Chapter 1

Overview of Arbitration in the Dispute Resolution Process[1]

1-1 HISTORY

As noted in the Preface, arbitration is but one of several methods to achieve resolution of 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 was 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 the communities such as religious advisors, and others have been sought out to render decisions that both sides would accept as binding. From ancient Rome through the Middle Ages, there had been parallel systems of resolution: the public courts and private arbitration. Arbitration, in fact, is older than the common law.

[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 and hence may not be cited in opinions or briefs, *see* N.J. Ct. R. 1:36-3. 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. If the reader perceives additional issues that should be included in future editions, the authors welcome such suggestions and will endeavor to cover the subjects in the future.

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. 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defaulting members be broken and their rights terminated when they could not meet their obligations.[2] Another prime historical reference to arbitration is the will of George Washington, which directed that a panel of three arbitrators should resolve any dispute under his will and that the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 Supreme Court of the United States.

Although there had been considerable judicial antipathy toward arbitration, that largely has been overcome by enactment of the Federal Arbitration Act ("FAA")[3] and similar state statutes (discussed below). Today, arbitration is used as a private, consensual dispute resolution process in commercial and a wide variety of other contexts (discussed below).

1-2 BENEFITS OF ARBITRATION

Having previously extolled the virtues of mediation,[4] the authors next recommend arbitration with its many benefits over litigation. Be proud of these benefits and advance them in practice. Briefly, they are:

(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,[5] they still may have a role in the process; they may receive a list of several who are willing to serve, and the parties

2. Thus, the term "bankrupt" or "broken table."
3. 9 U.S.C. § 1 *et seq*.
4. *See* the Preface to this volume.
5. *See* § 1-3.

or court may indicate a preference as to experience or technical background.

(2) In contrast to litigation in 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. Confidentiality also may be lost if the parties file in court to compel or stay arbitration or to confirm, modify, or vacate an award.

(3) The parties and arbitrator can formulate the rules for the arbitration before agreeing to proceed or at the outset. 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. Other reasonable limits or procedures that the parties may agree upon can be followed by the arbitrator, be it a sealed record, a limitation on discovery, an acceptance of affidavits as testimony, or a trip to view sites or to hear witnesses 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 seeks the extensive discovery 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 new 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 much shorter period.

(5) Arbitration can take many forms, and some of these are discussed later in this book.[6] 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, if that is what the parties had consented to in their arbitration agreement or agree after the dispute is filed.

(6) 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 outcome is a reasoned award, which is a short award with a brief statement of reasons—but the parties decide which they prefer.

(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,[7] any review of

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6. *See, e.g.*, Chapter 9.

7. In New Jersey, *if* the case is not subject to the FAA, then parties can 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 has instituted an Appellate Arbitration program. 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 review. New Jersey arbitration gives this option. Although the Supreme Court in *Hall Street Associates, LLC v. Mattel, Inc.,* 552 U.S. 576, 590 (2008), has stated in dictum that 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*, 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 Fed. Appx. 708, 710-11 (3d Cir. 2009) (citing cases). *See, e.g*., Chapter 1, § 1-4:3.10 and Chapter 8, § 8-4.

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 expenses, are absent in procedures for confirmation or vacature of an arbitration award. Interlocutory court applications generally are not permitted.[8]

(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)[9] permits enforcement of an award in domestic courts—often using a 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, and the like.

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[8] *E.g., Lloyd v. Hovensa, LLC*, 369 F.3d 263, 270 (3d Cir. 2004) ("the 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). *But cf. Union Switch & Signal Div. Am. Standard, Inc. v. United Elec., Radio & Mach. Workers of Am., Local 610*, 900 F.2d 608 (3d Cir. 1990) (permitting court jurisdiction regarding partial labor award as to liability only). *See* Chapter 3, § 3-6 (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.

[9] 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 U.S. Dec. 29, 1970).

A word of caution is necessary, however. 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, may lead to trial court motions and appeals. 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).

Parties to a dispute may be bound to an arbitration regime based either on a statute or their pre-dispute arbitration agreement. Most of the discussion regarding issues of scope and arbitrability 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. This Handbook notes some of the differences, but New Jersey parties involved in such arbitrations should consult the appropriate treaties, statutes, and treatises.[10]

1-3 STATUTORY AND COURT-RULES BASED ARBITRATION; LIMITATIONS

1-3:1 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.[11] The arbitration awards rendered in these proceedings are subject to court and appellate review, the opinions from which occasionally

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10. *See, e.g.*, Gary B. Born, International Arbitration Law and Practice (2016).

11. *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).

are reported but generally are sufficiently unique not to warrant comment in this text.

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.[12]

Housing-related disputes between unit owners and condominium associations are governed by N.J.S.A. 46:8B-14(k), requiring the use of "a fair and efficient procedure," and the Appellate Division in *The Glens of Pompton Plains Condominium Association v. Van Kleeff* held that this was a direction to use ADR to resolve such disputes.[13]

There are other arbitration statutes in specialized areas.[14]

1-3:2 Limitations

Arbitration is not unlimited, however. Statutorily mandated binding arbitration is not permitted where there is a constitutional or common law right to a jury.[15] Appraisal has been held by some courts not a form of statutory arbitration.[16] 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.[17] Some matters—such as granting a

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12. *See* N.J.S.A. 39:6A-5.1. *See also* N.J.S.A. 39:6A-25. *Ambulatory Surgical Center of Somerset v. Allstate Fire Casualty Insurance 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.*, — N.J. Super. —, No. A-3749-16T3, 2018 N.J. Super. LEXIS 43 (N.J. Super. Ct. App. Div. Mar. 14, 2018), held that an in-person hearing is not required.

13. *The Glens of Pompton Plains Condo. Ass'n v. Van Kleeff*, No. A-0418-13T4, 2015 WL 9486151 (N.J. Super. Ct. App. Div. May 7, 2015).

14. *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*.); Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1382 (discussed in *Steelworkers Pension Trust v. Renco Group, Inc*., 694 Fed. Appx. 69 (3d Cir. 2017)).

15. *Jersey Central Power & Light, Co. v. Melcar Util. Co.*, 212 N.J. 576 (2013) (ruling N.J.S.A. 48:2-80(d) unconstitutional).

16. In *Adler Engineers, Inc. v. Dranoff Properties, Inc*., No. 14-921, 2016 WL 3608810 (D.N.J. July 5, 2015), the court described the competing arguments and cases.

17. *Cf. Blaichman v. Pomeranc*, No. A-1839-15T2, 2017 N.J. Super. Unpub. LEXIS 1717 (N.J. Super. Ct. 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)

divorce, determining ethical issues, and appointing receivers—are specifically or by implication reserved for judicial officers.[18]

1-3:3 Court Rules Mandates

Several statutes have authorized arbitration and mediation programs 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[19] and the Local Civil Rules of the U.S. District Court for the District of New Jersey.[20] We describe these court-annexed CDR programs in Chapter 9.[21] The Court Rules also specify the process for resolving fee disputes between lawyers and clients.[22]

1-4 CONTRACTUAL ARBITRATION

The overwhelming portion of legal issues regarding arbitration in New Jersey arise in the context of contractual arbitration, that is, arbitration to which parties to a dispute have agreed "in writing"[23]

(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, 570 N.Y.S.2d 33 (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.

18. *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).

19. *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).

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

21. *See also* Bartkus, Sher & Chewning, *N.J. Federal Civil Procedure*, ch. 19 (Gooding, *Alternative Dispute Resolution*) (2018 ed.).

22. *See* N.J. Ct. R. 1:20A-1 *et seq*. (District Fee Arbitration). Recent cases discussing fee arbitration include *Cardillo v. Clerk*, No. 16-2347, 2018 U.S. Dist. LEXIS 29375 (D.N.J. Feb. 23, 2018) (default issues arising from address of retired attorney); *Law Offices of Bruce E. Baldinger, LLC v. Rosen*, No. A-2060-15T3, 2017 N.J. Super. Unpub. LEXIS 1152 (N.J. Super. Ct. App. Div. Apr. 28, 2017) (attorneys' fees not permitted as part of fee arbitration without clear agreement in retainer); *Helmer, Conley & Kasselman, PA v. Montalvo*, No. A-806-15T3, 2017 N.J. Super. Unpub. LEXIS 2681 (N.J. Super. Ct. App. Div. Oct. 25, 2017) (discussing notice requirements and knowledge issue).

23. 9 U.S.C. § 2. That does not necessarily mean that signatures are required. *See Fisser v. Int'l Bank*, 282 F.2d 231, 233 (2d Cir. 1960) (footnotes omitted) ("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

or "in a record"[24] either before the dispute arose or once the dispute has arisen.[25] 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 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.

Issues may also arise regarding the mental or contractual competence[26] or authority of the person approving the contract with an arbitration clause.[27] In finding that Kentucky's special

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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."). *E.g., Byrne v. K12 Servs.*, No. 1-4311, 2017 U.S. Dist. LEXIS 124734 (D.N.J. Aug. 4, 2017) (motion to compel granted). The absence of a signature may be evidence of the lack of mutual assent. *See also, e.g., 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) (citing *Leodori v. Cigna Corp.*, 175 N.J. 293, 305 (2003)).

The Third Circuit has noted special concerns regarding the formation of contracts governed by the Uniform Commercial Code. *Aliments Krispy Kernels, Inc. v. Nichols Farms,* 851 F.3d 283 (3d Cir. 2017). The UCC's statute of frauds provision, N.J.S.A. 12A:2-201, 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. *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). The authors are not aware of any New Jersey decisions on the subject.

The signature requirement in international arbitration is explored in *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").

24. N.J.S.A. 2A:23B-6. "Record" is defined in N.J.S.A. 2A:23B-1 as information that is "inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in perceived form." As with the domestic FAA, there is no signature requirement in the statute.

25. A recent example enforcing a post-dispute agreement to arbitrate is *Jang Won So v. EverBeauty, Inc.*, No. A-3560-16T4, 2018 N.J. Super. Unpub. LEXIS 4 (N.J. Super. Ct. App. Div. Jan. 2, 2018), in which the Appellate Division held that an exchange between attorneys to dismiss an action in favor of arbitration should be evaluated using the same standard as a settlement agreement.

26. *See Patterson v. Care One at Moorestown, LLC*, No. A-4358-15T3, 2017 N.J. Super. Unpub. LEXIS 423 (N.J. Super. Ct. App. Div. Feb. 21, 2017), *certif. denied*, 230 N.J. 476 (2017).

27. *Compare Hall v. Healthsouth Rehab. Hosp. of Vineland*, No. A-2453-12T4, 2013 N.J. Super. Unpub. LEXIS 1752 (N.J. Super. Ct. 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 (N.J. Super. Ct. 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

requirement for a power of attorney to authorize signing a contract with an arbitration clause was preempted by the FAA, the U.S. Supreme Court in 2017 held that any such requirements could not "disfavor[]" arbitration contracts, directly or indirectly.[28]

In this section, we briefly 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.

1-4:1 The Principal Authorizing Statutes

1-4:1.1 Federal Arbitration Act

Arbitration may have ancient roots,[29] 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")[30] was enacted in 1925 to reverse that hostility and "place arbitration agreements 'upon the same footing as other contracts.'"[31] Thus, section two of the FAA provides that arbitration agreements covered by the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The FAA is said to "reflect[] an emphatic public policy in favor of" arbitration.[32] Thus, once an agreement is found to contain an arbitration clause, "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."[33]

(N.J. Super. Ct. App. Div. Aug. 14, 2013) (arbitration order as to mother and child; denied as to spouse).

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

29. *See* § 1-1.

30. 9 U.S.C. § 1 *et seq*. Title nine 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 text of the FAA governing domestic disputes is contained in Appendix 5.

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

32. *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).

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

This "presumption of arbitrability" means 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."[34] 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 to commercial and other arbitration contexts.[35] For example, the U.S. Supreme Court recently held in *Kindred Nursing Centers* that the FAA "displaces any rule … covertly … disfavoring contracts that (oh, so coincidently) have the defining features of arbitration agreements."[36]

These principles are equally applicable to contracts governed by the FAA regardless of whether they are pending in federal or state court.[37]

New Jersey courts have accepted these principles.[38]

1-4:1.2 New Jersey Arbitration Acts

Although New Jersey traces its arbitration roots to Colonial times,[39] arbitration currently is governed by two principal state statutes.

The 2003 New Jersey Revised Uniform Arbitration Act (the "NJRUAA" or the New Jersey Arbitration Act)[40] by its terms supersedes common law arbitration[41] and is the default governing

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34. *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)).

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

36. *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).

37. *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).

38. *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); *Fastenberg v. Prudential Ins. Co. of Am.*, 309 N.J. Super. 415, 420 (App. Div. 1998) ("positive assurance").

39. *See Barcon Assoc., Inc. v. Tri-Cty. Asphalt Corp.*, 86 N.J. 179, 186 (1981) (citing Boskey, *A History of Commercial Arbitration in New Jersey*, 8 Rut. Cam. L. J. 15 (1975)).

40. N.J.S.A. 2A:23B-1 *et seq*. The text of the act is contained in Appendix 6.

41. 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*

law in a New Jersey arbitration if the FAA does not apply and the parties have not agreed to contrary rules. 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 New Jersey Revised Arbitration Act.[42]

The second primary New Jersey statute is the 1987 Alternative Procedure for Dispute Resolution Act ("APDRA").[43] 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.[44] 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."[45] The parties must explicitly adopt the APDRA for its provisions to apply; review may be limited to the trial court.[46]

Differences in the two New Jersey statutes, and with the FAA, are discussed in the relevant text sections below. Notably, though, because the 2003 New Jersey Arbitration Act permitted parties to

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Ass'n v. Borough of North Haledon, 158 N.J. 392, 398, 403 (1999), in a statutory grievance arbitration. The New Jersey Arbitration Act, 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.

42. *See Petersburg Regency, LLC v. Selective Way Ins. Co.*, No. A-3855-11T2, 2013 WL 1919556 (N.J. Super. Ct. 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). *But cf. NAACP of Camden Cty. E. v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404 (App. Div. 2011) (discussing formation issue when there are competing arbitration clauses).

43. N.J.S.A. 2A:23A-1 *et seq*. *See generally Mt. Hope Dev. Assoc. 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.

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

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

46. N.J.S.A. 23A-18(b). *See 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).

agree to limited appeals,[47] 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.

1-4:1.3 Alternative Designations; Choice of Law Issues

Determining the applicable arbitration law is not merely a matter of designating a specific statute or state law to supplant the default FAA or New Jersey Arbitration Act. First, the designation must specifically relate to arbitration, as in the arbitration clause; a general choice of law provision is inadequate.[48] The Third Circuit applies this rule.[49]

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 affecting interstate and foreign commerce,[50] except for specific federal statutory exemptions[51]) and the competing law is said to conflict with the FAA.

Parties may select procedural rules or statutes to govern their arbitration even though otherwise bound by the FAA.[52] However,

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47. *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 8, § 8-4; however, the FAA and statutes in other states do not have the same flexibility regarding appeals as does the New Jersey Act, *see* Chapter 8, §§ 8-4:1 and 8-4:3.

48. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-60 (1995).

49. *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 Fed. Appx. 708, 710-11 (3d Cir. 2009).

50. *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).

51. 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. The Supreme Court has granted *certiorari* in a trio of major NLRB preemption cases. *See N.L.R.B. v. Murphy Oil*, 137 S. Ct. 809 (2017), *argued* October 2, 2017. 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. The meaning of the so-called "transportation employees" exemption of 9 U.S.C. § 1 is discussed in *Singh v. Uber Technologies, Inc.*, 235 F. Supp. 3d 656, 668-70 (D.N.J. 2017).

52. *See, e.g., Volt Info. Scis., Inc. v. Bd. of Trs., Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989). *See also MacDonald v. CashCall, Inc.*, — F.3d —, No. 17-2161, 2018 U.S. App. LEXIS 4795 (3d Cir. Feb. 27, 2018) (distinguishing *Khan*, where terms of clause made nonexistent tribal forum integral). *See also* §§ 1-2 n.7 and 1-4:3.4.

a rule or state law or policy that is unfavorable to arbitration, or that restricts, limits, or conditions agreements to arbitrate, is not permitted.[53] 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.[54] Arbitration agreements must be judged on an equal footing with, and according to the same principles as, all other contracts.[55] To the extent New Jersey policy suggests otherwise, the supremacy of the FAA "renders that state policy irrelevant."[56] Specific issues regarding preemption, such as unconscionability and class action waivers, are discussed below.[57]

1-4:2 Contracts in Which Arbitration Is Permitted

Subsequent to a number of decisions, such as *Wilko v. Swan*,[58] holding that arbitration in certain industries or certain matters was inconsistent with the enabling 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

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

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

55. *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).

56. *Glamorous Inc. v. Angel Tips, Inc*., No. A-985-16T1, 2017 N.J. Super. Unpub. LEXIS 1526, at *3 (N.J. Super Ct. App. Div. June 23, 2017) (citing *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017)). The New Jersey Supreme Court has accepted certification in *Kernahan v. Home Warranty Administrator of Florida, Inc*., No. A-1355-16T4, 2017 N.J. Super. Unpub. LEXIS 1527 (N.J. Super. Ct. App. Div. June 23, 2017), *certif. granted*, 231 N.J. 334 (2017), regarding whether referring to arbitration as the exclusive remedy was a sufficient waiver under *Atalese*. The petitioner specifically raised whether *Atalese* was preempted by the U.S. Supreme Court's prohibition of "clear statement" requirements in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017).

57. *See* Chapter 2, § 2-6.

58. *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).

in contexts perhaps not obvious. Arbitration in international transactions appears especially favored.[59]

One must always 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 to so submit.'"[60] This requires a two-step analysis. First, is there a contract that includes an arbitration clause? This is in part whether a 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; in other cases, courts consider whether the clause properly waives statutory or other rights that may (or may not) take precedence over the governing arbitration statute.[61] New Jersey courts have adopted the same two-step inquiry.[62]

Thus, as a general matter, courts will enforce properly drafted arbitration provisions in attorney retainers, labor agreements, employment contracts, consumer transactions, utility contracts, construction, architectural or engineering contracts, franchise agreements, commercial leases and sales transactions, accompanying or referenced "terms and conditions," and partnership and operating agreements (for an L.L.C., for

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59. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

60. *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 Bel-Ray Co., Inc. v. Chemrite (pty) Ltd.,* 181 F.3d 435, 444 (3d Cir. 1999); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980). *But cf.* Chapter 2, § 2-5:5 (non-signatories).

61. *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 (ES) (JAD), 2017 U.S. Dist. LEXIS 42144, at *11 (D.N.J. Mar. 23, 2017); *Singh v. Uber Techs., Inc.*, 235 F. Supp. 3d 656, 664 (D.N.J. 2017). *Pearson v. Valeant Pharmaceuticals International, Inc*., No. 17-1995-BRM-DEA, 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 to the second, *scope* step.

62. *See*, *e.g*., *26 Flavors, LLC v. Two Rivers Coffee, LLC*, No. A-5291-14T4, 2017 N.J. Super. Unpub. LEXIS 2252, at *9 (N.J. Super. Ct. 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 (N.J. Super. Ct. 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).

example).[63] Retirement account,[64] securities, credit card,[65] and other financial agreements also may contain arbitration clauses, but in some cases (*e.g.*, securities) they are governed by federal regulatory provisions. Non-traditional contexts in which arbitration provisions have been sustained include bylaws for

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[63] *E.g.*, *Smith v. Lindemann*, 710 Fed. Appx. 101 (3d Cir. 2017) (fee agreement); *Delany v. Dickey* (discussed New Jersey Law Journal article titled *Challenge to Sills Cummis' Retainer Arb Clause Turned Back* on Nov. 11, 2017) (same); *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124 (2001) (contracts of employment); *Curtis v. Cellco P'ship,* 413 N.J. Super. 26 (App. Div. 2010) (consumer fraud claims); *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 Fed. Appx. 113 (3d Cir. 2017) (hidden warranty); *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); *Tedeschi v. D.N. Desimone Constr., Inc*., No. 15-8484 (NLH/JS), 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 (N.J. Super. Ct. 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., LLC*, No. A-1907-15T1, 2017 WL 958489 (N.J. Super. Ct. App. Div. Mar. 13, 2017); *but see Epstein v. Conboy*, No. A-2135-15T3, 2016 WL 3600251 (N.J. Super. Ct. App. Div. July 6, 2016) (AIA construction); *Glamorous Inc. v. Angel Tips, Inc*., No. A-985-16T1, 2017 N.J. Super. Unpub. LEXIS 1526 (N.J. Super. Ct. 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. Jun. 20, 2016); *Paul Green Sch. of Rock Music Franchising, LLC v. Smith*, 389 Fed. Appx. 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); *Frick Joint Venture v. Vill. Super Mkt., Inc*., No. A-1441-15, 2016 WL 3092980 (N.J. Super. Ct. App. Div. Jun. 3, 2016) (commercial leases); *Emcon Assoc., Inc. v. Zale Corp*., No. 16-1985, 2016 WL 7232772 (D.N.J. Dec. 14, 2016) (sales transactions, accompanying or referenced "terms and conditions"); *Ames v. Premier Surgical Ctr., L.L.C.,* No. A-1278-15T1, 2016 WL 3525246 (N.J. Super. Ct. App. Div. Jun. 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. July 28, 2016) (shareholders' agreement) (remanded)*; Smith v. Lindemann,* No. 10-3319, 2014 WL 835254 (D.N.J. Mar. 4, 2014) (distinguishing *Kamaratos v. Palias,* 360 N.J. Super. 76, 84 (App. Div. 2003)) (attorney-client relationship), *aff'd*, 710 Fed. Appx. 101 (3d Cir. 2017); *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).

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

[65] *E.g., 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. Jun. 23, 2009) (line of credit); *Novack v. Cities Service 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).

religious societies,[66] funeral contracts,[67] settlement agreements,[68] and employment applications.[69] Arbitration clauses in unilateral contracts such as separate limited warranties may not be enforced.[70]

Although New Jersey courts had held that certain arbitration clauses were not enforceable as a matter of state public policy,[71] such rulings have been held preempted, as, for example, regarding class-action waivers[72] and regarding health care or nursing contracts,[73] though courts may find ways to avoid the preemption and apply rough justice to preclude arbitration in such contexts.[74] Unconscionability issues, as discussed in *Muhammad*, still may be raised in specific contexts and result in severance of unconscionable provisions.[75] Although final or proposed federal regulations would have either regulated, limited, or prohibited arbitration in consumer financial, health care, or other transactions, they have

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66. *See Matahen v. Sehwail*, No. A-4312-14T1, 2016 N.J. Super. Unpub. LEXIS 647 (N.J. Super. Ct. 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 (N.J. Super. Ct. App. Div. Feb. 17, 2017), *certif. denied*, 230 N.J. 569 (2017).

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

68. *See Jang Won So v. EverBeauty, Inc*., No. A-3560-16, 2018 N.J. Super. Unpub. LEXIS 4 (N.J. Super. Ct. 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).

69. *Martindale v. Sandvik, Inc*., 173 N.J. 76 (2002).

70. *Noble v. Samsung Elecs. Am., Inc*., No. 15-3713, 2016 WL 1029790 (D.N.J. Mar. 15, 2016), *aff'd*, 682 Fed. Appx. 113 (3d Cir. 2017). *Cf. 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).

71. *E.g., Muhammad v. Cty. Bank of Rehoboth Beach, Del.*, 189 N.J. 1 (2006).

72. *See Litman v. Cellco P'ship*, 655 F.3d 225, 230 (3d Cir. 2011) (holding *Muhammad v. Cty. Bank of Rehoboth Beach, Del.*, 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 (N.J. Super. Ct. App. Div. Mar. 27, 2017) (noting same).

73. *Marmet Health Care Ctr., Inc. v. Brown,* 565 U.S. 530 (2012); *Brown v. 5101 N. Park Drive Operations, LLC*, No. A-5372-12T2, 2014 WL 1613648 (N.J. Super. Ct. App. Div. Apr. 23, 2014) (citing *Marmet*); *Estate of Ruszala v. Brookdale Living Communities, Inc.*, 415 N.J. Super. 272 (App. Div. 2010) (pre-*Marmet*; finding FAA pre-emption but severing unconscionable aspects of arbitration). *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).

74. *See Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545 (App. Div. 2016) (denying arbitration because AAA forum not available). Other examples include: *Patterson v. Care One at Moorestown, LLC*, No. A-4358-15T3, 2017 N.J. Super. Unpub. LEXIS 423 (N.J. Super. Ct. App. Div. Feb. 21, 2017), *certif. denied*, 230 N.J. 476 (2017).

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

been withdrawn by the new administration or are subject to court review.[76]

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 evidences "mutual assent" 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.[77] Standard contract elements used to judge arbitration clauses also include consideration, offer and acceptance (as evidenced by words or conduct), and reasonably definite terms.[78] Cases have held that parties' "acknowledging" or indicating they have "read and understood" a term is not sufficient to indicate acceptance, absent other factors,[79] though performance may be held evidence of acceptance if other factors (such as adequate notice) are met.[80] A party's failing to read a contract term is not sufficient to indicate lack of acceptance; a party is deemed to have accepted

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76. 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). *See* http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf (May 3, 2016); http://blogs.harvard.edu/billofhealth/2016/10/03/cms-prohibits-arbitration-clauses-in-long-term-care-facility-contracts. At publication, Congress had passed, and the New Jersey Legislature was considering, legislation limiting arbitration in civil rights and other matters.

77. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442 (2014), *cert. denied*, 135 S. Ct. 2804 (2015). *See also, e.g.*, *Leodori v. Cigna Corp.*, 175 N.J. 293 (2003) (employee handbook). The Third Circuit in *Aliments Krispy Kernels, Inc. v. Nichols Farms*, 851 F.3d 283, 288-90 (3d Cir. 2017), reiterated that the "mutual assent" standard under New Jersey contract formation principles governs and not its prior holding in *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980) ("express [and] unequivocal"). *See* Chapter 2, § 2-5:2.

78. *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 (N.J. Super. Ct. Law Div., Essex Cty. Mar. 6, 2017) (telephone call about draft not sufficient for contract formation) (discussing, *inter alia*, *Leodori v. CIGNA Corp.*, 175 N.J. 293 (2003)); *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 (N.J. Super. Ct. App. Div. Jan. 2, 2018) (enforcing agreement between attorneys to dismiss employment litigation in favor of arbitration).

79. *E.g., Dugan v. Best Buy Co.*, No. A-1897-16T4, 2017 N.J. Super. Unpub. LEXIS 2053 (N.J. Super. Ct. App. Div. Aug. 11, 2017), *certif. denied,* 231 N.J. 327 (2017).

80. *See James v. Global Tel*Link Corp.*, 852 F.3d 262, 265-66 (3d Cir. 2017) (reviewing N.J. law regarding contract principles).

terms in a contract that he or she signs.[81] Parties typically must have sufficient competence and actual or apparent authority for contract formation.[82] Following *Kindred*, courts have looked to whether a signatory had actual or apparent authority to commit the principal.[83]

An arbitration provision that is ambiguous, or that indicates arbitration only as an option, may not be enforced.[84]

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,[85] as will be the case where the parties (or their labor representatives) have specifically bargained for the terms of a dispute resolution mechanism.[86]

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81. *E.g., Noble v. Samsung Elecs. Am., Inc*., 682 Fed. Appx. 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 (N.J. Super. Ct. App. Div. Dec. 13, 2017) (noting that terms must be in plain language understandable to the reasonable consumer).

82. *See* § 1-4 at nn.26-28.

83. *E.g., 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).

84. *See Marchak v. Claridge Commons, Inc*., 134 N.J. 275 (1993) (homeowners warranty claim, clause ambiguous); *Kernahan v. Home Warranty Adm'r of Fla., Inc*., No. A-1355-16T4, 2017 N.J. Super. Unpub. LEXIS 1527 (N.J. Super. Ct. App. Div. June 23, 2017) ("mediation" heading for paragraph), *certif. granted*, 231 N.J. 334 (2017); *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 (N.J. Super. Ct. 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 (N.J. Super. Ct. App. Div. Nov. 16, 2017) (arbitration award confirmed). *See* § 1-4:3.1.

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-BRM-DEA, 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).

85. *E.g., Columbus Circle N.J. LLC v. Island Constr. Co., LLC*, 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 (NLH/JS), 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).

86. *See White v. Camden Cty. 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*).

Where an individual is involved, despite obvious sophistication, that presumption may not hold sway,[87] and there may be other instances (particularly in federal court) where a court may require fact-finding to determine whether parties achieved mutual assent.[88] 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,[89] though these formats may help to evidence knowledge or notice.[90] Clauses that are "illegible",[91] "onerous to read,"[92] or "buried" in a document that does not appear to be a bilateral contract[93] preclude mutual assent to contract formation and are not enforceable.

In *Atalese v. U.S. Legal Services Group, L.P.*,[94] the New Jersey Supreme Court reviewed its prior holdings requiring mutual

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87. *See 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). After *Epstein*, the Supreme Court described *Atalese* as applying to "consumer contracts." *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 294 (2016). *See also* Chapter 2, § 2-5:2 (discussing problems with extending *Atalese* beyond the consumer area).

88. *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764 (3d Cir. 2013) (remanding); *Corchado v. Foulke Mgmt. Corp.*, No. 15-6600, 2016 WL 2727268 (D.N.J. May 6, 2016), *aff'd*, 2017 U.S. Dist. LEXIS 21457 (D.N.J. Feb. 14, 2017), *aff'd*, 707 Fed. Appx. 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 (N.J. Super. Ct. App. Div. Dec. 22, 2017). *But see Ace Am. Ins. Co. v. Guerriero*, No. 2:17-cv-00820, 2017 U.S. Dist. LEXIS 135891 (D.N.J Aug. 24, 2017), *aff'd*, No. A-0669-16T2, 2017 N.J. Super. Unpub. LEXIS 3155 (N.J. Super. Ct. App. Div. Dec. 22, 2017) (no discovery required).

89. *E.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (state statute requiring first-page underlined notice was preempted by FAA).

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

91. *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).

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

93. *E.g.*, *Noble v. Samsung Elecs. Am., Inc.*, 682 Fed. Appx 113, 116 (3d Cir. 2017) (terms must be reasonably conspicuous).

94. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442 (2014) (providing several examples of sufficient language), *cert. denied*, 135 S. Ct. 2804 (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 Capital 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.

assent, in the context of a Consumer Fraud Act claim regarding a consumer debt-adjustment services contract, holding that the arbitration agreement must contain language clearly and unambiguously waiving the right to a court or jury determination of their dispute.

Following *Atalese*, New Jersey state and federal courts (applying New Jersey law) have found a variety of arbitration provisions invalid in consumer, employment, and other situations,[95] although they may have conflated the two steps of the arbitrability analysis identified at footnote 61 in this chapter. In New York, specific waivers are not required;[96] the law in other states may vary. Thus, the applicable law or forum may be critical on this issue.

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 any such case.[97] *Atalese* took particular care to find that it was following a principle applicable generally to contracts and not one that disfavored arbitration agreements.

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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) (as to fees issue only).

95. *E.g., Barr v. Bishop Rosen & Co*., 442 N.J. Super. 599 (App. Div. 2015) (employment), *certif. denied*, 224 N.J. 244 (2016); *Myska v. N.J. Mfrs. Ins. Co*., 440 N.J. Super. 458 (App. Div. 2015), *certif. granted*, 223 N.J. 554 (2015), *dismissed*, 224 N.J. 523 (2016); *Dispenziere v. Kushner Cos*., 438 N.J. Super. 11 (App. Div. 2014) (condominium purchase); *Milloul v. Knight Capital Grp., Inc*., No. A-1953-13T2, 2015 N.J. Super. Unpub. LEXIS 2115 (N.J. Super. Ct. App. Div. Sept. 1, 2015) (employment); *Rosenthal v. Rosenblatt*, No. A-3753-12T2, 2014 WL 5393243 (N.J. Super. Ct. App. Div. Oct. 24, 2014) (sale of dental practice). *But see Jaworski v. Ernst & Young US LLP*, 441 N.J. Super. 464, 482 (App. Div.) (waiving ability "to sue in court" sufficient), *certif. denied*, 223 N.J. 406 (2015). *See generally* Chapter 2, § 2-5:2.

96. *E.g., Valdes v. Swift Transp. Co., Inc*., 292 F. Supp. 2d 524 (S.D.N.Y. 2003) (citing, *e.g., Berkovitz v. Arib & Houlberg, Inc*., 230 N.Y. 261, 130 N.E. 288 (1921)). *See also 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).

97. In *Ritz-Carlton Development Co. v. Narayan*, 136 S. Ct. 800 (2016), the Court granted the writ, vacated the judgment and remanded to the Supreme Court of Hawaii in light of *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (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*. The issue has now been presented for review in the New Jersey Supreme Court. *See Kernahan v. Home Warranty Adm'r of Fla., Inc*., 231 N.J. 334 (2017) (granting certification).

1-4:3 Terms That May Be Included in Arbitration Provisions

As already noted, one of the advantages of arbitration is that the parties may, to a large extent,[98] 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,[99] but—along with language such as required by *Atalese* 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 and scope issues described earlier,[100] but also the manner of conducting the arbitration.

1-4:3.1 Location of Clause

A provision requiring arbitration may be located in a variety of places: the parties' substantive contract, a separate arbitration agreement, separate terms and conditions, bylaws, and guild rules.

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98. As a matter of general contract law, some limitations/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. *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*., *Inc*., 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. 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 (N.J. Super. Ct. 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 Assoc., Inc. v. Zale Corp.,* No. 16-1985*,* 2016 WL 7232772 (D.N.J. Dec. 14, 2016) (Ohio law).

99. *E.g*., AAA, *Drafting Dispute Resolution Clauses – A Practical Guide*, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540; *see also* John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 *Dispute Resolution Journal* 1 (Feb.-Apr. 2003), http://www.hugheshubbard.com/ArticleDocuments/Townsend.pdf. Although not specifically addressed to drafting arbitration clauses, the Preliminary Hearing Procedures "checklist" in the AAA Commercial Rules, section "P-2" (*see* Chapter 3, § 3-1:2.1, and Appendix 1) "suggests issues to include in an arbitration clause."

100. *See* § 1-4:2.

A review of the cases suggests several cautions, though, where the arbitration agreement is not separately signed (and even when it is).

First, 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 a referenced document (such as a unilateral warranty) that one would not expect to be a bilateral contract.[101] As noted earlier in § 1-4:2, terms must be legible, but no specific format of typeface or type size is required.

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.[102] Words such as "acknowledge receipt" or "received" may not be sufficient to evidence contractual acceptance.[103]

Second, 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.*,[104] 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.[105] However, trivial differences will not preclude enforcement.[106] Under

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101. *See, e.g.*, *Noble v. Samsung Elecs. Am., Inc.*, 682 Fed. Appx 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)).

102. *See Carfagno v. ACE, Ltd.*, No. 04-6184 (JBS), 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 (JBS), 2001 U.S. Dist. LEXIS 10661 (D.N.J. June 15, 2001).

103. *See* § 1-4:3.1.

104. *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.*, § 1-4:1.2 at n.42 and 1-4:3.3 at n.152.

105. *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).

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

proper circumstances, the arbitration clause in an agreement may be enforced even though a subsequent agreement does not refer to arbitration.[107] Appendix 7 contains other recent unreported examples.

Third, an arbitration provision in a separate document may be adopted by reference,[108] but—keeping in mind the requirements of notice of and assent to any contractual condition—it is important to consider the clarity of the reference,[109] the actual delivery of the referenced document, and the timing of the delivery;[110] for web or similar situations, the mechanics of an electronic acceptance of the provision may be key. An unreported Appellate Division case, *Arafa v. Ahmend*,[111] illustrates some of the problems. There, the court distinguished between two groups of plaintiffs: one

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107. *See Pearson v. Valeant Pharms. Int'l, Inc*., No. 17-1995-BRM-DEA, 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 Weed v. Sky NJ, LLC*, No. A4589-16T1, 2018 N.J. Super. Unpub. LEXIS 410 (N.J. Super. Ct. App. Div. Feb 22, 2018) (parent's approval on prior visit ineffective).

108. *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, L.L.C*., 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).

109. *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).

110. 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. *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).

111. *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 Fed. Appx. 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 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 (N.J. Super. Ct. 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.

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.[112]

Fatal problems in designing a hyperlink to the Terms of Use on a website are illustrated by *Hite v. Lush Internet, Inc.*[113] 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.*,[114] where the Terms 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. Arbitration also was compelled based on an agreement signed in an employee "onboarding process" where the hyperlinks were said to be properly sequenced.[115]

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*.[116] 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.

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

113. *Hite v. Lush Internet, Inc.*, 244 F. Supp. 3d 444 (D.N.J. 2017) (arbitration denied).

114. *Singh v. Uber Techs. Inc.*, 235 F. Supp. 3d 656 (D.N.J. 2017).

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

116. *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).

Fourth, an arbitration provision in a single document may have carve-out provisions for, for example, small claims, probate, bankruptcy, or injunctive relief, but the document should not contain or be joined by potentially conflicting provisions, such as two "exclusive" jurisdiction provisions.[117] The "Seven Deadly Sins" of arbitration agreements[118] 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.[119] Provisions for emergency court relief may not be necessary where the provider's rules[120] call for a similar emergency arbitrator, hearing and interim award (although judicial enforcement still may be advisable). A common-sense multi-step ADR process, *i.e.*, consultation, mediation, then arbitration, must clearly identify each step.[121] A waiver-of-class-action clause can lead to the loss of the ability to compel arbitration if not clearly stated.[122]

Fifth, be careful of boilerplate provisions in the contract that may defeat the alleged intent of the arbitration clause. This problem may be illustrated by *Castle Realty Management, LLC v. Burbage*,[123] where efforts to claim a right to compel arbitration

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117. *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 (N.J. Super. Ct. 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).

118. John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Dispute Resolution Journal 1 (Feb.-Apr. 2003), http://www.hugheshubbard.com/ArticleDocuments/Townsend.pdf.

119. *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 (N.J. Super. Ct. App. Div. June 23, 2017), an exception for claims for "money owed" created an issue.

120. *See, e.g.*, AAA Commercial Rules R-37 & R-38 (Appendix 1) and ICDR Articles 6 & 24 (Appendix 3). *See* Chapter 2, § 2-4:4; Chapter 3, § 3-6. *See also* N.J.S.A. 2A:23B-8(c) (emergent relief does not waive arbitration).

121. Confusion in the language may make the contract unenforceable. *See Kernahan v. Home Warranty Admin. of Fla., Inc*., No. MID-L-7052-15, 2016 N.J. Super. Unpub. LEXIS 2503 (N.J. Super. Ct. Law Div. Nov. 18, 2016), *aff'd*, No. A-1355-16T4, 2017 N.J. Super. Unpub. LEXIS 1527 (N.J. Super. Ct. App. Div. June 23, 2017), *certif. granted*, 231 N.J. 334 (2017); *Dvorak v. AW Dev. LLC*, No. A-3531-14T2, 2016 WL 595844 (N.J. Super. Ct. App. Div. Feb. 16, 2016).

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

123. *Castle Realty Mgmt., LLC v. Burbage*, No. A-5399-15T4, 2017 N.J. Super. Unpub. LEXIS 1748 (N.J. Super. Ct. App. Div. July 13, 2017), *certif. denied*, 231 N.J. 111 (2017).

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.*,[124] the defendant attempted (unsuccessfully) to enforce an 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.

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.

1-4:3.2 Scope and Delegation

One of the first questions parties must resolve in designing their arbitration provision is the scope of issues that they want to mediate, arbitrate, or litigate. Courts generally differentiate between "broad" and "narrow" clauses,[125] with the former being distinguished by language such as "all disputes concerning or arising out of this agreement, its interpretation, breach and

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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.

124. *White v. Sunoco, Inc.*, 870 F.3d 257 (3d Cir. 2017).

125. *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). Judge Thompson recently held that a potential arbitration clause in one alleged agreement, which referred to the parties' "relationship," was not so broad as 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 Fed. Appx. 124 (3d Cir. 2016) (lease with arbitration clause did not encompass wage and hour dispute).

enforcement."[126] The standard AAA clause[127] (though not as complete or appropriate for New Jersey) falls into this category, which may result in non-contract (statutory or tort) claims being arbitrated, though courts have required that the scope language also specifically refer to statutory or class claims if they are to be arbitrated.[128]

However, 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[129] or reinsurance, fit this pattern. Thus, "narrow" clauses may be further categorized as "specific" or "divided,"

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126. The arising-out-of language was specifically upheld in *Yale Materials Handling Corp. v. White Storage & Retrieval Systems, 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).

127. "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://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540. Note: The AAA clause would not satisfy the requirements of *Atalese v. U.S. Legal Services Group, L.P*., 219 N.J. 430, 442 (2014), *cert. denied*, 135 S. Ct. 2804 (2015), for consumer or other covered cases or cover statutory claims or waive statutory jury rights. The AAA has a free "Clause Builder" website, www.clausebuilder.org, 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* www.adr.org/consumerclauseregistry, 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 (N.J. Super. Ct. Law Div. Dec. 8, 2016). *See also Case Med., Inc. v. Advanced Sterilization Prods. Servs., Inc*., No. A-0567-15T4, 2016 WL 3369414 (N.J. Super. Ct. App. Div. June 20, 2016) (requiring arbitration of tortious interference claims; "Any controversy or claim arising out of or relating to this agreement shall be resolved by arbitration.").

128. *See, e.g., Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124 (2001) (employment). *But cf. Emcon Assoc., 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). "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).

129. *See Columbus Circle N.J. LLC v. Island Constr. Co., LLC*, 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).

where parties attempt to exclude certain matters from arbitration, such as small claims or injunctive relief.[130]

Words that have been interpreted as including or excluding the claims at issue include "under this agreement."[131] "Relating to" has been held broader than "arising out of."[132]

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.[133] Given the policy favoring arbitration under the FAA, once it is determined that a valid contract has been formed, courts apply a presumption of arbitrability regarding the scope of issues to be arbitrated, resolving ambiguities in favor of arbitration,[134] though it is also said (in New Jersey) that the court may not write a better or broader clause than the parties bargained for.[135]

As noted, "equivocation" between arbitration and litigation can lead to uncertainty regarding the parties' intent and consequent delay as they litigate what is in or out of an arbitration.

As a general matter, courts (rather than the arbitrator(s)) must decide whether a particular dispute is within the arbitration

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130. *See, e.g., Moore v. Fischer*, No. A-3419-15T3, 2017 N.J. Super. Unpub. LEXIS 350 (N.J. Super. Ct. 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.

131. *Moon v. Breathless, Inc*., 868 F.3d 209 (3d Cir. 2017) (denied arbitration of statutory overtime claims where clause was in a "consulting contract").

132. *Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc.*, 240 N.J. Super. 370, 375 (App. Div. 1990).

133. *See Employer Trs. of W. Pa. Teamsters v. Union Trs. of W. Pa. Teamsters*, 870 F.3d 235, 241 (3d Cir. 2017) (citation omitted); *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) (employment termination) (citing *AT&T Techs., Inc. v. Commc'ns Workers of Am*., 475 U.S. 643, 654 (1986)).

134. *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)).

135. *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 (JLL), 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).

clause;[136] the New Jersey Arbitration Act is specific about this.[137]

However, as discussed in Chapter 2, § 2-4:2, 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 …," although not all courts have accepted this as sufficient. The New Jersey Supreme Court has held recently that language in the parties' contract was not a sufficient delegation, but that language accepted by the U.S. Supreme Court in *Rent-A-Center, West, Inc. v. Jackson,*[138] would be sufficient.[139]

Most courts have accepted the second (rules-adoption) delegation as sufficient,[140] though there is no New Jersey Supreme

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136. *AT&T Techs., Inc. v. Commc'ns Workers of Am.,* 475 U.S. 643, 649 (1986). However, procedural matters regarding the clause generally are for the arbitrator. *See* §§ 1-4:1.1 and 1-4:3.2.

137. N.J.S.A. 2A:23B-6(b) ("The court shall decide whether an agreement to arbitration 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).

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

139. *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 (RMB/AMD), 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.*, No. 17-2161, 2018 U.S. App. LEXIS 4795 (3d Cir. Feb. 27, 2018).

140. *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. Jun. 30, 2016), *reconsideration denied*, 2106 WL 7238795 (D.N.J. Dec. 14, 2016), *appeal filed*, No. 17-1116 (3d Cir. Jan. 20, 2017) (citing, *e.g., MACTEC Dev. Corp. v. EnCap Golf Holdings, LLC (In re EnCap 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 (Oct. 3, 2016). However, *Chesapeake* and its

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.[141]

1-4:3.3 Administered and Non-Administered Arbitration

Arbitration may be administered by the organizations mentioned in § 1-2, or others, with professionals dealing with the attorneys or pro se parties, arranging for collection of fees, clearing and reviewing documents for form, providing a location for the hearings, and providing staff services. Arbitration may also be administered by a Beth Din or other religious forum.[142]

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 conventions abound, often governed by the UNCITRAL[143] 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.

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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. Jun. 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*, — F.3d —, No. 17-2161, 2018 U.S. App. LEXIS 4795 (3d Cir. Feb. 27, 2018).

141. *See* Appendix 1; *but see* cases cited in fn. 122 and Chapter 2, § 2-4:2 (Delegation) 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 (N.J. Super. Ct. 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.

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

143. The United Nations Commission on International Trade Law, www.uncitral.org.

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 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.[144] 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.[145] Merely agreeing to arbitrate under the AAA Rules may not always be sufficient, though, since the prior rules did not include that proviso.[146]

The parties' agreement may designate a forum, *e.g.*, ICDR, and different rules, *e.g.*, UNCITRAL.

Note: Throughout this edition, the authors have referred to the October 1, 2013 revision of the AAA Commercial Arbitration Rules found in Appendix 1 in this edition of this book. If the case is governed by the 2009 Commercial Arbitration Rules, copies of the text can be found online at adr.org, with a copy in the Appendix of the 2013 edition of this book. Under R-1(a), the new rules apply only to cases filed after October 1, 2013. But the changes certainly can be argued as being indicative of the intent and interpretation of the 2009 rules. Parties may specify "the then-current AAA rules …" to this effect.

In addition to these changes, the AAA on November 1, 2013 established Optional Appellate Arbitration Rules, discussed in detail in Chapter 8.

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144. AAA Commercial Arbitration Rules, R-4(a).

145. *E.g.*, AAA Commercial Arbitration Rules, R-1 & R-2 (Appendix 1); ICDR Rules, Article 1 (Appendix 3). *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).

146. *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).

On June 13, 2014, the AAA adopted new Fixed Time and Costs Construction Arbitration Rules, and on September 1, 2014, adopted new Consumer Arbitration Rules. Additionally, on November 1, 2014, AAA's International Centre for Dispute Resolution (ICDR) adopted new International Dispute Resolution Procedures, contained in Appendix 3 of this book. These ICDR procedures mirror most international rules and (by limiting discovery) depart radically from the rules governing most American litigation and the AAA domestic rules. The Consumer Fee Schedule was updated effective October 1, 2016. The Commercial, Construction, Employment, and International Fee Schedules (and possibly others) were amended effective October 1, 2017.

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,[147] other cases have attempted to determine if the selected forum or arbitrator was an "integral" aspect of the parties' agreement to arbitration;[148] if it was not, then the court may sever the forum provision[149] and appoint an arbitrator pursuant to the FAA[150] or New Jersey Arbitration Act[151] or fashion other equitable arrangements. 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 was deemed integral to the clause.[152]

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147. *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).

148. *Khan v. Dell Inc.,* 669 F.3d 350 (3d Cir. 2012) (forum not integral, severed), *on remand*, 2014 WL 718314 (D.N.J. Feb. 1, 2014); *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.*, No. 17-2161, 2018 U.S. App. LEXIS 4795 (3d Cir. Feb. 27, 2018).

149. *See Control Screening LLC v. Tech. Application & Prod. Co.*, 687 F.3d 163, 170 (3d Cir. 2012) (international).

150. 9 U.S.C. § 5 ("or if for any other reason … the court shall designate and appoint ….").

151. 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 WL 588271 (N.J. Super. Ct. App. Div. Feb. 13, 2015) (selection of AAA rules did not require AAA administration under then-existing rules).

152. *See MacDonald v. CashCall, Inc.*, No. 17-2161, 2018 U.S. App. LEXIS 4795 (3d Cir. Feb. 27, 2018).

Outside of these organizations, as permitted by statute, arbitrators may be retained directly by counsel or the parties and perform these services themselves, in which case it may be wise to specify rules to govern the arbitration.[153] This latter course may be less expensive for the parties but is financially riskier for the arbitrator.[154] 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, with the parties' agreement.[155]

1-4:3.4 Choice of Law and Rules

Although the law governing an underlying contract may be determined by a choice-of-law clause or the forum state's choice-of-law rules, that determination may not govern the law applicable to the arbitration provision within that contract.[156] Although some choice-of-law clauses refer to "interpretation and enforcement" of the contract, the authors are not aware of any New Jersey cases accepting this as applicable to arbitration procedure.[157] In New Jersey, the default arbitration law is the New Jersey Arbitration Act,[158] 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

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153. *Cf. Marano v. Hills Highland Master Ass'n, Inc.*, No. A-5538-15T1, 2017 N.J. Super. Unpub. LEXIS 2854 (N.J. Super. Ct. App. Div. Nov. 16, 2017) (award sustained; the agreement should be sure to specify arbitration, rather than mediation).

154. *Cf. Shah v. Shah*, No. A-0762-15T3, 2017 N.J. Super. Unpub. LEXIS 2368 (N.J. Super. Ct. App. Div. Sept. 20, 2017) (domestic relations arbitration abandoned because of costs).

155. *E.g., Kelly v Kelly*, No. A-2637-14T2, 2016 WL 6068244 (N.J. Super. Ct. App. Div. Oct. 17, 2016) (affirming enforcement of agreed arbitration order in Family Part).

156. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-60 (1995). *See* § 1-4:1.3.

157. The potential conflict between a state's procedural rules and a forum's rules is illustrated by *Weirton Medical Center, Inc. v. Community Health Systems, 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).

158. *See* N.J.S.A. 2A:23B-3.

to enforce the parties' choice of arbitration law if that law violates federal public policy.[159]

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.[160] Although some arbitration clauses provide that the FAA shall apply,[161] 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 likely still would apply its own substantive and arbitration law in a case not in interstate commerce.

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, AAA Commercial Rules, R-34 & R-32) and depart from the nature of arbitration, causing issues at the time of enforcing the award. (*See* Chapter 8, §§ 8-3:6 to 8-3:8.)

As indicated in § 1-4:3.3, the parties also 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. A 2017 not-for-publication 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.[162] The selection of a

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159. *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*, — F.3d —, No. 17-2161, 2018 U.S. App. LEXIS 4795 (3d Cir. Feb. 27, 2018).

160. *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 (N.J. Super. Ct. App. Div. June 23, 2017) (New York law; preemption of franchise rules); *KDDI Glob. LLC v. Fisk Telecom LLC*, No. 17-5445-BRM-DEA, 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 (JBS/JS), 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.

161. *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).

162. *Patterson v. Care One at Moorestown, LLC*, No. A-4358-15T3, 2017 N.J. Super. Unpub. LEXIS 423, at *7 & *12 (N.J. Super. Ct. App. Div. Feb. 21, 2017), *certif. denied*, 230 N.J. 476 (2017). This unique, unsupported result can best be viewed as anti-arbitration *dictum*.

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 the October 2013 AAA Commercial Rules provide that adoption of the rules also accepts AAA administration,[163] that designation does not affect pre-2013 agreements;[164] 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 New Jersey Arbitration Act.[165] 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.[166]

The AAA and other rules permit class actions and provide procedures for their administration. However, there are questions if the arbitration agreement does not specifically adopt the provider's class-action rules but is silent regarding the procedure, even though the AAA Commercial Rules, generally, are specified.[167] Issues regarding class actions, including waiving the right to class actions in arbitrations, are discussed in greater detail in Chapter 2.[168]

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163. *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).

164. 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).

165. *See Petersburg Regency, LLC v. Selective Way Ins. Co.*, No. A-3855-11T2, 2013 WL 1919556 (N.J. Super. App. Div. 2013) (where the parties have specified arbitration but there is no agreement concerning its terms, the New Jersey Arbitration Act can operate as a "gap filler" to remedy the parties' omission).

166. *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).

167. *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016) (discussed in more detail elsewhere).

168. *See* Chapter 2, § 2-6.

1-4:3.5 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. As noted elsewhere, non-signatories may be included whether 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 affiliates, agents, franchisees, "third parties," or assigns and using broad "all disputes" language without limiting the parties bound.[169]

Narrow or ambiguous language may defeat efforts to compel arbitration by non-signatories.[170] There were several examples in 2017 to illustrate plaintiffs avoiding arbitration by suing only non-signatories. In *White v. Sunoco, Inc.*,[171] 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

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169. *See* Chapter 2, § 2-5:5. 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 (N.J. Super. Ct. App. Div. Apr. 24, 2017), the court distinguished cases that had not permit enforcement by "affiliates" and ordered arbitration.

170. 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-(RBK/KMW), 2017 U.S. Dist. LEXIS 68870 (D.N.J. May 5, 2017) (assignee of receivables did not receive right to compel arbitration).

171. *White v. Sunoco, Inc.*, 870 F.3d 257 (3d Cir. 2017). *See also Castle Realty Mgmt., LLC v. Burbage*, No A-5399-15T4, 2017 N.J. Super. Unpub. LEXIS 1748 (N.J. Super. Ct. App. Div. July 13, 2017) (Re/Max franchisees as barred third-party beneficiaries), *certif. denied*, 231 N.J. 111 (2017).

or credit documents rather than the warranty.[172] A False Claims Act claim was held not arbitrable since the government is the real party in interest in such claims.[173]

Arguments that non-signatories were indispensable parties may not defeat arbitration as to signatories.[174] A claim by or against the non-signatory may by severed and proceed separately.

1-4:3.6 Pre-Arbitration Mediation; Non-Binding Arbitration

Parties may require mediation or executive consultation (multi-step) as a precondition to arbitration, but the clause must be clear and not contradictory.[175] Captioning the arbitration clause 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.[176] 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 mediation as an auxiliary to an arbitration.[177]

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172. *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).

173. *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).

174. *Mahanandigari v. Tata Consultancy Servs*., No. 16-8746 (JLL), 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).

175. *See, e.g., Gastelu v. Martin*, No. A-0049-14T2, 2014 WL 10044913 (N.J. Super. Ct. App. Div. July 9, 2015); *Kernahan v. Home Warranty Admin. of Fla., Inc*., No. MID-L-7052-15, 2016 N.J. Super. Unpub. LEXIS 2503 (N.J. Super. Ct. Law Div. Nov. 18, 2016), *aff'd*, No. A-1355-16T4, 2017 N.J. Super. Unpub. LEXIS 1527 (N.J. Super. Ct. App. Div. June 23, 2017), *certif. granted*, 231 N.J. 334 (2017). In *Sand Castle Development, LLC v. Avalon Development Group, LLC*, No. A-3325-16T1, 2017 N.J. Super. Unpub. LEXIS 2701 (N.J. Super. Ct. 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.

176. *E.g., Marano v. Hills Highland Master Ass'n, Inc.*, No. A-5538-15T1, 2017 N.J. Super. Unpub. LEXIS 2854 (N.J. Super. Ct. App. Div. Nov. 16, 2017) (award sustained).

177. *See* AAA Commercial Arbitration Rule R-9 & its Commercial Mediation Procedures (Appendix 1).

A variety of "dispute resolution programs" require "non-binding arbitration" as a preliminary step before litigation.[178] Whether or not intended to be a precondition to litigation, these have encountered enforcement problems.[179] Appraisal has been held by some courts not a form of statutory arbitration.[180]

1-4:3.7 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 complex matters. The parties also should consider whether a single arbitrator may be able to make himself or herself more readily available for a hearing, especially if changes are required. An appeals process may provide a less expensive alternative to multiple arbitrators.[181]

Clauses that require the parties to negotiate regarding the choice of arbitrator have been held enforceable; if they cannot agree, a court appoints the arbitrator.[182]

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. Lay, non-lawyer arbitrators also may be designated, and some industry arbitral fora specialize in making non-lawyer arbitrators available, as would be the case in pre-industrial guilds. Identifying a specific, named person as arbitrator may cause problems if he or she is not available.

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178. *See, e.g., Bowen v. Hyundai Motor Am.*, No. A-4188-15T3, 2017 N.J. Super. Unpub. LEXIS 1330 (N.J. Super. Ct. App. Div. June 1, 2017) (Better Business Bureau; fees awarded). *See generally* Chapter 9, § 9-1.

179. *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* 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).

180. In *Adler Engineers, Inc. v. Dranoff Properties, Inc.*, No. 14-921, 2016 WL 3608810 (D.N.J. July 5, 2015), the court described the competing arguments and cases.

181. *See* Chapter 8, § 8-4.

182. *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). Alternatives to a designated non-existent forum may not be effective. *See MacDonald v CashCall, Inc.*, No. 17-2161, 2018 U.S. App. LEXIS 4795 (3d Cir. Feb. 27, 2018).

Issues regarding arbitrator selection, once the arbitration has been filed, are discussed in Chapter 2, § 2-3.

1-4:3.8 Confidentiality, Timing, Discovery, Hearings, Class Actions, Remedies, 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. 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.*, employment) may contain fee and other provisions that protect against such problems. 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.

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.[183] Fashioning an arbitration that is too much like a traditional court litigation may diminish the benefits of arbitration in reduced cost and time.

One of the most widely mentioned benefits of arbitration is that the proceedings are 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) or they select a forum with rules that require confidentiality. The AAA Commercial and ICDR Rules, for example, do not (except with respect to arbitrator, administrator, and award).[184] Employment arbitrations are an exception, and Rule 23 of the AAA Employment Rules provides for confidentiality.[185] *See* Chapter 3, § 3-3, for an

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[183] John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Dispute Resolution Journal 1 (Feb.-Apr. 2003), http://www.hugheshubbard.com/ArticleDocuments/Townsend.pdf.

[184] *See* AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI (Appendix 4); ICDR Rules Articles 30(3) & 27 (Appendix 3). *See also* AAA Employment Arbitration Rules, R-23, effective Nov. 1, 2009 (arbitrator confidentiality).

[185] AAA Employment Arbitration Rules, R-23 ("The arbitrator shall maintain the confidentiality of the arbitration …"). https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased.

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—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.[186] In some cases, as discussed in Chapter 8, § 8-1:2, the arbitrator may render both a confidential award and a non-confidential summary award if requested.

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; 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. *See* Chapter 2, § 2-5:3.

The nature of the hearings also may be specified on documents only, with witness statements, using video testimony, allowing or precluding prehearing dispositive motions, or with a limited number of witnesses. In-person hearings are not required by the New Jersey Arbitration Act.[187]

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. A carve out for injunctive relief will be enforced.[188]

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186. *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) (2018 ed.).

187. *See State Farm Guaranty Ins. Co. v. Hereford Ins. Co.*, — N.J. Super. —, No. A-3749-16T3, 2018 N.J. Super. LEXIS 43 (N.J. Super. Ct. App. Div. Mar. 14, 2018).

188. *See Archer & White Sales, Inc. v. Henry Schein, Inc*., 878 F.3d 488 (5th Cir. 2017).

A key provision in any agreement is the location or site of the arbitration, although the selection of an inconvenient site may lead to unconscionability issues. Local restrictions on out-of-state arbitrations may be preempted by the FAA.[189] Even if the parties may agree to modify the site, the initial choice may restrict the list of arbitrators 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.[190] The location (or "seat") is a particularly important matter in international arbitrations.

Shortening the otherwise available statute of limitations in which to file an arbitration may not be permitted in certain areas.[191]

The clause may provide that any class action claims be heard in arbitration according to the class action procedures of the chosen forum.[192] However, merely selecting the forum's rules, without specific adoption of the class-action rules, has been held not a sufficient election of arbitrability issues.[193] Although class-action waivers have been the subject of considerable U.S. 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 context of an arbitration clause.[194]

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189. *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).

190. Note: Under the FAA, a court may not 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).

191. *See Bowman v. Raymours Furniture Co., Inc.*, No. A-4061-14T1, 2016 WL 5096353 (N.J. Super. Ct. App. Div. Sept. 20, 2016) (N.J. LAD) (citing *Rodriguez v. Raymours Furniture*, 225 N.J. 343 (2016)), *certif. denied*, 228 N.J. 444 (2016).

192. *See* AAA Supplementary Rules for Class Arbitrations, Appendix 2.

193. *Opalinski v. Robert Half Int'l Inc.*, 677 Fed. Appx. 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); *see also Abrams v. Chesapeake Energy Corp.*, Nos. 4:16-CV-16-1343, 4:16-CV01345, 4:16-CV-1346, 4:16-CV-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).

194. *Kernahan v. Home Warranty Admin. of Fla., Inc.*, No. MID-L-7052-15, 2016 N.J. Super. Unpub. LEXIS 2503 (N.J. Super. Ct. Law Div. Nov. 18, 2016), *aff'd*, No. A-1355-16T4,

1-4:3.9 Allocation/Shifting of Fees and Costs

1-4:3.9a Administrative and Arbitrator's Fees and Costs

The administrative and filing fees required by a provider normally are born by the claimant or counterclaimant. The arbitrator's fees normally are born 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. 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.[195]

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.

1-4:3.9b 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 New Jersey Arbitration Act, albeit only if "authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding."[196] The parties' agreement may include a fee-shifting clause in the underlying contract or in the arbitration clause; their "agreement"

2017 N.J. Super. Unpub. LEXIS 1527 (N.J. Super. Ct. App. Div. June 23, 2017), *certif. granted*, 231 N.J. 334 (2017).

195. *See, e.g., Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002) (remanding for hearing on ability to pay); *Riley v. Raymour & Flanigan*, No. A-2272-16T1, 2017 N.J. Super. Unpub. LEXIS 2651 (N.J. Super. Ct. 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).

196. N.J.S.A. 2A:23B-21(b).

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.[197] The arbitrator's authority to award attorney's fees (and possible limitations on that authority) is discussed further in Chapter 7. Notably, as discussed in Chapter 7, AAA Commercial Rule R-47(d) permits an award of attorney's fees where both sides have requested such an award.

1-4:3.10 Award (*e.g.*, Form and Remedies) and Post-Award Issues (*e.g.*, Appeal)

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 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 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.

In addition to indicating whether the arbitrator must or may (or may not) shift or allocate the attorney's fees, expenses, and costs of the arbitration, as discussed above, an arbitration clause also may restrict the remedies (such as punitive damages) that an arbitrator may award. However, cases have found that restrictions on fee shifting or remedies may make an adhesion contract unconscionable and, thus unenforceable, or those provisions severable. Provider rules also may restrict such prohibitions. Some of these issues are discussed elsewhere in this Handbook.

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197. *Compare* AAA Commercial Arbitration Rule, R-47(c), *with* R-47(d) (Appendix 1).

Parties may agree to a statutory or provider provision that allows an appeal or more intense review than otherwise would be permitted.[198]

The arbitration clause should include a proviso 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[199] as does the New Jersey Arbitration Act.[200]

1-5 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 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.[201] 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-9 of the 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

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198. *See* Chapter 8, § 8-4:1 (also noting limitations).

199. *E.g.*, AAA Commercial Arbitration Rules, R-52(c).

200. N.J.S.A. 2A:23B-25(a). *See also* FAA, 9 U.S.C. § 13 (same force and effect; enforcement).

201. *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 (N.J. Super. Ct. Ch. Div. Mar. 8, 2017) (authorized by consent order). (*See* discussion in Chapter 9, § 9-6.)

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.