arbitration clauses were not enforceable as a matter of state public policy,[228] such rulings have been held preempted as, for example, regarding class-action waivers[229] and regarding health care or nursing contracts,[230] though courts may find ways to avoid the preemption and apply rough justice to preclude arbitration in such contexts.[231]

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[225] *Wollen v. Gulf Stream Restoration & Cleaning, LLC*, 468 N.J. Super. 483, (App. Div. 2021) (home improvement referral service). *Wollen* is distinguished in *Lloyd v. Retail Equation, Inc.*, No. 21-17057, 2022 U.S. Dist. LEXIS 233637 (D.N.J. Dec. 29, 2022) ("PLACE ORDER" button). "SIGN UP" sufficed in *Racioppi v. Airbnb, Inc.*, No. A-455-22, 2023 N.J. Super. Unpub. LEXIS 1200 (App. Div. July 17, 2023). Failure to move timely as to an online TV-setup clause was fatal in *White v. Samsung Electronics America, Inc.*, 61 F.4th 334 (3d Cir. 2023).

[226] *Knight v. Vivint Solar Dev., LLC*, 465 N.J. Super. 416 (App. Div. 2020), *certif. denied*, 246 N.J. 222 (2021) (additional box to check; wrong name inserted below e-signature). *See also Johnson v. Sky Zone Indoor Trampoline Park in Springfield*, No. A-2489-20, 2021 N.J. Super. Unpub. LEXIS 2949 (App. Div. Dec. 6, 2021) (affirming order enforcing agreement in park kiosk sign-in).

[227] *See O'Hanlon v. Uber Techs. Inc.*, 990 F.3d 757 (3d Cir. 2021).

[228] *E.g.*, *Muhammad v. Cnty. Bank of Rehoboth Beach*, 189 N.J. 1 (2006). In a partial concurrence and dissent, in *Colon v. Strategic Delivery Solutions, LLC*, 243 N.J. 147 (2020), Justice Albin laid out the case that *Muhammad* may be brought back to life in a case where the exemption of Section 1 of the FAA applied, resulting in no FAA preemption.

[229] *See Litman v. Cellco P'ship*, 655 F.3d 225, 230 (3d Cir. 2011) (holding *Muhammad v. Cnty. Bank of Rehoboth Beach*, 189 N.J. 1 (2006), preempted by FAA); *Snap Parking, LLC v. Morris Auto Enters.*, *LLC*, No. A-4733-15T4, 2017 N.J. Super. Unpub. LEXIS 750, at *8 (App. Div. Mar. 27, 2017) (noting same).

[230] *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); *Estate of Ruszala v. Brookdale Living Cmtys., Inc.*, 415 N.J. Super. 272 (App. Div. 2010) (pre-*Marmet*; finding FAA pre-emption; severing unconscionable aspects of arbitration); *Barberi v. 1351 Old Freehold Rd. Operations LLC*, No. A-3265-21, 2023 N.J. Super. Unpub. LEXIS 641 (App. Div. Apr. 28, 2023) (incomplete documentation satisfied by other records); *Silvera v. Aristacare at Cherry Hill, LLC*, No. A-0519-20, 2021 N.J. Super. Unpub. LEXIS 530 (App. Div. Mar. 30, 2021). *Cf. Andreyko v. Sunrise Senior Living, Inc.*, 993 F. Supp. 2d 475 (D.N.J. 2014) (discussing state nursing home statute in assisted living context). The AAA, JAMS, ABA, AMA, and others have adopted healthcare protocols regarding arbitration. Federal regulations in 2022 prohibit certain nursing care arbitration. See above.

[231] *See Cottrell v. Holtzberg*, 468 N.J. Super. 59 (App. Div. 2021) (initial cover arbitration agreement not enforced as to subsequent admissions); *Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545 (App. Div. 2016) (denying arbitration because AAA forum not available per its then-current HealthCare Policy Statement). Other examples include: *Fung v. Varsity Tutors, LLC*, No. A-3650-17, 2019 N.J. Super. Unpub. LEXIS 960 (App. Div. Apr. 25, 2019) (small claims case); *Patterson v. Care One at Moorestown, LLC*, No. A-4358-15T3, 2017 N.J. Super. Unpub. LEXIS 423 (App. Div. Feb. 21, 2017), *certif. denied*, 230 N.J. 476 (2017).

These cases may have limited effect going forward, in light of the amendment to the FAA adding Sections 401 and 402 prohibiting mandatory arbitration clauses regarding sexual abuse and harassment,[232] discussed above.

Unconscionability issues, as discussed in *Muhammad*, still may be raised in specific contexts and result in severance of unconscionable provisions.[233] However, an unlawful shortened statute of limitations in an arbitration clause was held so intertwined as to make the entire clause unconscionable.[234] Arguments regarding unconscionability were not accepted where the parties were sophisticated.[235]

Although final or proposed federal regulations would have either regulated, limited, or prohibited arbitration in consumer financial, health care, or other transactions, they were revoked.[236] New Jersey's Law Against Discrimination was amended in 2019 to preclude enforcement of waiver of "any substantive or procedural right" in employment contracts.[237] However, the amendment was held preempted by the FAA in *New Jersey Civil Justice Institute v. Grewal*[238] and *Antonucci v. Curvature Newco.*[239] The federal

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The broad language of *Kleine* may be brought into question by *Flanzman v. Jenny Craig, Inc*., 244 N.J. 119 (2020), which reversed an Appellate Division opinion, 456 N.J. Super. 613 (App. Div. 2018), that relied in large part on *Kleine*.

232. 9 U.S.C. § 401 & 402. The act is effective March 9, 2022. Section 1 also was amended.

233. *See Delta Funding Corp. v. Harris*, 189 N.J. 28 (2006) (unconscionable fee provisions should be severed).

234. *Guc v. Raymours Furniture Co*., No. A-3452-20, 2022 N.J. Super. Unpub. LEXIS 395 (App. Div. Mar. 11, 2022). The limitations clause had been held illegal in a prior Supreme Court case involving the same defendant, *Rodriguez v. Raymours Furniture Co.*, 225 N.J. 343 (2016). The company had failed to amend its employment documentation by the time plaintiff was on-boarded in 2018. The appellate court did not follow an earlier unpublished opinion enforcing the same clause, with the offending clause severed. Limitations on damages and delay to judgment, in a bellwether provision, may also be viewed "under all the circumstances" to find the clause unconscionable, rather than severing the unconscionable provisions. *See Achey v. Cellco P'ship*, 475 N.J. Super. 446 (App. Div. 2023), *certif. granted*, 255 N.J. 286 (2023).

235. *Land of Land, Inc. v. PayPal, Inc*., No. 22-00261, 2023 U.S. Dist. LEXIS 47337 (D.N.J. Mar. 21, 2023).

236. H.J. Res. 111, signed on November 11, 2017, avoided the CFPB's regulation limiting class-action waivers in pre-dispute arbitration clauses in certain consumer financial documents. *See also* CMS Issues Proposed Requirements for Long-Term Care Facilities Arbitration Agreements, 82 FR 26649 (June 8, 2017), now final.

237. *See* N.J.S.A. § 10:5-12.7. *See also* N.J.S.A. § 10:5-12.8 (non-disclosure agreements).

238. *New Jersey Civil Justice Inst. v. Grewal*, No. 19-17518, 2021 U.S. Dist. LEXIS 57437 (D.N.J. Mar. 25, 2021). Although *Grewal* did not involve an employee, it was followed in *Meshefsky v. Rest. Depot, LLC*, No. 21-3711, 2021 U.S. Dist. LEXIS 91335 (D.N.J. May 13, 2021). Preemption was held not a basis for removal in *Lemiska v. Briad Grp*., No. 20-08130, 2021 U.S. Dist. LEXIS 32140 (D.N.J. Feb. 22, 2021).

239. *Antonucci v. Curvature Newco*, 470 N.J. Super. 553 (App. Div. 2022).

whistleblower act prohibited certain arbitration agreements, but it has been held to be preempted by the FAA.[240] As just noted, the scope of preemption for sexual abuse and harassment claims is now limited by amendments to the FAA effective in 2022.

1-5:3 Contract Formation Elements

1-5:3.1 Generally

Although it is often said that arbitration is a favored means of resolving disputes, in all cases in New Jersey, whether an arbitration provision will be enforced in court will depend on whether the writing satisfies the requirements for contract formation. This is itself a two-part inquiry, given the severability of arbitration clauses from their underlying contract: "[1] whether a valid agreement to arbitrate exists and [2] whether the particular dispute falls within the scope of that agreement."[241]

In both, the writing must evidence "mutual assent" (a) to the contract terms and (b) to resolve covered disputes in arbitration rather than in court proceedings in which a trial by jury may be a constitutional (and sometimes specific statutory) right.[242] These steps are set out in *Moon v. Breathless, Inc.*[243] Standard contract elements, listed in *Weichert Co. Realtors v. Ryan*,[244] used to judge both, also include consideration, offer, and acceptance (as evidenced by words or conduct), and reasonably definite terms.[245]

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240. In *Robertson v. Intratek Computer, Inc.*, 976 F.3d 575 (5th Cir. 2020), *cert. denied*, 142 S. Ct. 2708 (2022), the Fifth Circuit held that a "no arbitration" provision of the Enhancement of Whistleblower Protection for Contractor and Grantee Employees Act, 41 U.S.C. § 4712, was preempted by the FAA.

241. *Trippe Mfg. Co. v. Niles Audio Corp*., 401 F.3d 529, 532 (3d Cir. 2005); *accord*, *Martindale v. Sandvik, Inc*., 173 N.J. 76, 92 (2002). A court may not make a better contract than the parties agreed to; nor may the court use the favorability of arbitration to create a pro-arbitration rule. *See Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). There were several examples in 2022 and 2023, discussed elsewhere, where drafting created problems.

242. *Atalese v. U.S. Legal Servs. Grp., L.P*., 219 N.J. 430, 442 (2014), *cert. denied*, 576 U.S. 1004 (2015). *See also, e.g*., *Leodori v. Cigna Corp*., 175 N.J. 293 (2003) (employee handbook). *See* Chapter 2, § 2-5:2, below.

243. *Moon v. Breathless Inc*., 868 F.3d 209 (3d Cir. 2017); *Harper v. Amazon.Com Servs. Inc.*, No. 19-21735, 2022 U.S. Dist. LEXIS 228118, at *26-27 (D.N.J. Dec. 19, 2022), termed this the "*Moon*" three-part test.

244. *Weichert Co. Realtors v. Ryan*, 128 N.J. 427 (1992).

245. *See PSEG Energy Res. & Trade LLC v. Onyx Renewable Partners, L.P*., No. L-6932-16, 2017 N.J. Super. Unpub. LEXIS 524, at *24 (Law Div. Mar. 6, 2017) (telephone call about draft not sufficient for contract formation) (discussing, *inter alia*, *Leodori v. CIGNA*

The standard of proof indicated in the Model Jury Instructions is a "preponderance of the evidence."[246] As held in *W. Caldwell v. Caldwell*:[247]

> The writing is to have a reasonable interpretation. Disproportionate emphasis upon a word or clause or a single provision does not serve the object of interpretation. The general purpose of the agreement is to be considered in ascertaining the sense of particular terms. The literal sense of particular words or clauses may be qualified by the context and given the meaning that comports with the probable intention. It is the revealed intention that is to be effectuated, the sense that would be given the integration by a reasonably intelligent person.

As set out in *Berg Agency v. Sleepworld-Willingboro, Inc.*, as "long as the basic essentials are sufficiently definite, any gaps left by the parties should not frustrate their intention to be bound."[248]

The Third Circuit in *Aliments Krispy Kernels, Inc. v. Nichols Farms*[249] reiterated that the "mutual assent" standard under New Jersey contract formation principles governs and not the court's prior wording in *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*[250] that

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Corp., 175 N.J. 293 (2003)), *aff'd*, No. A-3057-16T2, 2018 N.J. Super. Unpub. LEXIS 340 (App. Div. Feb. 14, 2018) (noting no need for a plenary hearing); *Bernetich, Hatzell & Pascu, LLC v. Med. Records Online, Inc.*, 445 N.J. Super 173 (App. Div.) (lack of consideration sufficient for contract formation where services were required by statute), *certif. denied*, 227 N.J. 245 (2016). *Compare Jang Won So v. EverBeauty, Inc.*, No. A-3560-16T4, 2018 N.J. Super. Unpub. LEXIS 4 (App. Div. Jan. 2, 2018) (enforcing agreement between attorneys to dismiss employment litigation in favor of arbitration). The New Jersey Model Civil Jury Charge for bilateral contracts, Charge 4.10C approved 5/98, lists and explains the elements, *available at* https://www.njcourts.gov/sites/default/files/charges/4.10C.pdf (last visited Dec. 6, 2023).

246. The New Jersey Model Civil Jury Charge for burden of proof, Charge 1.12G, approved 11/98, *available at* https://www.njcourts.gov/sites/default/files/charges/1.12G.pdf (last visited Dec. 6, 2023).

247. *W. Caldwell v. Caldwell*, 26 N.J. 9, 25 (1958) (citations omitted).

248. *Berg Agency v. Sleepworld-Willingboro, Inc.*, 136 N.J. Super. 369, 377 (App. Div. 1977) (quoted with approval in *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 135 (2020)). As the Supreme Court stated: "Under state law, 'if parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract.'" *Id.* at 135 (simplified).

249. *Aliments Krispy Kernels, Inc. v. Nichols Farms*, 851 F.3d 283, 288-90 (3d Cir. 2017).

250. *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980).

mutual assent must be "express [and] unequivocal". The difference relates to confusion between (1) contract formation and (2) the standard for summary judgment.[251]

In analyzing the cases, it is useful to remember that arbitration may be upheld based on clauses in both negotiated contracts and standard-form contracts of adhesion, as in standard commercial terms and conditions, consumer purchases, and employment applications and enrollment contracts. Whereas mutual assent may be aptly understood in negotiated contracts by the "meeting of the minds" rubric, in form contracts constructive notice is key. The cases also do not necessarily distinguish the contract formation issue from the arbitration clause formation or scope and delegation issues. The distinctions may be important in light of the *Par-Knit Mills* severability principle applied by the New Jersey Supreme Court in *Goffe v. Foulke Management Corp.*,[252] and the federal circuit split regarding reconciling formation and delegation,[253] discussed later in this chapter and in Chapter 2, below.

Where successive or multiple documents may involve the same parties or issues, the Third Circuit has been particularly detailed in its reading of the language of the documents in order to determine the parties' intent.[254]

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251. *See* Chapter 2, § 2-5:2, below.

252. *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191 (2019). Severability, delegation, and allegations of "fraud in the execution" are discussed in *MZM Construction Co., Inc. v. New Jersey Building. Laborers Statewide Benefit Funds*, 974 F.3d 386 (3d Cir. 2020) (sustaining arbitrability). *See also Kalypsys, LLC v. Blue Label Sols., LLC*, No. 22-00510, 2022 U.S. Dist. LEXIS 169929 (D.N.J Sept. 20, 2022) (fraud in the inducement issues severed and delegated to arbitrator); *Tharpe v. Securitas Sec. Servs. USA*, No. 20-13267, 2021 U.S. Dist. LEXIS 34275 (D.N.J. Feb. 24, 2021) (ordering discovery on unconscionability), *motion to compel granted*, 2021 U.S. Dist. LEXIS 94656 (D.N.J. May 17, 2021) (plaintiff bears burden).

253. *Compare, e.g.*, *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020) ("prospective waiver" doctrine; arbitration contract violated federal policy by waiving substantive statutory rights), *with Brice v. Plain Green, LLC*, 13 F.4th 823 (9th Cir. 2021) (describing circuit split; court must determine delegation first), *vacated*, *rehearing en banc ordered*, 35 F.4th 1219 (9th Cir. 2022). Severability of the arbitration clause from the contract, and the delegation clause from the arbitration clause are important concepts. A plaintiff specifically must challenge each.

254. *E.g.*, *Zirpoli v. Midland Funding, LLC*, 48 F.4th 136 (3d Cir. 2022) (assignment); *Abdurahman v. Prospect CCMC LLC*, 42 F.4th 156 (3d Cir. 2022) (definition of "affiliates" created issues where documents did not reference each other); *Pittsburgh Mailers Union Loc. 22 v. PG Publ'g Co. Inc.*, 30 F.4th 184 (3d Cir. 2022) (termination of container contract); *Kantz v. AT&T, Inc.*, No. 21-15620, 2022 U.S. App. LEXIS 3658 (3d Cir. Feb. 10, 2022) (not precedential) (effect of general release with integration clause).

Consideration has been an issue in cases involving accepting an application for employment or continuing employment.[255]

A party's failing to read a contract term is not sufficient to indicate lack of acceptance; a party is deemed to have accepted terms in a contract that he or she signs[256] so long as other formation elements such as notice and clarity are satisfied. Failure to fill in the numbers of the various safety deposit boxes on a form for a new box means there was insufficient notice of the "blank" terms and no mutual assent; otherwise broad language does not bring the old boxes into that arbitration clause.[257]

Fraud by a minor customer (as to his age) may not excuse his inability to enter into a contract,[258] unless reliance or estoppel can be shown.[259]

Courts have held that one need not point out an arbitration clause in a contract that is otherwise enforceable.[260]

Despite the opinions applying general contract formation rules to arbitration clauses, noted just above, opinions continue to require that a contract with an arbitration clause be provided to

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255. *See Nau v. Chung*, No. A-5315-17T1, 2019 N.J. Super. Unpub. LEXIS 1445 (App. Div. June 24, 2019); *Stacy v Tata Consultancy Servs., Ltd.*, No. 16-13243, 2019 U.S. Dist. LEXIS 43911 (D.N.J. Mar. 14, 2019); *Horowitz v. AT&T Inc.*, No. 17-4827, 2019 U.S. Dist. LEXIS 60 (D.N.J. Jan. 2, 2019); *D.M. v. Same Day Delivery Serv.*, No. A-2374-17T3, 2018 N.J. Super. Unpub. LEXIS 1973 (App. Div. Aug. 23, 2018). These cases also are instructive regarding the scope of the arbitration, such as whether statutory rights must be waived by general language and employees may opt-out. *See, e.g.*, *AT&T Mobility Services LLC v. Francesca Jean-Baptiste*, No. 17-11962, 2018 U.S. Dist. LEXIS 117880 (D.N.J. July 13, 2018).

256. *E.g.*, *Noble v. Samsung Elecs. Am., Inc.*, 682 F. App'x 113, 116 (3d Cir. 2017) (citing cases). *See also Russo v. J.C. Penney Corp., Inc.*, No. A-3116-16T1, 2017 N.J. Super. Unpub. LEXIS 3074 (App. Div. Dec. 13, 2017) (noting that terms must be in plain language understandable to the reasonable consumer).

257. *See Poniz v. Wells Fargo Bank, N.A.*, No. A-2249-18, 2019 N.J. Super. Unpub. LEXIS 2247 (App. Div. Nov. 1, 2019).

258. *Matullo v. Sky Zone Trampoline Park*, 472 N.J. Super. 220 (App. Div. 2022) (disavowal upheld).

259. *Hernandez v. Brinker Int'l Payroll Co., L.P.*, No. 20-17667, 2021 U.S. Dist. LEXIS 188328 (D.N.J. Sept. 30, 2021) (arbitration compelled).

260. *E.g.*, *GAR Disability Advocates, LLC v Taylor*, 365 F. Supp. 3d 522, 531 n.4 (D.N.J. 2019), citing *Bacon v. Avis Budget Grp., Inc.*, 357 F. Supp. 3d 401, 422-23 (D.N.J. 2018), *aff'd*, 959 F.3d 590 (3d Cir. 2020). *But see Delaney v Dickey*, 244 N.J. 466 (2020), *aff'g as modified* No. A-1726-17, 2019 N.J. Super. Unpub. LEXIS 1814 (App. Div. Aug. 23, 2019) (N.J. Rule of Professional Conduct 1.4(c) requires explanation). *Smith v. Lindemann*, 710 F. App'x 101, 104 (3d Cir. 2017), suggests that a rule requiring greater scrutiny of an arbitration clause in an attorney retainer would violate the FAA. The Supreme Court emphasized that extra scrutiny of a retainer argument was a function of the fiduciary relationship being formed. The same detailed explanation was required for all aspects of the attorney retainer and, hence, is (arguably) not subject to FAA preemption.

the employee or customer, particularly where there was an explicit opt-out mechanism,[261] and parties regularly attempt to avoid arbitration by arguing they did not receive a copy, were not aware of the arbitration clause, or did not have the clause pointed out or explained to them. In the future, these cases may consider the severability and delegation issues highlighted in *Goffe v. Foulke Management Corp.*,[262] especially concerning the requirement in the Consumer Fraud Act to provide a copy of a consumer contract to the consumer, which issue *Goffe* held was not a matter of contract formation, but went to the enforceability of the underlying contract, and was delegated to the arbitrator.

An arbitration provision that is confusing or ambiguous, or that indicates arbitration only as an option, may not be enforced.[263]

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261. *E.g.*, *Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C.*, 416 N.J. Super. 30 (App. Div. 2010), *on remand*, No. A-683-22, 2013 N.J. Super. Unpub. LEXIS 2015 (App. Div. Aug. 14, 2013), *accord Ricciardi v. Abington Care & Rehab. Ctr*., No. A-3255-18, 2019 N.J. Super. Unpub. LEXIS 2166 (App. Div. Oct. 23, 2019). Note that this is a special situation – how can one decide whether to opt out of a clause, presumably based on time to read carefully and reflect, if one is not given the document to read? Failing to fill out the opt-out form may not avoid arbitration. *Levy v. AT&T Serv*s., No. 21-11758, 2022 U.S. Dist. LEXIS 50758 (D.N.J. Mar. 22, 2022). But the argument is raised in other contexts, such as emails and web pages, *see Knight v. Vivint Solar Dev., LLC*, 465 N.J. Super. 416 (App. Div. 2020), or general terms that are incorporated by a valid reference. In *Delaney v. Dickey*, No. A-1726-17, 2019 N.J. Super. Unpub. LEXIS 1814 (App. Div. Aug. 23, 2019), *aff'd as modified*, 244 N.J. 466 (2020), the Appellate Division required that a retainer agreement with an arbitration clause must, as a matter of contract formation and ethics rules under the Rules of Professional Conduct, physically include a copy of the arbitration forum's rules. The Supreme Court did not address this.

262. *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191 (2019). Severability, delegation, and allegations of "fraud in the execution" are discussed in *MZM Constr. Co., Inc. v. New Jersey Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386 (3d Cir. Sept. 14, 2020), *aff'g* 2019 U.S. Dist. LEXIS 136896 (D.N.J. Aug. 14, 2019) (sustaining arbitrability). *See also Petrozzino v. Vivint, Inc.*, No. 1:20-cv-01949-NLH-KMW, 2020 U.S. Dist. LEXIS 245134 (D.N.J. Dec. 31, 2020), citing *MZM*.

263. *See Kernahan v. Home Warranty Adm'r of Florida, Inc.*, 236 N.J. 301 (2019) ("mediation" heading for paragraph; rules reference confusing; typeface small); *Marchak v. Claridge Commons, Inc*., 134 N.J. 275 (1993) (homeowners warranty claim, clause ambiguous); *Kopec v. Moers*, 470 N.J. Super. 133 (App. Div. 2022) (arbitration clauses in attorney retainer agreements held unenforceable as ambiguous and, e.g., not making proper distinctions between binding arbitration and fee arbitration); *Marano v. Glancey*, No. A-4955-14T2, 2016 WL 687263 (N.J. Super. Ct. App. Div. Feb. 22, 2016), *confirming award on remand*, No. CAM-L-686-15 (July 15, 2016), *aff'd*, No. A-0669-16T2, 2017 N.J. Super. Unpub. LEXIS 3155 (App. Div. Dec. 22, 2017); *Madison House Grp. v. Pinnacle Entm't, Inc.*, No. A-3171-08T2, 2010 WL 909663 (N.J. Super. Ct. App. Div. Mar. 15, 2010) ("notwithstanding" language made arbitration only an option). The potential dangers of signing a retired judge's "mediation" agreement are illustrated by *Marano v. Hills Highlands Master Ass'n, Inc.*, No. A-5538-15T1, 2017 N.J. Super. Unpub. LEXIS 2854 (App. Div. Nov. 16, 2017) (arbitration award confirmed). *See* § 1-5:4.1, below. Where state law contract principles do not dictate a clear result, however, the federal (or state) policy favoring

A remand may not always be ordered to determine the parties' understanding where that may further delay resolution.[264] The entanglement of class-action waivers and court-jury waivers has led to arbitration being denied.[265]

Where the parties are sophisticated commercial entities, their understanding of the nature of arbitration and a waiver of court or jury rights ordinarily will be understood,[266] as will be the case where the parties (or their labor representatives) have specifically bargained for the terms of a dispute resolution mechanism[267] or the check boxes in the AIA form construction contract indicate that a choice was given.[268]

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arbitration may tip the balance. *See In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 522 (3d Cir. 2019).

Parties must be wary of the distinction between whether an enforceable arbitration contract exists and the scope of the issues that the parties have agreed to arbitrate. Often the parties' agreement to arbitrate certain issues is clear, but the scope of the issues to be arbitrated is "ambiguously or less clearly" identified, in which cases the presumption in favor of arbitration holds sway. *See Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc.*, 240 N.J. Super. 370, 375 (App. Div. 1990). *See also Pearson v. Valeant Pharms. Int'l, Inc.*, No. 17-1995, 2017 U.S. Dist. LEXIS 209102 (D.N.J. Dec. 20, 2017) (noting that the presumption of arbitrability regarding ambiguous scope language may be inapplicable to formation issues). Where there is conflicting language in the court's jurisdiction, vice arbitration, a court may refer that issue to the arbitrator where there is a valid delegation clause as to jurisdiction. *Tox Design Grp., LLC v. RA Pain Servs.*, PA., No. A-4092-18, 2019 N.J. Super. Unpub. LEXIS 2634 (App. Div. Dec. 26, 2019) (citing AAA Rule - R-7).

264. *See Bedrock Steel v. Raritan Urban Renewal*, No. A-0410-22 2023 N.J. Super. Unpub. LEXIS 691 (App. Div. May 8, 2023) (seemingly applying rough justice).

265. *See Pace v. Hamilton Cove*, 475 N.J. Super. 568 (App. Div.), *motion for leave to appeal granted*, 255 N.J. 342 (2023).

266. *E.g.*, *GAR Disability Advocates, LLC v. Taylor*, 365 F. Supp. 3d 522 (D.N.J. 2019); *Divalerio v. Best Care Lab.*, No. 20-17268, 2021 U.S. Dist. LEXIS 194896 (D.N.J. Oct. 8, 2021) (negotiated); *Silvera v. Aristacare at Cherry Hill, LLC*, No. A-0519-20, 2021 N.J. Super. Unpub. LEXIS 530 (App. Div. Mar. 30, 2021); *Columbus Circle N.J. LLC v. Island Constr. Co.*, No. A-1907-15T1, 2017 WL 958489 (N.J. Super. Ct. App. Div. Mar. 13, 2017) (less scrutiny by court when sophisticated parties are involved); *Tedeschi v. D.N. Desimone Constr., Inc.*, No. 15-8484, 2017 U.S. Dist. LEXIS 69695 (D.N.J. May 8, 2017); *Frick Joint Venture v. Vill. Super Mkt., Inc.*, No. A-1441-15T1, 2016 WL 3092980 (N.J. Super. Ct. App. Div. June 3, 2016); *Jade Apparel, Inc. v. United Assurance, Inc.*, No. A-2001-14T1, 2016 WL 5939470 (N.J. Super. Ct. App. Div. Oct. 13, 2016) (affirming order compelling arbitration), *certif. denied*, 229 N.J. 151 (2017).

267. *See White v. Camden Cnty. Bd. of Chosen Freeholders*, No. A-4938-14T3, 2016 WL 4016651, at *3 n.1 (N.J. Super. Ct. App. Div. July 28, 2016) (collective bargaining agreement; distinguishing *Atalese*).

268. *Grandvue Manor, LLC v. Cornerstone Contr. Corp.*, 471 N.J. Super. 135 (App. Div. 2022) (noting language and sophistication of the parties); *Arbor Green Condo. Ass'n v. Start 2 Finish Restoration & Bldg. Servs.*, 2023 N.J. Super. Unpub. LEXIS 620 (App. Div. Apr. 24, 2023) (AIA contract check boxes).

Resolving conflicting unpublished panel opinions, the Appellate Division in *County of Passaic v. Horizon Healthcare, Inc*.[269] held that an arbitration clause in a commercial contract between two sophisticated parties, negotiated by counsel, did not need to meet the 2014 requirement of the New Jersey Supreme Court in *Atalese v. United States Legal Services Group*,[270] for an arbitration clause in certain contracts to include a clear and unambiguous waiver of the right to a court and/or jury determination of the dispute. The *Passaic* opinion resolves for now an issue that had divided state and federal courts, including a 2021 precedential decision in the Third Circuit that had held that the waiver language required in *Atalese* is not required in commercial contracts.[271] *Divalerio v. Best Care Laboratory*[272] distinguished among business contracts (to which *Atalese* was inapplicable), consumer contracts, and employment contracts, finding that earlier New Jersey Supreme Court opinions had read broad language in employment contracts as sufficient to waive a right to a court or jury hearing. The court did not discuss the section of *Skuse v. Pfizer, Inc*.[273] attempting to reconcile these cases in the context of employment agreements other than statutory claims.

Where an individual is involved, despite obvious sophistication, that presumption may not hold sway,[274] and there may be other

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269. *County of Passaic v. Horizon Healthcare Servs., Inc.*, 474 N.J. Super. 498 (App. Div. 2023), *certif. granted*, 254 N.J. 69, *appeal dismissed*, 2023 N.J. LEXIS 1167 (2023).

270. *Atalese v. U.S. Legal Servs. Grp.*, 219 N.J. 430 (2014).

271. *In re Remicade Antitrust Litig.*, 938 F.3d 515 (3d Cir. 2019) (predicting how New Jersey Supreme Court would decide the issue).

272. *Divalerio v. Best Care Lab.*, No. 20-17268, 2021 U.S. Dist. LEXIS 194896, at *22-26 (D.N.J. Oct. 8, 2021).

273. *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020). In a somewhat ambiguous fashion, it said: "Our case law thus requires that a waiver-of-rights provision be written clearly and unambiguously. *Atalese*, 219 N.J. at 44; *Leodori*, 175 N.J. at 302. In an employment setting, employees must 'at least know that they have "agree[d] to arbitrate all statutory claims arising out of the employment relationship or its termination."'" *Skuse*, 244 N.J. at 49-50 (simplified). As noted earlier, though, Appellate Division cases have applied *Atalese* to non-statutory employment cases.

274. *See, e.g.*, *Itzhakov v. Segal*, No. A-2619-17, 2019 N.J. Super. Unpub. LEXIS 1829 (App. Div. Aug. 28, 2019); *Epstein v. Wilentz, Goldman & Spitzer, P.A.*, No. A-1157-14T1, 2015 WL 9876918 (N.J. Super. Ct. App. Div. Jan. 22, 2016) (remanding for discovery regarding intent of experienced attorney). Post-*Epstein*, the Supreme Court described *Atalese* as applying to "consumer contracts." *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 294 (2016). *See In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515 (3d Cir. 2019) (*Atalese* does not apply to commercial contracts). *See also* Chapter 2, § 2-5:2, below (discussing problems with extending *Atalese* beyond the consumer area).

instances (particularly in federal court) where a court may require fact-finding to determine whether parties achieved mutual assent.[275] In employment, consumer, real estate, and other transactions involving individuals, New Jersey courts have required a particularized showing, by the words of the arbitration provision, evidencing that they understood and agreed to waive statutory and constitutional rights to a court or jury trial in favor of arbitration.

Specific forms of notice or format, such as capitalization or type size, are not required as long as consistent with New Jersey's Plain Language Act,[276] though these formats may help to evidence knowledge or notice.[277] Clauses that are "illegible,"[278] "onerous to read,"[279] "buried" in a document that does not appear to be a bilateral contract,[280] or indicated by non-contract language [281] preclude mutual assent to contract formation and are not enforceable, although not necessarily in the commercial context.[282] As noted elsewhere, a court may require that (at the point of contract formation or soon

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275. *Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764 (3d Cir. 2013) (remanding); *Corchado v. Foulke Mgmt. Corp*., 707 F. App'x 761 (3d Cir. 2017). *See also Marano v. Glancey*, No. A-4955-14T2, 2016 WL 687263 (N.J. Super. Ct. App. Div. Feb. 22, 2016), *confirming award on remand*, No. CAM-L-686-15 (July 15, 2016), *aff'd*, No. A-0669-16T2, 2017 N.J. Super. Unpub. LEXIS 3155 (App. Div. Dec. 22, 2017). *But see Ace Am. Ins. Co. v. Guerriero*, No. 17-00820, 2017 U.S. Dist. LEXIS 135891 (D.N.J Aug. 24, 2017), (ordering arbitration and enjoining state court, discovery not required), *aff'd*, 738 F. App'x 72 (3d Cir. 2018).

276. *E.g.*, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (state statute requiring first-page underlined notice was preempted by FAA). *But see Kernahan v. Home Warranty Adm'r of Fla., Inc*., 236 N.J. 301 (2019) (small typeface was not consistent with statute applicable to all consumer contracts, N.J.S.A. 56:12-1 *et seq*.); *Bartz v. Weyerhaeuser Co.*, No. A-5635-18T1, 2020 N.J. Super. Unpub. LEXIS 1640 (App. Div. Aug. 26, 2020) (motion to compel denied).

277. *See Davis v. Michael Anthony Auto Sales Inc*., No. A-3831-15T2, 2017 N.J. Super. Unpub. LEXIS 651 (App. Div. Mar. 17, 2017).

278. *E.g.*, *Winters v. Elec. Merch. Sys.*, No. BER-L-7152-16 (N.J. Super. Ct. Law. Div. Oct. 27, 2017) ("indecipherable") (DDS-03-3-5142).

279. *Rockel v. Cherry Hill Dodge*, 368 N.J. Super. 577, 586 (App. Div. 2004).

280. *E.g*., *Noble v. Samsung Elecs. Am., Inc*., 682 F. App'x 113, 116 (3d Cir. 2017) (terms must be reasonably conspicuous).

281. *See Wollen v. Gulf Stream Restoration & Cleaning, LLC*, 468 N.J. Super. 483 (App. Div. 2021) ("view matching pros"). "SIGN UP" has been acceptable. *Racioppi v. Airbnb, Inc*., 2023 N.J. Super. Unpub. LEXIS 1200 (App. Div. July 17, 2023), *citing Selden v. Airbnb, Inc*., 4 F.4th 148 (D.C. Cir. 2021).

282. *See National Fire Ins. Co. v. Cintas Fire Prot., Inc*., No. A-1802-17, 2019 N.J. Super. Unpub. LEXIS 1168 (App. Div. May 21, 2019) (small typeface in a commercial contract permissible, distinguishing *Kernahan* and *Rockel*).

thereafter) a copy of the contract has been provided to the party attempting to avoid arbitration.

In *Atalese v. U.S. Legal Services Group, L.P.*,[283] the New Jersey Supreme Court reviewed its prior holdings requiring mutual assent, in the context of a Consumer Fraud Act claim regarding a consumer debt-adjustment services contract, and held that the arbitration agreement must contain language clearly and unambiguously waiving the right to a court or jury determination of their dispute. The absence of the words "waiver" or "judge" in the clause were held not critical in *Pharr v. Lowe's*,[284] which also offered to supply a copy of the AAA or JAMS rules.

Thus, as discussed elsewhere,[285] the applicable law or forum may be critical on this issue. The split on whether *Atalese* applies to contracts involving sophisticated parties and commercial undertakings has been resolved by *County of Passaic v. Horizon Healthcare Services, Inc*.[286] The Third Circuit has held that *Atalese* does not apply to commercial contracts.[287] The Supreme Court has discussed *Atalese* in the context of a variety of cases without

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283. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442 (2014) (providing several examples of sufficient language), *cert. denied*, 576 U.S. 1004 (2015). *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 294 (2016) (delegation clause and waiver of issue), described *Atalese* as applying to "a consumer contract." *See also Gras v. Assocs. First Cap. Corp.*, 346 N.J. Super. 42, 52 (App. Div. 2001) (language sufficient), *certif. denied*, 171 N.J. 445 (2002). The need for a clear jury waiver in a CEPA case, outside the context of a motion to compel arbitration, is seen in *Noren v. Heartland Payment Systems, Inc*., 448 N.J. Super. 486 (App. Div.) (comparing decisions regarding arbitration jury waivers in statutory cases), *reconsideration denied*, 449 N.J. Super. 193 (App. Div.), *certif. granted*, 230 N.J. 499 (2017), *vacated in part*, 2018 N.J. LEXIS 7 (Jan. 12, 2018) (as to fees issue only).

284. *Pharr v. Lowe's*, No. A-1056-22, 2023 N.J. Super. Unpub. LEXIS 1447 (App. Div. Aug. 21, 2023).

285. *See*, Chapter 2, below.

286. *County of Passaic v. Horizon Healthcare Servs., Inc.*, 474 N.J. Super. 498 (App. Div. 2023), *certif. granted*, 254 N.J. 69, *appeal dismissed*, 2023 N.J. LEXIS 1167 (2023). The opinion is described earlier in this chapter.

287. *In re Remicade Antitrust Litig.*, 938 F.3d 515 (3d Cir. 2019) (predicting how New Jersey Supreme Court would decide the issue). *Morgan v. Sanford Brown Institute*, 225 N.J. 289, 294 (2016) (delegation clause and waiver of issue), described *Atalese* as applying to "a consumer contract." *See also GAR Disability Advocates, LLC v. Taylor*, 365 F. Supp. 3d 522 (D.N.J. 2019) (*Atalese* not applicable to sophisticated parties); *Tox Design Grp., LLC v. RA Pain Servs., PA.*, No. A-4092-18T1, 2019 N.J. Super. Unpub. LEXIS 2634, at *14 (App. Div. Dec. 26, 2019) (*Atalese* inapplicable). *But see Itzhakov v. Segal*, No. A-2619-17, 2019 N.J. Super. Unpub. LEXIS 1829 (App. Div. Aug. 28, 2019) (pharmacy sale; *Atalese* applied); *Estate of Noyes v. Morano*, No. A-1665-17T3, 2019 N.J. Super. Unpub. LEXIS 47 (App. Div. Jan. 8, 2019) (investments, *Atalese* applied, citing cases).

saying that its holding is applicable outside statutory consumer claims.[288]

Continuing to arbitrate a claim may be sufficient evidence of intent to arbitrate despite the absence of *Atalese* waiver language.[289]

The language of *Atalese* has influenced other opinions, separate and apart from whether the "waiver" language is sufficient. Although the holding was reversed by the Supreme Court, the language of the Appellate Division in *Flanzman v. Jenny Craig, Inc.*[290] discussed a need to inform the parties of the nature of the arbitration process, and many consumer and employment arbitration agreements provide extensive information regarding the arbitration process, as does Appendix XXIX-B to the New Jersey Court Rules. *Atalese* terminology was combined with ethical obligations in requiring that the arbitration rules selected in a law firm's retainer agreement be physically provided to the client.[291]

Achey v. Cellco Partnership[292] raised questions about whether the parties could reasonably have been aware of the pro-company provisions in the arbitration clause and that a mass action process could have taken the 145 years projected. The process was held unconscionable for lack of mutual assent, and arbitration was denied.

Although challenges have been made to whether *Atalese* and similar cases conflict with the FAA, and are therefore preempted, because they are not based on generally applicable contract principles but instead show a hostility to arbitration, the United States Supreme Court has not yet accepted "full" *certiorari* in

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288. *See, e.g.*, *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 137-38 (2020) (discussing "waiver-of-rights" issue broadly).

289. *See Shah v. T&S Builders, LLC*, No. A-0276-17T2, 2018 N.J. Super. Unpub. LEXIS 1760 (App. Div. July 24, 2018).

290. *Flanzman v. Jenny Craig, Inc.*, 456 N.J. Super. 613 (App. Div. 2018), *rev'd*, 244 N.J. 119 (2020). *But see In re Sprint Premium Data Plan Mktg. & Sales Practices Litig.*, No. 10-6334, 2012 U.S. Dist. LEXIS 33579 (D.N.J. Mar. 13, 2012) (noting role of FAA); *Solar Leasing, Inc. v. Hutchinson*, No. 2017-76, 2019 U.S. Dist. LEXIS 160497 (D. V.I. Sept. 20, 2019) (enforcing arbitration, citing *Sprint*); *Gomez v. PDS Tech, Inc.*, No. 17-12351, 2018 U.S. Dist. LEXIS 66589 (D.N.J. Apr. 19, 2018) (lack of forum does not negate arbitration under section 5). *See also* § 1-5:1.2 (NJRUAA as "gap filler"), above.

291. *Delaney v. Dickey*, No. A-1726-17, 2019 N.J. Super. Unpub. LEXIS 1814 (App. Div. Aug. 23, 2019), *aff'd as modified*, 244 N.J. 466 (2020). The Supreme Court did not adopt this aspect of the Appellate Division opinion.

292. *Achey v. Cellco P'ship*, 475 N.J. Super. 446 (App. Div.), *certif. granted*, 255 N.J. 286 (2023).

any such case.[293] *Atalese* and subsequent New Jersey Supreme Court opinions have taken particular care to find that *Atalese* was following a principle applicable generally to contracts and not one that disfavored arbitration agreements.

1-5:3.2 Means of Indicating Assent

A signature on a written contract is the most direct way to indicate assent, or to be bound, but it is not the only way. Signing electronically or performance also may suffice. Requesting more than one indication of assent may create confusion.[294] A federal district court has held that failure to satisfy a contractual condition for three signatures may be satisfied indirectly and by estoppel.[295] A "contract" in the form of a letter requesting agreement to arbitrate is not enforceable without assent by the party to be bound by, for example, a signature.[296] But conduct after renewing may.[297]

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[293] In *Ritz-Carlton Development Co. v. Narayan*, 577 U.S. 1056 (2016), the Court granted the writ, vacated the judgment, and remanded to the Supreme Court of Hawaii in light of *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015). The Supreme Court of Hawaii in *Narayan v. Ritz-Carlton Development Co.*, 350 P.3d 995 (Haw. 2015), had held that the intent to arbitrate was ambiguous and the terms were unconscionable (in part because the clause limited discovery and punitive damages). Since these conditions are not uncommon in non-arbitration contracts, they would appear to contradict *DIRECTV*. *Kernahan v. Home Warranty Administrator of Florida, Inc*., 236 N.J. 301 (2019), did not address the issue in the majority opinion, *See Richardson v. Coverall N. Am., Inc.*, No. 18-532, 2018 U.S. Dist. LEXIS 167240 (D.N.J. Sept. 27, 2018) (no preemption), *rev'd on other grounds*, 811 F. App'x 100 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 1685 (2021).

Skuse v. Pfizer, Inc., 244 N.J. 30 (2020), *rev'g* 457 N.J. Super. 539 (App. Div. 2019); *DeFina v. Go Ahead & Jump 1, LLC*, No. A-1861, 2019 N.J. Super. Unpub. LEXIS 1400 (App. Div. June 5, 2019) (no preemption). *New Jersey Civil Justice Institue v. Grewal*, No. 19-17518, 2021 U.S. Dist. LEXIS 57437 (D.N.J. Mar. 25, 2021), held that the 2019 amendments to the LAD were preempted by the FAA. Although *Grewal* did not involve an employee, it was followed in *Meshefsky v. Rest. Depot, LLC*, No. 21-3711, 2021 U.S. Dist. LEXIS 91335 (D.N.J. May 13, 2021).

[294] *Knight v. Vivint Solar Dev., LLC*, 465 N.J. Super. 416 (App. Div. 2020) (signing contract and checking box), *certif. denied*, 246 N.J. 222 (2021).

[295] *Richardson v. Coverall N. Am., Inc*., No. 18-532, 2018 U.S. Dist. LEXIS 167240, at *5-7 (D.N.J. Sept. 27, 2018) (dual corporate signatures not required; plaintiff estopped from arguing signature issue, having operated under the franchise agreement for years), *rev'd on other grounds*, 811 F. App'x 100 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 1685 (2021).

[296] *Bozek v. PNC Bank*, No. 20-3515, 2021 U.S. App. LEXIS 28040 (3d Cir. Sept. 17, 2021); *Pena v. TD Auto Fin. LLC*, 860 F. App'x 220, (3d Cir. 2021). The award in these cases, rendered by an online dispute center, was not enforced.

[297] *See Blessing v. Hoffman*, No. A-416-20, 2021 N.J. Super. Unpub. LEXIS 1100 (App. Div. June 10, 2021), *certif. denied*, 250 N.J 1 (2022), *cert. denied*, 143 S. Ct. 454 (2022).

The efficacy of mailing the letter, inviting continuing employment, can be an issue.[298] The efficacy of a mass mailing was questioned in *Stabile v. Macy's, Inc*.;[299] the court ordered discovery.

Skuse v. Pfizer, Inc.[300] clarified the means by which parties may express their assent to an arbitration agreement. The Supreme Court resolved the tension with earlier case law created by the Appellate Division's holding that "acknowledging" receipt by a company-wide email announcing a new policy requiring arbitration was not sufficient for the formation of an arbitration contract.

The company had circulated two emails to all employees announcing the arbitration policy and stating that employees would be deemed to have accepted that policy if they remained in the company's employ more than 60 days later. The final page of the "Agreement" sent by the first email stated:

> You understand that your acknowledgement of this Agreement is not required for the Agreement to be enforced. If you begin or continue working for the Company sixty (60) days after receipt of this Agreement, even without acknowledging this Agreement, this Agreement will be effective, and you will be deemed to have consented to, ratified and accepted this Agreement through your acceptance of and/or continued employment with the Company.

The email also included a link to Frequently Asked Questions, with answers such as "The Arbitration Agreement is a condition of continued employment with the Company. If you begin or continue working for the Company sixty (60) days after receipt of this Agreement, it will be a contractual agreement that binds both you and the Company." This warning was repeated at other locations, including a second email with four "slides". The third slide stated, in part:

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298. *E.g*., *Marley v. PricewaterhouseCoopers, LLP*, No. 21-14280, 2022 U.S. Dist. LEXIS 29493 (D.N.J. Feb. 18, 2022) (presumption of receipt; insufficiently rebutted evidence of mailing).

299. *Stabile v. Macy's, Inc.*, No. 22-06776, 2023 U.S. Dist. LEXIS 120348 (D.N.J. July 13, 2023).

300. *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020).

> I understand that I must agree to the Mutual Arbitration and Class Waiver Agreement as a condition of my employment. Even if I do not click here, if I begin or continue working for the Company sixty (60) days after receipt of this Agreement, even without acknowledging this Agreement, this Agreement will be effective, and I will be deemed to have consented to, ratified and accepted this Agreement through my acceptance of and/or continued employment with the Company.

After that paragraph, the slide contained a button instructing the employee to "CLICK HERE to acknowledge" the new policy, as indicated earlier in the slides.

A dispute arose when Ms. Skuse, a corporate flight attendant, declined to be vaccinated for yellow fever on religious grounds. (The vaccine contained animal products, the ingestion of which was contrary to her Buddhist faith.) The company allegedly refused an accommodation, and she was terminated. When she sued for violation of New Jersey's Law Against Discrimination, the company successfully moved to compel arbitration. The trial court relied on *Jaworski v. Ernst & Young U.S. LLP*,[301] which had held that continuing employment could constitute assent to an announced arbitration policy.

The Appellate Division reversed, holding that there must be an affirmative acceptance of the arbitration requirement by use of "agree" or similar word. Implied agreement, or agreement by performance, was held "inadequate,"[302] despite *Jaworski* and other cases holding that agreement could be indicated by accepting employment, or continuing to work, with knowledge of the arbitration policy.

The Supreme Court reinstated the Law Division order compelling arbitration, noting that courts may not subject arbitration agreements to "more burdensome requirements than

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301. *Jaworski v. Ernst & Young U.S. LLP*, 441 N.J. Super. 464 (App. Div. 2015).

302. *Skuse v. Pfizer, Inc.*, 457 N.J. Super. 539, 542 (App. Div. 2019), *rev'd*, 244 N.J. 30 (2020).

those governing the formation of other contracts."[303] It then reaffirmed *Martindale v. Sandvik, Inc*.[304] for the proposition that continued employment can "constitute sufficient consideration to support certain employment-related agreements," and *Weichert Co. Realtors v. Ryan*[305] that "assent" to an offer can be by words or "by conduct, creating a contract implied-in-fact."

Given the prior case law, the question became whether it was appropriate to notify employees by emails sending attachments and slides termed "training," and whether the employee need only "acknowledge" receipt of the email notice (by clicking a button in the electronic message) rather than "agree" to be bound by the terms set out in the communications. *Leodori v. CIGNA Corp.*[306] had held that where the company says that assent is to be indicated by signing the handbook at issue, acknowledging receipt or other methods of purported "assent" are not sufficient for contract formation. In *Skuse*, the Supreme Court held that the concerns evident in *Leodori* were not present, since Pfizer had informed the employees that assent would be communicated by continued employment, rather than by a signature or clicking "agree".

While characterizing the communication as a "training" module was a misnomer, it was held not "misleading" in this context. Emails were held to be a regular means of corporate communication, and employees who do not read their emails do so at their own risk. Consistent with standard contract principles, noted above, not reading a contract or clause does not negate contract formation where assent is otherwise present.

By discussing the differences between *Martindale* and *Leodori*, in the context of mass email communications and click-wrap solicitations, *Skuse* gives employers clearer guidance regarding distributing an arbitration program and the means of obtaining employees' assent, all marked as consistent with standard contract formation principles.

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303. *Skuse v. Pfizer, Inc.*, 244 N.J. 30, 47 (2020), quoting *Leodori v. CIGNA Corp*., 175 N.J. 293, 302 (2003).

304. *Martindale v. Sandvik, Inc*., 173 N.J. 76, 88-89 (2002).

305. *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 436 (1992).

306. *Leodori v. CIGNA Corp*., 175 N.J. 293, 302 (2003).

"Agree" remains the appropriate standard terminology, but cases holding that parties' "acknowledging" receipt or indicating they have "read and understood" a term is not sufficient to indicate acceptance, absent other factors,[307] must be reviewed in light of *Skuse* and other cases holding performance may be held evidence of acceptance if other factors (such as adequate notice) are met.[308]

Where a remand to permit discovery on arbitration contract formation did not resolve several issues, the Appellate Division remanded for further discovery and a plenary hearing at which several identified questions were to be resolved.[309]

Arbitration may not be enforced where it is an alternative and the language is not mandatory, such as by using the term "may".[310] Lack of mutuality, as with only one party having the right to demand arbitration, may raise contract and unconscionability issues.[311]

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307. *E.g.*, *Dugan v. Best Buy Co.*, No. A-1897-16T4, 2017 N.J. Super. Unpub. LEXIS 2053 (App. Div. Aug. 11, 2017), *certif. denied*, 231 N.J. 327 (2017), citing, *e.g.*, *Morgan v. Raymours Furniture Co.*, 443 N.J. Super. 338, 343 (App. Div.), *certif. denied*, 225 N.J. 220, *cert. denied*, 137 S. Ct. 204 (2016).

308. *See, e.g.*, *James v. Global Tel*Link Corp*., 852 F.3d 262, 265-66 (3d Cir. 2017) (reviewing N.J. law regarding contract principles). *See also Nau v. Chung*, No. A-5315-17T1, 2019 N.J. Super. Unpub. LEXIS 1445 (App. Div. June 24, 2019).

309. *See Porcelli v. Green Power Sol*., No. A-1109-22, 2023 N.J. Super. Unpub. LEXIS 1885 (App. Div. Oct. 24, 2023).

310. *Medford Twp. Sch. Dist. v. Schneider Elec. Bldgs. Ams.*, 459 N.J. Super. 1 (App. Div. 2019). The court discusses alternative language that may have cured the problem and made one party's election of arbitration mandatory on the other. *See also Trout v. Winner Ford*, No. A3529-17T4, 2018 N.J. Super. Unpub. LEXIS 2759 (App. Div. Dec. 18, 2018) (remanding). *But see Delaware River Partners, LLC v. R.R. Constr. Co.*, No. A-2613-20, 2022 N.J. Super. Unpub. LEXIS 1134 (App. Div. June 24, 2022) (sophisticated parties; using "finally settled" meant mandatory). Arbitration need not be mutual; consideration may be found in employment or other acts. *Contra Ribe v. Macro Consulting Grp., LLC*, No. A-2894-18T4, 2020 N.J. Super. Unpub. LEXIS 468 (App. Div. Mar. 8, 2020). Giving unilateral authority to select "method" creates problems. *See Mazzara Trucking & Excavation Corp. v. Premier Design + Build Grp., LLC*, No. A-965-20, 2022 N.J. Super. Unpub. LEXIS 74 (App. Div. Jan. 20, 2022).

311. Mutuality is discussed generally under the prior arbitration act, citing language continued in the NJRUAA, in *Kalman Floor Co., Inc. v. Jos. L. Muscarelle, Inc*., 196 N.J. Super. 16, 22-29 (App. Div. 1984), *aff'd o.b.*, 98 N.J. 266 (1985). As the court stated: "We see no reason why justice should require perfect symmetry of remedy and there is no suggestion made that commercial arbitration is not a desirable alternative to judicial dispute resolution." However, *Kleine v. Emeritus at Emerson*, 445 N.J. Super 545, 551 (App. Div. 2016), questions the lack of mutuality as raising unconscionability issues. A Georgia case, *Kattula v. Coinbase Global, Inc.*, No. 22-3250, 2023 U.S. Dist. LEXIS 119359 (N.D. Ga. Jul. 6, 2023), discussed corrective changes in clause terms previously disallowed for lack of mutuality.

In *Wollen v. Gulf Stream Restoration & Cleaning, LLC*,[312] the Appellate Division discussed the requirements for determining assent in a computer contract designed for a contractor referral service. A click-icon saying only "View Matching Pros" was held insufficient to notify the customer that they were entering into a contract with the service; the web design and placement of the link to terms and conditions that included an arbitration clause were, improperly, set after the "click" icon.[313] "Courts consider whether 'the terms are reasonably conspicuous on the webpage so that the user can be fairly charged with constructive notice that continued use will constitute acceptance of the agreement.'"[314] However, activating a cell phone after opening a box with terms and conditions may.[315]

Where the circumstances of providing a signature on an iPad remain unclear, including access to the documents being "signed," the Appellate Division has remanded for further proceedings, including a plenary hearing and findings of fact.[316]

1-5:3.2a Capacity; Authority; Infancy/Minors

Issues may also arise regarding the mental or contractual competence[317] or authority of the person approving the contract

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312. *Wollen v. Gulf Stream Restoration & Cleaning, LLC*, 468 N.J. Super. 483 (App. Div. 2021). "Sign Up" screens sufficed in *Racioppi v. Airbnb, Inc.*, 2023 N.J. Super. Unpub. LEXIS 1200 (App. Div. July 17, 2023).

313. *But cf. Petrozzino v. Vivint, Inc.*, No. 1:20-cv-01949-NLH-KMW, 2020 U.S. Dist. LEXIS 245134 (D.N.J. Dec. 31, 2020) (link after signature referenced before signature, *citing, e.g., Marini v. Quality Remodeling Co.*, No. A-5511-04T3, 2006 N.J. Super. Unpub. LEXIS 597 (App. Div. Feb. 10, 2006).

314. *Ackies v. Scopely, Inc.*, No. 19-19247, 2022 U.S. Dist. LEXIS 13086, at *11 (D.N.J. Jan. 25, 2022). *See also Lloyd v. Retail Equation, Inc.*, No. 21-17057, 2022 U.S. Dist. LEXIS 233637 (D.N.J. Dec. 29, 2022) ("Place order").

315. *V.S. v. T-Mobile*, No. A-973-21, 2022 N.J. Super. Unpub. LEXIS 1094 (App. Div. June 21, 2022).

316. *Bhoj v. OTG Mgmt.*, No. A-628-21, 2022 N.J. Super. Unpub. LEXIS 1292 (App. Div. July 18, 2022); *Cordero v. Fitness Int'l, LLC*, No. A-1662-20, 2021 N.J. Super. Unpub. LEXIS 2740 (App. Div. Nov. 10, 2021). *Cf. Robert D. Mabe, Inc. v. OptumRX*, 43 F.4th 307 (3d Cir. 2022) (discovery required re agent's providing required copy of Terms and Conditions); *RD Foods Americas, Inc. v. DycoTrade HGH B.V.*, No. A-1163-20, 2022 N.J. Super. Unpub. LEXIS 1436 (App. Div. Aug. 15, 2022) (same). *But see Matczak v. Compass Grp. USA, Inc.*, No. 21-20415, 2022 U.S. Dist. LEXIS 32408 (D.N.J. Feb. 24, 2022) (evidence clear).

317. *See Patterson v. Care One at Moorestown, LLC*, No. A-4358-15T3, 2017 N.J. Super. Unpub. LEXIS 423 (App. Div. Feb. 21, 2017), *certif. denied*, 230 N.J. 476 (2017). The court in *Jackson-Billie v. Virtua Memorial Hospital Burlington County*, No. A-0418-19T2, 2020 N.J. Super. Unpub. LEXIS 755 (App. Div. Apr. 27, 2020), held that the issue of competence was delegated to the arbitrator.

with an arbitration clause.[318] The burden of proof in such instances is explored in a variety of cases.[319]

Strowbridge v. Freemen[320] illustrates the hesitancy of courts to enforce arbitration agreements for patients in a nursing home or continuing care facility.

Gayles v. Sky Zone Trampoline Park,[321] illustrates some of the problems in the context of a children's park: a parental sponsor of a trampoline party signed the contractual waivers of liability and arbitration agreement "for" all of the minor guests, but the sponsor had not obtained a written power of attorney from the parents to do so, and the park did not ask. The court held that the park should have been on notice of the likely lack of authority (for a large group of minors) and declined to compel arbitration.

In finding that Kentucky's special requirement for a power of attorney to authorize signing a contract with an arbitration clause

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318. *Compare Ondrof v. CSL Summit*, No. A-2223-20, 2021 N.J. Super. Unpub. LEXIS 2806 (App. Div. Nov. 15, 2021) (multiple signatures; remand for plenary hearing), *and Hall v. Healthsouth Rehab. Hosp. of Vineland*, No. A-2453-12T4, 2013 N.J. Super. Unpub. LEXIS 1752 (App. Div. July 16, 2013) (remanding for evidentiary hearing regarding authority of husband), *with Hylak v. Manor Care-Pike Creek of Wilmington, DE, LLC*, No. N17C-04-148 ALR, 2017 Del. Super. LEXIS 393 (Del. Super. Aug. 15, 2017) (authority not retroactive). *See also Weed v. Sky NJ, LLC*, No. A-4589-16T1, 2018 N.J. Super Unpub. LEXIS 410 (App. Div. Feb. 22, 2018) (parent of friend); *Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C.*, 416 N.J. Super. 30 (App. Div. 2010) (spouses and infant), *on remand*, 2013 N.J. Super. Unpub. LEXIS 2035 (App. Div. Aug. 14, 2013) (arbitration order as to mother and child; denied as to spouse). *See also Summers v. SCO, Silver Care Operations, LLC*, No. A-5168-15T2, 2018 N.J. Super. Unpub. LEXIS 1178 (App. Div. May 21, 2018); *Portfolio One, LLC v. Joie*, No.17-579, 2019 U.S. Dist. LEXIS 10690 (D.N.J. Jan. 23, 2019) (power of attorney). Questions may arise whether the signatory was acting ultra vires. *See SBRMCOA, LLC v. Bayside Resort, Inc.*, 707 F. App'x 108 (3d Cir. 2017) (mandamus). Under Pennsylvania law, the Third Circuit held that an agent's authority was either implicit or apparent. *Sugartown Pediatrics, LLC v. Merck Sharp & Dohme Corp.* (*In re Rotavirus Vaccines Antitrust Litig.*), 30 F.4th 148 (3d Cir. 2022).

319. *E.g.*, *McDermott v. Genesis Healthcare*, No. A-3565-17, 2019 N.J. Super. Unpub. LEXIS 1662 (App. Div. July 22, 2019), citing *Jennings v. Reed*, 381 N.J. Super. 217, 227 (App. Div. 2003) (settlements).

320. *Strowbridge v. Freemen*, No. A-4215-19; 2021 N.J. Super. Unpub. LEXIS 611 (App. Div. Apr. 13, 2021) (declining to enforce clear delegation clause; remanding for factual development); *cf. Cottrell v. Holtzberg*, 468 N.J. Super. 59 (App. Div. 2021) (declining to abide by delegation clause in cover agreement, as to second admission). *But see Silvera v. Aristacare at Cherry Hill, LLC*, No. A-0519-20, 2021 N.J. Super. Unpub. LEXIS 530 (App. Div. Mar. 30, 2021) (enforcing agreement).

321. *Gayles v. Sky Zone Trampoline Park*, 468 N.J. Super. 17 (App. Div. 2021). *See also Matullo v. Sky Zone Trampoline Park*, 472 N.J. Super. 220 (App. Div. 2022) (infant signature insufficient); *Perez v. Sky Zone LLC*, 472 N.J. Super. 240 (App. Div. 2022) (arbitration not permitted as to non-signatories; JAMS could be replaced by court); *Checchio v. Fitness*, 471 N.J. Super. 1 (App. Div.) (non-parent signature insufficient), *certif. denied*, 252 N.J. 85 (2022).

was preempted by the FAA, the United States Supreme Court held that any such requirements could not "disfavor" arbitration contracts, directly or indirectly.[322]

Hernandez v. Brinker International Payroll Co., L.P.[323] presents an important review of the "infancy doctrine" and the ability of minors to disaffirm employment (or other) contracts. The two plaintiffs in a federal sexual harassment and Law Against Discrimination case were minors when they signed employment contracts with a restaurant chain. After reviewing the doctrine and the small number of cases (outside New Jersey) that considered the issue, the federal district court decided to enforce the arbitration agreements with the employment contracts. Because the New Jersey Supreme Court in *Hojnowski v. Vans Skate Park*,[324] and other New Jersey cases, had compelled arbitration of a minor's claim when the parent signed the arbitration agreement, the federal court concluded that the strong public policy in favor of arbitration, expressed in both state and federal cases and statutes, warranted an extension compelling arbitration when the minor signed the contracts. Allegations that the minor's signature was fraudulent did not preclude disavowal in absence of reliance.[325]

Where questions in a mass action arose whether individual plaintiffs gave the requisite consent, in part because it was unclear whether differing Terms and Conditions had been provided to them by an agent, the Third Circuit remanded for discovery.[326]

1-5:3.3 Failures in Indicating Assent

After drafting a clause with all the appropriate waiver and notice provisions, a defendant's efforts to compel arbitration still may be frustrated when the formalities of contract formation are not observed – failure to permit a party to read; not allowing a party to consult an attorney; not signing the agreement itself.[327] Although

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322. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017).

323. *Hernandez v. Brinker Int'l Payroll Co., L.P.*, No. 20-17667, 2021 U.S. Dist. LEXIS 188328 (D.N.J. Sept. 30, 2021). *See also Chaudhri v. StockX, LLC* (*In re StockX Customer Data Sec. Breach Litig.*), No. 21-1089, 2021 U.S. App. LEXIS 35813 (6th Cir. Dec. 2, 2021).

324. *Hojnowski v. Vans Skate Park*, 187 N.J. 323 (2006).

325. *Matullo v. Sky Zone Trampoline Park*, 472 N.J. Super. 220 (App. Div. 2022).

326. *Robert D. Mabe, Inc. v. OptumRX*, 43 F.4th 307 (3d Cir. 2022).

327. *See, e.g.*, *Imperato v. Medwell, LLC*, No. A-2023-19T1, 2020 N.J. Super. Unpub. LEXIS 1994 (App. Div. Oct. 19, 2020).

the defendant need not execute its own form agreement where offer and acceptance are evidenced by other means, as noted in *Leodori v. CIGNA Corp*.,[328] "the omission of [the] signature [of the party relying on the arbitration agreement] is a significant factor in determining whether the two parties mutually have reached an agreement;" but requesting assent by a specific means, as in *Leodori*, or including "no contract" language in a handbook may limit the possibility of assent by other means, such as commencing or continuing employment.

Several recent cases illustrate drafting errors. In *Wollen*,[329] discussed above, the web page "click" icon ("View Matching Pros") did not indicate a contractual undertaking, whereas "SIGN UP" will.[330] *Knight v. Vivint Solar Developer, LLC*,[331] was remanded to sort out a computer signature that differed from the computer-generated/filled name under the signature line and the plaintiff's assertion that she did not place an "X" in a ("belt and suspenders") box indicating agreement to arbitration.

These cases also indicate that the process may be flawed.[332]

Where the party moving to compel arbitration had amended an agreement to require arbitration, issues may arise if proper notice of the amending agreement was not proved.[333]

Bedrock Steel v. Raritan Urban Renewal,[334] illustrates how informal acceptance language ("happy to come") may satisfy contract formation rules but be too ambiguous to satisfy *Atalese*.

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328. *Leodori v. CIGNA Corp.*, 175 N.J. 293, 306 (2003) (handbook). In *Hampton v. ADT, LLC*, No. A-0172-20, 2021 N.J. Super. Unpub. LEXIS 764 (App. Div. Apr. 30, 2021), the court remanded for a further consideration of the facts, including the lack of a counter-signature. Stating that a handbook does not create an enforceable contract may vitiate an employer's effort to include an arbitration clause. *See Ramadan v. Lippolis Electric, Inc.*, No. A-2514-21, 2023 N.J. Super. Unpub. LEXIS 3 (App. Div. Jan. 3, 2023), citing *Morgan v. Raymours Furniture Co.*, 443 N.J. Super. 338 (App. Div. 2016).

329. *Wollen v. Gulf Stream Restoration & Cleaning, LLC*, 468 N.J. Super. 483 (App. Div. 2021). *See* § 1-5:3.2, above.

330. *Racioppi v. Airbnb, Inc*., 2023 N.J. Super. Unpub. LEXIS 1200 (App. Div. July 17, 2023).

331. *Knight v. Vivint Solar Dev., LLC*, 465 N.J. Super. 416 (App. Div. 2020), *certif. denied*, 246 N.J. 222 (2021).

332. *See also Cordero v. Fitness Int'l, LLC*, No. A-1662-20, 2021 N.J. Super. Unpub. LEXIS 2740 (App. Div. Nov. 10, 2021) (remanding for plenary hearing).

333. *See Black Ship, LLC v. Heartland Payment Sys., LLC*, No. 21-13855, 2023 U.S. Dist. LEXIS 88778 (D.N.J. May 22, 2023).

334. *Bedrock Steel v. Raritan Urban Renewal*, No. A-0410-22 2023, N.J. Super. Unpub. LEXIS 691 (App. Div. May 8, 2023).

The term "mutual assent" may be used at times to refer to the wording of an adhesive arbitration clause that does not sufficiently explain the nature of arbitration or its terms. This meaning is discussed in other portions of the Handbook regarding *Atalese* and subsequent opinions regarding the difference between arbitration and court.

On uncontroverted evidence (accepted by the trial court) that the employee requested to have the contract reviewed by an attorney, but was told that he no longer would be employed if he did not sign the arbitration agreement then and there, the courts found a lack of mutual assent and denied arbitration.[335]

1-5:4 Terms To Be Included in Arbitration Provisions

As already noted, one of the advantages of arbitration is that the parties may, to a large extent,[336] design their own dispute-resolution protocol by the terms included in the arbitration provision. The alternatives are discussed at great length in several respected publications,[337] but—along with language such as required by

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335. *Dahl v. Open Rd. Auto Grp.*, No. A-528-21, 2022 N.J. Super. Unpub. LEXIS 623 (App. Div. Apr. 18, 2022). The court also found no evidence that terms and conditions had been provided to the employee.

336. As a matter of general contract law, some limitations or provisions in an arbitration clause may be challenged as either unconscionable in themselves, and thus severable, or as making the entire arbitration process unconscionable, and thus unenforceable. *See* Chapter 2, § 2-5:3, below. *See generally Delta Funding Corp. v. Harris*, 189 N.J. 28 (2006) (discussing particular provisions on fees and costs). Agreements may contain a severance clause, thereby saving a request for arbitration from cost-shifting/sharing provisions that would render the arbitration unenforceable. In *Bowman v. Raymours Furniture Co*., No. A-4061-14T1, 2016 WL 5096353 (N.J. Super. Ct. App. Div. Sept. 20, 2016), the court held that a 180-day contractual limitation for commencing an employment discrimination arbitration was not valid and was severed, but the *same* clause was held so permeated by the unlawful 180-day limitation that the entire clause was stricken. *Guc v. Raymours Furniture Co.*, No. A-3452-20, 2022 N.J. Super. Unpub. LEXIS 395 (App. Div. Mar. 11, 2022). In *Kobren v. A-1 Limousine Inc*., No. 16-516, 2016 WL 6594075 (D.N.J. Nov. 7, 2016), the court noted the severance clause and prior decisions that cost-sharing provisions may make arbitration too expensive for a claimant to be able to enforce his or her rights; the court ordered that claimant would be required to pay no more than the filings fees that would be incurred in court. In *Riley v. Raymour & Flanigan*, No. A-2272-16T1, 2017 N.J. Super. Unpub. LEXIS 2651 (App. Div. Oct. 20, 2017), the AAA cost-shifting rules were considered in determining that arbitration was not unconscionable. Discovery and other limitations may be held acceptable as part of arbitration generally. *E.g.*, *Emcon Assocs., Inc. v. Zale Corp.*, No. 16-1985, 2016 WL 7232772 (D.N.J. Dec. 14, 2016) (Ohio law).

337. *E.g.*, AAA, *Drafting Dispute Resolution Clauses – A Practical Guide*, *available at* https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf (last visited Dec. 10, 2023); *see also* John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 *Dispute Resolution Journal* 1 (Feb.-Apr. 2003), *available at* https://www.hugheshubbard.com/

Skuse, *Atalese*, *Garfinkle* and other cases indicating mutual assent and waiver of statutory or constitutional rights—the following items may have specific relevance for contracts governed by New Jersey law. The terms may address not only the *formation* issues described earlier,[338] such as in *Atalese*, but also the *scope* of the issues to be referred to arbitration and the manner of conducting the arbitration.

1-5:4.1 Location of Clause

A provision requiring arbitration may be located in a variety of places: the parties' substantive contract, a separate arbitration agreement, a company policy, an employee handbook, separate terms and conditions, master agreement, bylaws, and guild rules. A review of the cases suggests several cautions, though, where the arbitration agreement is not separately signed (and even when it is).

In a case that should raise concern regarding free-standing arbitration agreements or master agreements that are intended to cover not only an immediate transaction but also all others in the parties' relationship, the Appellate Division in *Cottrell v. Holtzberg*[339] declined to enforce a delegation clause in a free standing, voluntary arbitration agreement with a nursing facility.

The court acknowledged that the agreement would have been enforceable had the claims arisen from an admission that began contemporaneously with execution of the arbitration agreement. However, the claims—part of a five-year battle with a hospital and doctors—arose from a subsequent admission, during which the plaintiff passed away. There was no separate arbitration agreement

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news/drafting-arbitration-clauses-avoiding-the-7-deadly-sins (last visited Dec. 10, 2023). Although not specifically addressed to drafting arbitration clauses, the Preliminary Hearing Procedures "checklist" in the AAA Commercial Rules, Section "P-2" (see Chapter 3, § 3-1.3, and Appendix 1, below) "suggests issues to include in an arbitration clause."

338. *See* § 1-5:2, above. The authors find it helpful to consider the *Atalese* waiver requirement a *formation* issue (though the Court's discussion of a statutory Consumer Fraud Act claim may lead to some confusion), while specificity regarding statutory and other claims, such as in *Garfinkle*, a *scope* issue. This may be significant for whether and to what extent federal or state presumptions regarding arbitration come into play. *See In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 522-23 (3d Cir. 2019); *Harper v. Amazon.com Servs. Inc.*, No. 19-21735, 2022 U.S. Dist. LEXIS 228118, at *26-27 (D.N.J. Dec. 19, 2022) (terming this the "*Moon*" three-part test).

339. *Cottrell v. Holtzberg*, 468 N.J. Super. 59 (App. Div. 2021). The authors suggest that this reading was inconsistent with the requirement that contract language must be read as a whole to give effect to the primary intent, and a healthy respect for arbitration, as discussed in other sections of this Handbook.

executed when the plaintiff re-entered the nursing home. Defendant argued that the delegation clause in the earlier agreement was broad enough to require that an arbitrator decide whether this claim should be arbitrated. After all, the arbitration agreement said it was intended to cover any admission to the nursing facility.

The trial and appellate courts would have none of it. There was no arbitration agreement executed upon the second admission, the Appellate Division said, and that was the "agreement" that had to be analyzed. Not only did the court disregard the delegation clause in the arbitration agreement, a clause that had not been challenged, the court then went on to decide the very issue that the delegation clause reserved for an arbitrator. The scope clause of the earlier arbitration agreement, it said, referred to prior admissions but not to later admissions — despite the initial clause that stated otherwise. It appears the case has settled, and the opinion was not appealed. Parties wishing to have such agreements enforced should review the opinion and ensure that unambiguous, consistent language showing the temporal, future intent is included.

Similar issues arose in the Third Circuit in *Abdurahman v. Prospect CCMC LLC*.[340] The employee signed an arbitration agreement as part of her intake, but her employment/training was with another member of the medical group. She sued that member, and arbitration and delegation were denied.

Contracts with arbitration provisions may provide for the contract being amended, but the arbitration clause in the amendment may not be enforced if the notice provisions were not followed.[341]

1-5:4.1a Notice

New Jersey courts have required that parties have reasonable notice of an arbitration clause. The clause cannot be hidden or "buried" in an unusual part of the contract, or in hidden layers

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340. *Abdurahman v. Prospect CCMC LLC*, 42 F.4th 156 (3d Cir. 2022). Drafting and cross-referencing might have avoided the issue. The multiple documents, concerning different aspects of a vehicle purchase and financing transaction, continue to create problems. *See Nawrocki v. J&J Auto Outlet*, No. A-2813-22, 2023 N.J. Super. Unpub. LEXIS 1962 (App. Div. Nov. 3, 2023) (defendant dealer was not a party to the financing agreement with an arbitration clause, despite dealer having signed as "agent"; motion to compel denied). *Zirpoli v. Midland Funding, Inc.*, 48 F.4th 136 (3d Cir. 2022), seems to take a different approach.

341. *See Black Ship, LLC v. Heartland Payment Sys., LLC*, No. 21-13855, 2023 U.S. Dist. LEXIS 88778 (D.N.J. May 22, 2023).

of a web page[342] or a referenced document (such as a unilateral warranty[343]) that one would not expect to be a bilateral contract. As noted in § 1-5:3, above, terms must be legible, but no specific format of typeface or type size is required as long as consistent with New Jersey's Plain Language Law. Including notice to a new arbitration policy in a so-called "training module" may have been accepted "in context" in *Skuse v. Pfizer, Inc.*,[344] but to do so after 2020 would appear highly risky. Amended arbitration terms are problematic.[345]

The signature line for an agreement containing an arbitration clause must be after the reference to arbitration or the hyperlink to the Terms and Conditions containing the clause.[346]

Words such as "acknowledge receipt" or "received" may be sufficient in a case such as *Skuse*,[347] where performance is invited to evidence acceptance, but not sufficient where, for example, acceptance is invited by a signature "agreeing" to the terms.[348] The term "may" will not provide sufficient definiteness in some situations[349] but not in others.[350] Terms must be reasonably available or visible to a customer before they sign a rental agreement.[351] Copies

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342. *See Wollen v. Gulf Stream Restoration & Cleaning, LLC*, 468 N.J. Super. 483 (App. Div. 2021).

343. *See, e.g.*, *Noble v. Samsung Elecs. Am., Inc*., 682 F. App'x 113, 116 (3d Cir. 2017) (terms must be reasonably "conspicuous"), *aff'g* No. 15-3713, 2016 U.S. Dist. LEXIS 33406, at *8-14 (D.N.J. Mar. 15, 2016) (citing, *e.g.*, *Hoffman v. Supplements Togo Mgmt., LLC*, 419 N.J. Super. 596, 606 (App. Div. 2011)).

344. *Skuse v. Pfizer, Inc.,* A-86, 244 N.J. 30, 2020 N.J. LEXIS 904 (Aug. 18, 2020), discussed in § 1-5:3.2, above.

345. *See Black Ship, LLC v. Heartland Payment Sys*., *LLC*, No. 21-13855, 2023 U.S. Dist. LEXIS 88778 (D.N.J. May 22, 2023).

346. *See Wollen v. Gulf Stream Restoration & Cleaning, LLC*, 468 N.J. Super. 483, (App. Div. 2021) (criticizing link to terms such as arbitration); *Carfagno v. ACE, Ltd*., No. 04-6184, 2005 N.J. Dist. LEXIS 12614 (D.N.J. June 28, 2005) (requiring arbitration for only some of plaintiffs), citing *Parker v. Hahnemann Univ. Hosp*., No. 00-4173, 2001 U.S. Dist. LEXIS 10661 (D.N.J. June 15, 2001).

347. *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020), discussed in § 1-5:3.2, above.

348. *E.g., Leodori v. CIGNA Corp*., 175 N.J. 293, 302 (2003). *See* § 1-5:3.2, above.

349. *Delaware River Partners, LLC v. R.R. Constr. Co.*, No. A-2613-20, 2022 N.J. Super. Unpub. LEXIS 1134 (App. Div. June 24, 2022) (sophisticated parties).

350. *E.g*., *Medford Twp. Sch. Dist. v. Schneider Elec. Bldgs. Ams.*, 459 N.J. Super. 1 (App. Div. 2019).

351. *Bacon v. Avis Budget Grp., Inc.*, 959 F.3d 590 (3d Cir. 2020) (declining to enforce based on lack of notice), *aff'g*, 357 F. Supp. 3d 401 (D.N.J. 2018) (distinguishing between cases where the agreement was and was not visible). In *C.D. v. Message Envy Franchising, LLC*, No. ESX-L-3263-19, 2020 N.J. Super. Unpub. LEXIS 2382 (Law. Div. Dec. 3, 2020), the reference was considered to be buried or hidden.

of physically signed contracts (as distinct from click signatures on web pages, for example) must be provided to the customer, patient, or employee, especially in an "opt-out" situation.[352] Whether terms and conditions have been provided by an agent may give rise to discovery.[353] Electronically signed contracts should be provided to the customer, if only to assist in evidencing notice of provisions.[354]

1-5:4.1b Multiple Locations or Documents/Termination

It is important not to include arbitration provisions in multiple locations, documents, or agreements, such that the intent becomes confused or ambiguous. A prime example of this problem arose in *NAACP of Camden County East v. Foulke Management Corp.*,[355] where multiple documents signed at a closing for an auto purchase contained different arbitration provisions with conflicting terms. Adding that one such document's arbitration provision superseded other clauses did not help in a 2016 case, since all documents were signed on the same day and the court could not determine which document ("superseding") was the last signed, nor did a "belt and suspenders" extra check box help.[356] Following *NAACP*, though, a number of auto cases have found that the documentation was

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352. *See, e.g.*, *Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C.*, 416 N.J. Super. 30 (App. Div. 2010), *on remand*, No. A-683-22, 2013 N.J. Super. Unpub. LEXIS 2015 (App. Div. Aug. 14, 2013).

353. *Robert D. Mabe, Inc. v. OptumRX*, 43 F.4th 307 (3d Cir. 2022) (discovery required regarding agent's providing required copy of Terms and Conditions); *RD Foods Americas, Inc. v. DycoTrade HGH B.V.*, No. A-1163-20, 2022 N.J. Super. Unpub. LEXIS 1436 (App. Div. Aug. 15, 2022).

354. *See Knight v. Vivint Solar Dev., LLC*, 465 N.J. Super. 416 (App. Div. 2020), *certif. denied*, 246 N.J. 222 (2021).

355. *NAACP of Camden Cty. E. v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404 (App. Div. 2011) (citing *Rockel v. Cherry Hill Dodge*, 368 N.J. Super. 577 (App. Div. 2004)). This formation issue differs from whether a statute may fill gaps or a judge may take other actions to enforce the parties' agreement. *E.g.*, § 1-5 at n. 67, 1-5:1.2 at n. 85, 1-5:3 at n. 177, above. *See also Trout v. Winner Ford*, No. A-3732-18, 2019 N.J. Super. Unpub. LEXIS 2440 (App. Div. Dec. 3, 2019) (submitting second contract with separate arbitration clause, after a motion to compel had been denied based on the first contract, compounded the problem).

356. *Souza-Bastos v. Fed. Auto Brokers, Inc.*, No. A-1594-15T3, 2016 WL 3199488 (N.J. Super. Ct. App. Div. June 10, 2016) (also indicating other drafting problems); *Knight v. Vivint Solar Dev., LLC*, 465 N.J. Super. 416 (App. Div. 2020), *certif. denied*, 246 N.J. 222 (2021).

properly organized and not confusing or contradictory.[357] Trivial differences should not preclude enforcement.[358]

Under proper circumstances, the arbitration clause in an agreement may be enforced even though a subsequent agreement does not refer to arbitration.[359] However, several recent cases highlight possible problems. As previously noted, the arbitration clause in a group's intake contract may not be enforced against the actual employer (the defendant) where the earlier agreement was not cross-referenced and the definitions of relevant parties was too narrow.[360] The arbitration clause in an amending document may not be enforced where proper notice of the amendment is lacking.[361] Subsequent documents, arguably superseding one with an arbitration clause, create problems.[362]

Overriding its own precedent, the Third Circuit held in a labor case, which might also affect non-labor cases, that an arbitration clause without its own termination-continuation clause might not survive post-termination during negotiations.[363] The case has led a district court to deny a motion for a preliminary injunction in an arbitration case.[364]

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357. *E.g.*, *Haynes v. DNC Auto. LLC*, A-4593-16T4, 2018 N.J. Super. Unpub. LEXIS 732 (App. Div. Apr. 2, 2018).

358. *See, e.g.*, *Mitnick v. Yogurtland Franchising, Inc.*, No. 17-00325, 2017 U.S. Dist. LEXIS 130466 (D.N.J. Aug. 16, 2017) (citing *Joaquin v. DIRECTV Grp. Holdings, Inc*., No. 15-8194, 2016 U.S. Dist. LEXIS 116312, at *13 n.1 (D.N.J. Aug. 30, 2016)).

359. *See Pearson v. Valeant Pharms. Int'l, Inc*., No. 17-1995, 2017 U.S. Dist. LEXIS 209102 (D.N.J. Dec. 20, 2017) (separation agreement referred to terms to be enforced in earlier agreement) (citing, *e.g.*, *Wein v. Morris*, 194 N.J. 364, 376 (2008)). *But see Cottrell v. Holtzberg*, 468 N.J. Super. 59 (App. Div. 2021) (not enforcing initial arbitration agreement as to second admission). Lumping multiple transactional contracts into one motion to compel will not "hide" that not all had arbitration clauses. *See Connectone Bank v. Bergen Protective Sys.*, No. A-1494-20, 2021 N.J. Super. Unpub. LEXIS 2578 (App. Div. Nov. 1, 2021); *Pomum Liber, LLC v. Blue Apple Books, LLC*, No. A-4562-19, 2022 N.J. Super. Unpub. LEXIS 614 (App. Div. Apr. 14, 2022). It generally is said that the termination of the contract does not conclude the parties' arbitration agreements. *See Woodham v. Morgan Stanley*, No. 23-2080, 2023 US. Dist. LEXIS 194875, at *14 (D.N.J. Oct. 31, 2023) (citing *New Jersey Bldg. Laborers Statewide Benefits Fund v. Am. Coring & Supply*, 341 F. App'x 816 (3d Cir. 2009)).

360. *Abdurahman v. Prospect CCMC LLC*, 42 F.4th 156 (3d Cir. 2022).

361. *See Black Ship, LLC v. Heartland Payment Sys., LLC*, No. 21-13855, 2023 U.S. Dist. LEXIS 88778 (D.N.J. May 22, 2023).

362. *E.g.*, *Field Intel. Inc. v. Xylem Dewatering Sols. Inc*., 49 F.4th 351, 2022 U.S. App. LEXIS 25561 (3d Cir. 2022) (integration clause did not include "express" language required by prior contract with arbitration clause; arbitration ordered); *Zirpoli v. Midland Funding, LLC*, 48 F.4th 136, 2022 U.S. App. LEXIS 24724, at *10 (3d Cir. 2022) (assignment); *Kantz v. AT&T, Inc.*, No. 21-15620, 2022 U.S. App. LEXIS 3658 (3d Cir. Feb. 10, 2022) (not precedential) (effect of general release with integration clause, applying Pennsylvania law).

363. *Pittsburgh Mailers Union Loc. 22 v. PG Publ'g Co. Inc.*, 30 F.4th 184 (3d Cir. 2022).

364. *1199 SEIU v. Cranford Rehab & Nursing Ctr*., No. 21-10472, 2022 U.S. Dist. LEXIS 130293 (D.NJ. July 24, 2022).

In *Tharpe v. Securitas Security Services USA*,[365] the court ordered discovery regarding a claim that the cost of an arbitration would render arbitration unenforceable as unconscionable. The Court made further findings that a freestanding or unattached arbitration agreement was enforceable; and noted that even after discovery, the court might order arbitration and delegate the unconscionability decision to the arbitrator. After discovery, the court ordered arbitration, noting that the employee bears the burden. Appendix 7, below, contains additional examples.

1-5:4.1c Adoption by Reference

An arbitration provision in a separate document may be part of an integrated document or adopted by reference,[366] but—keeping in mind the requirements of notice of and assent to any contractual condition—it is important to consider the location[367] and clarity of the reference,[368] the actual delivery of the referenced document, the

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365. *Tharpe v. Securitas Sec. Servs. USA*, No. 20-13267, 2021 U.S. Dist. LEXIS 34275 (D.N.J. Feb. 24, 2021), *arbitration ordered*, 2021 U.S. Dist. LEXIS 94656 (D.N.J. May 17, 2021). *See also Salerno Med. Assoc., LLP v. Riverside Med. Mgmt., LLC*, No. 20-10539, 2021 U.S. LEXIS 107540 (D.N.J. June 8, 2021); *Russo v. Chugai Pharma USA, Inc*., No. A-1410-20, 2021 N.J. Super. Unpub. LEXIS 2197 (App. Div. Sept. 16, 2021) (requiring arbitration; plaintiff argued clause was hidden in a side agreement).

366. *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440 (3d Cir. 2003) (incorporation by reference satisfied international convention); *but compare Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764 (3d Cir. 2013) (remanded). *See also Century Indem. Co. v. Certain Underwriters at Lloyd's*, 584 F.3d 513 (3d Cir. 2009) (finding incorporation); *Estate of Noyes v. Morano*, No. A-1665-17T3, 2019 N.J. Super. Unpub. LEXIS 47 (App. Div. Jan. 8, 2019) (citing *Alpert, Goldberg, Butler v. Quinn*, 410 N.J. Super. 510 (App. Div. 2009) (discussing burdens)); *Buzalski v. Geopeak Energy*, No. A-4814-17T1, 2019 N.J. Super. Unpub. LEXIS 1162 (App. Div. May 21, 2019); *Victory Entm't, Inc. v. Schibell*, No. A-3388, 2018 N.J. Super. Unpub. LEXIS 1467 (App. Div. June 21, 2018) (citing *In re Resnick*, 284 N.J. Super. 47 (App. Div. 1995)); *James Talcott, Inc. v. Roto Am. Corp*., 123 N.J. Super. 183 (Ch. Div. 1973); *Sampson v. Pierson*, 140 N.J. Eq. 524 (Ch. 1947).

367. *Compare Wollen v. Gulf Stream Restoration & Cleaning, LLC*, 468 N.J. Super. 483 (App. Div. 2021) *with Petrozzino v. Vivint, Inc.*, No. 1:20-01949, 2020 U.S. Dist. LEXIS 245134 (D.N.J. Dec. 31, 2020) (citing, *e.g.*, *Marini v. Quality Remodeling Co.*, No. A-5511-04T3, 2006 N.J. Super. Unpub. LEXIS 597 (App. Div. Feb. 10, 2006)).

368. *See Bacon v. Avis Budget Grp., Inc*., No. 16-5939 (KM) (JBC), 2017 U.S. Dist. LEXIS 88868, at *22-35 (D.N.J. June 9, 2017) (describing the heightened standard for incorporation by reference under state law; requiring discovery as to incorporation issues); later opinion at 357 F. Supp. 3d 401 (D.N.J. 2018) (granting some arbitration; ordering further discovery), *aff'd*, 959 F.3d 590 (3d Cir. 2020).

timing of the delivery,[369] and the burden of proof.[370] Issues arise regarding references in an employment handbook,[371] corporate training module, or email mailings.[372]

In 2022, the integration clause in a superseding agreement failed to use the "express" language required by the prior document; arbitration was required.[373] Whether an assignment was valid was sent to the arbitrator.[374] And a general release was held to preclude arbitration required under an earlier agreement.[375]

1-5:4.1d Internet Issues; Click-Wrap Agreements

For web or similar situations, the design of the web page and mechanics of an electronic acceptance of the provision may be key, as discussed above regarding *Skuse*, *Wollen*, *Lloyd*, and *Knight*.

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369. Failing to provide a referenced arbitration agreement or policy/program can lead to denial of arbitration or, as in *Heller v. Wells Fargo Bank, N.A.*, No. A-4728-14T4, 2016 WL 818734, at *4 (N.J. Super. Ct. App. Div. Mar. 3, 2016), a remand for a further hearing, evidence, or discovery, *see RD Foods Americas, Inc. v. DycoTrade HGH B.V.*, No. A-1163-20, 2022 N.J. Super. Unpub. LEXIS 1436 (App. Div. Aug. 15, 2022). *See also Schmell v. Morgan Stanley & Co.*, No. 17-3080, 2018 U.S. Dist. LEXIS 33395 (D.N.J. Mar. 1, 2018) (disputed receipt of notice for ADR program; arbitration denied); *Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C.*, 416 N.J. Super. 30 (App. Div. 2010), *on remand*, No. A-683-22, 2013 N.J. Super. Unpub. LEXIS 2015 (App. Div. Aug. 14, 2013), *accord Ricciardi v. Abington Care & Rehab. Ctr.*, No. A-3255-18, 2019 N.J. Super. Unpub. LEXIS 2166 (App. Div. Oct. 23, 2019).

370. New Jersey requires a high degree of certainty before a separate document will be deemed to be incorporated by reference in a contract: "In order for there to be a proper and enforceable incorporation by reference of a separate document, the document to be incorporated must be described in such terms that its identity may be ascertained beyond doubt and the party to be bound by the terms must have had "knowledge of and assented to the incorporated terms." *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 533 (App. Div. 2009) (quoting 4 Williston on Contracts § 30:25 (Lord ed. 1999)).

371. *E.g.*, *Leodori v. CIGNA Corp.*, 175 N.J. 293, 302 (2003). Disclaimer of contracted intent in a handbook showed lack of mutual assent to arbitration in *Ramadan v. Lippolis Electric, Inc.*, No. A-2514-21, 2023 N.J. Super. Unpub. LEXIS 3 (App. Div. Jan. 3, 2023), despite continuing employment language.

372. *See Jasicki v. Morganstanley Smithbarney LLC*, No. A-1629-19T1, 2021 N.J. Super. Unpub. LEXIS 93 (App. Div. Jan. 19, 2021) (affirming order compelling arbitration, relying on *Skuse*; denying request for metadata to evidence viewing of emails).

373. *Field Intel. Inc. v. Xylem Dewatering Sols. Inc.*, 49 F.4th 351, 2022 U.S. App. LEXIS 25561 (3d Cir. 2022).

374. *Zirpoli v. Midland Funding, LLC*, 48 F.4th 136, 2022 U.S. App. LEXIS 24724, at *10 (3d Cir. 2022); *See also Delgado v. BMW Fin. Servs. Na*, No. A-0933-22, 2023 N.J. Super. Unpub. LEXIS 1484 (App. Div. Aug. 29, 2023) (assignee identified in lease could enforce clause).

375. *Kantz v. AT&T, Inc.*, No. 21-15620, 2022 U.S. App. LEXIS 3658 (3d Cir. Feb. 10, 2022) (not precedential) (effect of general release with integration clause).

Although somewhat dated, an unreported 2015 Appellate Division case, *Arafa v. Ahmend*,[376] illustrates some of the problems. There, the court distinguished between two groups of plaintiffs: one group applied for travel arrangements on the internet and was provided an opportunity to read the terms and conditions before accepting the transaction; the other did not receive the document with the arbitration clause until after they had agreed to purchase the tickets. The first was bound to arbitrate; the second was not.

Whether there has been an incorporation by reference may have to be resolved in a jury trial under the FAA.[377]

Fatal problems in designing a hyperlink to the Terms of Use on a website are illustrated by *Wollen v. Gulf Stream Restoration & Cleaning, LLC*,[378] discussed above, and *Hite v. Lush Internet, Inc.*[379] The hyperlink required to view the Terms was "obscure," in small print and did not refer to arbitration. Accessing the Terms was not necessary in order to use the website to purchase goods or services. In denying the motion to compel arbitration based on the arbitration clause in the Terms, the court contrasted the hyperlink in *Singh v. Uber Technologies, Inc.*,[380] where the Terms

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376. *Arafa v. Ahmend*, No. A-3517-13T2, 2015 WL 9594341 (N.J. Super. Ct. App. Div. Sept. 1, 2015) (A-422) (citing, *e.g.*, *Hoffman v. Supplements Togo Mgmt., LLC*, 419 N.J. Super. 596 (App. Div. 2011)) (noting website was "structured" unfairly to avoid actual notice); *James v. Glob. Tel*Link Corp.*, No. 13-4989, 2016 WL 589676 (D.N.J. Feb. 11, 2016), *aff'd*, 682 F. App'x 113 (3d Cir. 2017), makes a distinction between notice and assent in a phone message, where the caller would not be expected to look up the terms of the arbitration clause on a website before continuing the call, and where the agreement was first displayed and accepted in the website. The mechanics of shrink-wrap and click-wrap "agreements" are described in detail in two New York federal court cases: *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015), and *Meyer v. Kalanick*, 199 F. Supp. 3d 752 (S.D.N.Y. 2016), *rev'd and remanded sub. nom. Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 76 (2d Cir. 2017). *See also Horowitz v. AT&T Inc.*, No. 17-4827, 2019 U.S. Dist. LEXIS 60 (D.N.J. Jan. 2, 2019); *Holdbrook Pediatric Dental, LLC v. Pro Comput. Serv., LLC*, No. 14-6115, 2015 WL 4476017 (D.N.J. July 21, 2015) (hyperlink; remanding for discovery as to arbitrability); *Russo v. J.C. Penney Corp., Inc.*, No. A-3116-16T1, 2017 N.J. Unpub. LEXIS 3074 (App. Div. Dec. 13, 2017) (noting stepped format for agreeing to employment arbitration program). Providing the signature before the arbitration clause can be fatal. *See* Chapter 2, § 2-5:1, below.

377. *See Guidotti v. Global Client Sols., LLC*, No. 11-1219, 2017 U.S. Dist. LEXIS 63350, at *5 (D.N.J. Apr. 26, 2017).

378. *Wollen v. Gulf Stream Restoration & Cleaning, LLC*, 468 N.J. Super. 483 (App. Div. 2021)

379. *Hite v. Lush Internet, Inc.*, 244 F. Supp. 3d 444 (D.N.J. 2017) (arbitration denied). *See also C.D. v. Massage Envy Franchising LLC*, No. ESX-L 3263-19, 2020 N.J. Super. Unpub. LEXIS 3282 (Law Div. Dec. 3, 2020).

380. *Singh v. Uber Techs. Inc.*, 235 F. Supp. 3d 656 (D.N.J. 2017), *rev'd and remanded on other grounds*, 939 F.3d 210 (3d Cir. 2019).

were preceded by a "prominent" notice that agreement to them was required in order to use the site. The user was not allowed to proceed to the final page without first clicking on an icon that said "YES, I AGREE" to the Terms and then a second confirmation icon.

Wollen was distinguished in a published opinion where the operative language was "I agree[.]"[381] Arbitration also was compelled based on an agreement signed in an employee "onboarding process" where the hyperlinks were said to be properly sequenced.[382]

The difficulties of providing an effective incorporation by reference under New Jersey law, distinct from arbitration issues, are described in detail in *Bacon v. Avis Budget Group, Inc*.[383] The reference must be "clear beyond doubt" and known to the party to be bound, though such knowledge may be imputed under normal contract principles—including the opportunity to read terms that are not "hidden." The court denied the motion to compel arbitration without prejudice pending discovery on the issues identified in the opinion, followed by motions for summary judgment.

1-5:4.1e Carve-Outs

An arbitration provision in a single document may have carve-out provisions for, for example, small claims, probate, bankruptcy, delegation, or injunctive relief, but the document should not contain or be joined by potentially conflicting provisions, such as two "exclusive" jurisdiction provisions.[384] The "Seven Deadly Sins"

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381. *Santana v. SmileDirectClub, LLC*, 475 N.J. Super. 279 (App. Div. 2023).

382. *Russo v. J.C. Penney Corp., Inc*., No. A-3116-16T1, 2017 N.J. Super. Unpub. LEXIS 3074 (App. Div. Dec. 13, 2017).

383. *Bacon v. Avis Budget Grp., Inc*., 959 F.3d 590, 600 (3d Cir. 2020). *See also Navigators Specialty Ins. Co. v. Jangho Curtain Wall Ams. Co.*, No. A-4222-19T4, 2020 N.J. Super. Unpub. LEXIS 2356 (App. Div. Dec. 9, 2020) (remanded; issues of multiple copies and signatures).

384. *See Marano v. Glancey*, No. A-4955-14T2, 2016 WL 687263 (N.J. Super. Ct. App. Div. Feb. 22, 2016), *confirming award on remand*, No. CAM-L-686-15 (July 15, 2016), *aff'd*, No. A-0669-16T2, 2017 N.J. Super. Unpub. LEXIS 3155 (App. Div. Dec. 22, 2017); *Madison House Grp. v. Pinnacle Entm't, Inc.*, No. A-3171-08T2, 2010 WL 909663 (N.J. Super. Ct. App. Div. Mar. 15, 2010) ("notwithstanding" language made arbitration only an option). *But see Singh v. Uber Techs., Inc.*, 67 F.4th 550, 563 (3d Cir. 2023) (The language in the two provisions is easily reconciled, and any conflict is "artificial.").

of arbitration agreements[385] include at least one relevant here: "Equivocation."

Allowing for optional small claims jurisdiction may sound practical, but it also may lead to ambiguity and charges of lack of consideration or mutuality.[386]

A carve out for "any other financial obligation" in a Financial Agreement essentially made its arbitration clause useless for many of the issues that might arise.[387]

Provisions for emergency court relief may not be necessary where the provider's rules[388] call for a similar emergency arbitrator, hearing and interim award (although judicial enforcement still may be advisable). Since the NJRUAA provides that requesting a preliminary injunction or TRO in court does not waive the right to seek arbitration, a carve out for that relief may not be necessary and may create a problem if the language appears to carve out injunctive relief that may include the final relief to be sought, such as a permanent injunction.[389] The United States Supreme Court granted, then dismissed *certiorari* in *Henry Schein, Inc. v. Archer & White Sales, Inc.*,[390] on an issue of delegation that turns on an exemption for injunctive relief.

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385. John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Dispute Res. J. 1 (Feb.-Apr. 2003), *available at* https://www.hugheshubbard.com/news/drafting-arbitration-clauses-avoiding-the-7-deadly-sins (last visited Dec. 10, 2023).

386. *See Midland Funding LLC v. Bordeaux*, 447 N.J. Super. 330 (App. Div. 2016). In *Glamorous Inc. v. Angel Tips, Inc.*, No. A-985-16, 2017 N.J. Super. Unpub. LEXIS 1526 (App. Div. June 23, 2017), an exception for claims for "money owed" created an issue. *See also Easterday v. USPack Logistics, LLC*, No. 15-7559, 2022 U.S. Dist. LEXIS 51990 (D.N.J. Mar. 23, 2022); *Fung v. Varsity Tutors, LLC*, No. A-3650-17T4, 2019 N.J. Super. Unpub. LEXIS 960 (App. Div. Apr. 25, 2019); *Webster v. OneMain Fin, Inc*. No. 18-2711, 2018 U.S. Dist. LEXIS 204600 (D.N.J. Dec. 4, 2018). Mutuality is discussed generally in *Kalman Floor Co., Inc. v. Jos. L. Muscarelle, Inc*., 196 N.J. Super. 16 (App. Div. 1984), *aff'd o.b*. 98 N.J. 266 (1985). *Kleine v. Emeritus at Emerson*, 445 N.J. Super 545, 551 (App. Div. 2016), questions the lack of mutuality as raising unconscionability issues. A one-sided right to an injunction was held not a bar in *Ribe v. Macro Consulting Group, LLC*, No. A-2894-18T4, 2020 N.J. Super. Unpub. LEXIS 468 (App. Div. Mar. 9, 2020).

387. *See City of Orange Twp. v. Millennium Homes at Wash. & Day Urban Renewal Assocs., LP*, No. A-3467-18, 2019 N.J. Super. Unpub. LEXIS 2250 (App. Div. Nov. 1, 2019).

388. *See, e.g.*, 2022 AAA Commercial Rules R-37 & R-38 (Appendix 1, below) and 2021 ICDR Articles 7 & 27 (Appendix 3, below). *See* Chapter 2, § 2-4:4; Chapter 3, § 3-1:1, below. *See also* N.J.S.A. 2A:23B-8(c) (emergent relief does not waive arbitration).

389. *See Thompson v. Nienaber*, 239 F. Supp. 2d 478 (D.N.J. 2002).

390. *Henry Schein, Inc. v. Archer & White Sales, Inc*., 141 S. Ct. 107 (2020), *dismissed as improvidently granted*, 141 S. Ct. 656 (2021).

A common-sense multi-step ADR process, *i.e.*, consultation, mediation, then arbitration, must clearly identify each step.[391]

A waiver-of-class-action clause can lead to the loss of the ability to compel arbitration if not clearly stated.[392]

A carve-out or exclusion for questions of jurisdiction or arbitrability[393]—overriding the standard AAA or JAMS rules language—may avoid delay or conflicting rulings.

1-5:4.1f Boilerplate

Be careful of boilerplate provisions in the "container" contract that may defeat the alleged intent of the arbitration clause. This problem may be illustrated by *Castle Realty Management, LLC v. Burbage*,[394] where efforts to claim a right to compel arbitration as a third-party beneficiary of another franchisee's arbitration clause were foiled by the "no third-party beneficiary" clause in the standard contracts.

References to other documents may be defeated by an integration or "sole-document" clause in the larger contract. Thus, in *White v. Sunoco, Inc.*,[395] the defendant attempted (unsuccessfully) to enforce an

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391. Confusion in the language may make the contract unenforceable. *See Kernahan v. Home Warranty Admin. of Fla., Inc.*, 236 N.J. 301 (2019); *Dvorak v. AW Dev. LLC*, No. A-3531-14T2, 2016 WL 595844 (N.J. Super. Ct. App. Div. Feb. 16, 2016). A warning: the AAA standard mediation-arbitration clause may not meet this standard. The step clause in *KPH Healthcare Servs. v. Janssen Biotech*, No. 20-05901, 2021 U.S. Dist. LEXIS 196095 (D.N.J. Oct. 8, 2021), was held sufficient, as was one in *Frederick v. Law Office of Fox, Kohler & Assocs., P.L.L.C.*, 852 F. App'x 673 (3d Cir. Mar. 24, 2021), *rev'g* No. 19-15887, 2020 U.S. Dist. LEXIS 114597 (D.N.J. June 30, 2020).

392. *Snap Parking, LLC v. Morris Auto Enters., LLC*, No. A-4733-15T4, 2017 N.J. Super. Unpub. LEXIS 750 (App. Div. Mar. 27, 2017).

393. *E.g.*, *Harris v. Credit Acceptance Corp.*, No. 21-12986, 2022 U.S. Dist. LEXIS 27806, at *20 (D.N.J. Feb. 16, 2022), *aff'd*, No. 22-1404, 2022 U.S. App. LEXIS 27143 (3d Cir. Sept. 28, 2022). The arbitrator, a former magistrate judge, stayed the arbitration until plaintiff sought a court ruling whether the exclusion applied and the arbitration should continue (for other reasons).

394. *Castle Realty Mgmt., LLC v. Burbage*, No. A-5399-15T4, 2017 N.J. Super. Unpub. LEXIS 1748 (App. Div. July 13, 2017), *certif. denied*, 231 N.J. 111 (2017). *Hoover v. Sears Holding Corp.*, No. 16-4520, 2017 U.S. Dist. LEXIS 144792 (D.N.J. Sept. 7, 2017) (denying reconsideration), illustrates the contrasting problem: plaintiff was unable to defeat arbitration by pointing to a clause in the general contract permitting Sears to unilaterally modify the agreement, which plaintiff said made the contract illusory and not mutual; the clause was not in the arbitration section, so the question was for the arbitrator. *Cf. Singh v. Uber Techs., Inc.*, 67 F.4th 550 (3d Cir. 2023) (modification noticed, with right to opt out).

395. *White v. Sunoco, Inc.*, 870 F.3d 257 (3d Cir. 2017). *Cf. Sikorski v. N.J. Ventures Partners, LLC*, No. A-0963-20, 2021 N.J. Super. Unpub. LEXIS 1350 (App. Div. July 2, 2021) (reversing in absence of affirmative beneficiary language). The effect of a merger clause using "superseding" language is discussed in *Field Intel. Inc. v. Xylem Dewatering Solutions Inc.*, 49 F.4th 351, 2022 U.S. App. LEXIS 25561 (3d Cir. 2022), and *Jaludi v. Citigroup*, 933 F.3d 246 (3d Cir. 2019) (handbooks).

arbitration clause in the bank credit card agreement for a "Sunoco" gas rewards program. Sunoco was not named or identified in the credit card agreement; its effort to claim third-party beneficiary status was defeated by equivocal definitions of the parties covered by the agreement. The court also rejected arguments that the rewards program documents should be read together with the bank card agreement.

Standard merger or integration clauses must take into account any special "express" language required by prior agreements—or arbitration under the earlier agreement will be precluded.[396]

Choice of law designations may foil a demand for arbitration. That state's law, though good for usury or other business reason, may impose burdens on enforcing arbitration. Some state laws may impose interest or attorneys' fees obligations not familiar to New Jersey. Choosing a body of tribal arbitration law or forum and rules has been fatal where they do not exist,[397] or where tribal law would improperly waive statutory rights.[398] Failing to make a designation may result in the court applying its own law or undertaking a conflict-of-laws analysis—which may not have been what the drafter intended.

The arbitration clause should provide for judicial enforcement of any interim or final award, including a proper venue of such a court, even though the provider's rules may include such a provision. Also, the parties' intent that an award be converted into a judgment may be signified by language that the award be final and binding or similar words.[399] Including a personal jurisdiction waiver and

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396. *Field Intel. Inc. v. Xylem Dewatering Sols. Inc*., 49 F.4th 351, 2022 U.S. App. LEXIS 25561 (3d Cir. 2022). The later agreement required litigation in court. This case also illustrates the potential weakness of standard words such as "same matter/subject" in an integration clause; the courts struggled to decide how that wording applied, until the Circuit resolved by looking to the "express" language.

397. *See MacDonald v. CashCall, Inc*., 883 F.3d 220 (3d Cir. 2018).

398. *See Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020). *But cf. Brice v. Plain Green, LLC*, 13 F.4th 823 (9th Cir. 2021) (describing circuit split; court must determine delegation first), *rehearing en banc ordered*, No. 19-15707, 2021 U.S. App. LEXIS 33152 (9th Cir. Nov. 8, 2021), *en banc hearing granted*, *opinion vacated*, 35 F.4th 1219 (9th Cir. 2022). The selection of an arbitration forum, and hence its rules (and vice versa), may impose the forum's administration rules, even though not specified in the identified rules (*e.g.*, Commercial or Consumer). *See, e.g.*, *Hernandez v. Microbilt Corp*., 88 F.4th 215 (3d Cir. 2023) (arbitration not accepted by AAA because damages limitation in arbitration clause violated AAA Consumer Protocol); *Schorr v. Am. Arb. Ass'n Inc.*, 2022 U.S. Dist. LEXIS 231957 (S.D.N.Y. Dec. 27, 2022) (arbitration terminated, violation of Standards of Conduct; case dismissed on immunity grounds).

399. *See, e.g.*, *Independent Lab. Emps.' Union, Inc. v. ExxonMobile Rsch. & Eng'g Co.*, No. 18-10835, 2019 U.S. Dist. LEXIS 126025 (D.N.J. July 29, 2019).

exclusive court designation in the container contract's choice of law clause may relate only to enforcement of the arbitration agreement, but that designation can create problems with the selection of the arbitration law or a later arbitration clause unless carefully worded.

Allowing modification must be accompanied by proper notice and a right to opt out.[400]

Termination clauses also may defeat arbitration, though survival language may protect arbitration rights.[401]

1-5:4.2 Scope and Delegation

1-5:4.2a Generally

Various arbitration institutions offer "standard" clauses or protocols for different forms of disputes (*e.g.*, commercial, employment, intellectual property, international) that designate that institution and its rules.[402] Care must be given, though, because they are not necessarily drafted with New Jersey law in mind. The AAA commercial clause may not satisfy the requirements of *Atalese v. U.S. Legal Services Group, L.P.*[403] for consumer or other covered cases. Nor would it likely satisfy *Garfinkel v. Morristown*

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400. *See Singh v. Uber Techs., Inc.*, 67 F.4th 550 (3d Cir. 2023) (modification noticed, with right to opt out).

401. *See Pittsburgh Mailers Union Loc. 22 v. PG Publ'g Co. Inc.*, 30 F.4th 184 (3d Cir. 2022). *See also* Section 1-5:4.2c (post-termination), below.

402. The standard AAA *commercial* clause states: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." *See* https://adr.org/Clauses (last visited Dec. 10, 2023). The AAA also has "cut and paste" clauses for other types of contractual relationship, including some construction, employment, and consumer situations and step-mediation, but they may not satisfy New Jersey's requirements either. The AAA has a free "Clause Builder" website, www.clausebuilder.org (last visited Dec. 10, 2023), to assist in formulating language for several terms, although the Clause Builder did not at last review contain wording to satisfy *Atalese*; the AAA also will "vet" consumer clauses, pursuant to Rule 12 of its Consumer Rules, *see* https://www.adr.org/consumer (last visited Dec. 10, 2023), and that review has been a factor in at least one court's finding a clause satisfactory. *Perez v. Leonard Auto. Enter., Inc.*, No. BER-L-588-16, 2016 N.J. Super. Unpub. LEXIS 2631 (Law Div. Dec. 8, 2016), *aff'd*, *Perez v. Leonard Auto Enters., Inc.*, No. A-2165-16T3, 2018 N.J. Super. Unpub. LEXIS 1062 (App. Div. May 7, 2018). The New Jersey Court Rules Appendix XXIX-B includes a format and language that may be adapted to non-administered consumer and other cases.

403. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442 (2014), *cert. denied*, 576 U.S. 1004 (2015).

Obstetrics & Gynecology Assocs., P.A.[404] regarding statutory claims in employment or other covered cases.

The oral arguments in the New Jersey Supreme Court cases decided in the summer of 2020 suggest that the structure of the clause is important: questions by the Justices highlighted the primacy of the initial sentence in the clauses, which evidenced a principal, material agreement to arbitrate. As in *Flanzman v. Jenny Craig, Inc.*,[405] if other details are omitted (as long as certain waiver language is included to satisfy other New Jersey cases discussed elsewhere), which the court characterized as potentially useful but not necessary, then the FAA or NJRUAA may fill in any gaps. The subsections of this part of the Handbook discuss some of the details to add or avoid.

Some aspects must be explicit, such as whether a waiver is to be decided by the arbitrator.[406]

1-5:4.2b Scope

One of the first questions parties must resolve in designing their arbitration provision is the scope of issues that they want to either mediate, arbitrate, or litigate. Courts generally differentiate between "broad" and "narrow" clauses,[407] with the former being distinguished by language such as "any claim or dispute, whether in contract, tort or statute, arising out of or relating to [employment; contract; transaction; services etc.]."[408] The standard

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404. *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124 (2001).

405. *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020). *See* § 1-5:1.2 (ns. 84 & 85), above.

406. *Coronel v. Bank of Am., N.A.*, No. 19-8492, 2022 U.S. Dist. LEXIS 147116 (D.N.J. Aug. 17, 2022).

407. *Mutual Benefit Life Ins. Co. v. Zimmerman*, 783 F. Supp. 853, 869-70 (D.N.J. 1992), *reconsideration denied*, 787 F. Supp. 71 (D.N.J. 1992), *aff'd*, 970 F.2d 899 (3d Cir. 1992) (table). *See also Cardionet, Inc. v. Cigna Health Corp.*, 751 F.3d 165, 175 (3d Cir. 2015) (distinguishing *RCM Techs., Inc. v. Brignik Tech., Inc.*, 137 F. Supp. 2d 550, 554-56 (D.N.J. 2001)) (discussing specific terms). A potential arbitration clause in one alleged agreement, which referred to the parties' "relationship," was not broad enough to cover disputes arising out of a second contractual relationship (for which there was insufficient evidence of an arbitration provision). *Katsil v. Citibank, N.A.*, No. 16-3694, 2016 WL 7173765 (D.N.J. Dec. 8, 2016). *See also Herzfeld v. 1416 Chancellor, Inc.*, 666 F. App'x 124 (3d Cir. 2016) (lease with arbitration clause did not encompass wage and hour dispute).

408. The "arising out of" language was specifically upheld in *Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc.*, 240 N.J. Super. 370, 375 (App. Div. 1990). "All dispute" language was held not applicable to class action determinations in *Opalinski v. Robert Half International, Inc.*, 761 F.3d 326 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015).

AAA *commercial* clause[409] may be considered "broad," but it is not tailored to New Jersey and the requirements of *Atalese* or *Garfinkle* with respect to a jury or court waiver or including statutory claims which, as discussed below, may be affected by whether the clause refers to "this agreement" or "my employment," our relationship, or other term.[410] A clause that is too narrow, or does not include certain claims may result in arbitration as to some but not all claims.[411]

The authors suggest that the "scope" issue has at least five aspects: (1) the breadth or coverage of the "disputes" to be arbitrated (*i.e.*, standard broad, intermediate, narrow, carve out, specific etc); (2) the legal basis of the claim, such as contract law, tort law or statutes; (3) temporal, *i.e.*, arising during contract term, after or post-termination; (4) whether limited to "this" contract or others, related or all future relationships; and (5) the persons or entities to be bound, *e.g.*, assignees.[412] The cases illustrate that the language

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409. *See* n. 332, above and Appendix 1, AAA Commercial Arbitration Rules, below.

410. *See, e.g.*, *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124 (2001) (statutory employment claim not arbitrable where clause referred to this agreement). *But cf. Emcon Assocs., Inc. v. Zale Corp*., No. 16-1985, 2016 WL 7232772 (D.N.J. Dec. 14, 2016) (in dictum, excluding commercial claims from *Garfinkel*) (citing, *e.g.*, *Gastelu v. Martin*, No. A-0049-14T2, 2015 WL 10044913, at *14 n.4 (N.J. Super. Ct. App. Div. July 9, 2015)). As noted, the waiver of statutory rights to a jury is subject to particular scrutiny in New Jersey. *See Noren v. Heartland Payment Sys., Inc*., 448 N.J. Super. 486, 497 (App. Div.) (CEPA), *reconsideration denied*, 449 N.J. Super 193 (App. Div.), *certif. granted*, 230 N.J. 499 (2017) (as to attorneys' fees issues), *vacated in part*, 2018 N.J. LEXIS 7 (Jan. 12, 2018) (as to fees' issue). In a case arising out of Pennsylvania federal court, the Third Circuit affirmed an order confirming an arbitration award concerning federal law where the clause referred to "a dispute" without any reference to waiving statutory rights. *Monfred v. St. Luke's Univ. Health Network*, 767 F. App'x 377 (3d Cir. 2019); there was no mention of cases such as *Garfinkle* requiring more exacting language. *Gomez v. PDS Tech, Inc*., No. 17-12351, 2018 U.S. Dist. LEXIS 66589 (D.N.J. Apr. 19, 2018); No. 18-11958, 2019 U.S. Dist. LEXIS 144589 (D.N.J. Aug. 23, 2019). "All controversies" language sometimes has been accepted as to statutory claims outside the employment area. *See Lueddeke v. Mazza*, No. A-5017-18T3, 2020 N.J. Super. Unpub. LEXIS 202 (App. Div. Jan. 29, 2020) (also added "between the parties"). "All dispute" language was held not applicable to class action determinations in *Opalinski v. Robert Half Int'l, Inc*., 761 F.3d 326 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015).

411. *See, e.g.*, *Divalerio v. Best Care Lab.*, No. 20-17268, 2021 U.S. Dist. LEXIS 194896 (D.N.J. Oct. 8, 2021). Chapter 2, below discusses whether claims will be stayed pending arbitration.

412. The Third Circuit has described three of the components: "First, it must identify the general substantive area that the arbitration clause covers"; "Second, it must reference the types of claims waived by the provision"; "Third, it must explain the difference between arbitration and litigation"). *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 525 (3d Cir. 2019) (citing *Moon v. Breathless Inc*, 868 F.3d 209, 214-15 (3d Cir. 2017)).

used must express the parties' intention, and boilerplate must not negate that intention.

In addition to attempting to use language that expresses a broad, intermediate, or narrow intent, parties are free to limit the questions to be arbitrated to specific matters, such as "pre-closing" or "interpretation," or contract provisions. Some industry clauses, such as for construction[413] or reinsurance, fit this pattern. Thus, "narrow" clauses may be further categorized as "specific" or "divided," where parties attempt to exclude certain matters from arbitration, such as small claims or injunctive relief,[414] or specify particular issues.

Words that have been interpreted as including or excluding the claims at issue include "under this agreement"[415] or "my employment."[416] "Relating to" has been held broader than "arising out of,"[417] though one must consider whether the clause is drafted to include tort as well as contract claims – if that is intended. Claims relating to financing problems were held arbitrable against the car dealer in *Griffin v. Burlington Volkswagen, Inc.*[418] Cases analyzing specific language are set out below[419] and in Appendix 7, below.

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413. *See Columbus Circle N.J., LLC v. Island Constr. Co.*, No. A-1907-15T1, 2017 WL 958489 (N.J. Super. Ct. App. Div. Mar. 13, 2017) (upholding AIA clause); *Blackman & Co., Inc. v. GE Bus. Fin. Servs., Inc*., No. 15-7274, 2016 WL 3638110 (D.N.J. July 7, 2016) (procedure referred to ongoing disputes during construction, not post-construction financing issues).

414. *See, e.g.*, *Moore v. Fischer*, No. A-3419-15T3, 2017 N.J. Super. Unpub. LEXIS 350 (App. Div. Feb. 13, 2017) (excluding small claims). Note that N.J.S.A. 2A:23B-8(c) provides that seeking emergent judicial relief before an arbitrator is appointed is not a waiver of the right to arbitrate. As discussed elsewhere, excluding "injunctive relief" from issues to be arbitrated may be interpreted to negate arbitration all-together, rather than merely permitting a court to address requests for a TRO or preliminary injunction; *see Thompson v. Nienaber*, 239 F. Supp. 2d 478 (D.N.J. 2002). *Jaludi v. Citigroup*, 933 F.3d 246 (3d Cir. 2019), discusses the carve-out for Sarbanes-Oxley issues in the statute.

415. *Moon v. Breathless*, *Inc*., 868 F.3d 209 (3d Cir. 2017) (denied arbitration of statutory overtime claims where clause was in a "consulting contract"). *See also Espinal v. Bob's Discount Furniture, LLC*, No. 17-2854, 2018 U.S. Dist. LEXIS 83705 (D.N.J. May 18, 2018) (equitable and statutory claims not arbitrable).

416. *E.g*., *Sarbak v. Citigroup Glob. Mkts., Inc.*, 354 F. Supp. 2d 531 (D.N.J. 2004).

417. *Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc.*, 240 N.J. Super. 370, 375 (App. Div. 1990) The Third Circuit has interpreted these phrases broadly to encompass antitrust claims. *In re Rotavirus Vaccines Antitrust Litig*., 789 F. App'x 934 (3d Cir. 2019).

418. *Griffin v. Burlington Volkswagen, Inc.*, 411 N.J. Super. 515 (App. Div. 2010).

419. *Wells Fargo Bank, NA v. Subaru 46, LLC*, No. A-5388-17T4, 2019 N.J. Super. Unpub. LEXIS 1458 (App. Div. June 25, 2019); *Alfa Adhesives v. A. Duie Pyle, Inc.*, No. 18-3689, 2018 U.S. Dist. LEXIS 85511 (D.N.J. May 22, 2018) (specific statutory waiver requirement satisfied by general language); *Patetta v. Red Hat, Inc*., No. 18-11958, 2019 U.S. Dist.

It is often said that the scope of arbitration should be viewed liberally, requiring "forceful evidence" to exclude a claim from arbitration once a valid arbitration agreement is found, a principle that has evolved from labor contracts to negotiated contracts.[420] Given the policy favoring arbitration under the FAA, once it is determined that a valid contract has been formed, courts have applied a presumption of arbitrability regarding the scope of issues to be arbitrated, resolving ambiguities in favor of arbitration,[421] though it is also said (in New Jersey) that the court may not write a better or broader clause than the parties bargained for.[422]

However, after *Morgan v. Sundance, Inc*.,[423] this concept must be reconsidered. The Third Circuit also has raised a question as to the applicability of some of these previously well-accepted principles. *In re Remicade (Direct Purchaser) Antitrust Litigation*[424] noted that state contract interpretation principles must be applied to the *scope* issue (as well as the *formation* issue), "clarified" prior expansive pro-arbitration wording, and ended with a catch-all category in which federal pro-arbitration principles might hold sway where state law does not provide a "clear" outcome.

As noted, "equivocation" between arbitration and litigation can lead to uncertainty regarding the parties' intent and consequent

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LEXIS 144589 (D.N.J. Aug. 23, 2019) (citing *Gomez*); *Tecnimont S.p.A. v. Holtec Int'l*, No. 17-5167, 2018 U.S. Dist. LEXIS 136794 (D.N.J. Aug. 13, 2018) ("arising from or connected with"); *Voorhees v. Tolia*, 761 F. App'x 88 (3d Cir. 2019), reversing and remanding 2018 U.S. Dist. LEXIS 14547 (D.N.J. Jan. 30, 2018). Although distinctions were made in an Appellate Division opinion, the Supreme Court reversed. *Goffe v. Foulke Mgmt. Corp.*, 238 N.J.191 (2019). A narrow clause was seen in *FBI Wind Down Inc. Liquidating Trust v. Heritage Home Group, LLC*, 741 F. App'x 104 (3d Cir. 2018) ("disputed items").

420. *See Employer Trs. of W. Pa. Teamsters v. Union Trs. of W. Pa. Teamsters*, 870 F.3d 235, 241 (3d Cir. 2017) (citation omitted); *Harris v. Credit Acceptance Corp*., No. 22-1404, 2022 U.S. App. LEXIS 27143 (3d Cir. Sept. 28, 2022) (not precedential); *Pearson v. Valeant Pharms. Int'l, Inc*., No. 17-1995, 2017 U.S. Dist. LEXIS 209102, at *8 (D.N.J. Dec. 20, 2017) (employment termination), citing *AT&T Techs., Inc. v. Commc'ns Workers of Am*., 475 U.S. 643, 654 (1986).

421. *See Pearson v. Valeant Pharms. Int'l, Inc*., No. 17-1995-BRM-DEA, 2017 U.S. Dist. LEXIS 209102, at *8 (D.N.J. Dec. 20, 2017) (citing *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010)).

422. *See Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc.*, 240 N.J. Super. 370, 375 (App. Div. 1990); *Mahanandigari v. Tata Consultancy Servs*., No. 16-8746, 2017 U.S. Dist. LEXIS 93739 (D.N.J. June 19, 2017), *reconsideration denied*, 2017 U.S. Dist. LEXIS 121516 (D.N.J. Aug. 2, 2017).

423. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022).

424. *In re Remicade (Direct Purchaser) Antitrust Litig*., 938 F.3d 515, 522-23 (3d Cir. 2019).

delay as they litigate what is in or out of an arbitration. Thus, as noted in Section 1-5:4.1e, above, carve-outs may cause issues. *Frederick v. Law Office of Fox, Kohler & Assocs., P.L.L.C.*, [425] raises a different, albeit still troublesome issue: where the clause referenced merely "any dispute that cannot be resolved between the parties after 180 days," the trial court found the scope and applicability to any statutory clause was insufficient. The Third Circuit reversed.

1-5:4.2c Statutory Claims; Post-Termination; Relationship

Relying on *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*,[426] courts often say that the ability to pursue statutory claims in arbitration requires some indication that the clause encompasses more than contract or tort claims, whether or not post-termination, though one need not refer to specific statutes or rules. In *Martindale v. Sandvick, Inc.*,[427] the Supreme Court distinguished *Garfinkle* as analyzing language limited to the employment "Agreement or the breach thereof," whereas the clause in *Martindale* referred to "my employment with Sandvik or termination thereof," and permitted arbitration of LAD and related claims. In *Moon v. Breathless*,[428] the Third Circuit similarly distinguished statutory claims from claims "under" a consulting agreement, and did not permit arbitration of wage and hour claims.

Garfinkle also has been distinguished on the basis that it was an employment case, and some courts, especially federal courts, have limited the specific holding to non-negotiated employment and consumer cases, and not commercial cases. Most recently, citing supportive cases, *KPH Healthcare Servs. v. Janssen Biotech, Inc.*[429] held "New Jersey case law requiring that waivers of litigation of statutory claims be explicit" applied to "the employment or

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425. *Frederick v. Law Office of Fox, Kohler & Assocs., P.L.L.C.*, No. 19-15887, 2020 U.S. Dist. LEXIS 114597 (D.N.J. June 30, 2020) (disputes not resolved), *rev'd*, 852 F. App'x 673 (3d Cir. 2021).

426. *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124 (2001).

427. *Martindale v. Sandvick, Inc.*, 173 N.J. 76, 96 (2002).

428. *Moon v. Breathless Inc.*, 868 F.3d 209 (3d Cir. 2017).

429. *Kph Healthcare Servs. v. Janssen Biotech, Inc.*, No. 20-5901, 2021 U.S. Dist. LEXIS 196095, at *11-14 (D.N.J Oct. 8, 2021), *citing, e.g.*, *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 525-26 (3d Cir. 2019).

consumer context, not the complex commercial context of this [antitrust] case."

Whether claims arising after the termination of a contractual relationship may be subject to the contract's arbitration clause may depend on the nature of the claim, whether the contractual relationship continued informally after termination, or other factors.[430] *Weed v. Sky N.J., LLC*[431] barred arbitration of claims arising during a second trip to a park, when the arbitration agreement was signed by a friend. *Spathos v. Smart Payment Plan, LLC*[432] did not permit arbitration of claims arising after the formal contract period, despite the parties continuing to work together. Likewise, an arbitration agreement in the contract for one credit card may not be effective for a dispute arising out of another credit card,[433] unless the initial agreement is sufficiently broadly worded to cover any future relationship.[434] These principles apply to arbitration agreements in all commercial relationships, not merely credit cards and financial accounts. An ousted member of an LLC cannot avoid arbitration.[435] The Third Circuit discussed termination provisions in 2022.[436]

1-5:4.2d Delegation

Delegation provides a particularly unique and troublesome "scope" issue. As a general matter, courts (rather than the

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430. *See, e.g.*, *Shakespeare Globe Tr. v. Kultur Int'l Films, Inc.*, No. 18-16297, 2019 U.S. Dist. LEXIS 67503 (D.N.J. Apr. 22, 2019); *O'Keefe v. Edmund Optics, Inc.*, No. L-3339-18, 2018 N.J. Super. Unpub. LEXIS 2517 (Ch. Div. Nov. 15, 2018); Robert Bartkus, *Termination Provisions May Defeat Arbitration*, ABA Litigation Section ADR Articles (Jan. 3, 2019).

431. *Weed v. Sky NJ, LLC*, No. A-4589-16T1, 2018 N.J. Super. Unpub. LEXIS 410 (App. Div. Feb. 22, 2018).

432. *Spathos v. Smart Payment Plan, LLC*, No. 15-8014, 2016 U.S. Dist. LEXIS 95152 (D.N.J. July 21, 2016), citing *Bogen Commc'ns, Inc. v. Tri-Signal Integration, Inc.*, No. 04-6275, 2006 U.S. Dist. LEXIS 10497 (D.N.J. Feb. 22, 2006), *aff'd*, 227 F. App'x 159 (3d Cir. 2007).

433. *Katsil v. Citibank, N.A.*, No. 16-3694, 2016 U.S. Dist. LEXIS 169560 (D.N.J. Dec. 8, 2016).

434. *Cf. Jacobowitz v. Experian Info. Sols., Inc.*, No. 19-20120, 2021 U.S. Dist. LEXIS 31058 (D.N.J. Feb. 19, 2021) (discussing various forms of "relationship" scope language and cases).

435. *See KRHP, LLC v. Best Care Lab., LLC*, No. A-1031-20, N.J. Super. Unpub. LEXIS 2562 (App. Div. Oct. 28, 2021).

436. *Pittsburgh Mailers Union Loc. 22 v. PG Publ'g Co. Inc.*, 30 F.4th 184 (3d Cir. 2022). *See also 1199 SEIU v. Cranford Rehab & Nursing Ctr.*, No. 21-10472, 2022 U.S. Dist. LEXIS 130293 (D.NJ. July 24, 2022) (following *Pittsburgh Mailers*).

arbitrator(s)) must decide whether a particular dispute is within the arbitration clause;[437] the NJRUAA is specific about this.[438]

However, as discussed in Chapter 2, § 2-4:2, below, the parties may delegate this arbitrability determination to the arbitrator by a "clear and unmistakable" delegation by either of (at least) two means: (1) words explicitly making the delegation of jurisdiction or arbitrability determinations to the arbitrator; or (2) the parties' election of an arbitral forum's rules that grant to the arbitrator the determination of his or her jurisdiction.

The first delegation may be achieved by an arbitration provision that begins with "all controversies . . .," but in 2010, the New Jersey Supreme Court held that similar language in the parties' contract was not a sufficient delegation; instead language accepted by the United States Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*,[439] would be sufficient.[440] The New Jersey Supreme Court discussed delegation in *Goffe v. Foulke Management Corp.*,[441] though the case turned on severability.[442]

Most courts have accepted the second (rules-adoption) delegation as sufficient,[443] though there is no New Jersey Supreme

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437. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986).

438. N.J.S.A. 2A:23B-6(b) ("The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate."). *But see* N.J.S.A. 2A:23A-5(a) (NJAPDRA) (granting umpire broader authority).

439. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

440. *Morgan v. Sanford Brown Inst.*, 225 N.J. 289 (2016) (delegation clause and waiver of issue in a consumer contract). The "all disputes" clause found wanting in *Morgan* delegated to the arbitrator, *inter alia*, the authority to determine "any objection to arbitrability or the existence, scope, validity, construction, or enforceability of this Arbitration Agreement . . . ." A general delegation clause was accepted in *Huertas v. Foulke Management Corp.*, No. 17-1891, 2017 U.S. Dist. LEXIS 207234 (D.N.J. Dec. 18, 2017) ("all disputes . . . relating to . . . Whether the claim or dispute must be arbitrated; The validity of this arbitration agreement"). Delegation to a non-existent forum will not be effective. *See MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018). *See also Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020) ("prospective waiver" doctrine).

441. *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191 (2019).

442. *See* Chapter 2, § 2:4:1, below. Objection must be made to the delegation or arbitration clause specifically. *Knight v. Vivint Solar Developer, LLC*, 465 N.J. Super. 416 (App. Div. 2020), *certif. denied*, 246 N.J. 222 (2021), illustrates how poorly worded arbitration clause can give rise to an issue that defeats delegation. Delegation also can be lost by "hiding" the link. *See C.D. v. Massage Envy Franchising LLC*, No. ESX-L 3263-19, 2020 N.J. Super. Unpub. LEXIS 3282 (Law Div. Dec. 3, 2020) (hidden links).

443. *Petrofac, Inc. v. DynMcDermott Petroleum Ops. Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (citing other circuits); *Contec Corp. v. Remote Sol. Co. Ltd.*, 398 F.3d 205, 209 (2d Cir. 2005); *Neal v. Asta Funding, Inc.,* No. 13-6981, 2016 WL 3566960, at *14 (D.N.J. June 30, 2016), *reconsideration denied*, 2016 WL 7238795 (D.N.J. Dec. 14, 2016), *aff'd*, 756 F. App'x 184 (3d Cir. 2018) (citing, *e.g.*, *MACTEC Dev. Corp. v. EnCap Golf Holdings, LLC (In re EnCap*

Court opinion directly on point. Thus, for example, an arbitration provision stating that the arbitration shall be conducted in accordance with the Commercial Rules of the AAA may be a sufficient delegation, since Rule R-7(a) provides that the arbitrator has the authority to determine his or her own jurisdiction.[444] A district court case characterizing this as taking "a good joke too far" was reversed.[445] The Third Circuit, although in a non-precedential opinion, held that the AAA provision "is about as 'clear and unmistakable' as language can get."[446]

Golf Holdings, LLC), No. 08-5178, 2009 WL 2488266, at *4 (D.N.J. Aug. 10, 2009)) ("the fact that the Lexington Policy incorporates the AAA Construction Rules and that Rule 8 of these rules provides that the arbitrator shall have the authority to determine jurisdiction constitutes clear and unmistakable evidence"). The Third Circuit has distinguished between bilateral and class arbitrations in this regard. *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763-64 (3d Cir. 2016) (noting broad agreement regarding bilateral delegation, but finding no delegation regarding class arbitration), *cert. denied*, 137 S. Ct. 40 (2016). However, *Chesapeake* and its predecessor in the Circuit, *Opalinski v. Robert Half International, Inc.*, 761 F.3d 326 (3d Cir. 2014) (class action waivers), *cert. denied*, 135 S. Ct. 1530 (2015), may be read more broadly, at least in the consumer/individual context, to apply to bilateral arbitration (which *Chesapeake* distinguished but did not specifically pass upon). The counter-argument is that in a contract of adhesion, such as a form consumer agreement, the consumer would not have sufficient knowledge to know, and thereby intend, that the rules included such a provision. Similar arguments have not been made regarding choice-of-law clauses, though the logic would be similar. *Ames v. Premier Surgical Ctr., L.L.C.*, No. A-1278-15T1, 2016 WL 3525246, at *3 (N.J. Super. Ct. App. Div. June 29, 2016) (adoption of AAA rules in LLC agreement not sufficient under *Atalese*). Delegation relying on a waiver of federal law, in favor of tribal law, is not enforceable. *MacDonald v. CashCall, Inc*., No. 16-2781, 2017 U.S. Dist. LEXIS 64761 (D.N.J. Apr. 28, 2017), *aff'd on other grounds*, 883 F.3d 220 (3d Cir. 2018).

444. *See Tox Design Grp., LLC v. RA Pain Servs., PA.*, No. A-4092-18, 2019 N.J. Super. Unpub. LEXIS 2634 (App. Div. Dec. 26, 2019) (noting reliance in FAA cases); *but see* cases cited in n. 135, above and Chapter 2, § 2-4:2 (Delegation), below regarding *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763-64 (3d Cir.) (mere acceptance of AAA rules does not "clearly and unmistakably" indicate that the courts are deprived of authority to determine jurisdiction re class-action issues), *cert. denied*, 137 S. Ct. 40 (2016). In *Patterson v. Care One at Moorestown, LLC*, No. A-4358-15T3, 2017 N.J. Super. Unpub. LEXIS 423 (App. Div. Feb. 21, 2017), *certif. denied*, 230 N.J. 476 (2017), the court declined to accept reference to the AAA rules where the rules were not provided to an elderly plaintiff.

445. *Richardson v. Coverall N. Am., Inc.*, No. 18-532, 2018 U.S. Dist. LEXIS 167240, at *11 (D.N.J. Sept. 27, 2018), *rev'd*, 811 F. App'x 100 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 1685 (2021).

446. *Richardson v. Coverall N. Am., Inc.*, 811 F. App'x 100, 104 (3d Cir. 2020) (quoting *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009)), *cert. denied*, 141 S. Ct. 1685 (2021). *See also Schmidt v. Laub*, No. A-0620-19T1, 2020 N.J. Super. Unpub. LEXIS 827 (App. Div. May 5, 2020) ("We conclude that the incorporation of the AAA rules into the arbitration provision clearly and unambiguously expressed the parties' intent to empower the arbitrator to determine arbitrability."). Delegation was accepted in *Carrone v. UnitedHealth Grp. Inc*., No. 20-5138, 2020 U.S. Dist. LEXIS 140142 (D.N.J. Aug. 6, 2020), where the court noted the plaintiff was not unsophisticated; criteria for accepting AAA rule as clear and unambiguous); *Anderson v. Skolnick*, No. 19-18138, 2020 U.S. Dist. LEXIS 75518 (D.N.J. Apr. 29, 2020) (AAA R-7).

However, a 2022 case may indicate that merely adopting the AAA rules may not be sufficient, where the court has more direct knowledge and (as with class action rules) the parties may expect a more explicit delegation provision involving whether a party has waived the right to arbitrate.[447] Further, in *Field Intelligence Inc. v. Xylem Dewatering Solutions Inc.*,[448] the Third Circuit held that delegation regarding supersession of a prior agreement is a special case:

> To hold otherwise would foster passing strange results. Xylem asks us to enforce the arbitration provision contained in the parties' 2013 contract despite the assertion that it was extinguished and that the parties instead redefined their relationship in the 2017 agreement not to include an arbitration obligation. Were we to do so, parties would never be able to execute a superseding agreement to rid themselves of a prior agreement to arbitrate arbitrability. They would forever be bound by that agreement even if their later dealings show an intent to avoid it. That in turn would undermine our guiding principle in the arbitration context: that "no arbitration may be compelled in the absence of an agreement to arbitrate." We decline to reach such an odd outcome and instead conclude that the District Court was right to resolve the supersession issue itself rather than send it to an arbitrator.

Interestingly, a different panel of the Circuit later in the year held that the validity of an assignment must be decided by the arbitrator.[449]

Delegation clauses were overridden by a court when there was a public policy or other formation challenge to the agreement.[450]

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447. *See Coronel v. Bank of Am., N.A.*, No. 19-8492, 2022 U.S. Dist. LEXIS 147116 (D.N.J. Aug.17, 2022).

448. *Field Intel. Inc. v. Xylem Dewatering Sols. Inc.*, 49 F.4th 351, 358 (3d Cir. 2022) (citation omitted). As noted elsewhere, in Chapter 2, § 2-4, below, a court must *always* decide the *formation* of a contract with the clause in issue: *See* Robert Bartkus, *Opinions Raise Questions About Severability and Delegation*, ABA Litigation Section Newsletter (Dec. 22, 2022).

449. *Zirpoli v. Midland Funding, LLC*, 48 F.4th 136, (3d Cir. 2022).

450. *See MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386 (3d Cir. 2020) (fraud in the execution; CBA clause); *Grantham v. TA Operating, LLC*, No. 20-

Even though delegation by adopting a forum's rules, such as AAA Commercial Rule R-7, is widely accepted, the issue is not resolved. The issue was raised in *Henry Schein*, though not accepted for certiorari, and the position of the new Restatement suggests that it will be raised again.[451]

Delegation in an initial arbitration agreement with a nursing facility was held ineffective with respect to a second admission, despite covering "any admission."[452] The language in such agreement forms should likely be amended to address the court's concerns. In another 2021 case, the delegation language was considered ambiguous.[453]

Where the arbitration clause and its delegation provision were considered clear and unmistakable, the question of whether the container contract had been signed by the patient (and thus satisfied the initial step of the court's required 2-step inquiry) was delegated to the arbitrator[454] —an interesting conclusion in light of the logic of *MXM Construction Co. v. New Jersey Building Laborers Statewide Benefit Funds*[455] that delegation only works when the formation of the referenced agreement is "not in issue."

A valid delegation clause does not apply to whether the FAA Section One exemption preludes the claims; this is solely a court function.[456] Consistent with the forum's rules and case law, though not strictly considered a "delegation" issue, the arbitrator(s) has

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1108, 2020 U.S. Dist. LEXIS 169413 (D.N.J. Sept. 16, 2020) (public policy), citing *MZM*. Chapter 2, below discusses the cases deciding this issue in greater detail.

451. See discussion of *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 141 S. Ct. 107 (2020), *dismissed as improvidently granted*, 141 S. Ct. 656 (2021), above.

452. *See Cottrell v. Holtzberg*, 468 N.J. Super. 59 (App. Div. 2021).

453. *Strowbridge v. Freemen*, No. A-4215-19; 2021 N.J. Super. Unpub. LEXIS 611 (App. Div. Apr. 13, 2021) (remanding for discovery). The gateway clause said: "[t]he Arbitrator shall resolve all gateway disputes regarding the enforceability, validity, severability and/or interpretation of this Agreement, as well as resolve issues involving procedure, admissibility of evidence, discovery or any other issue." The court differentiated between formation and arbitrability. *See MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386 (3d Cir. 2020).

454. *See Barberi v. 1351 Old Freehold Rd. Operations LLC*, No. A-3265-21, 2023 N.J. Super. Unpub. LEXIS 641 (App. Div. Apr. 28, 2023).

455. *MXM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386 (3d Cir. 2020).

456. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

the authority to decide defenses,[457] procedural rules and issues such as applying claim or issue preclusion.[458]

1-5:4.3 Administered and Non-Administered Arbitration

1-5:4.3a Administered

Arbitration may be administered by the organizations mentioned in § 1-3, above, or others, with professionals dealing with the attorneys or pro se parties, arranging for collection of fees, clearing, and reviewing documents for form, providing telephone or videoconference services or a location for the hearings, and providing staff services. Arbitration may also be administered by a Beth Din or other religious forum.[459] However, there are suspect "providers" whose "agreements" and *ex parte* "awards" are not recognized – as discussed in other sections of this Handbook.

Providers typically offer alternative categories of proceedings that reflect the size and complexity of the matter (*e.g.*, expedited, standard, or large/complex), the amount sought in damages, the time limits to be applied, or the general type of dispute (*e.g.*, commercial, construction, consumer, employment, or international). Some of the AAA alternatives are shown in Appendices 1 and 3, below; others are available on the prodivers' respective websites. The arbitration clause may preliminarily designate which of these formats is the default if a demand is sought (*e.g.*, expedited commercial), though the rules permit some flexibility depending on the dispute actually filed. The providers may provide alternative means for paying the fees, or for selecting the arbitrator.

Internationally, forums such as the ICDR, JAMS, the CPR, and the ICC provide services worldwide, as do arbitration organizations in London, Singapore, and other commercial centers. International

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457. *See, e.g.*, *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997); *Garcia v. Tempoe, LLC*, No. 17-2106, 2018 U.S. Dist. LEXIS 52497 (D.N.J. Mar. 29, 2018). This principle was highlighted in *Goffe v. Foulke Management Corp.*, 238 N.J. 191 (2019).

458. *E.g.*, *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132 (3d Cir. 1998) (discussing whether this is a threshold issue); *see also Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 131 (2d Cir. 2015).

459. *See 26 Flavors, LLC v. Two Rivers Coffee, LLC*, No. A-5291-14T4, 2017 N.J. Super. Unpub. LEXIS 2252 (App. Div. Sept. 12, 2017).

conventions abound, often governed by the UNCITRAL[460] Arbitration Rules, or their own rules, with specialized arbitrators providing their services. Title 9 of the U.S. Code contains two articles governing international arbitrations; the domestic FAA may serve as a gap-filler where those articles do not cover an issue.

Parties and their counsel should consult the various rules before selecting a provider, since they may vary in respects that are important to them, especially regarding issues such as confidentiality, fees, and sanctions, and in specialized areas such as employment or construction. Websites may provide charts comparing the providers' rules.[461] Possibly more important, the rules may cover topics and restrictions that the parties would otherwise include in their arbitration clauses—the rules selected may either make the specific additions to the clause unnecessary or they may conflict with the provisions in the rules. Cases have concluded that conflicts between the chosen rules and the specific requirements in the written clause affect arbitrability or give rise to ambiguity a court (or arbitration) may resolve in a way not contemplated by the parties.[462]

Fora may have "rules" that are not included in the formal rules, or only referenced. In *Schorr v. American Arbitration Association*,[463] the case was terminated by the AAA because of respondent's repeated violations of the AAA Standards of Conduct.[464]

The administration by AAA is triggered by an express agreement to that effect in the arbitration agreement and institution of the claim with the AAA pursuant to its commercial, construction, or other specialized rules. Even if the parties' agreement only provides for the applicability of the AAA Rules (*without specifying* administration by the AAA), the initiation of the proceeding by

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460. United Nations Commission on International Trade Law, *available at* https://uncitral.un.org (last visited Dec. 10, 2023). New Jersey does not have a UNCITRAL statute as other states do.

461. *See, e.g.*, https://globalarbitrationnews.com/comparative-chart/ (2023 version last visited Dec. 10, 2023).

462. *Sabre GLBL, Inc. v. Shan*, 779 F. App'x 843 (3d Cir. 2019).

463. *Schorr v. Am. Arbitration Ass'n*, 2022 U.S. Dist. LEXIS 231957 (S.D.N.Y. Dec. 27, 2022). *Cf. Hernandez v. Microbilt Corp*., 88 F.4th 215 (3d Cir. 2023) (arbitration not accepted by AAA because damages limitation in arbitration clause violated AAA Consumer Protocol).

464. *See* https://www.adr.org/sites/default/files/document_repository/AAA_ICDR_Standards_of_Conduct_Parties_and_Representatives_0.pdf. (last visited Dec. 10, 2023).

one party filing a demand for arbitration with the AAA commences the arbitration and administration by the AAA, even without the consent of the adverse party.[465] The current Commercial, ICDR, and Consumer Rules also provide that the selection of the Rules is an acceptance of the AAA to administer the arbitration.[466] Merely agreeing to arbitrate under the AAA Rules may not always be sufficient, though, since the prior rules did not include that proviso.[467] The language may create toxic ambiguity.

The parties' agreement may opt out of specific provisions of the chosen forum rules, as to require a court to decide questions such as arbitrability (where the rules may delegate that issue to the arbitrator).[468] The adoption of a forum's rules may have unintended consequences, for example when determining who shall bear the costs of the arbitration. In *Lang v. PTC, Inc.*,[469] the company's motion to compel fee sharing was frustrated by "supplementary" rules governing certain employment cases.

The parties' agreement may designate a forum, *e.g.*, ICDR, and different rules, *e.g.*, UNCITRAL. New Jersey does not have a UNCITRAL statute; other states do.

In prior editions, the authors have referred to the October 1, 2013 revision of the AAA Commercial Arbitration Rules. However, in September 2022, the AAA amended the Commercial Rules; those amendments are found in Appendix 1 to this edition, below. If the case is governed by the 2013 or 2009 Commercial Arbitration Rules, copies of the text can be found online at adr.org, with a copy in the Appendix of the 2013 or 2014-2022 editions of this

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465. 2022 AAA Commercial Arbitration Rules, R-4(a). However, it is better to follow the language of the standard AAA clause, noting both administration *and* the rules.

466. *E.g.*, 2022 AAA Commercial Arbitration Rules, R-1 & R-2; 2021 ICDR Rules, Article 1. *See Roach v. BM Motoring, LLC*, 228 N.J. 163, 178 (2017) (accepting AAA Commercial Rule R-2). Refusing to pay the filing fee is a material breach of the arbitration agreement, allowing the other party to sue in court. *Roach v. BM Motoring, LLC*, 228 N.J. 163, 178 (2017). *See also Page v. GPB Cars 12, LLC*, No. 19-11513, 2019 U.S. Dist. LEXIS 179498 (D.N.J. Oct. 17, 2019) (alleged failure to receive multiple notice attempts did not excuse failure to advance AAA fees as arbitration clause required). Refusal to abide by consumer protocols can waive the right to arbitrate. *Heisman v. Wyndham Vacation Resorts, Inc.*, No. 20-11480, 2021 U.S. Dist. LEXIS 55369 (D.N.J. Mar. 22, 2021).

467. *See Altamirano v. Maxon Hyundai Inc.*, No. A-3949-13T1, 2015 WL 588271 (N.J. Super. Ct. App. Div. Feb. 13, 2015) (selection of AAA consumer rules did not require AAA administration under then-existing rules). *But see Roach v. BM Motoring, LLC*, 228 N.J. 163, 178-79 (2017) (accepting AAA Commercial Rule R-2).

468. *Lang v. PTC, Inc.*, No. 21-04451, 2021 U.S. Dist. LEXIS 218997 (D.N.J. Nov. 12, 2021).

469. *Lang v. PTC, Inc.*, No. 21-04451, 2021 U.S. Dist. LEXIS 218997 (D.N.J. Nov. 12, 2021).

book. Under R-1(a), the new rules apply only to cases filed after September 2022. But the changes certainly can be argued as being indicative of the intent and interpretation of the 2009 or 2013 rules. Parties may specify "the then-current AAA rules . . ." to this effect. The ICDR Rules (in Appendix 3, below) were amended effective March 1, 2021. These ICDR procedures mirror most international rules and (by limiting discovery) depart from the rules governing most American litigation and the AAA domestic rules. A summary of the changes may be found on the AAA and ICDR websites.

In addition to these changes, the AAA amended the Supplementary Rules for Mass Arbitrations effective January 15, 2024; on November 1, 2013 it established Optional Appellate Arbitration Rules, discussed in Chapter 7, below.

Other rules and fee schedules are under periodic review.

Although cases have held that arbitration will not be compelled if the chosen forum is not available, either because it is no longer in operation or because it may not accept a specific type of case or procedure,[470] other cases have attempted to determine if the selected forum or arbitrator was an "integral" aspect of the parties' agreement to arbitration;[471] if it was not, then the court may sever the forum provision[472] and appoint an arbitrator pursuant to the FAA[473] or NJRUAA[474] or fashion other equitable arrangements.

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470. *See, e.g.*, *Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545 (App. Div. 2016) (AAA forum not available for nursing home disputes unless court ordered); *cf. Bowman v. Raymours Furniture Co*., No. A-4061-14T1, 2016 WL 5096353 (N.J. Super. Ct. App. Div. Sept. 20, 2016) (discussing JAMS "Minimum Standards" for employment cases). Where AAA declined to administer case because the arbitration clause damages limitation violated the AAA Consumer protocol, the remedy was to return to court—as required by the AAA protocol and the arbitration clause. *See Hernandez v. Microbilt Corp*., 88 F.4th 215 (3d Cir. 2023).

471. *Khan v. Dell Inc.*, 669 F.3d 350 (3d Cir. 2012) (forum not integral, noting presumption of arbitrability under FAA, forum choice severed), *on remand*, 2014 U.S. Dist. LEXIS 27091, 2014 WL 718314 (D.N.J. Feb. 1, 2014) (compelling arbitration; denying discovery); *River Drive Constr. Co. v. N.J. Bldg. Laborer's Statewide Benefit Funds*, No. 14-5440 (JLL), 2015 U.S. Dist. LEXIS 26414 (D.N.J. Mar. 4, 2015); *cf. Control Screening LLC v. Tech. Application & Prod. Co*., 687 F.3d 163 (3d Cir. 2012) (under N.Y. Convention, forum severable). Held integral: *MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018).

472. *See Control Screening LLC v. Tech. Application & Prod. Co.*, 687 F.3d 163, 170 (3d Cir. 2012) (international). Where AAA refused to administer the arbitration because the respondent was not in good standing, the court ordered arbitration in a different forum. *Aguilar v. Payless Auto Wholesale & Les Agboh*, No. A-150-22, 2023 N.J. Super. Unpub. LEXIS 1042 (App. Div. June 23, 2023).

473. 9 U.S.C. § 5 ("or if for any other reason . . . the court shall designate and appoint . . . .").

474. N.J.S.A. 2A:23B-11(a) ("If the . . . agreed method fails . . . the court . . . shall appoint the arbitrator."). *Cf. Altamirano v. Maxon Hyundai Inc*., No. A-3949-13T1, 2015 N.J. Super.

Designating "administration" by the AAA or JAMS as an alternative to a non-existent forum may not save the arbitration where the arbitrators had to be from the non-existent forum and this was deemed integral to the clause.[475]

In *Falzo v. Greene Jumpers South Plainfield, LLC*,[476] the Law Division had denied a motion to compel arbitration (relying on *Kleine*) where JAMS was the designated provider, since JAMS was no longer permitted to arbitrate matters in New Jersey. The Appellate Division remanded in light of *Flanzman v. Jenny Craig, Inc.*[477] and its holding regarding Section 5 of the NJRUAA. Subsequent to *Flanzman*, courts have found JAMS not to be an essential aspect of the arbitration clause – and ordered arbitration.[478] The lesson may be to designate an alternative or substitute forum; however, failure to make an alternative designation is not necessarily fatal (in a JAMS case).[479]

Designating arbitration by an on-line provider by means of a letter, without signature by the party to be responsible, has resulted in vacating the "award."[480]

Selecting a forum and rules that necessarily would have precluded pursuit of federal statutory claims may result in the arbitration agreement being voided.[481]

1-5:4.3b Non-Administered

Outside of these organizations, as permitted by statute, arbitrators may be retained directly by counsel or the parties and perform

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Unpub. LEXIS 267, 2015 WL 588271 (App. Div. Feb. 13, 2015) (selection of AAA rules did not require AAA administration under then-existing rules).

475. *See MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018).

476. *Falzo v. Greene Jumpers South Plainfield, LLC*, A-2134-19, 2020 N.J. Super Unpub. LEXIS 1893 (App. Div. Oct. 7, 2020).

477. *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020).

478. *E.g.*, *Lawrence v. Sky Zone*, No. A-3092-19, 2021 N.J. Super. Unpub. LEXIS 528 (App. Div. Mar. 30, 2021); *Richardson v. Sky Zone, LLC*, Nos. A-3833-19, A-3934-19, A-3935-19, 2021 N.J. Super. Unpub. LEXIS 583 (App. Div. Apr. 8, 2021).

479. *Sharma v. Sky Zone, LLC*, Nos. A-5601-18T1 & A-5602-18T1, 2020 N.J. Super. Unpub. LEXIS 1061 (App. Div. June 4, 2020). JAMS was not indicated to be exclusive, and the "agree to arbitrate" clause was not in the same sentence as the JAMS designation.

480. *See Bozek v. PNC Bank*, No. 20-3515, 2021 U.S. App. LEXIS 28040 (3d Cir. Sept. 17, 2021); *Pena v. TD Auto Fin. LLC*, 860 F. App'x 220 (3d Cir. 2021).

481. *See Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020). *But see Brice v. Plain Green, LLC*, 13 F.4th 823 (9th Cir. 2021) (describing circuit split; court must determine delegation first), *rehearing en banc granted*, No. 19-15707, 2021 U.S. App. LEXIS 33152 (9th Cir. Nov. 8, 2021), *rehearing granted, opinion vacated*, 35 F.4th 1219 (9th Cir. 2022).

arbitration services themselves, in which case it may be wise to specify the rules to govern the arbitration.[482] Since a question may arise regarding selecting the AAA or other provider's rules for a non-administered arbitration, parties may select the UNCITRAL or other generic rules. Where the clause designates a specific arbitrator, or requires the parties to agree on the arbitrator, the pre-dispute clause may designate alternatives or refer to the gap filling provisions of the FAA and NJRUAA.[483]

A special problem arises when the clause gives one party the unilateral right to select the "method" of dispute resolution; the court held that did not give plaintiff the sole power to appoint an arbitrator.[484]

Designating an arbitrator rather than the AAA or JAMS may be less expensive for the parties but is financially riskier for the arbitrator.[485] Thus, the arbitrator is advised to obtain payment in advance. A court may order arbitration, distinct from the court-administered non-binding arbitration, see Chapter 9, below with the parties' agreement.[486] Providers may offer a non-administered service to assist in selecting an arbitrator.

1-5:4.3c No Selection of Provider or Arbitrator: *Flanzman*

The Appellate Division introduced considerable uncertainty in this area in *Flanzman v. Jenny Craig, Inc.*,[487] in which the court held that the general concerns in *Atalese* mandated that an arbitration clause must include a designation of the forum or, at least, some indication of the rules to be applied in the arbitration, in contrast

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482. *Cf. Marano v. Hills Highland Master Ass'n, Inc.*, No. A-5538-15T1, 2017 N.J. Super. Unpub. LEXIS 2854 (App. Div. Nov. 16, 2017) (award sustained; the agreement should be sure to specify arbitration, rather than mediation).

483. *See Allstate Lending Grp., Inc. v. Gran Centurions, Inc.*, Nos. A-3018-18T1, A-3827-18T1, A-4524-18T1, 2020 N.J. Super. Unpub. LEXIS 1220 (App. Div. June 23, 2020). Saying only that a "judge" shall select the arbitrator risks confusing arbitration with court procedure. *See Seese v. Lograsso*, No. A-1378-20, 2021 N.J. Super. Unpub. LEXIS 3139 (App. Div. Dec. 22, 2021) (refusing arbitration; *Atalese* not satisfied).

484. *Mazzara Trucking & Excavation Corp. v. Premier Design + Build Grp., LLC*, No. A-965-20, 2022 N.J. Super. Unpub. LEXIS 74 (App. Div. Jan. 20, 2022).

485. *Cf. Shah v. Shah*, No. A-0762-15T3, 2017 N.J. Super. Unpub. LEXIS 2368 (App. Div. Sept. 20, 2017) (domestic relations arbitration abandoned because of costs). *See also* § 1-5 at n.69, above.

486. *E.g.*, *Kelly v Kelly*, No. A-2637-14T2, 2016 WL 6068244 (App. Div. Oct. 17, 2016) (affirming enforcement of agreed arbitration order in Family Part).

487. *Flanzman v. Jenny Craig, Inc.*, No. A-2580-17T1 (N.J. Super. Ct. App. Div. Oct. 17, 2018) (first opinion, withdrawn), 456 N.J. Super. 613 (App. Div. 2018), *rev'd*, 244 N.J. 119 (2020).

to the rules applied in court, and how an arbitrator would be selected. The Supreme Court reversed, consistent with cases holding that Section 11 of the NJRUAA and Section 5 of the FAA give the court the authority to supply the "gap filling" noted by the Appellate Division.[488]

Ms. Flanzman's sympathetic status may have swayed the Appellate Division's analysis: in her 80's, she had worked for Jenny Craig for many years and alleged that her hours had been gradually reduced to such extent as to constitute a constructive discharge in violation of New Jersey's Law Against Discrimination. The arbitration agreement she signed in 2011 as a condition of her continuing employment began with a straightforward sentence: "Any and all claims or controversies . . . shall . . . be settled by final and binding arbitration,"[489] and included a waiver of her right to a jury trial and court determination of her claims, as required three years later in *Atalese v. United States Legal Services Group, L.P.*[490] It also delegated arbitrability issues to the arbitrator. However, the clause did not specify the location, choice of law or other rules for the arbitration, or the arbitral body to administer any claims; nor did it provide a method of selecting an arbitrator or rules – the absence of which the Appellate Division held precluded a "meeting of the minds" or mutual assent required for contract formation in New Jersey. Oddly, the opinion dismissed Section 5 of the FAA and Section 11 of the NJRUAA on the basis that they only addressed appointment of an arbitrator rather than an arbitral forum or institution.

The Supreme Court recognized that, although identifying the arbitrator or forum (such as the AAA or JAMS) as well as the detailed rules governing the arbitration would be useful, these designations may be intentionally omitted for practical reasons

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488. *E.g.*, *Hoboken Yacht Club LLC v. Marinetek North Am. Ins. Co.*, No. 19-12199, 2019 U.S. Dist. LEXIS 221575 (D.N.J. Dec. 26, 2019); *Gomez v. PDS Tech, Inc.*, No. 17-12351, 2018 U.S. Dist. LEXIS 66589 (D.N.J. Apr. 19, 2018). *See also* § 1-5:1.2 at n.85, § 1-5:3 at n.177, above. One case held that designating the rules of the U.S. District Court and a national judge is sufficient. *Hannen v. Grp. One Auto., Inc.*, No. A-35551-18, 2019 N.J. Super. LEXIS 2658 (App. Div. Dec. 30, 2019).

489. *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 126 (2020). Note that information satisfying the concerns raised in the Appellate Division are incorporated in the Court Rules Appendix regarding arbitration.

490. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430 (2014).

and, in any case, were not necessary for contract formation – whether measured by the "meeting of the minds" rubric or the requirement in *Atalese* that an arbitration clause fairly indicate to the parties (in certain consumer or employment contracts) the nature of the process that would be replacing a determination by a court and/or jury.

Significantly for other cases, the Supreme Court noted that Section 3 of the New Jersey statute provides that it "governs all agreements to arbitrate" other than under a collective bargaining agreement or collectively negotiated agreement (which are covered by the predecessor act). The NJRUAA therefore is the "default" law part of all New Jersey arbitration agreements and, whether an agreement is negotiated or adhesive, all parties are on legal notice of and bound by its provisions. Among those provisions are general descriptions of how an arbitration shall be run. More specific provisions, as in a forum's rules, are not necessary for contract formation or to place parties on further notice of what to expect in an arbitration.

Flanzman's holding did not appear determinative in *Delaney v. Dickey*[491] where the Appellate Division held that an arbitration clause in an attorney retainer agreement must attach or be accompanied by the rules for the forum specified in the clause.

The *Flanzman* Supreme Court opinion is also interesting for its discussion of the ways that the common law and other statutes, such as the Uniform Commercial Code or "terms that accomplish a result that was necessarily involved in the parties' contractual undertaking,"[492] have been used to fill gaps in contracts in order to give effect to the parties' intent. As the Court noted, contracts often are "incomplete," and courts are left to create or rely on background or default rules such as industry norms.[493] Thus, where the parties' agreement evidences an intent to arbitrate, applying general contract rules is, the Court held, consistent with New Jersey's policy in favor of arbitration. Left unsaid, to do otherwise

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491. *Delaney v. Dickey*, 244 N.J. 466 (2020), *aff'g as modified* No. A-1726, 2019 N.J. Super. Unpub. LEXIS 1814 (App. Div. Aug. 23, 2019).

492. *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 135-36 (2020) (quoting cases).

493. *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 135 (2020).

would place arbitration agreements on a lesser footing than other contracts. To do so also was held to be consistent with *Atalese*.

As discussed in other sections of this Handbook, questions remain whether a court has the authority to appoint a substitute arbitrator once the arbitration has begun.[494]

1-5:4.4 Choice of Law and Rules

1-5:4.4a Applicable Law

Although the law governing an underlying contract may be determined by a choice-of-law clause or the forum state's conflict-of-law rules, that determination may not govern the law applicable to the arbitration provision within that contract.[495] Although there may be cases that do not recognize the difference, this is contrary to precedent.[496] In New Jersey, the default arbitration law is the NJRUAA,[497] but parties may choose the APDRA or another state's arbitration law—unless FAA preemption applies (as discussed elsewhere in this Handbook), because the relationship involves interstate commerce, to either the arbitration procedures or as to the substantive law governing the enforceability of the arbitration clause. Even where the FAA applies, a court still may enforce the parties' selection—by "clear intent"—of a state's law to apply to matters that are not preempted by the FAA. A court may refuse to enforce the parties' choice of arbitration law if that law violates federal public policy.[498] or would preclude access to a

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494. Under the prior Arbitration Act, the Appellate Division held that the court did not have the authority to remove an arbitrator. *Aronowitz v. Reyville Textile Corp.*, 21 N.J. Super. 234 (App. Div. 1952). The federal court in Manhattan has held that there is no authority under the FAA to remove an arbitrator once the arbitration has begun. *E.g.*, *San Carlo Opera Co. v. Conley*, 72 F. Supp. 825 (S.D.N.Y. 1946).

495. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-60 (1995). *See* § 1-5:1.3, above.

496. The potential conflict between a state's procedural rules and a forum's rules is illustrated by *Weirton Med. Ctr., Inc. v. Community Health Sys., Inc.*, No. 5:15CV132 (STAMP), 2017 U.S. Dist. LEXIS 203725 (N.D. W. Va. Dec. 12, 2017) (approving arbitrator's reliance on AAA rules regarding acceptance of summary judgment application).

497. *See* N.J.S.A. 2A:23B-3; *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 134 (2020); *Arafa v. Health Express Corp.*, 243 N.J. 147 (2020).

498. *See MacDonald v. CashCall, Inc.*, No. 16-2781, 2017 U.S. Dist. LEXIS 64761 (D.N.J. Apr. 28, 2017), *aff'd on other grounds*, 883 F.3d 220 (3d Cir. 2018).

statutory remedy.[499] A New Jersey court may find it lacks subject matter jurisdiction when the dispute clause calls for New York law and a New York forum.[500] One issue is whether the parties' choice of non-New Jersey law to govern the contract or arbitration will affect whether a New Jersey court will apply *Atalese* or other New Jersey case law.[501] Although some arbitration clauses provide that the FAA shall apply,[502] the ultimate result of that designation is uncertain; in issues concerning New Jersey public policy, such as the waiver rules in *Atalese* and related cases, a New Jersey court may still apply its own substantive and arbitration law in a case not in interstate commerce.[503] *Grandvue Manor, LLC v. Cornerstone Contracting Corp*.[504] illustrates this anomaly. The court reviewed the conflicting contract provisions regarding the waiver of jury / court determination, since New York was said to apply; it noted the public policy issues, and eventually decided that the AIA form clause satisfied *Atalese* for these sophisticated parties.

However, as discussed in Chapter 8, below whether New Jersey law (and which New Jersey law) or federal law applies may affect

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499. *See Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020). *But see Brice v. Plain Green, LLC*, 13 F.4th 823 (9th Cir. 2021) (describing circuit split; court must determine delegation first), *rehearing en banc granted*, No. 19-15707, 2021 U.S. App. LEXIS 33152 (9th Cir. Nov. 8, 2021), *rehearing granted*, *opinion vacated*, 35 F.4th 1219 (9th Cir. 2022).

500. *See Rizzo v. Island Med. Mgmt. Holdings, LLC*, No. A-554-17, 2018 N.J. Super. Unpub. LEXIS 1225 (App. Div. May 25, 2018).

501. *International Foodsource, L.L.C. v. Grower Direct Nut Co., Inc.*, No. 16-3140, 2016 WL 4150748, at *9-13 (D.N.J. Aug. 3, 2016) (applying California law as not requiring *Atalese*-type waiver). *See also Glamorous Inc. v. Angel Tips, Inc.*, No. A-0985-16T1, 2017 N.J. Super. Unpub. LEXIS 1526 (App. Div. June 23, 2017) (New York law; preemption of franchise rules); *KDDI Glob. LLC v. Fisk Telecom LLC*, No. 17-5445, 2017 U.S. Dist. LEXIS 188774 (D.N.J. Nov. 15, 2017) (accepting designation of AAA rules for arbitrator to decide arbitrability). In *Ingenieria, Maquinaria Y Equipose de Colombia S.A. v. ATTS, Inc.*, No. 17-3624, 2017 U.S. Dist. LEXIS 202863 (D.N.J. Dec. 8, 2017), the choice of Columbian law was said to control the issue, though the decision may depend on the wording of the international treaty governing the case. Other cases are discussed in Appendix 7, below.

502. *See State v. Phillip Morris, USA, Inc.*, No. MDL-C-103-06, 2006 WL 6000399 (N.J. Super. Ct. Ch. Div. 2006) (noting express reference to FAA). Where the arbitration clause selected the FAA as the governing law, but the case was exempt from the FAA by reason of its Section 1, the state law applies as if the FAA never existed. *See Colon v. Strategic Delivery Sols., LLC*, 459 N.J. Super. 349 (App. Div. 2019), citing *Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004), *aff'd*, 343 N.J. 147 (2020), discussed earlier.

503. As discussed earlier, this is less than clear. *See Cangiano v. Doherty Grp.*, No. A-3082-19, 2022 N.J. Super. Unpub. LEXIS 569 (App. Div. Apr. 8, 2022) (selecting FAA in contract meant LAD limits on arbitration were preempted).

504. *Grandvue Manor, LLC v. Cornerstone Contracting Corp.*, 471 N.J. Super. 135 (App. Div. 2022) (discussed earlier in this chapter).

the timeliness of a motion to vacate and the standards applicable on that motion[505] or whether an appeal is permissible.[506]

Other choice of law issues have arisen regarding agency law,[507] attorneys' fees and whether specific damages were permissible. The Third Circuit has required making the choice of law determination before discovery and a ruling on the applicability of the exemption in Section 1 of the FAA.[508]

The parties may designate specific rules of evidence, such as the Federal Rules of Evidence, or procedure, but to do so may conflict with the forum's rules (for example, 2022 AAA Commercial Rules, R-33 & R-35) and depart from the nature of arbitration, causing issues at the time of enforcing the award. (See Chapter 8, § 8-3:7, below.)

1-5:4.4b Forum Rules

As indicated in § 1-5:4.3, above, the parties may select a provider-forum's rules (such as the AAA Commercial Rules) to govern various aspects of the process. However, one must keep in mind that the selection of the arbitral forum and the selection of a forum's rules are two separate and distinct matters, even though the rules may link the two. The selection of a forum's rules does not necessarily mean that a court will find that the forum has been chosen. The clause can make a clear distinction such as indicating an *ad hoc* appointment or specific provider as administrator, but nevertheless specifying other rules to apply. Although Rule R-1 of the 2013 and 2022 AAA Commercial Rules provides that adoption of the rules also accepts AAA administration,[509] that

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505. *See, e.g.*, *Chakrala v. Bansal*, No. A-78-11, 2013 N.J. Super. Unpub. LEXIS 2337 (App. Div. Sept. 24, 2013), *certif. denied*, 217 N.J. 293 (2014), *cert. denied*, 574 U.S. 823 (2014); Bartkus, *A Multiplicity of Procedures in Challenging an Award*, ABA ADR Section, *Just Resolutions* (Apr. 2020); Bartkus, *So There Is an Award*, New Jersey Lawyer 36 (Apr. 2020).

506. *See, e.g.*, § 1-5:1.2, above and Chapter 8, below.

507. *Orn v. Alltran Fin., L.P.*, 779 F. App'x 996 (3d Cir. 2019).

508. *Harper v. Amazon.com Serv., Inc.*, 12 F.4th 287 (3d Cir. 2021).

509. *See Madison House Grp. v. Pinnacle Entm't, Inc.*, No. A-3171-08T2, 2010 WL 909663 (N.J. Super. Ct. App. Div. Mar. 15, 2010). *See also Altamirano v. Maxon Hyundai Inc.*, No. A-3949-13T1, 2015 WL 588271 (N.J. Super. Ct. App. Div. Feb. 13, 2015) (selection of AAA rules did not require AAA administration under then-existing rules).

designation does not affect pre-2013 agreements;[510] one may select a forum (such as the AAA) but provide that a different set of arbitral rules (such as the ICC rules or the UNCITRAL Rules) shall apply. Where no particular procedure is specified and the matter is not being administered under the rules of AAA, CPR, JAMS, or other provider, an agreement to arbitrate still will be enforced, with the court applying the general rules set forth in the FAA or NJRUAA.[511] Designating a forum's rules or its "current" rules, rather than its "then-current" rules, may preclude reliance on the rules in effect at the time the dispute is commenced.[512] Some clauses provide a URL-link to the rules.

A 2017 unpublished opinion from the Appellate Division declined to enforce the contract's choice of the AAA rules where the rules were not provided to the objecting party.[513]

Be careful not to select a forum rule that contradicts the parties' explicit choice regarding a specific procedural issue. That may create an ambiguity raising enforcement issues.[514]

Although selection of the AAA rules has been widely accepted as "clear and unmistakable" evidence of selecting specific aspects of the rules such as the arbitrability language in Commercial Rule R-7, this has been challenged in the recent Restatement and parties to the most recent appeal of *Henry Schein*[515] in the Supreme Court. The issue was not accepted for *certiorari* and has not been addressed. Earlier sections discuss situations where a designation may not be sufficiently explicit.

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510. AAA Commercial Arbitration Rules, R-1, R-2 & R-4 (Appendix 1). *See also Roach v. BM Motoring, LLC*, 228 N.J. 163 (2017) (adopting AAA rules also accepted AAA administration).

511. *Flanzman v. Jenny Craig. Inc.*, 244 N.J. 119 (2020).

512. *See Altamirano v. Maxon Hyundai Inc.*, No. A-3949-13T1, 2015 WL 588271 (N.J. Super. Ct. App. Div. Feb. 13, 2015) (selection of AAA rules did not require AAA administration under then-existing rules).

513. *Patterson v. Care One at Moorestown, LLC*, No. A-4358-15T3, 2017 N.J. Super. Unpub. LEXIS 423, at *7 & *12 (App. Div. Feb. 21, 2017), *certif. denied*, 230 N.J. 476 (2017). This unique, unsupported result can best be viewed as anti-arbitration *dictum. See also* § 1-5:2, above and source cited at footnote 160 (attorney fee agreement issues). *See also Delaney v. Dickey*, 244 N.J. 466 (2020), *aff'g as modified*, No. A-1726-17, 2019 N.J. Super. Unpub. LEXIS 1814 (App. Div. Aug. 23, 2019) (JAMS rules must be physically provided). The Supreme Court did not mandate this aspect of the Appellate Division opinion.

514. *Sabre GLBL, Inc. v. Shan*, 779 F. App'x 843 (3d Cir. 2019).

515. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 141 S. Ct. 107 (2020), *dismissed as improvidently granted*, 141 S. Ct. 656 (2021).

The AAA and other rules permit class actions and mass arbitrations, and provide procedures for their administration. However, there are questions if the arbitration agreement does not specifically adopt the provider's class-action or mass arbitration rules but is silent regarding the procedure, even though the AAA Commercial Rules, generally, are specified.[516] Issues regarding class actions, including waiving the right to class actions in arbitrations, are discussed in greater detail in Chapter 2, below.[517]

1-5:4.5 Parties To Be Bound

An arbitration provision may be written to govern disputes only between or among the signatories to the specific agreement (*e.g.*, "Mr. Smith and Ms. Jones agree . . ") or more broadly (*e.g.*, "all disputes arising under this agreement . . ."); subcontractors, for example, often receive the protection of broad language in the primary contract.[518]

As noted elsewhere, non-signatories may be included whether "by operation of [statutory] law,"[519] by operation of legal principles, by identifying specific titles or entities in the clause, or by the definitions within the contract of who are "parties," such as subsidiaries,[520] affiliates, agents, franchisees, "third parties," or assigns and using broad "all disputes" language without limiting the parties bound.[521] The definitions and descriptions of parties

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[516] *Lamps Plus, Inc. v. Verela*, 139 S. Ct. 1407 (2019) (class action choice must be explicit); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016) (discussed in more detail elsewhere).

[517] *See* Chapter 2, § 2-6:2, below.

[518] *See Bruno v. Mark MaGrann Assocs., Inc*., 388 N.J. Super. 539 (App. Div. 2006); *Wasserstein v. Kovatch*, 261 N.J. Super. 277 (App. Div. 1993); *Cf. Navigators Specialty Ins. Co. v. Jangho Curtain Wall Americas Co., Ltd.*, No. BER-L-8246-19, 2020 N.J. Super. Unpub. LEXIS 1295 (Law Div. June 10, 2020), *remanded*, No. A4222-19T4, 2020 N.J. Super Unpub. LEXIS 2356 (App. Div. 2020), requiring discovery.

[519] *See Freeman v. Makanash*, No. A-2177-21, 2022 N.J. Super. Unpub. LEXIS 1942 (App. Div. Oct. 19, 2022), citing *James v. New Jersey Mfrs. Ins. Co*., 216 N.J. 552, 568 (2014).

[520] *See Meshefsky v. Rest. Depot, LLC*, No. 21-3711, 2021 U.S. Dist. LEXIS 91335 (D.N.J. May 13, 2021).

[521] *See* Chapter 2, § 2-5:5, below. In *Foti v. Toyota Motor Sales U.S.A., Inc*., No. A-5215-15T3, 2017 N.J. Super. Unpub. LEXIS 1001, at *6 n.4 (App. Div. Apr. 24, 2017), the court distinguished cases that did not permit enforcement by "affiliates" and ordered arbitration. *Mutual Benefit Life Ins. Co. v. Zimmerman*, 783 F. Supp. 853, 865-66 (D.N.J.), *aff'd*, 970 F.2d 899 (3d Cir. 1992), discussed the factors relating to agents and third-party beneficiaries, and denied standing to seek arbitration. Confusion regarding condominium owners, users and LLC members is illustrated in *Pjeternikaj v. Peters*, Nos. A-4515-19, A-4594-19, 2022 N.J. Super. Unpub. LEXIS 4 (App. Div. Jan. 3, 2022) (vacating award).

to be bound affect whether assignees, agents or affiliates could compel arbitration or be compelled.[522] After-execution affiliates create special problems.[523] Alter egos may also be compelled.[524] Assignees' ability to enforce arbitration may depend on the words used in the clause and other factors.[525] Sureties may not be compelled to arbitrate claims outside the construction contract.[526] A defendant may not succeed in compelling arbitration based on the key document's silence regarding that entity.[527] Failing to include the parent employer of a medical group in the arbitration clause's definitions may preclude arbitration with the defendant.[528]

Narrow or ambiguous language may defeat efforts to compel arbitration by non-signatories.[529] There are several examples of plaintiffs avoiding arbitration by suing only non-signatories. In

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522. *E.g.*, *Nawrocki v. J&J Auto Outlet*, No. A-2813-22, 2023 N.J. Super. Unpub. LEXIS 1962 (App. Div. Nov. 3, 2023) (defendant dealer signed financing agreement as agent, arbitration denied); *Medical Transcription Billing Corp. v. Randolph Pain Relief & Wellness Ctr., P.C.*, No. A-4673-17T2, 2019 N.J. Super. Unpub. LEXIS 930 (App. Div. Apr. 13, 2019); *Williams-Hopkins v. LVNV Funding, LLC*, No. A-5325-17T2, 2019 N.J. Super. Unpub. LEXIS 951 (App. Div. Apr. 26, 2019); *Clemons v. Midland Credit Mgmt., Inc.*, No. 18-16883, 2019 U.S. Dist. LEXIS 123840 (D.N.J July 25, 2019); *Dixon Mills Condo. Ass'n v. RGD Holding Co., LLC*, No. A-3383-16T1, 2018 N.J. Super. Unpub. LEXIS 464 (App. Div. Feb. 28, 2018); *Reid v. DCH Auto Grp., Inc.*, No. A-2349-17, 2018 N.J. Super. Unpub. LEXIS 2472 (App. Div. Nov. 8, 2018) (successors; company not defined; arbitration denied).

523. *See Revitch v. DIRECTV, LLC*, 977 F.3d 713 (9th Cir. 2020) (no reasonable consumer would expect that an agreement with a phone company would require arbitration with any company later acquired by the phone company); *but see Mey v. DIRECTV, LLC*, 971 F.3d 284 (4th Cir. 2020) (company that became an affiliate by merger, after the arbitration clause was signed, could enforce; distinguishing cases).

524. *See, e.g.*, *1567 S. Realty, LLC v. Strategic Contract Brands, Inc.*, No. A-0935-19T2, 2020 N.J. Super. Unpub. LEXIS 1360 (App. Div. July 9, 2020).

525. *See Rodriguez-Ocasio v. Midland Credit Mgmt.*, No. 17-3630, 2021 U.S. Dist. LEXIS 161071 (D.N.J. Aug. 25, 2021). *See also Zirpoli v. Midland Funding, LLC*, 48 F.4th 136, 2022 U.S. App. LEXIS 24724 (3d Cir. 2022) (delegated to arbitrator). Referring in the clause to the types of parties or "assignees" explicitly (such as those who purchase debt or are to collect debt) may avoid this issue. *See also Anfibio v. Optio Sols. LLC*, No. 20-11146, 2022 U.S. Dist. LEXIS 115824 (D.N.J. June 30, 2022) (remanding for discovery and hearing regarding successor); *Hampton v. ADT, LLC*, No. A-0172-20, 2021 N.J. Super. Unpub. LEXIS 764 (App. Div. Apr. 30, 2021) (remanded for hearing on the issue of assignment).

526. *See Gloucester City Bd. of Educ. v. Am. Arbitration Ass'n*, 333 N.J. Super. 511, 522 (App. Div. 2000) (distinguishing claim under performance bond).

527. *See Sikorski v. N.J. Ventures Partners, LLC*, No. A-0963-20, 2021 N.J. Super. Unpub. LEXIS 1350 (App. Div. July 2, 2021).

528. *Abdurahman v. Prospect CCMC LLC*, 42 F.4th 156 (3d Cir. 2022).

529. Where the language is narrow, arbitration may not be extended to non-signatories. *See World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc.*, 517 F.3d 1240, 1247 (11th Cir. 2008) (discussed in *Century Indem. Co. v. Certain Underwriters at Lloyd's*, 584 F.3d 513 (3d Cir. 2009)). *See also Garcia v. Midland Funding, LLC*, No. 15-6119, 2017 U.S. Dist. LEXIS 68870 (D.N.J. May 5, 2017) (assignee of receivables did not receive right to compel arbitration).

White v. Sunoco, Inc.,[530] the sponsor of a gas station credit card loyalty program (Sunoco) sought to compel arbitration of claims regarding deficiencies in the program, but the only arbitration agreement was between the cardholder and the bank issuing the credit card. Although the Sunoco name was on the card and the obvious beneficiary of the program, Sunoco was not a party to the credit card agreement and was not specifically identified as a beneficiary of the arbitration clause. The court held the references on the card to affiliates and a "no third-party beneficiary" clause did not permit arbitration by Sunoco.

In another case, an effort to compel arbitration of a warranty claim against the manufacturer granting the warranty was unsuccessful where the arbitration clause was in the dealers' sales or credit documents rather than the warranty.[531] A False Claims Act claim was held not arbitrable since the government is the real party in interest in such claims.[532] *Hirsch v. Amper Financial Services, LLC*[533] distinguished among different estoppel theories and denied arbitration that had relied on an intertwinement theory. But in *KPH Healthcare Services v. Janssen Biotech*[534] the district court distinguish *Hirsch* on the facts. Non-signatory theories may not assist a claim for arbitration if no agreement was entered at all.[535]

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530. *White v. Sunoco, Inc.*, 870 F.3d 257 (3d Cir. 2017). *See also Orn v. Alltran Fin., L.P.*, 779 F. App'x 996 (3d Cir. 2019); *Sikorski v. N.J. Ventures Partners, LLC*, No. A-0963-20, 2021 N.J. Super. Unpub. LEXIS 1350 (App. Div. July 2, 2021); *Saroza v. Client Servs, Inc.*, 2020 U.S. Dist. LEXIS 33375 (D.N.J. Feb. 27, 2020) (citing *White*); *Castle Realty Mgmt., LLC v. Burbage*, No A-5399-15T4, 2017 N.J. Super. Unpub. LEXIS 1748 (App. Div. July 13, 2017) (Re/Max franchisees as barred third-party beneficiaries), *certif. denied*, 231 N.J. 111 (2017).

531. *In re Volkswagen Timing Chain Prod. Liab. Litig.*, No. 16-2765 (JLL), 2017 U.S. Dist. LEXIS 70299, at *28 (D.N.J. May 8, 2017) (in suit based on separate warranty, manufacturer cannot rely on arbitration clause in sales contract). *See also Shapiro v. Logitech, Inc.*, No. 17-00673, 2019 U.S. Dist. LEXIS 15138 (D.N.J. Jan. 31, 2019) (Amazon Prime terms do not convey third-party beneficiary status to vendor).

532. *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791 (9th Cir. 2017) (arbitration clause was in employment agreement).

533. *Hirsch v. Amper Fin. Servs.*, *LLC*, 215 N.J. 174, 192-93 (2013).

534. *KPH Healthcare Servs. v. Janssen Biotech*, No. 20-05901, 2021 U.S. Dist. LEXIS 196095 (D.N.J. Oct. 8, 2021).

535. *See O'Hanlon v. Uber Techs. Inc.*, 990 F.3d 757 (3d Cir. 2021) (ADA claim, service never used).

Care should be made distinguishing the parties to be bound from the scope of the claims; referencing "parties" in describing what claims are to be bound may not accomplish the goal.

Arguments that non-signatories were indispensable parties may not defeat arbitration as to signatories.[536] A claim by or against the non-signatory may by severed and proceed separately. Parties in a construction case may be deemed sufficiently intertwined to have been contemplated as bound.[537]

A receiver has standing to compel FINRA arbitration.[538]

In 2020, the United States Supreme Court held, in *GE Energy v. Outokumpu Stainless USA, LLC*,[539] that state estoppel principles could be applied to bring in non-signatories in cases governed by the New York Convention.

The New Jersey Supreme Court accepted certification of a matter regarding third-party beneficiaries and estoppel, but decided the matter based on New Jersey's Direct Action Statute.[540]

1-5:4.6 Pre-Arbitration Mediation; Non-Binding Arbitration

Parties may require mediation, dispute resolution boards (DRB's as in the construction industry[541]), or executive consultation (multi-step) as a precondition to arbitration, but the clause must be clear and not contradictory.[542] Captioning the arbitration clause

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536. *Mahanandigari v. Tata Consultancy Servs.*, No. 16-8746, 2017 U.S. Dist. LEXIS 93739 (D.N.J. June 19, 2017), *reconsideration denied*, 2017 U.S. Dist. LEXIS 121516 (D.N.J. Aug. 2, 2017). *See also Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981 (9th Cir. 2017) (joinder of sureties to arbitration was issue of scope, delegated to the arbitrator). *But see Bruno v. Mark MaGrann Assocs., Inc.*, 388 N.J. Super. 539 (App. Div. 2006) (subcontractor could compel).

537. *See Kensington Park Owners Corp. v. Archtectura, Inc.*, No. BER-L-2055-19, 2019 N.J. Super. Unpub. LEXIS 1601 (Law Div. June 28, 2019).

538. *Interactive Brokers, LLC v. Barry*, 457 N.J. Super. 357 (App. Div. 2018). Other situations are described in Appendix 7, below.

539. *GE Energy v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020).

540. *Crystal Point Condo. Ass'n, Inc. v. Kinsale Ins. Co.*, 251 N.J. 437 (2022).

541. *See* American Arbitration Association's Dispute Resolution Board Guide Specifications https://www.adr.org/sites/default/files/document_repository/AAA%20Dispute%20Resolution%20Board%20Guide%20SPECIFICATIONS.pdf (last visited Dec. 9, 2023). Parties outside the construction industry, such as in Life Sciences, see Mary E. Bartkus, *Dispute Resolution Provisions in Life Sciences Agreements*, 75:2 AAA Disp. Resol. J. 1 (2020), often use or should consider such mechanisms.

542. *See, e.g.*, *Kernahan v. Home Warranty Admin. of Fla., Inc.*, 236 N.J. 301 (2019) (dispute clause heading was "mediation" and rules applicable to arbitration were termed "mediation" rules); *Gastelu v. Martin*, No. A-0049-14T2, 2014 WL 10044913 (N.J. Super. Ct. App. Div. July 9, 2015). In *Sand Castle Development, LLC v. Avalon Development*

as "Mediation" is a clear path to disaster, but it is oddly common, especially for retired judges who focus their practice on mediation or who start the process as a mediator and transition to arbitration without a separate order or clear agreement.[543] Strict time limits for the mediation (absent specific further agreement) may be necessary to avoid issues of waiver or intent. The AAA and other forums provide suggested mediation clauses and provide for a mediation as an auxiliary to an arbitration,[544] though they may not meet the requirements of New Jersey cases.

A variety of "dispute resolution programs" require "non-binding arbitration" as a preliminary step before litigation.[545] Whether or not intended to be a precondition to litigation, these have encountered enforcement problems.[546] To avoid confusion, and to dispel any questions about enforcement and entry of judgment, parties usually use "final, binding arbitration" or similar words in their pre-dispute clause.

1-5:4.7 Arbitrator Number, Selection, and Qualifications

Parties may agree to one or three arbitrators (generally), with the thought that more complex cases may benefit from the collegial factual and legal analysis of three, or a way to avoid a rogue arbitrator; but the expense of three may not be warranted in less

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Grp., LLC, No. A-3325-16T1, 2017 N.J. Super. Unpub. LEXIS 2701 (App. Div. Oct. 26, 2017), one subparagraph called for mediation and then litigation pursuant to the next subparagraph, but that subparagraph called for arbitration, to be enforced by a court. The court held that the sequence of paragraphs meant that arbitration was unambiguous. Had the contract involved an individual, the result may well have been otherwise. A step clause did not waive arbitration in *KPH Healthcare Servs. v. Janssen Biotech*, No. 20-05901, 2021 U.S. Dist. LEXIS 196095 (D.N.J. Oct. 8, 2021).

543. *E.g.*, *Marano v. Hills Highland Master Ass'n, Inc.*, No. A-5538-15T1, 2017 N.J. Super. Unpub. LEXIS 2854 (App. Div. Nov. 16, 2017) (award sustained).

544. *See* AAA Commercial Arbitration Rule R-9 & its Commercial Mediation Procedures.

545. *See, e.g.*, *Condemi Motor Co., Inc. v. Bautista*, No. A-4526-15T1, 2018 N.J. Super. Unpub. LEXIS 509 (App. Div. Mar. 6, 2018) (court annexed regarding fees and costs); *Bowen v. Hyundai Motor Am.*, No. A-4188-15T3, 2017 N.J. Super. Unpub. LEXIS 1330 (App. Div. June 1, 2017) (Better Business Bureau; fees awarded). *See generally* Chapter 9, § 9-1, below.

546. *See Dvorak v. AW Dev. LLC*, No. A-3531-14T2, 2016 WL 595844 (N.J. Super. Ct. App. Div. Feb. 16, 2016) (citing, *e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 941 F. Supp. 2d 513 (D.N.J. 2005)). *Exxon Mobil Corp.* noted that there is a question as to whether the FAA applies to non-binding arbitration. *See Dluhos v. Strasberg*, 321 F.3d 365 (3d Cir. 2003). Reference only to a 180-day time period to settle disputes caused scope issues in *Frederick v. Law Office of Fox, Kohler & Assocs., P.L.L.C.*, No. 19-15887, 2020 U.S. Dist. LEXIS 114597 (D.N.J. June 30, 2020) (disputes not resolved), *rev'd*, 852 F. App'x 673 (3d Cir. 2021).

complex matters. The parties should also consider whether a single arbitrator may be able to make himself or herself more readily available for a hearing, especially if adjournments are required. An appeals process may provide a less expensive alternative to multiple arbitrators.[547]

Clauses that require the parties to negotiate regarding the choice of arbitrator have been held enforceable; if the parties cannot agree, a court appoints the arbitrator.[548]

Parties may seek special qualifications, such as a state or federal judge (retired) or a lawyer with specific expertise in the legal, industry, or factual issues at hand or language skills; they also may request a "diverse" panel.[549] Layperson, non-lawyer arbitrators may also be designated, and some industry arbitral fora specialize in making non-lawyer arbitrators available, as would be the case in pre-industrial guilds. Being too specific may result in no "qualified" arbitrators being available, in which case a provider may request the parties to give alternative designations. Identifying an arbitrator by name may cause problems if he or she is not available, though state and federal law provide a mechanism if the parties cannot agree on a substitute.[550]

Issues regarding arbitrator selection, once the arbitration has been filed, are discussed in Chapter 2, § 2-3, below.

1-5:4.8 Confidentiality, Timing, Discovery, Hearings, Class/Mass Actions, Remedies, Notice, and Location

There are almost limitless ways parties may shape the hearing and pre-hearing process. A word of warning, though: complexity leads to potential enforcement issues both at the outset and in the confirmation process. As noted in other sections, indicating

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547. *See* Chapter 7, § 7-6, below.

548. *See, e.g.*, *Hunt v. Moore*, 861 F.3d 655, 659 (7th Cir. 2017) (citing 9 U.S.C. § 5; such lapses in appointment were described as "common"). *See also Keppler v. Terhune*, 88 N.J. 455, 462 (1965) (statute empowers court to appoint arbitrator where parties do not make the designation). *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020), regarding the authority of courts to appoint an arbitrator, is discussed elsewhere in this Handbook. Alternatives to a designated non-existent forum may not be effective. *See MacDonald v CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018); *cf. Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020) (rules precluded remedy).

549. *See* CPR Model Clause (Apr. 1, 2020), *available at* https://www.cpradr.org/news-publications/press-releases/2020-04-01-cpr-continues-to-pioneer-in-diversity-space-with-launch-of-diversity-inclusion-model-clause (last visited Dec. 9, 2023).

550. *See* 9 U.S.C. § 5; N.J.S.A. 2A:23B-11. Issues under these statutes are discussed elsewhere in this Handbook.

requirements that do not align with the chosen forum's rules may create ambiguity.[551] A second warning: attempting to control the process in standard-form employee, consumer, or other contracts of adhesion may give rise to unconscionability issues and resultant non-enforcement or severance of those provisions. The standard provider rules for such cases (*e.g.*, consumer and employment) may contain fee and other provisions that protect against such problems and can be pre-approved by the provider. Also, many details for the conduct of the arbitration can be agreed to, or resolved by the arbitrator, at the preliminary hearing. See Chapter 3, § 3-1, below.

In considering what if any special provisions to add to a generic arbitration provision, the parties also should be wary of one of the earlier-mentioned "Seven Deadly Sins:" litigation envy.[552] Fashioning an arbitration that is too much like a traditional court litigation may diminish the benefits of arbitration in reduced cost and time.

1-5:4.8a Confidentiality

One of the most widely mentioned benefits of arbitration is that the proceedings are "private," *i.e.*, not public (in comparison to a court). However, most arbitrations are not "confidential" unless the parties so agree in their arbitration clause (or during the arbitration), the arbitrator orders confidentiality, or they select a forum with rules that require confidentiality. The AAA Commercial Rules, for example, do not (except with respect to arbitrator, administrator, and award)[553] but do permit the arbitrator to issue a confidentiality order. Employment arbitrations are an exception, and Rule 23 of the AAA Employment Rules permits confidentiality.[554] Questions then rise about how to enforce

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551. *See Sabre GLBL, Inc. v. Shan,* 779 F. App'x 843 (3d Cir. 2019).

552. John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Dispute Res. J. 1 (Feb.-Apr. 2003), *available at* https://www.hugheshubbard.com/news/drafting-arbitration-clauses-avoiding-the-7-deadly-sins (last visited Dec. 10, 2023).

553. *See* 2022 AAA Commercial Arbitration Rules, R-45(a) (confidentiality) (new); AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI (Appendix 4). The 2021 ICDR Rules Article 40 (Appendix 3), provides broader confidentiality. *See also* AAA Employment Arbitration Rules, R-23, effective Nov. 1, 2009 (arbitrator confidentiality). Confidentiality agreements may be breached by subpoena or court order, though state law differs. *See Delgado v. BMW Fin. Servs. Na*, No. A-0933-22, 2023 N.J. Super. Unpub. LEXIS 1484 (App. Div. Aug. 29, 2023).

554. AAA Employment Arbitration Rules, R-23 ("The arbitrator shall maintain the confidentiality of the arbitration . . ."), *available at* https://www.adr.org/sites/default/files/Employment%20Rules.pdf (last visited Dec. 3, 2023).

such an order, especially as to witnesses, unless contractually bound. See Chapter 3, § 3-3, below for an extended discussion of confidentiality.

Even where the parties have taken steps to protect the confidentiality of their proceedings and the resultant award, if a party moves to vacate or confirm, the award and other portions of the proceedings may be filed on the public record and available[555] — except in those cases where the court has sealed the award or other portions of the record in accordance with the procedures governing that court.[556] In some cases, as discussed in Chapter 7, § 7-2, below the arbitrator may render both a confidential award and a non-confidential summary award if requested.

1-5:4.8b Discovery

The rules of the major arbitration providers contain default provisions that govern the timing of certain steps in the process, the extent of (or limits on) discovery or disclosure, and the time to render an award once the hearings are closed. For example, some rules may provide for information exchanges, but not depositions; "Expedited Rules" may deter discovery; the AAA Employment Rules provide a standard list of documents to be exchanged. The parties may modify these default provisions in the arbitration provision by permitting more or less discovery and by specifying stricter time limits. They also may agree during the course of the arbitration, for example, at the preliminary organizational meeting, or they may seek the arbitrators' ruling on alternatives. Restrictions on discovery do not make the arbitration inherently unconscionable and they may be over-ridden by the arbitrator, under the rules, in the interests of justice. However, exhibits must

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555. *See CAA Sports LLC v. Dogra*, No. 18-1887, 2018 U.S. Dist. LEXIS 214223 (E.D. Mo. Dec. 20, 2018) (sealing limited part of award); *dismissed*, 2019 U.S. LEXIS 31752 (E.D. Mo. Feb. 28, 2019) (not a final award). The Third Circuit expresses a more rigorous standard for determining reduction and scaling. *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. New England Reinsurance Corp.*, 794 F. App'x 213 (3d Cir. 2019). Recent cases include *Pennsylvania Nat'l Mut. Cas. Ins. Grp. v. New England Resinusrance Co.*, 840 F. App'x 688 (3d Cir. 2020); *Bowken v. Midland Funding Co.*, No. 18-11320, 2020 U.S. Dist. LEXIS 189173 (D.N.J. Oct. 9, 2020). In *Faiella v. Sunbelt Rentals, Inc.*, No. 18-11383, 2021 U.S. Dist. LEXIS 241270 (D.N.J. Dec. 17, 2021), the court declined to seal certain portions of arbitration proceedings used in another action.

556. *See, e.g.*, N.J. L. Civ. R. 5.3. *See generally* Bartkus, Sher & Chewning, N.J. Federal Civil Procedure, ch. 11, § 11-6:2 (motions) (2022 ed.).

be exchanged in advance, regardless of any "discovery" limitations. See Chapter 3, §§ 3-1:3 and 3-9, below.

1-5:4.8c Hearings; Motions; Witnesses

The nature of the hearings may also be specified: on documents only, with witness statements, using video testimony, allowing or precluding prehearing dispositive motions, or with a limited number of witnesses. Keep in mind, though, that the provider rules usually contain provisions regarding these issues. In-person hearings are not required by the NJRUAA.[557] Although the parties may agree to subpoena witnesses, courts will not necessarily be compliant;[558] the NJRUAA permits subpoenas,[559] but subpoenas must still be served and enforced within the proper jurisdiction.

Whether or not to permit motions remains a controversial issue, since a proper dispositive motion may resolve a case early on, but motions in the nature of summary judgment often are inimical to arbitration and give rise to challenges to an award. The 2021 ICDR rules refer to motions in Article 23, "Early Disposition," and require a premotion application that addresses the criteria for permitting a motion: "the application (a) has a reasonable possibility of succeeding, (b) will dispose of, or narrow, one or more issues in the case, and (c) that consideration of the application is likely to be more efficient or economical than leaving the issue to be determined with the merits." The 2022 AAA Commercial Rules, R-34 has a similar criteria.

Deciding a case, and issuing the award, based on a pre-hearing summary judgment motion was held not to be a basis for vacating the award.[560]

The "location" of a hearing has gained particular significance in the COVID-19 age of Zoom or other remote hearings. Hence, although provider rules have been amended to provide flexibility in mode, setting or changing hearing locations, the parties' agreement may permit remote hearings yet retain a clear understanding

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557. *See State Farm Guar. Ins. Co. v. Hereford Ins. Co.*, 454 N.J. Super. 1 (App. Div. 2018).

558. *See, e.g.*, *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1160 (11th Cir. 2019) (FAA did not permit subpoena of remote witness).

559. N.J.S.A. 2A:23B-17(a).

560. *Simons v. Brown*, No. 20-1814, 2022 U.S. App. LEXIS 2850 (3d Cir. Feb. 1, 2022) (not precedential).

of the seat, site, or location. Although not yet addressed in the Third Circuit, there have been challenges to remote hearings on the ground that Section 7 of the FAA requires witnesses to be "summoned" to appear "before them." Clarity in drafting the clause may obviate this issue—at least as to the parties.

1-5:4.8d Relief Permitted; Legal Errors; Limitations

The parties may attempt to limit or describe the forms of relief that may be awarded, such as injunctive or equitable relief and punitive damages, keeping in mind that the forum's rules (such as AAA Commercial Rule, R-47(a)) or state statutes may address the remedies to be awarded. For example, in New Jersey the parties may not agree to waive punitive damages as a form of relief in an LAD case; the waiver will be severed and voided.[561]

As discussed in Chapter 2, below parties may agree that the arbitrator is required to apply the law, so that legal error may be grounds for vacating an award. In certain labor arbitrations, arbitrators must apply the law correctly, as a matter of public policy.[562] That is not grounds for vacating an award in private contracts based on the "exceed authority" or "other means" language in the vacatur sections of the statutes, unless specifically required by contract.

However, in *Strickland v. Foulke Management Corp*.[563] a provision requiring adherence to New Jersey law was not enforced when the time came to review the award. The arbitration clause provided:

> THE ARBITRATOR SHALL RENDER HIS/HER DECISION ONLY IN CONFORMANCE WITH NEW JERSEY LAW. IF THE ARBITRATOR FAILS TO RENDER A DECISION IN CONFORMANCE WITH NEW JERSEY LAW,

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561. *Roman v. Bergen Logistics, LLC*, 456 N.J. Super. 157 (App. Div. 2018) (granting motion to compel arbitration). In *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997), the court held that the availability of punitive damages was to be determined by the arbitrator; this ruling may be superseded by New Jersey cases such as *Roman*.) *Cf. Delaney v. Dickey*, 244 N.J. 466 (2020) (questioning limits on punitive damages).

562. *E.g.*, *Sanjuan v. Sch. Dist. of W. N. Y.*, 473 N.J. Super. 416 (App. Div. 2022) (arbitrator improperly awarded relief not specified in applicable statute), *certif. granted*, 254 N.J. 90 (2023); *Hoboken Mun. Emps.' Ass'n v. City of Hoboken*, No. A-0143-21, 2022 N.J. Super. Unpub. LEXIS 1246 (App. Div. July 8, 2022) (no basis in contract).

563. *Strickland v. Foulke Mgmt. Corp.*, 475 N.J. Super. 27 (App. Div. 2023).

> THEN THE AWARD MAY BE REVERSED BY A COURT OF COMPETENT JURISDICTION FOR MERE ERRORS OF NEW JERSEY LAW. A MERE ERROR IS THE FAILURE TO FOLLOW NEW JERSEY LAW.[564]

The Appellate Division accepted that the clause called for the FAA to apply, which meant that it must also apply *Hall St. Assocs., L.L.C. v. Mattel, Inc.*[565] and its holding that the FAA's grounds for vacatur were exclusive where applicable. Error of law is not a basis for vacating an award under the FAA, and the award was confirmed.

A carve out for preliminary restraints or injunctive relief will be enforced.[566] However, exempting declaratory judgment relief and "injunctive relief" may negate the arbitration where these are seen as the ultimate, rather than preliminary, relief to be sought.[567]

Shortening the otherwise available statute of limitations in which to file an arbitration may not be permitted in certain areas.[568]

1-5:4.8e Notice; Service

One advantage of arbitration is the possibility that parties may agree in advance that informal means of service or notice – rather than service in person or pursuant to the means for serving a court summons – are proper. However, problems can arise regarding failure to provide proper notice to parties of the claim, award, or other matters. A provider's rules typically specify how notice may be given, and the provider may be responsible for giving notice in some instances, but a court-appointed or *ad hoc* arbitration agreement should include terms that comply with any applicable

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564. *Strickland v. Foulke Mgmt. Corp.*, 475 N.J. Super. 27, 33 (App. Div. 2023). The "error" concerned the shortened limitations period in the contract.

565. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

566. *See Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488 (5th Cir. 2017). Right to seek an injunction need not be mutual. *Ribe v. Macro Consulting Grp. LLC*, No. A-2894-18T4, 2020 N.J. Super. Unpub. LEXIS 468 (App. Div. Mar. 9, 2020).

567. *See Thompson v. Nienaber*, 239 F. Supp. 2d 478 (D.N.J. 2002) (distinguishing carveout for TRO versus permanent injunction); *compare Go Express, Inc. v. Autodrop, Inc.*, No. C-231-18, 2018 N.J. Super. Unpub. LEXIS 2252 (Ch. Div. Oct. 10, 2018) (issues for permanent injunction for arbitrator).

568. *See Guc v. Raymours Furniture Co.*, No. A-3452-20, 2022 N.J. Super. Unpub. LEXIS 395 (App. Div. Mar. 11, 2022) (citing *Rodriguez v. Raymours Furniture*, 225 N.J. 343 (2016)).

statute. Email notice is not necessarily sufficient (or effective, since email addresses may be outdated or be hacked).

The provider's rules may not cover all eventualities though, and a "service" sentence in an arbitration clause may avoid problems regarding serving the demand, the award, or a motion to confirm or vacate an award. The latter can be an issue where there had not been a prior motion to compel in the court, since the FAA may otherwise require service pursuant to the Federal Rules of Civil Procedure.[569]

In 2020, the California Supreme Court held that that service by Federal Express was appropriate where the parties had agreed to that mode, despite contrary requirements in the governing treaty.[570]

As noted elsewhere,[571] obligations may be triggered by specific forms of service or notice, including the difference between service and receipt, and rights may be lost if those triggers are not observed and time is miscalculated.

1-5:4.8f Location or Site/Seat of the Arbitration/Hearings

A key provision in any agreement is the location or site of the "arbitration" and where the hearings will be conducted, which are two different concepts. The site or seat may govern the law to be applied. The specification of an inconvenient city or state to hold the hearings may lead to unconscionability issues.[572] Local restrictions on out-of-state arbitrations may be preempted by the FAA.[573] Even if the parties later agree to modify the originally designated site, the initial choice may restrict the list of arbitrators

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569. *See Dobco, Inc. v. Mery Gates, Inc.*, No. 06-0699, 2006 U.S. Dist. LEXIS 49849, 2006 WL 2056799, at *2 (D.N.J. July 20, 2006) (FAA Section 9 requires service of motion to confirm/vacate by U.S. Marshal)). *See also Red Spark, LP v. Saut Media, Inc.*, No. 21-00171, 2021 U.S. Dist. LEXIS 51942 (E.D. Pa. Mar. 19, 2021) (service by U.S. Marshal acceptable).

570. *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., Ltd.*, 460 P.3d 764 (Cal. 2020), *cert. denied*, 141 S. Ct. 374 (2020).

571. *See* Chapter 8, below.

572. For example, in *Vegter v. Forecast Financial Corp.*, No. 07-279, 2007 U.S. Dist. LEXIS 85653 (W.D. Mich. Nov. 20, 2007), the court severed and voided the designated location as unconscionable and ordered arbitration in Michigan; the court would appoint the arbitrator. Requiring arbitration in California was an obvious, if unstated, concern in *Flanzman v. Jenny Craig, Inc.*, 459 N.J. Super. 613 (App. Div. 2018), *rev'd*, 244 N.J. 119 (2020).

573. *See Central Jersey Freightliner, Inc. v. Freightliner Corp.*, 987 F. Supp. 289 (D.N.J. 1997); *Allen v. World Inspection Network Int'l, Inc.*, 389 N.J. Super 115 (App. Div. 2006); *B & S Ltd., Inc. v. Elephant & Castle Int'l, Inc.*, 388 N.J. Super. 160 (Ch. Div. 2006).

or govern the law that a reviewing court might apply in considering procedural or substantive issues. The agreement also may indicate not only that the award may be enforced in a court with jurisdiction, but the parties may agree that a specific court has jurisdiction or exclusive jurisdiction on such matters.[574] The location (or "seat") is a particularly important matter in international arbitrations and the enforcement of an award.

Do not confuse the location of a court for enforcement with the location for the arbitration. The county location for hearings is not necessarily the court for enforcement.[575]

1-5:4.8g Class/Mass Actions

The clause may provide that any class action claims or mass arbitrations be heard in arbitration according to the class action or mass arbitration procedures of the clause or the chosen forum.[576] However, merely selecting the forum's rules, without specific adoption of the class-action rules, has been held insufficient for election of arbitrability issues.[577] Although class-action waivers have been the subject of considerable United States Supreme Court litigation, generally upholding such waivers in principle, New Jersey courts have viewed them with greater skepticism. For example, the language of a class-action waiver has been held ambiguous viewed in the context of an arbitration clause and defeated an effort to

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574. Note: Under the FAA, a court may not normally compel arbitration outside its own district. *See Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc*., 499 F.2d 1392, 1394 (3d Cir. 1974).

575. *See Virtua Health, Inc. v. Diskriter, Inc.*, No. 19-21266, 2020 U.S. Dist. LEXIS 132218, at n.1 (D.N.J. July 27, 2020).

576. *See* AAA Supplementary Rules for Class Arbitrations, Appendix 2 in prior editions of this Handbook; AAA Mass Arbitration Supplementary Rules (amended and effective Jan. 15, 2024), https://www.adr.org/sites/default/files/Mass_Arbitration_Supplementary_Rules.pdf (last visited Jan. 21, 2024). The mass arbitration process is relatively new but has spawned several cases, including *Achey v. Cellco Partnership*, 475 N.J. Super. 446 (App. Div.) (not enforcing bellwether arbitration clause in the parties agreement), *certif. granted*, 255 N.J. 286 (2023). See Robert Bartkus, *Bellwether Arbitration Clause Held Unconscionable & Unenforceable* (ABA Litigation Section, Jan. 2024).

577. *Opalinski v. Robert Half Int'l Inc*., 677 F. App'x 738 (3d Cir. 2017) (intent to arbitrate class action cannot be found in adoption of AAA Rules; the contract preceded the adoption of the rules), *cert. denied*, 138 S. Ct. 378 (2017); *see also Chesapeake Appalachia LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016) (selection of AAA rules not a sufficient delegation to decide arbitrability of class action issue); *Abrams v. Chesapeake Energy Corp*., Nos. 16-1343, 16-1345, 16-1346, 16-1347, 2017 U.S. Dist. LEXIS 209905 (M.D. Pa. Dec. 21, 2017) (noting the Third Circuit opinions and that plaintiffs' desire to avoid high AAA filing fees is not a good reason to order class arbitration).

compel arbitration.[578] When the class action waiver has been in the arbitration clause, it can be thought of as applying only to a class action in arbitration, and refused enforcement.[579]

Neither silence nor ambiguity may give rise to class action arbitration.[580]

Waiving the right to arbitrate a dispute (by, for example, the defendant's failing to pay the required AAA fees in a consumer dispute) does not forfeit the contract's waiver of the right to bring a class action.[581]

1-5:4.9 Allocation/Shifting of Fees and Costs

1-5:4.9a Administrative and Arbitrator's Fees and Costs

The administrative and filing fees required by a provider normally are borne by the claimant or counterclaimant. The arbitrator's fees normally are borne equally by each side. However, the arbitration clause or the rules selected to govern the arbitration may alter the proportion of the filing or arbitrator's fees to be allocated to each party. For example, an employer may agree to bear all of the initial filing fees and arbitrator's fees; consumer and employment rules may require the employer/corporate respondent to bear those costs.[582] Where a claimant argues that these fees make arbitration unaffordable, thereby making him or her unable to "vindicate" their rights and arbitration unconscionable, courts have looked to the provider's rules to reallocate the fees, required discovery to evaluate such claims, or reallocated the fees to more nearly resemble normal court costs and fees.[583]

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578. *Kernahan v. Home Warranty Admin. of Fla., Inc*., No. MID-L-7052-15, 2016 N.J. Super. Unpub. LEXIS 2503 (Law Div. Nov. 18, 2016), *aff'd*, No. A-1355-16T4, 2017 N.J. Super. Unpub. LEXIS 1527 (App. Div. June 23, 2017), *aff'd on other grounds*, 233 N.J. 220 (2019).

579. *See Fallah v. Tesla Energy Operations*, No. A-0794-22, 2023 N.J. Super. Unpub. LEXIS 256 (App. Div. Feb. 24, 2023).

580. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

581. *Cerciello v. Salerno Duane, Inc.*, 473 N.J. Super. 249 (App. Div.), *motion for leave to appeal denied*, 252 N.J. 184 (2022).

582. *See Lang v. PTC, Inc.*, No. 21-04451, 2021 U.S. Dist. LEXIS 218997 (D.N.J. Nov. 12, 2021).

583. *See, e.g.*, *Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002) (remanding for hearing on ability to pay); *Tharpe v. Securitas Sec. Servs. USA*, No. 20-13267, 2021 U.S. Dist. LEXIS 34275 (D.N.J. Feb. 24, 2021) (same; noting issue may be delegated to arbitrator), *requiring arbitration*, 2021 U.S. Dist. LEXIS 94656 (D.N.J. May 17, 2021); *Riley v. Raymour & Flanigan*, No. A-2272-16T1, 2017 N.J. Super. Unpub. LEXIS 2651

The parties' agreement or provider's rules may permit the arbitrator to reallocate the filing and administrative fees.

A severance clause may avoid non-enforcement of fee (and other) provisions if they are found to be unconscionable in standard form contracts. Some providers' rules prohibit onerous fee or other provisions. Problems with non-payment of fees are discussed in Chapter 7, below.

1-5:4.9b Attorneys' Fees and Costs

Whether the prevailing party may be awarded its legal fees and expenses is not addressed in the FAA, but it is specifically permitted in the NJRUAA (if "authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding").[584] The parties' agreement may include a fee-shifting clause in the underlying contract or in the arbitration clause;[585] their "agreement" also may include the arbitration forum's rules if the parties have adopted those rules. The AAA Commercial Rules distinguish between assessing administrative and arbitration expenses and compensation, on the one hand, and awarding attorneys' fees, on the other.[586] The arbitrator's authority to award attorneys' fees (and possible limitations on that authority) is discussed further in Chapters 7 and 8, below. Notably, AAA Commercial Rule R-49(d) permits an award of attorneys' fees where both sides have requested such an award.[587] A contradiction or inconsistency with the provider's rules may create troublesome ambiguity.[588]

Parties must be aware of the difference between authorizing attorneys' fees for the arbitration and for post-award or other motions in court. The clause may permit both or either; the

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(App. Div. Oct. 20, 2017) (comparing to court costs); *Kobren v. A-1 Limousine Inc.*, No. 16-517, 2016 WL 6594075 (D.N.J Nov. 7, 2016) (limiting fees paid by claimant to court fees). The NJRUAA, N.J.S.A. 2A:23B-21, permits the arbitration to allocate such fees.

584. N.J.S.A. 2A:23B-21(b).

585. *See Beery v. Quest Diagnostics, Inc*., 953 F. Supp. 2d 531 (D.N.J. 2013) ("loser pays" provision does not void arbitration; ambiguous terms to be decided by arbitrator).

586. *Compare* 2022 AAA Commercial Arbitration Rule, R-49(c), *with* R-49(d).

587. *See, e.g.*, *Zecca v. Monterey Condo. Ass'n, Inc*., No. A-4531-18T3, 2020 N.J. Super. Unpub. LEXIS 848 (App. Div. May 6, 2020) (arbitrator acted within his discretion in awarding fees).

588. *See Sabre GLBL, Inc. v. Shan*, 779 F. App'x 843 (3d Cir. 2019).

NJRUAA permits both; the FAA does not.[589] The authority in the NJRUAA for awarding attorneys' fees in the arbitration differs from a court's ability to award fees after the award, or in connection with confirming or vacating the award.[590]

1-5:4.10 Award (*e.g.*, Form and Remedies; Interest)

Parties may provide that the arbitration may be bifurcated between, *e.g.*, liability and damages, with separate final awards for each.

Although a number of post-hearing matters are dealt with either in a forum's rules or by agreement during the preliminary/organizational sessions of the arbitration, the parties' contract also may state, at least preliminarily, their preference for some of them. For example, they may require that the award be rendered within a set number of days after the hearing is closed different from the provider's rules (although this may create problems and often is waived). Or they may require that the award be reasoned (*i.e.*, stating the basis for the award in varying degrees of detail) or summary (*i.e.*, the result only, without any explanation). The parties may have institutional reasons for this choice, a statute or rule may require one form, or the parties simply may not want to pay the additional fees necessary for the arbitrator to draft a reasoned award. In complex cases, the parties may preliminarily or ultimately designate an award with "findings of fact and conclusions of law" similar to those required in federal bench trials. Chapter 7, below, deals with these issues in greater detail.

In addition to indicating whether the arbitrator must or may (or may not) shift or allocate the attorneys' fees, expenses, and costs of the arbitration, as discussed above, an arbitration clause may also restrict or allow the remedies (such as damages or interest[591]) that an arbitrator may award. However, cases have

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589. *Davison Design & Dev. Inc. v. Frison*, 815 F. App'x 659 (3d Cir. 2020) (FAA does not authorize post-award fees, unless a contractual or other basis). *See* Chapter 8, below.

590. *See* Chapter 7, § 7-2:7.2, below; *Mitschele v. WILF/Mitschele Joint Venture*, No. A-0777-18T2, 2020 N.J. Super. Unpub. LEXIS 828 (App. Div. May 5, 2020); *Zecca v. Monterey Condo. Ass'n, Inc.*, No. A-4531-18T3, 2020 N.J. Super. Unpub. LEXIS 848 (App. Div. May 6, 2020).

591. Cases have restricted the right to pre-judgment interest without contractual, clause, rules or other authority. *See Elliott-Marine v. Campenella*, 351 N.J. Super. 135 (App. Div.), *certif. denied*, 174 N.J. 365 (2002) (noting lack of agreement for interest).

found that restrictions on fee shifting or remedies may make an adhesion contract unconscionable and, thus, unenforceable, or those provisions severable.[592] Provider rules also may restrict such prohibitions. Some of these issues are discussed elsewhere in this Handbook.

The arbitration clause should include a provision that judgment on the award may be entered or enforced in a court of competent jurisdiction—though the AAA and other rules include such a provision,[593] as does the NJRUAA.[594]

1-5:4.11 Appeals

Parties may agree to a statutory or provider provision that allows an appeal or more intense review than otherwise would be permitted.[595]

1-6 GENERATIVE AI

The Silicon Valley Arbitration and Mediation Center has promulgated a draft set of guidelines for the use of generative artificial intelligence (AI) such as ChatGPT, including a suggested clause and topics such as competence, transparency, confidentiality, and integrity.[596] The United States government is also issuing general AI guidelines; courts are expected to follow.

1-7 ARBITRATE, BUT FOSTER SETTLEMENTS

Clearly, arbitration as an adjudicative process contains elements of the evaluative modes of ADR, but it adds the binding effect of a decision. It also contains the seeds of the facilitative approach, as it may foster the parties to reevaluate their cases and settle during the arbitration process, often with the aid of the arbitrator. In such cases the arbitrator must carefully walk the thin line between arbitrator and mediator, and cross it only with the parties' express

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592. *See Roman v. Bergen Logistics, LLC*, 456 N.J. Super. 157 (App. Div. 2018) (cannot waive punitive damages in LAD claim); *Tharpe v. Securitas Sec. Servs. USA*, No. 20-13267, 2021 U.S. Dist. LEXIS 34275 (D.N.J. Feb. 24, 2021) (ordering discovery).

593. *E.g.*, 2022 AAA Commercial Arbitration Rules, R-54(c).

594. N.J.S.A. 2A:23B-25(a). *See also* FAA, 9 U.S.C. § 13 (same force and effect; enforcement).

595. *See* Chapter 7, § 7-5, below; Chapter 8, § 8-3:11, below (also noting limitations).

596. It is available at https://www.iareporter.com/wp-content/uploads/2023/08/SVAMC-AI-Guidelines.pdf (last visited Dec. 5, 2023).

written permission. New Jersey prohibits an arbitrator who has acted as a mediator, even if initially the arbitrator, from resuming his or her arbitrator role. The parties, however, can expressly permit the mediator/arbitrator to perform both functions and resume the arbitration.[597] Because of the danger of confusing the two roles, organizations such as the AAA frown on the arbitrator acting as a mediator, except in rare cases. The AAA Code of Ethics for Arbitrators in Commercial Disputes (2004) provides in Canon IV F that "an arbitrator should not be present or otherwise participate in settlement discussions or act as mediator unless requested to do so by all the parties." Rule R-10 of the 2022 AAA Commercial Rules now requires the parties to mediate certain categories of cases.

One author in his private arbitrations has an express provision in his arbitration agreement that permits him to aid in settlement during the arbitration process. In this process one must never hold the threat of a particular arbitration result over the heads of the parties to effect a settlement. Any tentative conclusion or proof problems that might affect a possible settlement should not be shared with only one side but must be explained to all parties so there is no appearance that the arbitrator favors one side over another.

[597] *Minkowitz v. Israeli*, 433 N.J. Super. 111 (App. Div. 2013); *see also Cabrera v. Hernandez*, No. HUD-C-190-16, 2017 N.J. Super. LEXIS 598 (Ch. Div. Mar. 8, 2017) (authorized by consent order). *See* discussion in Chapter 9, § 9-6, below. The agreement need not be in writing, but the Appellate Division has remanded for a finding regarding alleged oral agreements. *E.g.*, *Pami Realty, LLC v. Locations XIX Inc.*, 468 N.J. Super. 546, (App. Div. 2021), *certif. denied*, 251 N.J. 1 (2022).