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 were once accepted as methods of dispute resolution, these were replaced by decisions of judges of some sort. The king, nobles, political leaders, professional judges, respected members of 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 (and earlier[2]) through the Middle

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

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

Ages, there had been parallel systems of resolution: the public courts and private arbitration. Arbitration, in fact, is older than the common law.

In the commercial world, the law merchant—the customary law of the marketplace—provided for representatives of the guilds and merchant associations to have those familiar with the practices of the marketplace pass on disputes.[3] The authorities of these associations could dictate that the booths of defaulting members be broken and their rights terminated when they could not meet their obligations.[4] 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,[5] that largely has been overcome by enactment of the Federal Arbitration Act ("FAA")[6] 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).

New Jersey has a rich history of arbitrating a variety of disputes, going back to Colonial times.[7] Following the Quaker tradition of

---

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

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

[5] As noted in the articles in footnote 7, English and other common law courts had viewed arbitration agreements as executory contracts, from which a party was privileged to withdraw, and therefore declined to order specific performance at least until the time of an award. However, parties to pre-dispute and post-dispute arbitration agreements, and the courts and legislatures, had developed a number of "work-arounds:" the arbitration agreement could be made a "rule" of a court; the agreement could include arbitration as a precondition to a court action, a bond could be required, and refusal to honor an agreement could be viewed as a breach for which damages might be awarded. Statutes regulating trade within an industry might include an arbitration requirement. Where arbitration was part of a guild's or other organization's charter, members who refused to honor the arbitration requirements of the group could be expelled. Although the issue has been couched as a matter of "remedies", some have said that judges did not like arbitrators taking fees and commissions from the local judiciary. An Act in England in 1889 altered the common law, thereby making pre-dispute arbitration agreement enforceable, *see* S. Whitney Landon, *Commercial Arbitration in New Jersey,* 1 N.J. L. Rev. Univ. of Newark 65, 78-79 (1935), but this change was not adopted in the U.S. until 1920 (New York) and 1923 (New Jersey).

[6] 9 U.S.C. § 1 *et seq*. Not all courts have been convinced. *See, e.g., CellInfo, LLC v. Am. Tower Corp*., 352 F. Supp. 3d 127 (D. Mass. 2018) (criticizing consumer arbitration).

[7] Books and articles discussing the history of arbitration include Carl N. Conklin, *Transformed, not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum*

arbitration in neighboring Philadelphia,[8] West Jersey is said to have adopted the first arbitration statute (in 1682) in the Colonies.[9] After the Revolution, an arbitration statute was adopted in New Jersey in 1790, restated in 1794 and reaffirmed periodically.[10] One historian characterizes the 1794 Act as applying whether or not a court action was pending.[11] The cases followed suit, and some authors have gone so far as to say that New Jersey was more favorably inclined toward arbitration than the English courts even after their early pro-arbitration reforms.[12]

1-2 ARBITRATION AND ARBITRATOR DEFINED

Arbitration is but one of several methods of resolving disputes outside a formal court system, but the term is not defined in either the Federal Arbitration Act or the applicable New Jersey statutes. In *Barcon Assocs., Inc. v. Tri-Cty. Asphalt Corp.*,[13] the New Jersey Supreme Court provided a broad, non-exclusive definition: "a substitution, by consent of the parties, of another tribunal for the

---

Kentucky and New Jersey, 48 The Am. J. of Legal Hist., No. 1, at 39 (Jan. 2006); James B. Boskey, *A History of Commercial Arbitration in New Jersey – Part I*, 8 Rutgers-Cam. L.J. 1 (1976); James B. Boskey, *A History of Commercial Arbitration in New Jersey – Part II*, 8 Rutgers-Cam. L.J. 284 (1977); S. Whitney Landon, *Commercial Arbitration in New Jersey*, 1 N.J. L. Rev. Univ. of Newark 65 (1935). Barrett, Jerome T. and Barnett, Joseph P., "A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement," Jossey-Bass, a Wiley imprint (2004); Odiorne, *Arbitration under Early New Jersey Law*, 8 Arb. J. 117 (1953) and Steven A. Certilman, *A Brief History of Arbitration in the United States*, Vol. 3. No. 1, New York Dispute Resolution Lawyer 10 (NYSBA Spring 2010), available at http://ssrn.com/abstract=1690512 (last visited Dec. 14, 2020). Additional sources are cited later in the sections regarding the enactment of the Federal Arbitration Act.

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

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

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

11. S. Whitney Landon, *Commercial Arbitration in New Jersey*, 1 N.J. L. Rev. Univ. of Newark 65, 71 (1935). Landon, at 74, n. 25, cites *Stoll v. Price*, 79 Atl. 318 (N.J. S. Ct. 1911), as permitting a contempt order to be entered for failure to honor the agreement.

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

13. *Barcon Assocs., Inc. v. Tri-Cty. Asphalt Corp.*, 86 N.J. 179, 187 (1981), quoting *Eastern Engineering Co. v. City of Ocean City*, 11 N.J. Misc. 508, 510-11 (Sup. Ct. 1933).

tribunal provided by the ordinary processes of law" intended to provide a "final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner . . . ." Contrary to the current reality, arbitration is further described as intending to provide "a substitute for and not a springboard for litigation."[14] The Court Rules define court-annexed arbitration as presenting a case to "a neutral third party, who then renders a specific award."[15]

The arbitration process should involve a hearing or other means of taking evidence by sworn testimony and legal argument, rather than rendering a decision based on one's own expertise or investigation.[16] A 2019 case involving an appraisal "umpire" that does not discuss arbitration is *Statewide Commercial Cleaning, LLC v. First Assembly of God*.[17] Nor is an order for a "true-up" process to adjust the purchase price for a corporate transaction,[18] but the report of an automobile repair "expert" may be allowed.[19]

The Third Circuit has described the nature of arbitration as typically private and consensual, though processes called arbitrations may be compelled, public and non-binding.[20]

Various states and courts have made considered distinctions between arbitration and appraisal or accounting. For example, the Third Circuit has held that Pennsylvania's Lemon Law appraisal

---

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

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

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

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

18. *Welsh Family Holdings, Inc. v. Addeo*, No. A-5688-18, 2020 N.J. Super. Unpub. LEXIS 988 (N.J. Super. Ct. App. Div. May 26, 2020) (the order therefore was not appealable as of right). As noted later, § 1-5:4.3, *supra*, though, religious bodies may conduct an arbitration. *See Veshnefsky v. Zisow v. Jewish Learning Center of Monmouth County, Inc.*, No. A-1306-18T4, 2020 N.J. Super. Unpub. LEXIS 1509 (N.J. Super. Ct. App. Div. July 27, 2020). *But see Itzhakov v. Segal*, No. A-2619-17T4, 2019 N.J. Super. Unpub. LEXIS 1829 (N.J. Super. Ct. App. Div. Aug. 28, 2019) (rabbi not necessarily acting as arbitrator).

19. *Maignan v. Precision Autoworks*, No. 13-3735, 2020 U.S. Dist. LEXIS 37803, 2020 WL 1061049 (D.N.J. Mar. 4, 2020) (car "expert"). *See also Kamineni v. Tesla, Inc*., No. 19-4288, 2020 U.S. Dist. LEXIS 1329 (D.N.J. Jan. 6, 2020) (Lemon Law); *Sica Indus., Inc. v. Macedo*, A-3802-18T3, 2019 N.J. Super. Unpub. LEXIS 2667 (App. Div. Dec. 31, 2019) (home warranty).

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

process is not arbitration.[21] In 2019, the Second Circuit, looking at federal common law, analyzed factors to be considered in whether an appraisal was an arbitration.[22]

The term "arbitrator" is defined in the New Jersey Revised Uniform Arbitration Act by circular reference to "an agreement to arbitrate,"[23] and the definition of arbitration in Court Rule R-1:40-2(a)(1) necessarily refers to a neutral who received evidence and renders an award. The term is not defined in the FAA. The term "umpire" is used in the 1987 Alternate Procedure for Dispute Resolution Act[24] without any apparent difference intended. A highlight of the arbitration process, as key to the final holding in *Barcon Associates,* is the impartiality of the arbitrators; hence the term "neutral" may be described in other regimes.[25] An arbitrator is said to provide a "quasi-judicial" function, rather than one calling for the exercise of particular expertise in a subject area, as would be the case for an appraiser,[26] though that is not necessarily determinative – as parties may designate as an arbitrator a person with expertise in the subject matter of the arbitration; and some industry forums highlight the subject-matter expertise of their arbitrators, who often are not attorneys. However, professionals can perform services similar to an arbitrator or umpire without the person being designated as such or the process being an "arbitration."[27]

These distinctions are not academic. The designation of a process or the professional can make a difference in whether the protections (such as immunity or replacement) of the FAA or state

---

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

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

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

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

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

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

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

arbitration statutes apply. A hearing officer is not an arbitrator.[28] An arbitrator under the Spill Act is governed by a separate statute and rules.[29] The differences between a special master and an arbitrator are explored in *Baker Industries, Inc. v. Cerberus, Ltd*.[30] There are many other examples set out in this handbook.[31]

In *Capparelli v. Lopatin,*[32] an attorney initially served as one of three "arbitrators" to resolve disputes between business partners. When problems arose with his continued service as an arbitrator, the parties reached another agreement in which he was designated to decide a limited carve-out of issues, but–in contrast to the initial agreement–he was not designated an arbitrator and the process was not designated arbitration. When he elected to terminate his services, the courts held that the court did not have the authority to appoint his successor using Section 11 of the NJRUAA[33] applicable to appointing successor arbitrators. Instead, the court found that the parties' contractual intent had been frustrated by the attorney's resignation, his agreement was void, and the parties had to resort to the earlier agreement or other processes. Had the parties used the terms "arbitration" and "arbitrator" in the second agreement, though, the result may have been the same, given his non-adjudicatory function; but as indicated above those terms may not be necessary in order to take advantage (or bear the burdens) of the protections of the statutes, so long as the process and the functions are *consistent* with the parties' intent to require arbitration.

Given the importance of the procedures and standards of the NJRUAA and FAA in confirming, modifying, or vacating an "arbitration" award, parties appointing professionals to non-standard decision-making positions should be conscious of the distinctions and the consequences of their choice, just as they

---

28. *See Teamsters Local Union No. 469 v. Stafford Township*, No. A-4344-15, 2018 N.J. Super. Unpub. LEXIS 1842 (N.J. Super. Ct. App. Div. Aug. 1, 2018).

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

30. *Baker Industries, Inc. v. Cerberus, Ltd.*, 764 F.2d 204, 207, 210 (3d Cir. 1985).

31. *E.g.*, § 1-4:2 (Limitations).

32. *Capparelli v. Lopatin*, 459 N.J. Super. 584 (App. Div. 2019). *Cf. Itzhakov v. Segal*, No. A-2619-17T4, 2019 N.J. Super. Unpub. LEXIS 1829 (N.J. Super. Ct. App. Div. Aug. 28, 2019) (rabbi not necessarily acting as arbitrator).

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

should be wary of having or selecting a particular statue or "law" to govern the process.

1-3 BENEFITS OF ARBITRATION

Having previously extolled the virtues of mediation,[34] the authors next recommend arbitration with its many benefits over litigation. Be proud of these benefits and advance them in practice. In one word, it might be summed up as party *autonomy*. The parties have the flexibility to control their process and provide as much flexibility (or otherwise) as they think is appropriate within the arbitral framework of fairness and cost-effectiveness. More particularly, benefits include:

(1) The ability of the parties to choose their own arbitrator, knowing in advance his or her special qualifications to decide a particular case; or, if the parties wish, they may even choose a panel of arbitrators, each bringing some special skill to the proceeding. Where the parties do not themselves select the arbitrator(s) in the agreement or as in a statutory or court-rule arbitration,[35] they still may have a role in the process; they may receive a list of several who are willing to serve, and the parties or court may 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.[36] Confidentiality also may be lost if the parties

---

34. *See* the Preface to this volume.

35. *See* § 1-4.

36. Court annexed arbitrations may require public access where the process mimics a court trial. *Delaware Coalition for Open Gov't, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013) (reviewing history and nature of arbitration).

file in court to compel or stay arbitration or to confirm, modify, or vacate an award.[37]

(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 seek 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 term: "muscular arbitration." It is the rare arbitration that should exceed six months from the date issue is joined, and many can be resolved in a shorter period.

---

37. *CAA Sports LLC v. Dogra*, No. 18-1887, 2018 U.S. Dist. LEXIS 214223 (E.D. Mo. Dec. 20, 2018) (analyzing applicability of arbitration confidentiality award to motion to seal in District Court; sealing only part). *See also* § 1-5:4.8a; Chapter 3, § 3-1:3.1.

(5) Arbitration can take many forms, and some of these are discussed later in this book.[38] 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,[39] any review of the award, on a motion to confirm or vacate the award, is limited to matters of corruption, fraud, partiality, refusal to consider evidence, and other similar grounds. The nitpicking of appeals for minor evidence problems,

---

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

39. 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, L.L.C. 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 at Lloyds*, 618 F.3d 277, 293 (3d Cir. 2010) (citing *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001)); *Oberwager v. McKechnie Ltd*., 351 Fed. Appx. 708, 710-11 (3d Cir. 2009) (citing cases). *See, e.g*., Chapter 1, § 1-5:4.11 and Chapter 8, § § 8-3:7 to 8-3:10.

with possible reversals and retrials and their attendant expenses, are absent in procedures for confirmation or vacatur of an arbitration award. Interlocutory court applications generally are not permitted.[40] However, the "complete arbitration rule" under the FAA has been held "prudential" rather than jurisdictional.[41]

(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)[42] permits enforcement

---

40. *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); *A Company v. X Y and Z*, [2020] EWHC 809 (TCC), April 17, 2020, available at https://hsfnotes.com/construction/2020/04/17/english-court-restrains-expert-from-acting-in-arbitration-due-to-breach-of-fiduciary-duty-of-loyalty-a-company-v-x-y-and-z-2020-ewhc-809-tcc/ (last visited Dec. 16, 2020) (court intervening to enjoin testimony at arbitration of expert with a conflict). An unusual "detour" was permitted outside the labor law context in *Sills Cummis & Gross, P.C. v. Matrix One Riverfront Plaza, L.L.C.*, No. A-3630-08, 2009 N.J. Super. Unpub. LEXIS 2944 (N.J. Super. Ct. App. Div. Dec. 3, 2009) (court intervention "for instructions" admittedly not contemplated by the statute). But intervention regarding new claims was not. *In the Matter of the Estate of Athanasenas*, No. A-2532-18T2, 2020 N.J. Super. Unpub. LEXIS 300 (N.J. Super. Ct. App. Div. Feb. 11, 2020). *See generally* Chapter 8, § 8-1:2.2a (Drafting the Award).

See Chapter 3, § 3-6 and Chapter 8, § 8-1:2.2 (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.

41. *See Shore Point Distrib. Co. v. Int'l Bhd. of Teamsters Local 701*, 756 Fed. Appx. 208 (3d Cir. 2019).

42. 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).

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.

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. Obtaining an early decision on a precondition may save the time of a hearing, but (as in a court) such motions are not automatically permitted. Discovery and the ability to call witnesses by subpoena may be limited. Additionally, despite an initial desire to avoid second-guessing an award, a disappointed party may regret its inability to appeal an award, unless limited statutory grounds exist or the parties have built an appeal process into their contract (if allowed).

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. The New Jersey arbitration statutes have different provisions applicable to different situations or time periods. Cases decided under one act may not be applicable outside that statute. This Handbook notes some of the differences, but New Jersey parties involved in such arbitrations should consult the appropriate treaties, statutes, and treatises.[43]

---

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

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

1-4:1 Statutory Mandates

Although the focus of this Handbook is contractual arbitration, a large proportion of arbitrations is the result of statutory or court-rules mandates. For example, in New Jersey some public employees are required by statute to present certain grievances and other disputes to a state-organized mediation or arbitration.[44] The arbitration awards rendered in these proceedings are subject to court and appellate review, the opinions from which occasionally are reported but generally are sufficiently unique not to warrant comment in this text; however, parties should be aware that the standards and procedures under the different statutes and regimens may differ significantly.[45]

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.[46]

Housing-related disputes between unit owners and condominium associations are governed by a section of the Condominium Act[47] requiring the use of "a fair and efficient procedure" to resolve certain disputes.[48] The Appellate Division in *The Glens of Pompton*

---

44. *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).

45. *E.g., US Masters Residential Prop. (USA) Fund v. N.J. Dep't of Envtl. Prot. - Fin. Servs. Element*, 239 N.J. 145 (2019).

46. *See* N.J.S.A. 39:6A-5.1. *See also* N.J.S.A. 39:6A-25. *Endo Surgi Ctr. v. NJM Ins. Group*, 459 N.J. Super. 289 (App. Div. 2019) (PIP); *Liberty Mutual Ins. Co. v. Penske Truck Leasing, Co*., 459 N.J. Super. 223 (App. Div. 2019) (non-PIP insurer); *Ambulatory Surgical Center of Somerset v. Allstate Fire Casualty Ins. Co*., No. 16-5378, 2017 U.S. Dist. LEXIS 165021 (D.N.J. Oct. 4, 2017) (granting reconsideration and reversing prior ruling), held that, under the Deemer Statute, N.J.S.A. 17:28-1.4, PIP arbitration may be compelled regarding out-of-state insureds. *State Farm Guaranty Ins. Co. v. Hereford Ins. Co.*, 454 N.J. Super. 1 (App. Div. 2018), held that an in-person hearing is not required.

47. N.J.S.A. 46:8B-1 *et seq*.

48. N.J.S.A. 46:8B-14(k).

Plains Condominium Ass'n v. Van Kleeff held that this was a direction to use ADR to resolve such disputes.[49]

There are other arbitration statutes in specialized areas.[50]

1-4:2 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.[51] Appraisal has been held by some courts not a form of statutory arbitration.[52] 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.[53] Some matters—such as granting

---

[49] *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). *See also Bell Tower Condo. Ass'n v. Haffert*, 423 N.J. Super. 507 (App. Div. 2012) (discussing N.J.S.A. 46:8B-14(k)), *certif. denied*, 210 N.J. 217 (2012). Subsequent cases in this matter confirmed the award and dealt with post-arbitration fees. In *Glogover v. Hudson Harbour Condo. Ass'n, Inc.,* A-3446-18, 2020 N.J. Super. Unpub. LEXIS 1784 (N.J. Super. Ct. App. Div. Sept. 29, 2020), the court did not question the use of an internal "ADR Committee" to conduct the proceedings.

[50] *See, e.g.,* Workers Compensation Arbitration (N.J.S.A. 34:13A-1 *et seq*.); Police and Fire Public Interest Arbitration Act (N.J.S.A. 34:13A-14a *et seq*.) (setting up review by the Public Services Relations Commission (PSRC)); teacher tenure hearing law (N.J.S.A. 18A:6-10 to -18.1); collective bargaining agreements (N.J.S.A. 2A:24-1 *et seq*.); Teachers, N.J.S.A. 18A-6-117, *e.g., Yarborough v. State Operated School Dist. of the City of Newark*, 455 N.J. Super. 136 (App. Div. 2018), *certif. denied*, 236 N.J. 631 (2019); 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)); *Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*, 331 F. Supp. 3d 365 (D.N.J. 2018) (ERISA MEPP withdrawal); Home Warranty Act, N.J.S.A. 46:3b - 1 to 20, *Sica Indus., Inc. v. Macado*, No. A-3802-18T3, 2019 N.J. Super. Unpub. LEXIS 2667 (N.J. Super. Ct. App. Div. Dec. 31, 2019).

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

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

[53] *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) (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.

a divorce, determining ethical issues, performing marriages, and appointing receivers—are specifically or by implication reserved for judicial officers.[54]

1-4:3 Bankruptcy

The automatic stay provisions of the U.S. Bankruptcy Code[55] are applicable to arbitrations, but not necessarily to guarantors or sureties.[56]

1-4:4 Court Rules Mandates

Several statutes have authorized arbitration and mediation as part of Complementary Dispute Resolution ("CDR") programs in New Jersey state and federal courts. These programs are implemented by detailed protocols in the New Jersey Court Rules[57] and the Local Civil Rules of the U.S. District Court for the District of New Jersey.[58] We describe these court-annexed CDR programs in Chapter 9.[59] The Court Rules also specify the process for resolving fee disputes between lawyers and clients,[60] including a limited ability to seek judicial relief.[61] The importance of an attorney's maintaining a correct current address with the state,

---

54. *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).

55. *E.g.*, 11 U.S.C. § 362.

56. *See National Westminster Bank NJ v. Lomker*, 277 N.J. Super. 491 (App. Div. 1994), *certif. denied*, 142 N.J. 454 (1995); *Seaboard Surety Co. v. Board of Chosen Freeholders*, 222 N.J. Super. 409 (App. Div. 1988). The interplay between the FAA and the Bankruptcy Code is discussed in cases such as *In re New Century TRS Holdings*, 407 B.R. 558, 570-71 (Bankr. D. Del. 2009) (discretion to enforce) and *In re Henry*, 944 F.3d 587 (5th Cir. 2019) (same); *FBI Wind Down Inc. Liquidating Trust v. Heritage Home Group LLC*, 741 Fed. Appx. 104 (3d Cir. 2018), noted the limitations of an arbitration clause to "disputed items".

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

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

59. *See also* Bartkus, Sher & Chewning, N.J. Federal Civil Procedure, ch. 19 (Gooding, *Alternative Dispute Resolution*) (2021 ed.).

60. *See* N.J. Ct. R. 1:20A-1 *et seq*. (District Fee Arbitration). Cases discussing fee arbitration include *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).

61. *See Weiner Lesnak LLP v. Darwish*, No. A-1588-16, 2018 N.J. Super. Unpub. LEXIS 1285 (N.J. Super. Ct. App. Div. June 4, 2018) (appellate rights waived by electing fee arbitration).

even after retirement, is illustrated by *Cardillo v. Neary.*[62] Proper service was again an issue in 2020.[63]

1-5 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"[64]

---

62. *Cardillo v. Neary*, 756 Fed. Appx. 150 (3d Cir. 2018) (mailing fee arbitration papers to old address), *cert. denied*, 139 S. Ct. 2700 (2019).

63. *See Rubin v. Tress*, 464 N.J. Super. 49 (App. Div. 2020).

64. 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 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., Richardson v. Coverall N. Am., Inc*., No. 18-532, 2018 U.S. Dist. LEXIS 167240 (D.N.J. Sept. 27, 2018) (dual corporate signatures not required; plaintiff estopped from arguing signature issue, having operated under the franchise agreement for years), *rev'd on other grounds*, 811 Fed. Appx. 100 (3d Cir. 2020); *Byrne v. K12 Servs.*, No. 17-4311, 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. *Leodori v. Cigna Corp*., 175 N.J. 293, 305 (2003). *See also, e.g., Imperato v. Medwell, LLC,* No. A. 2023-19T1, 2020 N.J. Unpub. LEXIS 1994 (N.J. Super. Ct. App. Div. Oct. 19, 2020); *Seriki v. Uniqlo N.J., L.L.C*., No. A-5835-13T3, 2015 WL 4207263 (N.J. Super. Ct. App. Div. July 14, 2015) (remanding for determination of intent in absence of signature). Where the documents evidenced that a signature was required, estoppel arguments would not suffice. *PSEG Energy Resources & Trade, LLC v. Onyx Renewable Partners, LP*, No. A-3057-16, 2018 N.J. Super. Unpub. LEXIS 340 (N.J. Super. Ct. App. Div. Feb. 14, 2018), *aff'g*, 2017 N.J. Super. Unpub. LEXIS 524 (N.J. Super. Ct. Ch. Div. Mar. 6, 2017).

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). In *Newark Bay Cogeneration P'ship, LP v. ETS Power Grp.*, No. 11-2441, 2012 U.S. Dist. LEXIS 141068 (D.N.J. Sept. 28, 2012), the court adopted the clause in referenced terms and conditions without discussing Section 2-207. *See generally Timothy Davis, U.C.C. Section 2-207: When Does an Additional Term Materially Alter a Contract?*, 65 Catholic U. L. Rev. 489, 511-15 (2016) (discussing arbitration).

The signature requirement in international arbitration is explored in *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003) (treaty terms require signed document or "an exchange of letters or telegrams"). The Supreme Court held that state estoppel arguments may be used in a case governed by the New York Convention to permit a non-signatory to demand arbitration. *GE Energy v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (June 1, 2020).

or "in a record"[65] either before the dispute arose or once the dispute has arisen.[66] 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.

Court-ordered arbitration (not based on an existing contract) as part of a partial settlement presents separate issues.[67]

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

1-5:1 The Principal Authorizing Statutes

1-5:1.1 Federal Arbitration Act

Arbitration may have ancient roots,[68] including under the common law, but courts jealous of their own jurisdiction were

---

65. 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.

66. An example of 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.

67. A relatively early discussion of a post-dispute arbitration so-ordered by a supervising court arose in the context of a dispute regarding a client's objection to fees billed by its attorney—and finding no issue with arbitration being used to decide that dispute as well as basic principles supporting arbitration. *Daly v. Komline-Sanderson Eng'g Corp.*, 40 N.J. 175 (1963). *See also Frank K. Cooper Real Estate #1, Inc. v. Cendant Corp.*, Nos. A1482-16T3; A-1579-16T3, 2018 N.J. Super. Unpub. LEXIS 2677 (N.J. Super. Ct. App. Div. Dec. 6, 2018) (arbitration of "split" of fees in class action settlement). Where a court ordered arbitration of an existing litigation, without specifying the terms, the Appellate Division held that the NJRUAA provided the default "gap fillers", after chiding future litigants to heed the problem created without a more detailed, written agreement in the order. *Petersburg Regency, LLC v. Selective Way Ins. Co.*, No. A-2855-11T2, 2013 N.J. Super. Unpub. LEXIS 1116 (App. Div. May 10, 2013), *certif. denied*, 217 N.J. 53 (2014).

68. *See* § 1-1.

perceived as being hostile to, or disfavoring, arbitration. The Federal Arbitration Act ("FAA")[69] was enacted in 1925 to reverse that hostility and "place arbitration agreements 'upon the same footing as other contracts.'"[70] Thus, section two of the FAA provides that arbitration agreements covered by the FAA[71] . . . "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.[72] Thus, once an agreement is found to contain an arbitration clause, courts have said "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[73] This "presumption of arbitrability" has been said to mean that arbitration "may not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[74] Although these principles often were articulated first in cases involving

---

69. 9 U.S.C. § 1 *et seq*. The original title of the act was the United States Arbitration Act; it was re-codified in 1947 and is now known as the Federal Arbitration Act. *See Florasynth v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984). Title 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.

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

71. Coverage extends to any "contract evidencing a transaction *involving* interstate commerce . . . ." 9 U.S.C. § 2 (emphasis added). A key exception to coverage, found in 9 U.S.C. § 1, was clarified in 2019 in *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), holding that independent contractors could be transport workers "*engaged* in foreign or interstate commerce" exempt from the FAA. (emphasis added, to compare coverage language in section two.) Courts typically say that, unless waived, *see* Chapter 2, § 2-6:1, *infra*, exempt transport workers still could be bound by state arbitration or other labor laws. *E.g., Singh v. Uber Tech., Inc*., 939 Fed. Appx. 210 (3d Cir. 2019); *Arafa v. Health Express Corp.,* 243 N.J. 147 (2020); *Colon v. Strategic Delivery Solutions, LLC,* 459 N.J. Super. 349 (App. Div. 2019), citing *Palcko v. Airborne Express, Inc*., 372 F.3d 588 (3d Cir. 2004), *aff'd by Arafa. See* Chapter 2, § 2-4:1a, *infra.*

72. *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).

73. *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.

74. *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)).

labor collective bargaining agreements, they are based on the language of the FAA and are equally applicable in commercial and other arbitration contexts.[75] For example, in 2017, the U.S. Supreme Court reaffirmed in *Kindred Nursing Centers* that the FAA "displaces any rule . . . covertly . . . disfavoring contracts that (oh, so coincidently) have the defining features of arbitration agreements."[76]

These principles are equally applicable to contracts governed by the FAA regardless of whether litigation is pending in federal or state court.[77]

New Jersey courts have accepted these principles.[78]

The Third Circuit has explained these principles in recognition that an arbitration agreement or clause is a contract; therefore, state contract law governs not only issues of contract *formation* but also the interpretation of the terms defining the *scope* of the arbitration. *In re Remicade (Direct Purchaser) Antitrust Litigation* says: "while federal law may tip the scales in favor of arbitration where state interpretive principles do not dictate a clear outcome, may displace state law through preemption, or may inform the interpretive analysis in other ways, applicable state law governs the scope of an arbitration clause—as it would any other contractual provision—in the first instance."[79]

1-5:1.2 New Jersey Arbitration Acts

Although New Jersey traces its arbitration roots to Colonial times,[80] and enacted one of the first modern arbitration acts in

---

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

76. *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).

77. *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).

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

79. *In re Remicade (Direct Purchaser) Antitrust Litig*., 938 F.3d 515, 522 (3d Cir. 2019) (citations omitted). Cases that rely on federal presumptions to override state law interpretive principles such as *contra proferentem* may need to be rethought.

80. *See Barcon Assocs., 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)).

1923,[81] arbitration currently is governed by two principal state statutes.

The 2003 New Jersey Revised Uniform Arbitration Act (the "NJRUAA")[82] by its terms supersedes common law arbitration[83] and is the default governing law in a New Jersey arbitration if the FAA does not apply and the parties have not agreed to contrary rules (or a statute requires otherwise). In the summer of 2020, the New Jersey Supreme Court held in *Flanzman v. Jenny Craig, Inc*.[84] that, where no particular procedure is specified and the matter is not being administered under the rules of the AAA, CPR, JAMS, or other provider, an agreement to arbitrate will still be enforced, with the court applying the general rules set forth in the NJRUAA.[85]

The second primary New Jersey statute is the 1987 Alternative Procedure for Dispute Resolution Act ("APDRA").[86] The

---

81. *See* § 1-1, *supra*.

82. N.J.S.A. 2A:23B-1 *et seq*. The present act *currently* applies, as the default, to commercial contracts regardless of when formed other than certain collective bargaining or collective negotiated agreements. N.J.S.A. 2A:23B-3. The text of the act is contained in Appendix 6. Care in terminology is warranted here, since the 1923 Act restated in 1951 sometimes is also called the New Jersey Arbitration Act. In January 2020, the governor signed an amendment to the NJRUAA regulating arbitration forums and (prospectively) pre-dispute consumer arbitrations. *See* N.J.S.A. 2A:23B-33 to 36 (in Appendix 6).

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

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

85. The Court overruled *Flanzman v. Jenny Craig, Inc.*, 456 N.J. Super. 613 (App. Div. 2018), which had taken an outlier position with respect to both Section 5 of the NJRUAA and Section 11 of the FAA. *See Petersburg Regency, LLC v. Selective Way Ins. Co.*, No. A-3855-11T2, 2013 N.J. Super. Unpub. LEXIS 1116 (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) *certif. denied*, 217 N.J. 53 (2014). *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). *Flanzman* leaves open the question the continuing effect of the broad language in *Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545 (App. Div. 2016), on which the Appellate Division opinion had relied.

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

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.[87] 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."[88] The parties must explicitly adopt the APDRA for its provisions to apply; review may be limited to the trial court.[89]

Differences in the two New Jersey statutes, and with the FAA, are discussed in the relevant text sections below. Notably, though, because the 2003 NJRUAA permitted parties to agree to limited appeals,[90] the APDRA is little used today, except where required in PIP, UM, and UIM cases by regulations adopted under N.J.S.A. 39:6A-5 and in some matrimonial matters.

The 1923 Arbitration Act as restated in 1951[91] was largely replaced by the subsequent acts, except for specific labor matters.[92] Cases before 2003 under the 1951 act must be read carefully; references to statutory terms, such as the timing for motions, are not relevant for the current acts and may be misleading.[93]

The New Jersey Court Rules contain Appendices discussing the NJRUAA and APDR and forms of agreement and notice that may

---

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

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

89. 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).

90. *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.

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

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

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

be used in connection with each.[94] The Supreme Court arguments in cases decided in the summer of 2020 were notable in their reference to the penultimate, usually initial, clause in contracts, sufficient under New Jersey law, such as (paraphrasing) "the parties [defined] agree to resolve all disputes [defined] by final and binding arbitration." This was viewed as the material intent of the parties, with either the statute, rules, or further terms expanding on this principal intention and satisfying any necessary notice or waiver issues for certain matters.

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

Determining the arbitration law applicable to a given arbitration agreement is not merely a matter of designating a specific statute or state law to supplant the default FAA or 2003 NJRUAA. First, the designation must specifically relate to arbitration, as in the arbitration clause; a general choice of law provision is inadequate.[95] The Third Circuit applies this rule,[96] though it is inconsistently acknowledged.

Second, by reason of the Supremacy Clause in Article VI of the United States Constitution, the FAA is said to preempt application of other statutes where the FAA applies (*e.g.*, in disputes affecting interstate and foreign commerce[97]) except for specific federal

---

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

95. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-60 (1995). Nevertheless, cases may refer to the general choice of law clause in a contract where there is no designation in the arbitration clause without undertaking a separate choice of law analysis referencing the arbitration clause. *See generally Fin Assocs. LP, et al. v. Hudson Specialty Ins. Co*., No. 741 Fed. Appx. 85 (3d Cir. 2018); *Koons v. Jetsmarter, Inc.,* No. 18-16723, 2019 U.S. Dist. LEXIS 117332 (D.N.J. July 15, 2019); *Rizzo v. Island Med. Mgmt. Holdings, LLC*, No. A-0554-17T2, 2018 N.J. Super. Unpub. LEXIS 1225 (N.J. Super. Ct. App. Div. May 25, 2018) (NY law in forum clause). This may be a reversible error. *Cf. Transmar Commodity Group Ltd. v. Cooperative Agraria Industrial Naranjillo LTDA*, 721 Fed. Appx. 88 (2d Cir. 2018).

96. *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).

97. *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).

statutory exemptions or the competing law is said to conflict with the FAA.[98]

Parties may select procedural rules or statutes to govern their arbitration even though otherwise bound by the FAA.[99] However, a rule or state law or policy that is unfavorable to arbitration, or that restricts, limits, or conditions agreements to arbitrate, is not permitted.[100] 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.[101] Arbitration agreements must be judged on an equal footing with, and according to the same principles as, all other contracts.[102] To the extent New Jersey policy suggests otherwise, the supremacy of the FAA "renders that state policy irrelevant."[103] Specific issues

---

98. By its terms, the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Labor arbitration is regulated by the National Labor Relations Board and other agencies and statutes. *Cf*. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (NLRA does not counter FAA re class action waiver). The Supreme Court has held that independent contractors may be exempt from the FAA as transportation workers under Section 1, and it remanded for further factual development. *New Prime Inc. v. Oliveira,* 139 S. Ct. 532 (2019). *See also Singh v. Uber Technologies, Inc.*, 939 F.3d 210 (3d Cir. 2019) (section 1 not limited to goods), *rev'g*, 235 F. Supp. 3d 656, 668-70 (D.N.J. 2017); *Colon v. Strategic Delivery Solutions, LLC,* 459 N.J. Super. 349 (App. Div. 2019) (remanding for factual development; noting that other law may apply when workers are exempt under Section 1, citing *Palcko v. Airborne Express, Inc*., 372 F.3d 588 (3d Cir. 2004) (section 1 exclusion merely means that the parties' agreement should be enforced as if the FAA never existed).), *aff'd*, 234 N.J. 147 (2020).

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

99. *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*., 883 F.3d 220 (3d Cir. 2018) (distinguishing *Khan*, where terms of clause made nonexistent tribal forum integral). *See also* §§ 1-3 n.39 and 1-5:4.4a.

100. *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).

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

102. *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).

103. *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 declined to address

regarding preemption, such as unconscionability and class action waivers, are discussed below.[104]

Some clauses specify that the FAA applies to the arbitration, but the designation has not always avoided New Jersey law. In *Arafa v. Health Express Corp.*,[105] the Supreme Court reversed an unpublished Appellate Division opinion[106] holding that the Section 1 exemption for transportation workers rendered the contractual choice of FAA void. In another case, the reference to the FAA was limited to "the arbitrability of all disputes . . .", which the court held did not encompass the *standard* for determining whether to vacate for an error of law.[107]

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

1-5:2 Contracts in Which Arbitration is Permitted

Subsequent to a number of decisions, such as *Wilko v. Swan*,[108] holding that arbitration in certain industries or certain matters was

---

preemption in *Kernahan v. Home Warranty Administrator of Florida, Inc.*, 236 N.J. 301 (2019) (holding that the clause was confusing and unenforceable).

104. *See* Chapter 2, § 2-5.

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

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

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

108. *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).

inconsistent with the underlying substantive statutes, federal and state courts gradually overruled such prohibitions. Today, virtually every type of contract with an arbitration provision "in writing" or "in a record," using the federal and state statutory language, will be subject to arbitration providing certain conditions are met. Indeed, as identified below, some arbitration provisions may be enforced in contexts perhaps not obvious. Arbitration in international transactions appears especially favored.[109]

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.'"[110] 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.[111] New Jersey courts have adopted the same two-step inquiry.[112] As noted above, the Third Circuit may have modified this in 2019.

---

109. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Issues particular to international arbitrations are discussed in, *e.g.*, Gary B. Born, International Arbitration Law and Practice (2016).

110. *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).

111. *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). *Pearson v. Valeant Pharms. Int'l, 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. That is not to say that federal law governs the scope issue. As clarified in *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 522 (3d Cir. 2019), the scope of the arbitration should be analyzed under state law contract principles, with federal law "tip[ing] the scale" when state law does not dictate a clear outcome, preempting state law, or otherwise informing the interpretation.

112. *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).

Thus, as a general matter, courts will enforce properly drafted arbitration provisions in labor agreements, employment contracts,[113] employee handbooks, emailed employment policies,[114] consumer transactions,[115] auto contracts,[116] utility contracts,[117] construction, architectural or engineering contracts,[118] franchise agreements,[119] commercial leases[120] and sales transactions,[121] accompanying or referenced "terms and conditions," and partnership and operating

---

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

[114] *Skuse v. Pfizer, Inc.,* 244 N.J. 30, 2020 N.J. LEXIS 904 (Aug. 18, 2020) (enforcing).

[115] *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);

[116] *See Kamineni v. Tesla, Inc.*, No. 19-14288, 2020 U.S. Dist. LEXIS 1329 (D.N.J. Jan. 6, 2020).

[117] *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).

[118] *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); *Kensington Park Owners Corp. v. Architectura, Inc.,* No. BER-L-2055-19, 2019 N.J. Super. Unpub. LEXIS 1601 (N.J. Super. Ct. Law Div. June 28, 2019); *but see Epstein v. Conboy*, No. A-2135-15T3, 2016 WL 3600251 (N.J. Super. Ct. App. Div. July 6, 2016) (AIA construction).

[119] *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. June 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).

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

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

agreements (for an L.L.C., for example)[122] and insurance.[123] Retirement account or securities account,[124] credit card,[125] car rental agreements,[126] and other financial agreements also may contain arbitration clauses, but in some cases (*e.g.*, securities) they may be governed by federal regulatory provisions.

Arbitration clauses in attorney fee retainers and related contexts, regarding both fee disputes and malpractice claims, raise somewhat distinct problems at the intersection of ethics and FAA preemption. The New Jersey Supreme Court approved arbitration clauses – for fee or malpractice disputes – in retainers in late 2020 in *Delaney v. Dickey*,[127] but required that attorneys meet the

---

[122] *Ames v. Premier Surgical Ctr., L.L.C.,* No. A-1278-15T1, 2016 WL 3525246 (N.J. Super. Ct. App. Div. June 29, 2016) (partnership and LLC operating agreements); *Victory Entm't, Inc. v Schibell,* No. A-4334-14T1, 2016 WL 4016634 (N.J. Super. Ct. App. Div. July 28, 2016) (shareholders' agreement) (remanded); *after remand*, No. A-3388-16, 2018 N.J. Super. Unpub. LEXIS 1467 (N.J. Super. Ct. App. Div. June 21, 2018) (enforcing arbitration).

[123] *Jade Apparel, Inc. v. United Assurance Inc.,* No. A-2001-14T1, 2016 WL 5939470 (N.J. Super. Ct. App. Div. Oct. 13, 2016) (insurance), *certif. denied*, 229 N.J. 151 (2017). Reinsurance and industry arbitration is common.

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

[125] *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. June 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).

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

[127] *Delaney v. Dickey*, ___ N.J. ___, 2020 N.J. LEXIS 1435 (Dec. 21, 2020), earlier cases include *Smith v. Lindemann*, 710 Fed. Appx. 101 (3d Cir. 2017) (permitting arbitration fee agreement, citing ABA Comm'n on Ethics & Prof'l Responsibility Formal Op. 02-425 (2002)); *Raia v. Cohnreznick, LLP*, No. A-1365-19T1, 2020 N.J. Super. Unpub. LEXIS 1207 (N.J. Super. Ct. App. Div. June 22, 2020), *aff'g*, No. BER-L-2262-18, 2019 N.J. Super. Unpub. LEXIS 2054 (N.J. Super. Ct. Law. Div. Sept. 23, 2019) (A-903). *But see Kamarotos v. Palias*, 360 N.J. Super. 76 (App. Div. 2003) (discussing competing positions and distinctions between arbitrating fee disputes and malpractice claims, questioned by *Smith* district court). *aff'd as modified, Delaney v. Dickey*, No. A-1726-17, 2019 N.J. Super. Unpub. LEXIS 1814 (N.J. Super. Ct. App. Div. Aug. 23, 2019) (JAMS rules must be physically provided). The Supreme Court emphasized the role of an attorney as a fiduciary; it did not comment on whether the provider's rules must be given to the client in paper form, as required by the Appellate Division. The disclosures are to be studied and a recommendation for any rule changes or formal Committee Opinion is to be made by the applicable Supreme Court committee. An early case supporting court-ordered arbitration is *Daly v. Komline-Sanderson Eng'g Corp.*, 40 N.J. 175 (1963). Rules mandated fee-arbitration is noted briefly in § 1-4:4 and *Frank K. Cooper Real Estate #1, Inc. v. Cendant Corp.*, Nos. A-1482-16T3; A-1579-16T3, 2018 N.J. Super. Unpub. LEXIS 2677 (N.J. Super. Ct. App. Div. Dec. 6, 2018), (arbitration of the "split" of attorneys' fees to be awarded in a class action settlement).

disclosure rules of RPC 1.4(c), including a reasonable explanation of the pros and cons of arbitration. This explanation, either oral or written, "may" cover the private nature of arbitrations, the lack of a jury, the limited "appeals" or court review of an award, that the client may be responsible for the costs of the arbitration, and that discovery may be more limited. Since the heightened duty of disclosure in RPS 1.4(c) was applicable to all aspects of a retainer, not only the arbitration clause, it arguably is not preempted by the FAA (where the FAA is applicable). This disclosure rule is to be applied prospectively, except with regard to the litigants in this case. Unfortunately, the Court sometimes confuses privacy with confidentiality, which can only be imposed by further agreement, provider rule, or court order. (*See* Section 1-5:4.8a.)

Non-traditional contexts in which arbitration provisions have been sustained include bylaws for religious societies,[128] funeral contracts,[129] settlement agreements,[130] employment applications,[131] play sites,[132] lease valuations,[133] and freight tariffs.[134]

---

[128] *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). *See also Torah v. Aryeh*, No. A-3344-16T2, 2018 N.J. Super. Unpub. LEXIS 1752 (N.J. Super. Ct. App. Div. July 23, 2018) (rabbinical court); *Itzhakov v. Segal*, No. A-2619-17, 2019 N.J. Super. Unpub. LEXIS 1829 (N.J. Super. Ct. App. Div. Aug. 28, 2019); *Veshnefsky v. Zisow v. Jewish Learning Center of Monmouth County, Inc.*, No. A-1306-18T4, 2020 N.J. Super. Unpub. LEXIS 1509 (N.J. Super. Ct. App. Div. July 27, 2020).

[129] *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).

[130] *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).

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

[132] *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 341-42 (2006); *but see Defina v. Go Ahead and Jump 1, LLC*, No. A-1861-17T2, 2019 N.J. Super. Unpub. LEXIS 1400 (N.J. Super. Ct. App. Div. June 5, 2018).

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

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

Arbitration clauses in unilateral contracts such as separate limited warranties may not be enforced.[135]

Although New Jersey courts had held that certain arbitration clauses were not enforceable as a matter of state public policy,[136] such rulings have been held preempted, as, for example, regarding class-action waivers[137] and regarding health care or nursing contracts,[138] though courts may find ways to avoid the preemption and apply rough justice to preclude arbitration in such contexts.[139] Unconscionability issues, as discussed in *Muhammad*, still may be raised in specific contexts and result in severance of unconscionable provisions.[140] Although final or proposed federal regulations would have either regulated, limited, or prohibited arbitration in consumer financial, health care, or other transactions, they were withdrawn by the current administration or are subject to court review.[141] New Jersey's Law Against Discrimination was amended

---

135. *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 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).

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

137. *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).

138. *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).

139. *See Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545 (App. Div. 2016) (denying arbitration because AAA forum not available). Other examples include: *Fung v. Varsity Tutors, LLC*, No. A-3650-17, 2019 N.J. Super. Unpub. LEXIS 960 ((N.J. Super. Ct. App. Div. Apr. 25, 2019) (small claims case); *Patterson v. Care One at Moorestown, LLC*, No. A-4358-15T3, 2017 N.J. Super. Unpub. LEXIS 423 (N.J. Super. Ct. App. Div. Feb. 21, 2017), *certif. denied*, 230 N.J. 476 (2017). The broad language of *Kleine* may be brought into question by *Flanzman v. Jenny Craig, Inc*., 244 N.J. 119 (2020), which reversed an Appellate Division opinion, 456 N.J. Super. 613 (App. Div. 2018), that relied in large part on *Kleine*.

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

141. 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

in 2019 to preclude enforcement of waiver of "any substantive or procedural right" in employment contracts.[142]

1-5:3 Contract Formation Elements

1-5:3.1 Generally

Although it is often said that arbitration is a favored means of resolving disputes, in all cases in New Jersey, whether an arbitration provision will be enforced in court will depend on whether the writing satisfies the requirements for contract formation. This is itself a two-part inquiry, given the severability of arbitration clauses from their underlying contract: "whether a valid agreement to arbitrate exists and (2) whether the particular dispute falls within the scope of that agreement."[143]

In both, the writing must evidence "mutual assent" to (a) the contract terms and (2) 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.[144] Standard contract elements used to judge both also include consideration, offer and acceptance (as evidenced by words or conduct), and reasonably definite terms.[145]

(last visited Dec. 16, 2020); http://blogs.harvard.edu/billofhealth/2016/10/03/cms-prohibits-arbitration-clauses-in-long-term-care-facility-contracts (last visited Dec. 16, 2020).

142. *See* N.J.S.A. § 10:5-12.7. The amendment was held not retroactive in *Guinguess v. Pub Serv. Elec. & Gas Co.*, No. A-2704-18T1, 2019 N.J. Super. Unpub. LEXIS 2501. There is also a question whether the statute is preempted by the FAA. *See also* N.J.S.A. § 10:5-12.8 (non-disclosure agreements).

143. *Trippe Mfg. Co. v. Niles Audio Corp*., 401 F.3d 529, 532 (3d Cir. 2005); *accord*, *Martindale v. Sandvik, Inc*., 173 N.J. 76, 92 (2002).

144. *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.

145. *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).The New Jersey Model Jury Charge for bilateral contracts, Charge 4.10C approved 5/98, lists and explains

In analyzing the cases, it is useful to remember that arbitration may be upheld based on clauses in negotiated contracts as well as standard-form contracts of adhesion, as in standard commercial terms and conditions, consumer purchases, and employment applications and enrollment contracts. Whereas mutual assent may be aptly understood in negotiated contracts by the "meeting of the minds" rubric, in form contracts constructive notice is key. The cases also do not necessarily distinguish the contract formation issue from the arbitration clause formation or scope issues. In 2019, these distinctions may be important in light of the severability principle applied by the New Jersey Supreme Court in *Goffe v. Foulke Mgmt. Corp.,*[146] discussed later in this chapter and Chapter 2.

Consideration has been an issue in 2019 cases involving accepting an application for employment or continuing employment.[147]

As discussed below, the means of indicating assent to a contract or an arbitration clause has been clarified in 2020.

A party's failing to read a contract term is not sufficient to indicate lack of acceptance; a party is deemed to have accepted terms in a contract that he or she signs[148] so long as other formation elements such as notice are satisfied. Failure to fill in the numbers of the various safety deposit boxes on a form for a new box means there was insufficient notice of the "blank" terms and no mutual

---

the elements, available at https://www.njcourts.gov/attorneys/assets/civilcharges/4.10C.pdf?c=DM8 (last visited Dec. 16, 2020).

146. *Goffe v. Foulke Mgmt. Corp.,* 238 N.J. 191 (2019). Severability, delegation, and allegations of "fraud in the execution" are discussed in *MZM Constr. Co., Inc. v. New Jersey Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 2020 U.S. App. LEXIS 29039 (3d Cir. Sept. 14, 2020), *aff'g*, 2019 U.S. Dist. LEXIS 136896 (D.N.J. Aug. 14, 2019) (sustaining arbitrability).

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

148. *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).

assent; otherwise broad language does not bring the old boxes into that arbitration clause.[149]

Courts have held that one need not point out an arbitration clause in a contract that is otherwise enforceable.[150]

Despite the opinions applying general contract formation rules to arbitration clauses, noted just above, opinions continue to require that a contract with an arbitration clause be provided to the employee or customer, particularly where there was an explicit opt-out mechanism,[151] and parties regularly attempt to avoid arbitration by arguing they did not receive a copy, were not aware of the arbitration clause, or did not have the clause pointed out or explained to them. In the future, these cases may consider the severability and delegation issues highlighted in *Goffe v. Foulke Mgmt. Corp.,*[152] especially concerning the requirement in the Consumer Fraud Act to provide a copy of a consumer contract to

---

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

150. *E.g.*, *GAR Disability Advocates, LLC v Taylor*, 365 F. Supp. 3d 522, 531 n.4 (D.N.J. 2019), citing *Bacon v. Avis Budget Grp., Inc.*, 357 F. Supp. 3d 401, 422-23 (D.N.J. 2018), aff'd, 959 F.3d 590 (3d Cir. 2020). *But see Delaney v. Dickey*, __ N.J. __, 2020 N.J. LEXIS 1435 (2020), *aff'd as modified*, No. A-1726-17, 2019 N.J. Super. Unpub. LEXIS 1814 (N.J. Super. Ct. App. Div. Aug. 23, 2019) (N.J. Rule of Professional Conduct 1.4(c) requires explanation), *certif. granted*, 240 N.J. 194 (2019). *Smith v. Lindemann*, 710 Fed. Appx. 101, 104 (3d Cir. 2017), suggests that a rule requiring greater scrutiny of an arbitration clause in an attorney retainer would violate the FAA. The Supreme Court emphasized that in extra scrutiny of a retainer argument was a function of the fiduciary relationship being formed. The same detailed explanation was required for all aspects of the attorney retainer and, hence, is (arguably) not subject to FAA preemption.

151. *E.g., Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C.,* 416 N.J. Super. 30 (App. Div. 2010), *on remand*, No. A-683-22, 2013 N.J. Super. Unpub. LEXIS 2015 (N.J. Super. Ct. App. Div. Aug. 14, 2013), *accord, Ricciardi v. Abington Care & Rehab. Ctr*., No. A-3255-18, 2019 N.J. Super. Unpub. LEXIS 2166 (N.J. Super. Ct. App. Div. Oct. 23, 2019). Note that this is a special situation–how can one decide whether to opt out of a clause, presumably based on time to read carefully and reflect, if one is not given the document to read? But the argument is raised in other contexts, such as emails and web pages or general terms that are incorporated by a valid reference. In *Delaney v. Dickey*, No. A-1726-17, 2019 N.J. Super. Unpub. LEXIS 1814 (N.J. Super. Ct. App. Div. Aug. 23, 2019), *certif. granted sub nom*., 240 N.J. 194, 2019 N.J. LEXIS 1604 (Dec. 2, 2019), *argued* Sept. 15, 2020, the Appellate Division required that a retainer agreement with an arbitration clause must, as a matter of contract formation and ethics rules under the Rules of Professional Conduct, physically include a copy of the designated arbitration forum's rules. Oral argument of the case may indicate that the matter will be remanded in light of *Flanzman v. Jenny Craig, Inc.,* 244 N.J. 119 (2020), *rev'g*, 456 N.J. Super. 613 (App. Div. 2018), discussed above, and whether limitations on arbitration should be applied retroactively.

152. *Goffe v. Foulke Mgmt. Corp.,* 238 N.J. 191 (2019). Severability, delegation, and allegations of "fraud in the execution" are discussed in *MZM Constr. Co., Inc. v. New Jersey Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 2020 U.S. App. LEXIS 29039 (3d Cir. Sept. 14, 2020), *aff'g*, 2019 U.S. Dist. LEXIS 136896 (D.N.J. Aug. 14, 2019) (sustaining arbitrability).

the consumer, which issue *Goffe* held was not a matter of contract formation, went to the enforceability of the underlying contract, and was delegated to the arbitrator.

Issues may also arise regarding the mental or contractual competence[153] or authority of the person approving the contract with an arbitration clause.[154] The burden of proof in such instances is explored in a variety of cases.[155] In finding that Kentucky's special 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.[156]

An arbitration provision that is confusing or ambiguous, or that indicates arbitration only as an option, may not be enforced.[157]

---

153. *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). In *Jackson-Billie v. Virtua Mem'l Hosp. Burlington Cty.*, No. A-0418-19T2, 2020 N.J. Super. Unpub. LEXIS 755 (Super. Ct. App. Div. Apr. 27, 2020), the issue of competence was held delegated to the arbitrator.

154. *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 (N.J. Super. Ct. App. Div. Aug. 14, 2013) (arbitration order as to mother and child; denied as to spouse). *See also Summers v. SCO, Silver Care Operations, LLC,* No. A-5168-15T2, 2018 N.J. Super. Unpub. LEXIS 1178 (N.J. Super. Ct. App. Div. May 21, 2018); *Portfolio One, LLC v. Joie,* No.17-579, 2019 U.S. Dist. LEXIS 10690 (D.N.J. Jan. 23, 2019) (power of attorney). Questions may arise whether the signatory was acting ultra vires. *See SBRMCOA, LLC v. Bayside Resort, Inc*. 707 Fed. Appx. 108 (3d Cir. 2017) (mandamus).

155. *E.g., McDermott v. Genesis Healthcare,* No. A03565-17, 2019 N.J. Super. Unpub. LEXIS 1662 (N.J. Super. Ct. App. Div. July 22, 2019), citing *Jennings v. Reed,* 381 N.J. Super. 217, 227 (App. Div. 2003) (settlements).

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

157. *See Kernahan v. Home Warranty Adm'r of Florida, Inc.,* 236 N.J. 301 (2019) ("mediation" heading for paragraph; rules reference confusing; typeface small); *Marchak v. Claridge Commons, Inc.*, 134 N.J. 275 (1993) (homeowners warranty claim, clause ambiguous); *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* § 1-5:4.1. Where state law contract principles do not dictate a clear result, however, the federal (or state) policy favoring arbitration may tip the balance. *See In re Remicade (Direct Purchaser) Antitrust Litig*., 938 F.3d 515, 522 (3d Cir. 2019).

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,[158] as will be the case where the parties (or their labor representatives) have specifically bargained for the terms of a dispute resolution mechanism.[159] The Third Circuit has held that the waiver language required in *Atalese* is not required in commercial contracts,[160] which sets up an interesting choice of whether to litigate the issue in federal or state court, since federal district courts are bound by this precedential decision, but state courts are not–and state courts on occasion find that *Atalese* also covers commercial contracts and sophisticated parties.[161]

Where an individual is involved, despite obvious sophistication, that presumption may not hold sway,[162] and there may be other

---

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). Where there is conflicting language in the court's jurisdiction, vice arbitration, a court may refer that issue to the arbitrator where there is a valid delegation clause as to jurisdiction. *Tox Design Group, LLC v. RA Pain Servs., PA.*, No. A-4092-18, 2019 N.J. Super. Unpub. LEXIS 2634 (N.J. Super. Ct. App. Div. Dec. 26, 2019) (citing AAA Rule - R-7). As noted elsewhere, the Third Circuit has clarified how federal law may impact state law interpretive principles on the scope issue. *see In re Remicade (Direct Purchaser) Antitrust Litig*., 938 F.3d 515, 522 (3d Cir. 2019) (citations omitted).

158. *E.g., GAR Disability Advocates, LLC v. Taylor,* 365 F. Supp. 3d 522 (D.N.J. 2019); *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).

159. *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*).

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

161. *E.g*., *Estate of Noyes v. Morano*, No. A-1665-17T3, 2019 N.J. Super. Unpub. LEXIS 47 (N.J. Super. Ct. App. Div. Jan. 8, 2019); *Shah v. T&S Builders, LLC,* No. A-0276-17T2, 2018 N.J. Super. Unpub. LEXIS 1760 (N.J. Super. Ct. App. Div. July 24, 2018).

162. *See, e.g., Itzhakov v. Segal*, No. A-2619-17, 2019 N.J. Super. Unpub. LEXIS 1829 (N.J. Super. Ct. App. Div. Aug. 28, 2019); *Epstein v. Wilentz, Goldman & Spitzer*, P.A., No. A-1157-14T1, 2015 WL 9876918 (N.J. Super. Ct. App. Div. Jan. 22, 2016) (remanding for discovery regarding intent of experienced attorney). After *Epstein*, the Supreme Court

instances (particularly in federal court) where a court may require fact-finding to determine whether parties achieved mutual assent.[163] In employment, consumer, real estate, and other transactions involving individuals, New Jersey courts have required a particularized showing, by the words of the arbitration provision, evidencing that they understood and agreed to waive statutory and constitutional rights to a court or jury trial in favor of arbitration.

Specific forms of notice or format, such as capitalization or type size, are not required as long as consistent with New Jersey's Plain Language Act,[164] though these formats may help to evidence knowledge or notice.[165] Clauses that are "illegible",[166] "onerous to read,"[167] or "buried" in a document that does not appear to be a bilateral contract[168] preclude mutual assent to contract formation and are not enforceable, although not necessarily in the commercial context.[169] As noted above, a court may require that (at the point of contract formation or soon thereafter) a copy of the contract has been provided to the party attempting to avoid arbitration.

---

described *Atalese* as applying to "consumer contracts." *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 294 (2016). *See In re Remicade (Direct Purchaser) Antitrust Litig.,* 938 F.3d 515 (3d Cir. 2019) (*Atalese* does not apply to commercial contracts). *See also* Chapter 2, § 2-5:2 (discussing problems with extending *Atalese* beyond the consumer area).

163. *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), (ordering arbitration and enjoining state court, discovery not required), *aff'd*, 738 Fed. Appx. 72 (3d Cir. 2018).

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

165. *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).

166. *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).

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

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

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

In *Atalese v. U.S. Legal Services Group, L.P.*,[170] the New Jersey Supreme Court reviewed its prior holdings requiring mutual assent, in the context of a Consumer Fraud Act claim regarding a consumer debt-adjustment services contract, 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,[171] although they may have conflated the two steps of the arbitrability analysis identified at footnote [92] in this chapter. In New York, specific waivers are not required;[172] the law in other states may vary. Thus, as discussed elsewhere,[173] the applicable law or forum may be critical on this issue. Courts continue to be split on whether *Atalese* applies to contracts involving sophisticated parties and commercial undertakings. The Third Circuit has held that *Atalese* does not apply to commercial contracts.[174] The Supreme Court

---

170. *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 Sys., Inc.*, 448 N.J. Super. 486 (App. Div.) (comparing decisions regarding arbitration jury waivers in statutory cases), *reconsideration denied*, 449 N.J. Super. 193 (App. Div.), *certif. granted*, 230 N.J. 499 (2017), *vacated in part*, ___ N.J. ___, 2018 N.J. LEXIS 7 (Jan. 12, 2018) (as to fees issue only).

171. *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.

172. *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).

173. *See*, Chapter 2, *infra.*

174. *In re Remicade Antitrust Litig.*, 938 F.3d 515 (3d Cir. 2019) (predicting how New Jersey Supreme Court would decide the issue). *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 294 (2016) (delegation clause and waiver of issue), described *Atalese* as applying to "a consumer contract." *See also GAR Disability Advocates, LLC v. Taylor*, 365 F. Supp. 3d 522 (D.N.J. 2019) (*Atalese* not applicable to sophisticated parties); *Tox Design Group, LLC v.*

has discussed *Atalese* in the context of a variety of cases without saying that its holding is applicable outside statutory consumer and employment claims.[175]

Notably, though, continuing to arbitrate a claim may be sufficient evidence of intent to arbitrate despite the absence of *Atalese* waiver language.[176]

The language of *Atalese* has influenced other opinions, separate and apart from whether the "waiver" language is sufficient. Although the holding was reversed by the Supreme Court, the language of the Appellate Division in *Flanzman v. Jenny Craig, Inc.*[177] discussed a need to inform the parties of the nature of the arbitration process, and many consumer and employment arbitration agreements provide extensive information regarding the arbitration process, as does Appendix XXIX-B to the New Jersey Court Rules. *Atalese* terminology was combined with ethical obligations in requiring that the arbitration rules selected in a law firm's retainer agreement be physically provided to the client.[178]

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

---

RA Pain Servs., PA., No. A-4092-18T1, 2019 N.J. Super. Unpub. LEXIS 2634 (N.J. Super. Ct. App. Div. Dec. 26, 2019); *Itzhakov v. Segal*, No. A-2619-17, 2019 N.J. Super. Unpub. LEXIS 1829 (N.J. Super. Ct. App. Div. Aug. 28, 2019) (pharmacy sale; *Atalese* applied); *Estate of Noyes v. Morano*, No. A-1665-17T3, 2019 N.J. Super. Unpub. LEXIS 47 (N.J. Super. Ct. App. Div. Jan. 8, 2019) (investments, *Atalese* applied, citing cases).

175. *See, e.g., Flanzman v. Jenny Craig, Inc.,* Slip Op. at 27-28, 244 N.J. 119 (2020) (discussing "waiver-of-rights" issue broadly).

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

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

178. *Delaney v. Dickey*, No. A-1726-17, 2019 N.J. Super. Unpub. LEXIS 1814 (N.J. Super. Ct. App. Div. Aug. 23, 2019), *aff'd as modified*, ___ N.J. ___, 2020 N.J. LEXIS 1435 (2020). The Supreme Court did not adopt this aspect of the Appellate Division opinion.

any such case.[179] *Atalese* and subsequent New Jersey Supreme Court opinions have taken particular care to find that *Atalese* was following a principle applicable generally to contracts and not one that disfavored arbitration agreements.

1-5:3.2 Means of Indicating Assent

In 2020, the Supreme Court in *Skuse v. Pfizer, Inc.*[180] clarified the means by which parties may express their assent to an arbitration agreement. The Supreme Court resolved the tension with earlier caselaw created by the Appellate Division's holding that "acknowledging" receipt by a company-wide email announcing a new policy requiring arbitration was not sufficient for the formation of an arbitration contract.

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

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

---

179. 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*. *Kernahan v. Home Warranty Adm'r of Fla., Inc*., 236 N.J. 301 (2019), did not address the issue in the majority opinion, *See Richardson v. Coverall N. Am., Inc.,* No. 18-532, 2018 U.S. Dist. LEXIS 167240 (D.N.J. Sept. 27, 2018) (no preemption*), rev'd on other grounds,* 811 Fed. Appx. 100 (3d Cir. 2020); *DeFina v. Go Ahead and Jump 1, LLC*, No. A-1861, 2019 N.J. Super. Unpub. LEXIS 1400 (N.J. Super. Ct. App. Div. June 5, 2019) (no preemption).

180. *Skuse v. Pfizer, Inc.,* 244 N.J. 30 (2020) (upholding arbitration contract formation), *rev'g*, 457 N.J. Super. 539 (App. Div. 2019).

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

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

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

A dispute arose when Ms. Skuse, a corporate flight attendant, declined to be vaccinated for yellow fever on religious grounds. (The vaccine contained animal products, the ingestion of which was contrary to her Buddhist faith.) The company allegedly refused an accommodation, and she was terminated. When she sued for violation of New Jersey's Law Against Discrimination, the company successfully moved to compel arbitration. The trial court relied on *Jaworski v. Ernst & Young U.S. LLP*,[181] which had held that continuing employment could constitute assent to an announced arbitration policy.

The Appellate Division reversed, holding that there must be an affirmative acceptance of the arbitration requirement by use of "agree" or similar word. Implied agreement, or agreement by

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

performance, was held "inadequate,"[182] despite *Jaworski* and other cases holding that agreement could be indicated by accepting employment, or continuing to work, with knowledge of the arbitration policy.

The Supreme Court reinstated the law Division order compelling arbitration, noting that courts may not subject arbitration agreements to "more burdensome requirements than those governing the formation of other contracts."[183] It then reaffirmed *Martindale v. Sandvik, Inc*.[184] for the proposition that continued employment can "constitute sufficient consideration to support certain employment-related agreements," and *Weichert Co. Realtors v. Ryan*,[185] that "assent" to an offer can be by words or "by conduct, creating a contract implied-in-fact."

Given the prior caselaw, the question became whether it was appropriate to notify employees by emails sending attachments and slides termed "training," and whether the employee need only "acknowledge" receipt of the email notice (by clicking a button in the electronic message) rather than "agree" to be bound by the terms set out in the communications. *Leodori v. CIGNA Corp.*[186] had held that where the company says that assent is to be indicated by signing the handbook at issue, acknowledging receipt or other methods of purported "assent" are not sufficient for contract formation. In *Skuse*, the Supreme Court held that the concerns evident in *Leodori* were not present, since Pfizer had informed the employees that assent would be communicated by continued employment, rather than by a signature or clicking "agree".

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

---

182. *Skuse v. Pfizer, Inc.*, 457 N.J. Super. 539, 542 (App. Div. 2019), *rev'd*, A-86, 244 N.J. 30 (2020).

183. *Skuse v. Pfizer, Inc.,* A-86, 244 N.J. 30 (2020) (Slip Op. at 19), quoting *Leodori v. CIGNA Corp*., 175 N.J. 293, 302 (2003).

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

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

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

reading a contract or clause does not negate contract formation where assent is otherwise present.

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

"Agree" remains the appropriate standard terminology, but cases holding that parties' "acknowledging" receipt or indicating they have "read and understood" a term is not sufficient to indicate acceptance, absent other factors,[187] must be reviewed in light of *Skuse* and other cases holding performance may be held evidence of acceptance if other factors (such as adequate notice) are met.[188]

Arbitration may not be enforced where it is an alternative and the language is not mandatory, such as by using the term "may".[189] Lack of mutuality, as with only one party having the right to demand arbitration, may raise contract and unconscionability issues.[190]

1-5:3.3 Failures in Indicating Assent

After drafting a clause with all the appropriate waiver and notice; provisions, a defendant's efforts to compel arbitration still may be frustrated when the formalities of contract formation are not observed – failure to permit a party to read, not allowing a party to

---

187. *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), citing, *e.g., Morgan v. Raymours Furniture Co.*, 443 N.J. Super. 338, 343 (App. Div.), *certif. denied*, 225 N.J. 220, *cert. denied*, 137 S. Ct. 204 (2016).

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

189. *Medford Twp. Sch. Dist. v. Schneider Elec. Bldgs. Ams.*, 459 N.J. Super. 1 (App. Div. 2019). The court discusses alternative language that may have cured the problem and made one party's election of arbitration mandatory on the other. *See also Trout v. Winner Ford,* No. A3529-17T4, 2018 N.J. Super. Unpub. LEXIS 2759 (N.J. Super. Ct. App. Div. Dec. 18, 2018) (remanding). Arbitration need not be mutual; consideration may be found in employment or other acts. *Contra Ribe v. Macro Consulting Group, LLC*, No. A-2894-18T4, 2020 N.J. Super. Unpub. LEXIS 468 (N.J. Super. Ct. App. Div. Mar. 8, 2020).

190. Mutuality is discussed generally under the prior arbitration act, citing language continued in the NJRUAA, in *Kalman Floor Co., Inc. v. Jos. L. Muscarelle, Inc*., 196 N.J. Super. 16, 22-29 (App. Div. 1984), *aff'd*, *o.b.* 98 N.J. 266 (1985). As the court stated: "We see no reason why justice should require perfect symmetry of remedy and there is no suggestion made that commercial arbitration is not a desirable alternative to judicial dispute resolution." However, *Kleine v. Emeritus at Emerson*, 445 N.J. Super 545, 551 (App. Div. 2016), questions the lack of mutuality as raising unconscionability issues.

consult an attorney; not signing the agreement itself.[191] Although the defendant need not execute its own form agreement where offer and acceptance are evidenced by other means, as noted in *Leodori v. CIGNA Corp*.,[192] "the omission of [the] signature [of the party relying on the arbitration agreement] is a significant factor in determining whether the two parties mutually have reached an agreement."

1-5:4 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,[193] 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,[194] but—along with language such as required by *Skuse, Atalese, Garfinkle* and other cases indicating mutual assent

---

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

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

193. 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 Assocs., Inc. v. Zale Corp.,* No. 16-1985*,* 2016 WL 7232772 (D.N.J. Dec. 14, 2016) (Ohio law).

194. *E.g*., AAA, *Drafting Dispute Resolution Clauses – A Practical Guide*, available at https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf (last visited Dec. 17, 2020); *see also* John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 *Dispute Resolution Journal* 1 (Feb.-Apr. 2003), available at https://www.hugheshubbard.com/news/drafting-arbitration-clauses-avoiding-the-7-deadly-sins (last visited Dec. 17, 2020). Although not specifically addressed to drafting arbitration clauses, the Preliminary Hearing Procedures "checklist" in the AAA Commercial Rules, Section "P-2" (*see* Chapter 3, § 3-1.3, and Appendix 1) "suggests issues to include in an arbitration clause."

and waiver of statutory or constitutional rights—the following items may have specific relevance for contracts governed by New Jersey law. The terms may address not only the *formation* issues described earlier,[195] such as *Atalese*, but also the *scope* of the issues to be referred to arbitration and the manner of conducting the arbitration.

1-5:4.1 Location of Clause

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

1-5:4.1a Notice

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.[196] As noted earlier in § 1-5:3, terms must be legible, but no specific format of typeface or type size is required as long as consistent with New Jersey's Plain Language Law. Including notice to a new arbitration policy in a so-called "training module" may have been accepted "in context" in *Skuse v. Pfizer, Inc.*,[197] but to do so after 2020 would appear highly risky.

---

195. *See* § 1-5:2. The authors find it helpful to consider the *Atalese* waiver requirement a *formation* issue (though the Court's discussion of a statutory Consumer Fraud Act claim may lead to some confusion), while specificity regarding statutory and other claims, such as in *Garfinkle*, a *scope* issue. This may be significant for whether and to what extent federal or state presumptions regarding arbitration come into play. *See In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 522-23, (3d Cir. 2019).

196. *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)).

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

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.[198]

Words such as "acknowledge receipt" or "received" may be sufficient in a case such as *Skuse,*[199] where performance is invited to evidence acceptance, but not sufficient where, for example, acceptance is invited by a signature "agreeing" to the terms.[200] The term "may" will not provide sufficient definiteness in some situations.[201] Terms must be reasonably available or visible to a customer before they sign a rental agreement.[202] Copies of physically signed contracts (as distinct from click signatures on web pages, for example) must be provided to the customer, patient, or employee.[203]

1-5:4.1b Multiple Locations or Documents

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.*,[204] 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,

---

198. *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).

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

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

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

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

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

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

since all documents were signed on the same day and the court could not determine which document ("superseding") was the last signed nor did a "belt and suspenders" extra check box.[205] Following *NAACP*, though, a number of auto cases have found that the documentation was properly organized and not confusing or contradictory.[206] Trivial differences will not preclude enforcement.[207] Under proper circumstances, the arbitration clause in an agreement may be enforced even though a subsequent agreement does not refer to arbitration.[208] Appendix 7 contains recent unreported examples.

1-5:4.1c Adoption by Reference

Third, an arbitration provision in a separate document may be part of an integrated document or adopted by reference,[209] 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,[210] the actual delivery of the referenced document,

---

[205] *Souza-Bastos v. Fed. Auto Brokers, Inc.*, No. A-1594-15T3, 2016 WL 3199488 (N.J. Super. Ct. App. Div. June 10, 2016) (also indicating other drafting problems); *Knight v. Vivent Solar*, _ N.J. Super. _, 2020 N.J. Super. LEXIS 240 (N.J. Super. App. Div. Dec. 2, 2020).

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

[207] *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)).

[208] *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).

[209] *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). *See also Estate of Noyes v. Morano*, No. A-1665-17T3, 2019 N.J. Super. Unpub. LEXIS 47 (N.J. Super. Ct. App. Div. Jan. 8, 2019), citing *Alpert, Goldberg, Butler et al v. Quinn*, 410 N.J. Super. 510 (App. Div. 2009) (discussing burdens); *Buzalski v. Geopeak Energy,* No. A4814-17T1, 2019 N.J. Super. Unpub. LEXIS 1162 (N.J. Super. Ct. App. Div. May 21, 2019); *Victory Entertainment, Inc. v. Schibell,* No. A-3388, 2018 N.J. Super. Unpub. LEXIS 1467 (N.J. Super. Ct. App. Div. June 21, 2018), citing *In re Resnick*, 284 N.J. Super. 47 (App. Div. 1995); *James Talcott, Inc. v. Roto American Corp.*, 123 N.J. Super. 183 (Ch. Div. 1973); *Sampson v. Pierson*, 140 N.J. Eq. 524 (Ch. 1947).

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

and the timing of the delivery;[211] and the burden of proof.[212] Issues arise regarding references in an employment handbook.[213]

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

Fourth, for web or similar situations, the mechanics of an electronic acceptance of the provision may be key, as discussed above regarding *Skuse v. Pfizer, Inc*.[214]

An unreported Appellate Division case, *Arafa v. Ahmend*,[215] illustrates some of the problems. There, the court distinguished between two groups of plaintiffs: one group applied for travel arrangements on the internet and was provided an opportunity to read the terms and conditions before accepting the transaction;

---

[211] 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); *Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C.,* 416 N.J. Super. 30 (App. Div. 2010), *on remand*, No. A-683-22, 2013 N.J. Super. Unpub. LEXIS 2015 (N.J. Super. Ct. App. Div. Aug. 14, 2013), *accord, Ricciardi v. Abington Care & Rehab. Ctr*., No. A-3255-18, 2019 N.J. Super. Unpub. LEXIS 2166 (N.J. Super. Ct. App. Div. Oct. 23, 2019).

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

[213] *E.g., Leodori v. CIGNA Corp*., 175 N.J. 293, 302 (2003).

[214] *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020) (upholding arbitration contract formation), *rev'g*, 457 N.J. Super. 539 (App. Div. 2019).

[215] *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 Horowitz,. v. AT&T Inc.,* No. 17-4827, 2019 U.S. Dist. LEXIS 60 (D.N.J. Jan. 2, 2019); *Holdbrook Pediatric Dental, LLC v. Pro Comput. Serv., LLC*, No. 14-6115, 2015 WL 4476017 (D.N.J. July 21, 2015) (hyperlink; remanding for discovery as to arbitrability); *Russo v. J.C. Penney Corp., Inc*., No. A-3116-16T1, 2017 N.J. Unpub. LEXIS 3074 (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.

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.[216]

Fatal problems in designing a hyperlink to the Terms of Use on a website are illustrated by *Hite v. Lush Internet, Inc.*[217] 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.*,[218] 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.[219]

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.*[220] 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

---

216. *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).

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

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

219. *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).

220. *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), *summary judgment granted, in part, summary judgment denied, in part*, 357 F. Supp. 3d 401 (D.N.J. 2018), a*ff'd,* 959 F.3d 590, 600 (3d Cir. 2020). *See also Navigators Specialty Ins. Co. v. Jangho Curtain Wall Ams. Co.*, No. A-4222-19T4, 2020 N.J. Unpub. LEXIS 2356 (N.J. Super. Ct. App. Div. Dec. 9, 2020) (remanded; issues of multiple copies and signatures).

compel arbitration without prejudice pending discovery on the issues identified in the opinion, followed by motions for summary judgment.

1-5:4.1e Carve-Outs

Fifth, 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.[221] The "Seven Deadly Sins" of arbitration agreements[222] 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.[223]

A carve out for "any other financial obligation" in a Financial Agreement essentially made its arbitration clause useless for many of the issues that might arise.[224]

Provisions for emergency court relief may not be necessary where the provider's rules[225] call for a similar emergency arbitrator, hearing and interim award (although judicial enforcement still

---

221. *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).

222. John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Dispute Resolution Journal 1 (Feb.-Apr. 2003), available at https://www.hugheshubbard.com/news/drafting-arbitration-clauses-avoiding-the-7-deadly-sins (last visited Dec.16, 2020).

223. *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. *See also Fung v. Varsity Tutors, LLC*, No. A-3650-17T4, 2019 N.J. Super. Unpub. LEXIS 960 (N.J. Super. Ct. App. Div. Apr. 25, 2019); *Webster v. OneMain Fin, Inc*. No. 18-2711, 2018 U.S. Dist. LEXIS 204600 (D.N.J. Dec. 4, 2018). Mutuality is discussed generally in *Kalman Floor Co., Inc. v. Jos. L. Muscarelle, Inc*., 196 N.J. Super. 16 (App. Div. 1984), *aff'd*, *o.b*. 98 N.J. 266 (1985). *Kleine v. Emeritus at Emerson*, 445 N.J. Super 545, 551 (App. Div. 2016), questions the lack of mutuality as raising unconscionability issues. One-sided right to injunction was not held a bar. *Ribe v. Macro Consulting Group, LLC,* No. A-2894-18T4, 2020 N.J. Super. Unpub. LEXIS 468 (N.J. Super. Ct. App. Div. Mar. 9, 2020).

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

225. *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, § 3-1:1. *See also* N.J.S.A. 2A:23B-8(c) (emergent relief does not waive arbitration).

may be advisable). Since the NJRUAA provides that requesting a preliminary injunction or TRO in court does not waive the right to seek arbitration, a carve out for that relief may not be necessary and may create a problem if the language appears to carve out injunctive relief that may include the final relief to be sought, such as a permanent injunction.[226] The United States Supreme Court granted, then dismissed, *certiorari* in *Henry Schein, Inc. v. Archer & White Sales, Inc.*,[227] on an issue of delegation that turns on an exemption for injunctive relief.

A common-sense multi-step ADR process, *i.e.*, consultation, mediation, then arbitration, must clearly identify each step.[228]

A waiver-of-class-action clause can lead to the loss of the ability to compel arbitration if not clearly stated.[229]

1-5:4.1f Boilerplate

Sixth, 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*,[230] where efforts to claim a right to compel arbitration as a third-party beneficiary of another franchisee's arbitration clause were foiled by the "no third-party beneficiary" clause in the standard contracts.

References to other documents may be defeated by an integration or "sole-document" clause in the larger contract. Thus, in *White v. Sunoco, Inc.*,[231] the defendant attempted (unsuccessfully) to enforce an arbitration clause in the bank credit card agreement

---

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

227. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963, 2020 U.S. LEXIS 3181 (June 15, 2020), *dismissed as improvidently granted*, 2021 U.S. LEXIS 746 (Jan. 25, 2021).

228. Confusion in the language may make the contract unenforceable. *See Kernahan v. Home Warranty Admin. of Fla., Inc.*, 236 N.J. 301 (2019); *Dvorak v. AW Dev. LLC*, No. A-3531-14T2, 2016 WL 595844 (N.J. Super. Ct. App. Div. Feb. 16, 2016).

229. *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).

230. *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). *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.

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

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.

Choice of law designations may foil a demand for arbitration. That state's law, though good for usury or other business reason, may impose burdens on enforcing arbitration. Some state laws may impose interest or attorneys' fees obligations not familiar to New Jersey. Choosing a body of tribal arbitration law or forum and rules has been fatal where they do not exist,[232] or where tribal law would improperly waive statutory rights.[233]

The arbitration clause should provide for judicial enforcement of any interim or final award, including a proper venue of such a court, even though the provider's rules may include such a provision. Also, the parties' intent that an award be converted into a judgment may be signified by language that the award be final and binding or similar words.[234]

1-5:4.2 Scope and Delegation

1-5:4.2a Generally

Various arbitration institutions offer "standard" clauses for different forms of disputes (e.g., commercial, employment, intellectual property, international) that designate that institution and its rules.[235] Care must be given, tough, because they are not

---

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

233. *See Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020).

234. *See, e.g., Independent Lad. Employees Union, Inc. v EXXONMobile Research & Eng'g Co.,* No. 18-10835, 2019 U.S. Dist. LEXIS 126025 (D.N.J. July 29, 2019).

235. The standard AAA clause states: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." *See* https://adr.org/Clauses (last visited Dec. 11, 2020). Note: The AAA clause would not satisfy the requirements of *Atalese v. U.S. Legal Servs. Grp., 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 (last visited Dec. 14, 2020), 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

necessarily drafted with New Jersey law in mind. The arguments in the New Jersey Supreme Court cases decided in the summer of 2020 suggest aht the structure of the clause is important: questions focused on then primacy of then initial; sentence in the clauses, which evidenced a principal, material agreement to arbitrate. As in *Flanzman v. Jenny Craig, Inc*.,[236] if other details are omitted (as long as certain waiver language is included to satisfy other New Jersey cases discussed elsewhere), which the court characterized as potentially useful but not necessary, then the FAA or NJRUAA may fill in any gaps. The authors suggest that – taking their lead from the Justices' questions in these cases – the first "building block" of an enforceable clause is a simple statement of the parties' clear intent to arbitrate: "the parties [defined] agree to resolve all disputes [defined] by final and binding arbitration." The subsections of this part of the Handbook discuss some of the details to add or avoid.

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,[237] with the former being distinguished by language such as "all disputes concerning or arising out of this agreement, its interpretation, breach and

---

to Rule 12 of its Consumer Rules, *see* https://www.adr.org/consumer (last visited Dec. 17, 2020), 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."). The New Jersey Court Rules Appendix XXIX-B includes a format and language that can be adapted.

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

237. *Mutual Benefit Life Ins. Co. v. Zimmerman*, 783 F. Supp. 853, 869-70 (D.N.J. 1992), *reconsideration denied*, 787 F. Supp. 71 (D.N.J. 1992), *aff'd*, 970 F.2d 899 (3d Cir. 1992) (table). *See also Cardionet, Inc. v. Cigna Health Corp.,* 751 F.3d 165, 175 (3d Cir. 2015) (distinguishing *RCM Techs., Inc. v. Brignik Tech., Inc*., 137 F. Supp. 2d 550, 554-56 (D.N.J. 2001)) (discussing specific terms). A potential arbitration clause in one alleged agreement, which referred to the parties' "relationship," was not 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), *aff'd*, *Perez v. Leonard Auto. Enters.*, No. A-2165 - 16T3, 2018 N.J. Super. Unpub. LEXIS 1062 (N.J. Super. Ct. App. Div. May 7, 2018). *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."[238] The standard AAA clause (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.[239] Appendix 7 contains a number of cases indicating inconsistent court views.

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[240] or reinsurance, fit this pattern. Thus, "narrow" clauses may be further categorized as "specific" or "divided," where parties attempt to exclude certain matters from arbitration, such as small claims or injunctive relief.[241]

---

238. 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 Int'l, Inc*., 761 F.3d 326 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015).

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

240. *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).

241. *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. As discussed elsewhere, excluding "injunctive relief" from issues to be arbitrated may be interpreted to negate arbitration all-together, rather than merely permitting a court to address requests for a TRO or preliminary injunction; *see Thompson v. Nienaber*, 239 F. Supp. 2d 478 (D.N.J. 2002). *Jaludi v. Citigroup*, 933 F.3d 246 (3d Cir. 2019), discusses the carve out for Sarbanes-Oxley issues in the statute.

Words that have been interpreted as including or excluding the claims at issue include "under this agreement."[242] "Relating to" has been held broader than "arising out of."[243] Cases analyzing specific language are set out below[244] and in Appendix 7.

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.[245] Given the policy favoring arbitration under the FAA, once it is determined that a valid contract has been formed, courts have applied a presumption of arbitrability regarding the scope of issues to be arbitrated, resolving ambiguities in favor of arbitration,[246] though it is also said (in New Jersey) that the court may not write a better or broader clause than the parties bargained for.[247] However, in 2019 the Third Circuit raised a question as to the applicability of some of these previously well-accepted principles. *In re Remicade*

---

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

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

244. *Wells Fargo Bank, NA v. Subaru 46, LLC,* No. A-5388-17T4, 2019 N.J. Super. Unpub. LEXIS 1458 (N.J. Super. Ct. App. Div. June 25, 2019); *Alfa Adhesives v. A. Duie Pyle, Inc.*, No. 18-3689, 2018 U.S. Dist. LEXIS 85511 (D.N.J. May 22, 2018) (specific statutory waiver requirement satisfied by general language); *Patetta v. Red Hat, Inc*., No. 18-11958, 2019 U.S. Dist. LEXIS 144589 (D.N.J. Aug. 23, 2019) citing *Gomez*); *Tecnimont S.p.A. v. Holtec Int'l,* No. 1:17-5167, 2018 U.S. Dist. LEXIS 136794 (D.N.J. Aug. 13, 2018) ("arising from or connected with"); *Voorhees v. Tolia*, 761 Fed. Appx. 88 (3d Cir. 2019), reversing and remanding 2018 U.S. Dist. LEXIS 14547 (D.N.J. Jan. 30, 2018) (A-659). Although distinctions were made in an Appellate Division opinion, the Supreme Court reversed. *Goffe v. Foulke Mgmt. Corp.,* 238 N.J.191 (2019). A narrow clause was seen in *FBA Wind Down Inc. Liquidating Trust v. Heritage Home Group, LLC*, 741 Fed. Appx. 104 (3d Cir. 2018) ("disputed items").

245. *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)).

246. *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)).

247. *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).

(Direct Purchaser) Antitrust Litig.[248] noted that state contract interpretation principles must be applied to the *scope* issue (as well as the *formation* issue), "clarified" prior expansive pro-arbitration wording, and ended with a catch-all category in which federal pro-arbitration principles might hold sway where state law does not provide a "clear" outcome. Since much of the pro-arbitration language comes either from the U.S. Supreme Court, which cannot be over-ruled by a circuit court, or by the N.J Supreme Court and precedential Appellate Division cases, which dictate state contract interpretive principles, this "clarification" may be less clear than intended.

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. Thus, as noted in Section 1-5:4.1e, carve-outs may cause issues. *Frederick v. Law Office*[249] raises a different, albeit still troublesome issue: where the clause referenced merely "any dispute that cannot be resolved between the parties after 180 days," the court found the scope and applicability to any statutory clause was insufficient. It denied arbitration in one part of the case and delegated the other to an arbitrator.

1-5:4.2b Delegation

Delegation provides a particularly unique "scope" issue. As a general matter, courts (rather than the arbitrator(s)) must decide whether a particular dispute is within the arbitration clause;[250] the New Jersey Arbitration Act is specific about this.[251]

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

---

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

249. *Frederick v. Law Office,* No. 19-15887, 2020 U.S. Dist. LEXIS 114597 (D.N.J. June 30, 2020) (disputes not resolved).

250. *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.

251. 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).

or arbitrability determinations to the arbitrator; or (2) the parties' election of an arbitral forum's rules that grant to the arbitrator the determination of his or her jurisdiction.

The first delegation may be achieved by an arbitration provision that begins with "all controversies . . .," but in 2010, the New Jersey Supreme Court held that similar language in the parties' contract was not a sufficient delegation; instead language accepted by the U.S. Supreme Court in *Rent-A-Center, West, Inc. v. Jackson,*[252] would be sufficient.[253] The New Jersey Supreme Court discussed delegation in *Goffe v. Foulke Mgmt. Corp.,*[254] though the case turned on severability.[255]

Most courts have accepted the second (rules-adoption) delegation as sufficient,[256] though there is no New Jersey Supreme

---

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

253. *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 Mgmt. 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.*, 883 F.3d 220 (3d Cir. 2018).

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

255. *See* Chapter 2, § 2:4:1, *infra*. Objection must be made to the delegation or arbitration clause specifically. *Knight v. Vivint Solar Developer, LLC*, __ N.J. Super. __, 2020 N.J. Super. LEXIS 240 (N.J. Super. Ct. App. Div. Dec. 2, 2020), illustrates how poorly worded arbitration clause can give rise to an issue that defeats delegation. Delegation also can be lost by "hiding" the link. See *C.D. v. Massage Envy Franchising LLC*, No. ESX-L 3263-19, 2020 N.J. Super. Unpub. LEXIS 3282 (N.J. Super. Ct. Law Div. Dec. 3, 2020) (hidden links).

256. *Petrofac, Inc. v. DynMcDermott Petroleum Ops. Co*., 687 F.3d 671, 675 (5th Cir. 2012) (citing other circuits); *Contec Corp. v. Remote Sol. Co. Ltd*., 398 F.3d 205, 209 (2d Cir. 2005); *Neal v Asta Funding, Inc.,* No. 13-6981, 2016 WL 3566960, at *14 (D.N.J. June 30, 2016), *reconsideration denied*, 2016 WL 7238795 (D.N.J. Dec. 14, 2016), *aff'd,* 756 Fed. Appx. 184 (3d Cir. 2018) (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 predecessor in the Circuit, *Opalinski v. Robert Half Int'l, 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,

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.[257] A 2018 district court case characterizing this as taking "a good joke too far" was reversed in 2020.[258] The Third Circuit, although in a non-precedential opinion, held that the AAA provision "is about as 'clear and unmistakable' as language can get."[259]

Although seemingly contrary to other cases discussing the severability principle, in 2020, delegation clauses were over-ridden by a court when there was a public policy or other formation challenge to the agreement.[260]

A valid delegation clause does not apply to whether the FAA Section One exemption preludes the claims; this is solely a court function.[261] Consistent with the forum's rules and caselaw, though not strictly considered a "delegation" issue, the arbitrator(s) has

---

though the logic would be similar. *Ames v. Premier Surgical Ctr., L.L.C.*, No. A-1278-15T1, 2016 WL 3525246, at *3 (N.J. Super. Ct. App. Div. June 29, 2016) (adoption of AAA rules in LLC agreement not sufficient under *Atalese*). Delegation relying on a waiver of federal law, in favor of tribal law, is not enforceable. *MacDonald v. CashCall, Inc.*, No. 16-2781, 2017 U.S. Dist. LEXIS 64761 (D.N.J. Apr. 28, 2017), *aff'd on other grounds*, 883 F.3d 220 (3d Cir. 2018).

257. *See Tox Design Group, LLC v. RA Pain Servs., PA.*, No. A-4092-18, 2019 N.J. Super. Unpub. LEXIS 2634 (N.J. Super. Ct. App. Div. Dec. 26, 2019) (noting reliance in FAA cases); *but see* cases cited in n. 135 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.

258. *Richardson v. Coverall N. Am., Inc.*, No. 18-532, 2018 U.S. Dist. LEXIS 167240, at *11 (D.N.J. Sept. 27, 2018), *rev'd*, 811 F. Appx. 100 (3d Cir. 2020).

259. *Richardson v. Coverall N. Am., Inc.*, 811 F. Appx. 100, 104 (3d Cir. 2020), quoting *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009). *See also Schmidt v. Laub*, A-620-19, 2020 N.J. Super. Unpub. LEXIS 827 (App. Div. May 5, 2020) ("We conclude that the incorporation of the AAA rules into the arbitration provision clearly and unambiguously expressed the parties' intent to empower the arbitrator to determine arbitrability.") Delegation was accepted in *Carrone v. UnitedHealth Group Inc.*, No. 20-5138, 2020 U.S. Dist. LEXIS 140142 (D.N.J. Aug. 6, 2020), where the court noted the plaintiff was not unsophisticated; criteria for accepting AAA rule as clear and unambiguous); *Anderson v. Skolnick*, No. 19-18138, 2020 U.S. Dist. LEXIS 75518 (D.N.J. Apr. 29, 2020) (AAA R-7).

260. *See MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386 (3d Cir. 2020) (fraud in the execution; CBA clause); *Grantham v. TA Operating, LLC*, No. 20-1108, 2020 U.S. Dist. LEXIS 169413 (D.N.J. Sep. 16, 2020) (public policy), citing *MZM*. Chapter 2 discusses the cases deciding this issue in greater detail.

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

the authority to decide defenses,[262] procedural rules and issues such as applying claim or issue preclusion.[263]

1-5:4.3 Administered and Non-Administered Arbitration

Arbitration may be administered by the organizations mentioned in § 1-3, 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.[264]

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

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[265] 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.

---

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

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

264. *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).

265. The United Nations Commission on International Trade Law, available at https://uncitral.un.org (last visited Dec. 16, 2020). New Jersey does not have a UNCITRAL statute; others do.

Parties and their counsel should consult the various rules before selecting a provider, since they may vary in respects that are important to them, especially in specialized areas such as employment or construction. Possibly more important, the rules may cover topics and restrictions that the parties would otherwise include in their arbitration clauses—the rules selected may either make the specific additions to the clause unnecessary or they may conflict with the provisions in the rules. Cases have concluded that conflicts between the chosen rules and the specific requirements in the written clause affect arbitrability or give rise to ambiguity a court (or arbitration) may resolve in a way not contemplated by the parties.[266]

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.[267] 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.[268] Merely agreeing to arbitrate under the AAA Rules may not always be sufficient, though, since the prior rules did not include that proviso.[269] The language may create toxic ambiguity.

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

---

266. *Sabre GLBL, Inc. v. Shan,* 779 Fed. Appx. 843, 2019 U.S. App. LEXIS 19983 (3d Cir. July 3, 2019).

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

268. *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). *See also Page v. GPB Cars 12, LLC,* No. 19-11513, 2019 U.S. Dist. LEXIS 179498 (D.N.J. Oct. 17, 2019) (alleged failure to receive multiple notice attempts did not excuse failure to advance AAA fees as arbitration clause required).

269. *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).

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.

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. Other rules are under periodic review.

Although cases have held that arbitration will not be compelled if the chosen forum is not available, either because it is no longer in operation or because it may not accept a specific type of case or procedure,[270] other cases have attempted to determine if the selected forum or arbitrator was an "integral" aspect of the parties' agreement to arbitration;[271] if it was not, then the court may sever

---

[270] *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).

[271] *Khan v. Dell Inc.,* 669 F.3d 350 (3d Cir. 2012) (forum not integral, noting presumption of arbitrability under FAA, forum choice severed), *on remand*, 2014 U.S. Dist. LEXIS 27091, 2014 WL 718314 (D.N.J. Feb. 1, 2014) (compelling arbitration; denying discovery). *River Drive Constr. Co. v. N.J. Bldg. Laborer's Statewide Benefit Funds*, No. 14-5440 (JLL),

the forum provision[272] and appoint an arbitrator pursuant to the FAA[273] or New Jersey Arbitration Act[274] 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.[275] Selecting a forum and rules that necessarily would have precluded pursuit of statutory claims may result in the arbitration agreement being voided.[276] In *Falzo v. Greene Jumpers South Plainfield, LLC*,[277] the Law Division had denied a motion to compel arbitration (relying on *Kleine*) where JAMS was the designated provider, since JAMS was no longer permitted to arbitrate matters in New Jersey. The Appellate Division remanded in light of *Flanzman v. Jenny Craig, Inc.*[278] and its holding regarding Section 5 of the NJRUAA. The lesson may be to designate an alternative or substitute forum; however, failure to make an alternative designation is not necessarily fatal (in a JAMS case).[279]

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.[280] Where the clause designates a specific arbitrator, or requires the parties to agree on

---

2015 U.S. Dist. LEXIS 26414 (D.N.J. Mar. 4, 2015); *cf. Control Screening LLC v. Tech. Application & Prod. Co.*, 687 F.3d 163 (3d Cir. 2012) (under N.Y. Convention, forum severable). Held integral: *MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018).

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

273. 9 U.S.C. § 5 ("or if for any other reason . . . the court shall designate and appoint . . . .").

274. 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).

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

276. *See Williams v. Medley Opportunity Fund II, LP,* 965 F.3d 229 (3d Cir. 2020).

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

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

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

280. *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).

the arbitrator, the pre-dispute clause may designate alternatives or refer to the gap filling provisions of the FAA and NJRUAA.[281] Designating an arbitrator rather than the AAA or JAMS may be less expensive for the parties but is financially riskier for the arbitrator.[282] 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.[283]

The Appellate Division introduced considerable uncertainty in this area in *Flanzman v. Jenny Craig, Inc.*,[284] in which the court held that the general concerns in *Atalese* mandated that an arbitration clause must include a designation of the forum or, at least, some indication of the rules to be applied in the arbitration, in contrast to the rules applied in court, and how an arbitrator would be selected. The Supreme Court reversed, consistent with cases holding that the Section 5 of the NJRUAA and Section 11 of the FAA give the court the authority to supply the "gap filling" noted by the Appellate Division.[285]

Ms. Flanzman's sympathetic status may have swayed the Appellate Division's analysis: in her 80's, she had worked for Jenny Craig for many years and alleged that her hours had been gradually reduced to such extent as to constitute a constructive discharge in violation of New Jersey's Law Against Discrimination. The arbitration agreement she signed in 2011 as a condition of her continuing employment began with a straightforward sentence:

---

281. *See Allstate Lending Group, Inc. v. The Gran Centurions, Inc.*, Nos. A3018-18T1, A3827-18T1, A4524-18T1, 2020 N.J. Super. Unpub. LEXIS 1220 (N.J. Super. Ct. App. Div. June 23, 2020).

282. *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). *See also* § 1-5 at n.67.

283. *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).

284. *Flanzman v. Jenny Craig, Inc.*, No. A-2580-17T1 (N.J. Super. Ct. App. Div. Oct. 17, 2018) (first opinion, withdrawn), 456 N.J. Super. 613 (App. Div. 2018), *rev'd*, 244 N.J. 119 (2020).

285. *E.g*., *Gomez v. PDS Tech, Inc.,* No. 17-12351, 2018 U.S. Dist. LEXIS 66589 (D.N.J. Apr. 19, 2018). *See also* § 1-5:1.2 at n.85, § 1-5:3 at n.177. Post- *Flanzman*, one case held that designating the rules of the U.S. District Court and a national judge is sufficient. *Hannen v. Group One Auto., Inc.*, No. A-35551-18, 2019 N.J. Super LEXIS 2658 (N.J. Super. Ct. App. Dis. Dec. 30, 2019), on the statute filled in the "gaps" *Flanzman* perceived. *Hoboken Yacht Club LLC v. Marinetek North Am. Ins. Co.*, No. 19-12199, 2019 U.S. Dist. LEXIS 221575 (D.N.J. Dec. 26, 2019).

"Any and all claims or controversies . . . shall . . . be settled by final and binding arbitration,"[286] and included a waiver of her right to a jury trial and court determination of her claims, as required three years later in *Atalese v. United States Legal Services Group, L.P.*[287] It also delegated arbitrability issues to the arbitration. However, the clause did not specify the location, choice of law or other rules for the arbitration, or the arbitral body to administer any claims; nor did it provide a method of selecting an arbitrator or rules – the absence of which the Appellate Division held precluded a "meeting of the minds" or mutual assent required for contract formation in New Jersey. Oddly, the opinion dismissed Section 5 of the FAA and Section 11 of the NJRUAA on the basis that they only addressed appointment of an arbitrator rather than an arbitral forum or institution.

The Supreme Court recognized that, although identifying the arbitrator or forum (such as the AAA or JAMS) as well as the detailed rules governing the arbitration would be useful, these designations may be intentionally omitted for practical reasons and, in any case, were not necessary for contract formation – whether measured by the "meeting of the minds" rubric or the requirement in *Atalese* that an arbitration clause fairly indicate to the parties (in certain consumer or employment contracts) the nature of the process that would be replacing a determination by a court and/or jury.

Significantly for other cases, the Court noted that Section 3 of the New Jersey statute provides that it "governs all agreements to arbitrate" other than under a collective bargaining agreement or collectively negotiated agreement (which are covered by the predecessor act). The NJRUAA therefore is the "default" law part of all New Jersey arbitration agreements and, whether an agreement is negotiated or adhesive, all parties are on legal notice of and bound by its provisions. Among those provisions are general descriptions of how an arbitration shall be run. More specific provisions, as in a forum's rules, are not necessary for contract formation or to place parties on further notice of what to expect in an arbitration.

---

286. *Flanzman v. Jenny Craig, Inc.*, Slip Op. at 5, 244 N.J. 119 (2020).

287. *Atalese v. United States Legal Servs. Group, L.P.*, 219 N.J. 430 (2014).

Flanzman's holding did not appear determinative in *Delaney v. Dickey*[288] where the Appellate Division held that an arbitration clause in an attorney retainer agreement must attach or be accompanied by the rules for the forum specified in the clause.

The *Flanzman* Supreme Court opinion also is interesting for its discussion of the ways that the common law and other statutes, such as the Uniform Commercial Code or "terms that accomplish a result that was necessarily involved in the parties' contractual undertaking,"[289] have been used to fill gaps in contracts in order to give effect to the parties' intent. As the Court noted, contracts often are "incomplete," and courts are left to create or rely on background or default rules such as industry norms.[290] Thus, where the parties' agreement evidences an intent to arbitrate, applying general contract rules is, the Court held, consistent with New Jersey's policy in favor of arbitration. Left unsaid, to do otherwise would place arbitration agreements on a lesser footing than other contracts. To do so also was held to be consistent with *Atalese*.

1-5:4.4 Choice of Law and Rules

1-5:4.4a Applicable Law

Although the law governing an underlying contract may be determined by a choice-of-law clause or the forum state's choice-of-law rules, that determination may not govern the law applicable to the arbitration provision within that contract.[291] Although there may be cases that do not recognize the difference, this is contrary to precedent.[292] In New Jersey, the default arbitration law is the NJRUAA,[293] but parties may choose the APDRA or another

---

288. *Delaney v. Dickey*, _N.J._, 2020 N.J. LEXIS 1435 (2020), *aff'd as modified* No. A-1726, 2019 N.J. Super. Unpub. LEXIS 1814 (N.J. Super. Ct. App. Div. Aug. 23, 2019).

289. *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 135-36 (2020) (quoting cases).

290. *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 135 (2020).

291. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-60 (1995). *See* § 1-5:1.3.

292. 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).

293. *See* N.J.S.A. 2A:23B-3; *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 134 (2020); *Arafa v. Health Express Corp.,* 243 N.J. 147 (2020).

state's arbitration law—unless FAA preemption applies (as discussed elsewhere in this Handbook), because the relationship involves interstate commerce, to either the arbitration procedures or as to the substantive law governing the enforceability of the arbitration clause. Even where the FAA applies, a court still may enforce the parties' selection—by "clear intent"—of a state's law to apply to matters that are not preempted by the FAA. A court may refuse to enforce the parties' choice of arbitration law if that law violates federal public policy.[294] or would preclude access to a statutory remedy.[295] A New Jersey court may find it lacks subject matter jurisdiction when the dispute clause calls for New York law and a New York forum.[296] 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.[297] Although some arbitration clauses provide that the FAA shall apply,[298] 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.

However, as discussed in Chapter 8, whether New Jersey law (and which New Jersey law) or federal law applies may affect the

---

294. *See MacDonald v. CashCall, Inc*., No. 16-2781, 2017 U.S. Dist. LEXIS 64761 (D.N.J. Apr. 28, 2017), *aff'd on other grounds*, 883 F.3d 220 (3d Cir. 2018).

295. *See Williams v. Medley Opportunity Fund II, LP,* 965 F.3d 229 (3d Cir. 2020).

296. *See Rizzo v. Island Med. Mgmt. Holdings, LLC*, No. A-554-17, 2018 N.J. Super. Unpub. LEXIS 1225 (N.J. Super. Ct. App. Div. May 25, 2018).

297. *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. Other cases are discussed in Appendix 7.

298. *See State v. Phillip Morris, USA, Inc*., No. MDL-C-103-06, 2006 WL 6000399 (N.J. Super. Ct. Ch. Div. 2006) (noting express reference to FAA). Where the arbitration clause selected the FAA as the governing law, but the case was exempt from the FAA by reason of its Section 1, the state law applies as if the FAA never existed. *See Colon v. Strategic Delivery Solutions, LLC,* 459 N.J. Super. 349 (App. Div. 2019), citing *Palcko v. Airborne Express, Inc*., 372 F.3d 588 (3d Cir. 2004), *aff'd*, 343 N.J. 147 (2020), discussed earlier.

timeliness of a motion to vacate and the standards applicable on that motion[299] or whether an appeal is permissible.[300]

Other choice of law issues have arisen regarding agency law,[301] attorneys' fees and whether specific damages were permissible.

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, § 8-3:7.)

1-5:4.4b Forum Rules

As indicated in § 1-5:4.3, 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.[302] The selection of a forum's rules does not necessarily mean that a court will find that the forum has been chosen. The clause can make a clear distinction such as indicating an *ad hoc* appointment or specific provider as administrator, but nevertheless specifying other rules to apply. Although the October 2013 AAA Commercial Rules provide that adoption of the rules also accepts AAA administration,[303] that designation does not affect pre-2013 agreements;[304] one may

---

299. *See, e.g., Chakrala v. Bansal*, No. A-78-11, 2013 N.J. Super. Unpub. LEXIS 2337 (N.J. Super. Ct. App. Div. Sept. 24, 2013), *certif. denied*, 217 N.J. 293 (2014), *cert. denied,* 574 U.S. 823 (2014), Berthus, *A Multiplicity of Procedures in Challenging an Award*, ABA ADR Section, *Just Resolutions* (April 2020); *So There Is an Award*, New Jersey Lawyer 36 (April 2020).

300. *See, e.g*., § 1-5:1.2 & Chapter 8.

301. *Orn v. Alltran Fin., L.P*., 779 Fed. Appx. 996 (3d Cir. 2019).

302. *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*. *See also* § 1-5:2 at n.127 (attorney fee agreement issues).

303. *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).

304. 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).

select a forum (such as the AAA) but provide that a different set of arbitral rules (such as the ICC rules or the UNCITRAL Rules) shall apply. Where no particular procedure is specified and the matter is not being administered under the rules of AAA, CPR, JAMS, or other provider, an agreement to arbitrate still will be enforced, with the court applying the general rules set forth in the FAA or NJRUAA.[305] 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.[306]

Be careful not to select a forum rule that contradicts the parties' explicit choice regarding a specific procedural issue. That may create an ambiguity raising enforcement issues.[307]

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.[308] Issues regarding class actions, including waiving the right to class actions in arbitrations, are discussed in greater detail in Chapter 2.[309]

1-5:4.5 Parties To Be Bound

An arbitration provision may be written to govern disputes only between or among the signatories to the specific agreement (*e.g.*, "Mr. Smith and Ms. Jones agree . . .") or more broadly; subcontractors, for example, often receive the protection of broad language in the primary contract.[310]

---

[305] *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). *But see Flanzman v. Jenny Craig. Inc*., 456 N.J. Super. 613 (App. Div. 2018), *certif. granted*, 237 N.J. 310 (2019).

[306] *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).

[307] *Sabre GLBL, Inc. v. Shan,* 779 Fed. Appx. 843, 2019 U.S. App. LEXIS 19983 (3d Cir. July 3, 2019).

[308] *Lamps Plus, Inc. v. Verela*, 139 S.Ct. 1407 (2019) (class action choice must be explicit); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016) (discussed in more detail elsewhere).

[309] *See* Chapter 2, § 2-6.

[310] *See Bruno v. Mark MaGrann Assocs., Inc*., 388 N.J. Super. 539 (App. Div. 2006); *Wasserstein v. Kovatch*, 261 N.J. Super. 277 (App. Div. 1993); *Cf. Navigators Specialty Ins.*

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.[311] The definitions and descriptions of parties to be bound affect whether assignees, agents or affiliates could compel arbitration or be compelled.[312] Alter egos also may be compelled.[313]

Narrow or ambiguous language may defeat efforts to compel arbitration by non-signatories.[314] There are several examples of plaintiffs avoiding arbitration by suing only non-signatories. In *White v. Sunoco, Inc.*,[315] 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

---

Co. v. Jangho Curtain Wall Americas Co., Ltd., No. BER-L-8246-19, 2020 N.J. Super. Unpub. LEXIS 1295 (N.J. Super. Ct. Law Div. June 10, 2020), *remanded*, No. A4222-19T4, 2020 N.J. Super Unpub. LEXIS 2356 (N.J. Super. Ct. App. Div. 2020), requiring discovery.

311. *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 did not permit enforcement by "affiliates" and ordered arbitration. *Mutual Benefit Life Ins. Co. v. Zimmerman*, 783 F. Supp. 853, 865-66 (D.N.J.), *aff'd*, 970 F.2d 899 (3d Cir. 1992), discussed the factors relating to agents and third-party beneficiaries, and denied standing to seek arbitration.

312. *E.g.*, *Medical Transcription Billing Corp., et al. v. Randolph Pain Relief & Wellness Ctr., P.C.*, No. A4673-17T2, 2019 N.J. Super. Unpub. LEXIS 930 (N.J. Super. Ct. App. Div. Apr. 13, 2019); *Williams-Hopkins v. LVNV Funding, LLC,* No. A-5325-17T2, 2019 N.J. Super. Unpub. LEXIS 951 (N.J. Super. Ct. App. Div. Apr. 26, 2019); *Clemons v. Midland Credit Mgmt., Inc.,* No. 18-16883, 2019 U.S. Dist. LEXIS 123840 (D.N.J July 25, 2019); *Dixon Mills Condo. Ass'n v. RGD Holding Co., LLC*, No. A-3383-16T1, 2018 N.J. Super. Unpub. LEXIS 464 (N.J. Super. Ct. App. Div. Feb. 28, 2018); *Reid v. DCH Auto Grp., Inc.,* No. A-2349-17, 2018 N.J. Super. Unpub. LEXIS 2472 (N.J. Super. Ct. App. Div. Nov. 8, 2018) (successors; company not defined; arbitration denied).

313. *See, e.g., 1567 South Realty, LLC, et al. v. Strategic Contract Brands, Inc.*, No. A-0935-19T2, 2020 N.J. Super. Unpub. LEXIS 1360 (N.J. Super. Ct. App. Div. July 9, 2020).

314. 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).

315. *White v. Sunoco, Inc*., 870 F.3d 257 (3d Cir. 2017). *See also Orn v. Alltran Fin., L.P.*, 779 F. Appx. 996 (3d Cir. 2019); *Saroza v. Client Servs, Inc.,* 2020 U.S. Dist. LEXIS 33375 (D.N.J. Feb. 27, 2020) (citing *White*); *Castle Realty Mgmt., LLC v. Burbage*, No A-5399-15T4, 2017 N.J. Super. Unpub. LEXIS 1748 (N.J. Super. Ct. App. Div. July 13, 2017) (Re/Max franchisees as barred third-party beneficiaries), *certif. denied*, 231 N.J. 111 (2017).

obvious beneficiary of the program, Sunoco was not a party to the credit card agreement and was not specifically identified as a beneficiary of the arbitration clause. The court held the references on the card to affiliates and a "no third-party beneficiary" clause did not permit arbitration by Sunoco.

In another case, an effort to compel arbitration of a warranty claim against the manufacturer granting the warranty was unsuccessful where the arbitration clause was in the dealers' sales or credit documents rather than the warranty.[316] A False Claims Act claim was held not arbitrable since the government is the real party in interest in such claims.[317]

Care should be made distinguishing the parties to be bound from the scope of the claims; referencing "parties" in describing what claims are to be bound may not accomplish the goal.

Arguments that non-signatories were indispensable parties may not defeat arbitration as to signatories.[318] A claim by or against the non-signatory may by severed and proceed separately. Parties in a construction case may be deemed sufficiently intertwined to have been contemplated as bound.[319]

A receiver has standing to compel FINRA arbitration.[320]

In 2020, the United States Supreme Court held, in *GE Energy v. Outokumpu Stainless USA, LLC*,[321] that state estoppel principles could be applied to bring in non-signatories in cases governed by the New York Convention.

---

316. *In re Volkswagen Timing Chain Prod. Liab. Litig*., No. 16-2765 (JLL), 2017 U.S. Dist. LEXIS 70299, at *28 (D.N.J. May 8, 2017) (in suit based on separate warranty, manufacturer cannot rely on arbitration clause in sales contract). *See also Shapiro v. Logitech, Inc.*, No. 17-673, 2019 U.S. Dist. LEXIS 15138 (D.N.J. Jan. 31, 2019) (Amazon Prime terms do not convey third-party beneficiary status or vendor).

317. *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).

318. *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). *But see Bruno v. Mark MaGrann Assocs., Inc*., 388 N.J. Super. 539 (App. Div. 2006) (subcontractor could compel).

319. *See Kensington Park Owners Corp. v. Archtectura, Inc*., BER-L-2055-19, 2019 N.J. Super. Unpub. LEXIS 1601 (N.J. Super. Ct. Law Div. June 28, 2019).

320. *Interactive Brokers, LLC v. Barry*, 457 N.J. Super. 357 (App. Div. 2018). Other situations are described in Appendix 7.

321. *GE Energy v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (June 1, 2020).

1-5:4.6 Pre-Arbitration Mediation; Non-Binding Arbitration

Parties may require mediation, dispute resolution boards (DRB's as in the construction industry[322]), or executive consultation (multi-step) as a precondition to arbitration, but the clause must be clear and not contradictory.[323] 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.[324] Strict time limits for the mediation (absent specific further agreement) may be necessary to avoid issues of waiver or intent. The AAA and other forums provide suggested mediation clauses and provide for a mediation as an auxiliary to an arbitration.[325]

A variety of "dispute resolution programs" require "non-binding arbitration" as a preliminary step before litigation.[326] Whether or not intended to be a precondition to litigation, these have encountered enforcement problems.[327] To avoid confusion, and to

---

322. *See* https://www.adr.org/sites/default/files/document_repository/AAA%20Dispute%20Resolution%20Board%20Guide%20SPECIFICATIONS.pdf. (last visited Dec. 16, 2020). Parties outside the construction industry, such as in Life Sciences, *see* Mary Bartkus, *Dispute Resolution Provisions in Life Sciences Agreements*, 75:2 Disp. Resol. J.1 (2020), often use or should consider such mechanisms.

323. *See, e.g., Kernahan v. Home Warranty Admin. of Fla., Inc.*, 236 N.J. 301 (2019) (dispute clause heading was "mediation" and rules applicable to arbitration were termed "Mediation" rules); *Gastelu v. Martin*, No. A-0049-14T2, 2014 WL 10044913 (N.J. Super. Ct. App. Div. July 9, 2015). In *Sand Castle Development, LLC v. Avalon Development 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.

324. *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).

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

326. *See, e.g., Condemi Motor Co., Inc. v. Bautista*, No. A-4526-15T1, 2018 N.J. Super. Unpub. LEXIS 509 (N.J. Super. Ct. App. Div. Mar. 6, 2018) (court annexed regarding fees and costs); *Bowen v. Hyundai Motor Am.*, No. A-4188-15T3, 2017 N.J. Super. Unpub. LEXIS 1330 (N.J. Super. Ct. App. Div. June 1, 2017) (Better Business Bureau; fees awarded). *See generally* Chapter 9, § 9-1.

327. *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). Reference only to a 180-day time period to settle disputes caused scope issues in *Frederick v. Law Office,* No. 19-15887, 2020 U.S. Dist. LEXIS 114597 (D.N.J. June 30, 2020) (disputes not resolved).

dispel any questions about enforcement and entry of judgment, parties usually use "final, binding arbitration" or similar words in their pre-dispute clause.

1-5:4.7 Arbitrator Number, Selection, and Qualifications

Parties may agree to one or three arbitrators (generally), with the thought that more complex cases may benefit from the collegial factual and legal analysis of three, or a way to avoid a rogue arbitrator; but the expense of three may not be warranted in less 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 adjournments are required. An appeals process may provide a less expensive alternative to multiple arbitrators.[328]

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.[329]

Parties may seek special qualifications, such as a state or federal judge (retired) or a lawyer with specific expertise in the legal, industry, or factual issues at hand or language skills; they also may request a "diverse" panel.[330] 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. Being too specific may result in no "qualified" arbitrators being available, in which case a provider may request the parties to give alternative designations. Identifying an arbitrator by name may cause problems if he or she is not available, though

---

328. *See* Chapter 8, § 8-4.

329. *See, e.g., Hunt v. Moore*, 861 F.3d 655, 659 (7th Cir. 2017) (citing 9 U.S.C. § 5; such lapses in appointment were described as "common"). *See also Keppler v. Terhune*, 88 N.J. 455, 462 (1965) (statute empowers court to appoint arbitrator where parties do not make the designation). *Flanzman v. Jenny Craig, Inc.,* 244 N.J. 119 (2020), regarding the authority of courts to appoint an arbitrator, is discussed elsewhere in this Handbook. Alternatives to a designated non-existent forum may not be effective. *See MacDonald v CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018); *cf. Williams v. Medley Opportunity Fund II, LP,* 965 F.3d 229 (3d Cir. 2020) (rules precluded remedy).

330. *See* CPR Model Clause (April 1, 2020), available at https://www.cpradr.org/news-publications/press-releases/2020-04-01-cpr-continues-to-pioneer-in-diversity-space-with-launch-of-diversity-inclusion-model-clause (last visited Jan. 26, 2021).

state and federal law provide a mechanism if the parties cannot agree on a substitute.[331]

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

1-5:4.8 Confidentiality, Timing, Discovery, Hearings, Class Actions, Remedies, Notice, and Location

There are almost limitless ways parties may shape the hearing and pre-hearing process. A word of warning, though: complexity leads to potential enforcement issues both at the outset and in the confirmation process. As noted in other sections, indicating requirements that do not align with the chosen forum's rules may create ambiguity.[332] A second warning: attempting to control the process in standard-form employee, consumer, or other contracts of adhesion may give rise to unconscionability issues and resultant non-enforcement or severance of those provisions. The standard provider rules for such cases (*e.g.*, consumer and employment) may contain fee and other provisions that protect against such problems and can be pre-approved by the provider. Also, many details for the conduct of the arbitration can be agreed to, or resolved by the arbitrator, at the preliminary hearing. *See* Chapter 3, § 3-1.

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

1-5:4.8a Confidentiality

One of the most widely mentioned benefits of arbitration is that the proceedings are "private", *i.e.*, not public (in comparison to a court). However, most arbitrations are not "confidential" unless the parties so agree in their arbitration clause (or during

---

331. *See* 9 U.S.C. § 5; N.J.S.A. 2A:23B-11. Issues under these statutes are discussed elsewhere in this Handbook.

332. *See Sabre GLBL, Inc. v. Shan,* 779 Fed. Appx. 843, 2019 U.S. App. LEXIS 19983 (3d Cir. July 3, 2019).

333. John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Dispute Resolution Journal 1 (Feb.-Apr. 2003), available at https://www.hugheshubbard.com/news/drafting-arbitration-clauses-avoiding-the-7-deadly-sins (last visited Dec.16, 2020).

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).[334] Employment arbitrations are an exception, and Rule 23 of the AAA Employment Rules permits for confidentiality.[335] *See* Chapter 3, § 3-3, for an extended discussion of confidentiality.

Even where the parties have taken steps to protect the confidentiality of their proceedings and the resultant award, if a party moves to vacate or confirm, the award and other portions of the proceedings may be filed on the public record and available[336]—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.[337] 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.

1-5:4.8b Discovery

The rules of the major arbitration providers contain default provisions that govern the timing of certain steps in the process, the extent of (or limits on) discovery or disclosure, and the time to render an award once the hearings are closed. For example, some rules may provide for information exchanges, but not depositions; "Expedited Rules" may deter discovery; the AAA Employment Rules provide a standard list of documents to be exchanged. The parties may modify these default provisions in the arbitration provision by permitting more or less discovery and by specifying stricter time limits. They

---

334. *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).

335. AAA Employment Arbitration Rules, R-23 ("The arbitrator shall maintain the confidentiality of the arbitration . . ."), available at https://www.adr.org/sites/default/files/Employment%20Rules.pdf (last visited Dec. 16, 2020).

336. *See CAA Sports LLC v. Dogra*, No. 18-1887, 2018 U.S. Dist. LEXIS 214223 (E.D. Mo. Dec. 20, 2018) (sealing limited part of award); *case dismissed*, 2019 U.S. LEXIS 31752 (E.D. Mo. Feb. 28, 2019) (not a final award). In 2019, the Third Circuit set a more rigorous standard for determining reduction and scaling. *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. New England Reinsurance Corp.*, 794 Fed. Appx. 213 (3d Cir. 2019). Recent cases include *Pennsylvania Mutual Cas. Ins. Grp. v. New England Resinusrance Co.*, _ Fed. Appx. _, 2020 U.S. App. Div. 40342 (3d Cir. Dec. 24, 2020); *Bowken v. Midland Funding Co.*, No. 18-11320, 2020 U.S. Dist. LEXIS 189173 (D.N.J. Oct. 9, 2020).

337. *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) (2021 ed.).

also may agree during the course of the arbitration, for example, at the preliminary organizational meeting, or they may seek the arbitrators' ruling on alternatives. Restrictions on discovery do not make the arbitration inherently unconscionable and they may be over-ridden by the arbitration, under the rules, in the interests of justice. However, exhibits must be exchanged in advance, regardless of any "discovery" limitations. *See* Chapter 2, § 2-5:3.

1-5:4.8c Hearings; Motions; Witnesses

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. Keep in mind, though, that the provider rules usually contain provisions regarding these issues. In-person hearings are not required by the NJRUAA.[338] Although the parties may agree to subpoena witnesses, courts will not necessarily be compliant;[339] the NJRUAA permits subpoenas,[340] but they still must be served and enforced within the proper jurisdiction.

The "location" of a hearing has gained particular significance in the COVID-19 age of Zoom or other remote hearings. Hence, although provider rules may provide some flexibility in setting or changing hearing locations, the parties' agreement may want to permit remote hearings yet retain a clear understanding of the seat, site or location.

1-5:4.8d Relief Permitted; Limitations

The parties may attempt to limit or describe the forms of relief that may be awarded, such as injunctive or equitable relief and punitive damages, keeping in mind that the forum's rules (such as AAA Commercial Rule, R-47(a)) or state statutes may address the remedies to be awarded. For example, in New Jersey the parties may not agree to waive punitive damages as a form of relief in an LAD case; the waiver will be severed and voided.[341]

---

338. *See State Farm Guaranty Ins. Co. v. Hereford Ins. Co.*, 454 N.J. Super. 1 (App. Div. 2018).

339. *See, e.g., Managed Care Advisory Group, LLC v. Cigna Healthcare, Inc.*, 939 F.3d 1145, 1160 (11th Cir. 2019) (FAA did not permit subpoena of remote witness).

340. N.J.S.A. 2A:23B-17(a).

341. *Roman v. Bergen Logistics, LLC*, 456 N.J. Super. 157 (App. Div. 2018) (granting motion to compel arbitration). In *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222 (3d Cir.

A carve out for preliminary restraints or injunctive relief will be enforced.[342] However, exempting declaratory judgment relief and "injunctive relief" may negate the arbitration where these are seen as the ultimate, rather than preliminary, relief to be sought.[343]

Shortening the otherwise available statute of limitations in which to file an arbitration may not be permitted in certain areas.[344]

1-5:4.8e Notice; Service

Problems can arise regarding failure to provide proper notice to parties of the claim, award or other matters. A provider's rules typically specify how notice may be given, and the provider may be responsible for giving notice in some instances, but a court-appointed or *ad hoc* arbitration agreement should include terms that comply with any applicable statute. Email notice is not necessarily sufficient (or effective, since email addresses may be old and be hacked.)

In 2020, the California Supreme Court held that that service by Federal Express was appropriate where the parties had agreed to that mode, despite contrary requirements in the governing treaty.[345]

As noted elsewhere,[346] obligations may be triggered by specific forms of service or notice, including the difference between service and receipt, and rights may be lost if those triggers are not observed and time is miscalculated.

1-5:4.8f Location or Site/Seat of the Arbitration/Hearings

A key provision in any agreement is the location or site of the "arbitration" and where the hearings will be conducted, which

---

1997), the court held that the availability of punitive damages was to be determined by the arbitrator; this ruling may be superseded by New Jersey cases such as *Roman*.) *Cf, Delaney v. Dickey*, _ N.J. _, 2020 N.J. LEXIS 1425 (2020) (questioning limits on punitive damages).

342. *See Archer & White Sales, Inc. v. Henry Schein, Inc*., 878 F.3d 488 (5th Cir. 2017). Right to seek an injunction need not be mutual. *Ribe v. Macro Consulting Group, LLC,* No. A-2894-18T4, 2020 N.J. Super. Unpub. LEXIS 468 (N.J. Super. Ct. App. Div. Mar. 9, 2020).

343. *See Thompson v. Nienaber*, 239 F. Supp. 2d 478 (D.N.J. 2002) (distinguishing carveout for TRO vice permanent injunction); *compare Go Express, Inc. v. Autodrop, Inc.*, No. BER-C-231-18, 2018 N.J. Super. Unpub. LEXIS 2252 (N.J. Super. Ct. Ch. Div. Oct. 10, 2018) (issues for permanent injunction for arbitrator).

344. *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).

345. *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co ., Ltd.*, 9 Cal. 5th 125, 260 Cal. Rptr. 3d 442, 460 P.3d 764 (2020), *cert. denied*, __ S. Ct. __ (2020), 2020 U.S. LEXIS 3995 (2020).

346. *See* Chapter 8.

are two different concepts. The site or seat may govern the law to be applied. The specification of an inconvenient city or state to hold the hearings may lead to unconscionability issues.[347] Local restrictions on out-of-state arbitrations may be preempted by the FAA.[348] Even if the parties later agree to modify the originally designated 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.[349] The location (or "seat") is a particularly important matter in international arbitrations and the enforcement of an award.

Do not confuse the location of a court for enforcement with the location for the arbitration. The county location for hearings is not necessarily the court for enforcement.[350]

1-5:4.8g Class Actions

The clause may provide that any class action claims be heard in arbitration according to the class action procedures of the chosen forum.[351] 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.[352] Although class-action

---

347. For example, in *Vegter v. Forecast Fin. Corp*., No. 07-279, 2007 U.S. Dist. LEXIS 85653 (W.D. Mich. Nov. 20, 2007), the court severed and voided the designated location as unconscionable and ordered arbitration in Michigan; the court would appoint the arbitrator. Requiring arbitration in California was an obvious, if unstated, concern in *Flanzman v. Jenny Craig, Inc.*, 459 N.J. Super. 613 (App. Div. 2018), *rev'd*, 244 N.J. 119 (2020).

348. *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).

349. Note: Under the FAA, a court may not normally compel arbitration outside its own district. *See Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc*., 499 F.2d 1392, 1394 (3d Cir. 1974).

350. *See Virtua Health, Inc. v. Diskriter, Inc.*, No. 19-21266 (RMB/JS), 2020 U.S. Dist. LEXIS 132218, at n.1 (D.N.J. July 27, 2020).

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

352. *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); *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).

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 and defeat an effort to compel arbitration.[353]

Neither silence nor ambiguity may give rise to class action arbitration.[354]

1-5:4.9 Allocation/Shifting of Fees and Costs

1-5:4.9a Administrative and Arbitrator's Fees and Costs

The administrative and filing fees required by a provider normally are 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.[355]

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

---

353. *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), *aff'd on other grounds*, 233 N.J. 220 (2019).

354. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

355. *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). The NJRUAA, NJSA 2A: 23 B -21, permits the arbitration to allocate such fees.

contracts. Some providers' rules prohibit onerous fee or other provisions.

1-5:4.9b Attorneys' Fees and Costs

Whether the prevailing party may be awarded its legal fees and expenses is not addressed in the FAA, but it is specifically permitted in the NJRUAA (if "authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding").[356] The parties' agreement may include a fee-shifting clause in the underlying contract or in the arbitration clause;[357] their "agreement" also may include the arbitration forum's rules if the parties have adopted those rules. The AAA Commercial Rules distinguish between assessing administrative and arbitration expenses and compensation, on the one hand, and awarding attorneys' fees, on the other.[358] The arbitrator's authority to award attorneys' fees (and possible limitations on that authority) is discussed further in Chapters 7 and 8. Notably, AAA Commercial Rule R-47(d) permits an award of attorneys' fees where both sides have requested such an award.[359] A contradiction or inconsistency with the provider's rules may create troublesome ambiguity.[360]

Parties must be aware of the difference between authorizing attorneys' fees for the arbitration and for post-award or other motions in court. The clause may permit both or either; the NJRUAA permits both; the FAA does not.[361] The authority in the NJRUAA for awarding attorneys' fees in the arbitration differs from a court's ability to award fees after the award, or in connection with confirming or vacating the award.[362]

---

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

357. *See Beery v. Quest Diagnostics, Inc.*, 953 F. Supp. 2d 531 (D.N.J. 2013) ("loser pays" provision does not void arbitration; ambiguous terms to be decided by arbitrator).

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

359. *See, e.g., Zecca v. Monterey Condo. Ass'n, Inc.*, No. A-4531-18T3, 2020 N.J. Super. Unpub. LEXIS 848 (N.J. Super. Ct. App. Div. May 6, 2020) (arbitrator acted within his discretion in awarding fees).

360. *See Sabre GLBL, Inc. v. Shan,* 779 Fed. Appx. 843 (3d Cir. 2019).

361. *Davison Design & Dev. Inc. v. Frison*, 815 Fed. Appx. 659 (3d Cir. 2020) (FAA does not authorize post award fees, unless a contractual or other basis). *See* Chapter 8.

362. *See* Chapter 7, § 7-2:7.2, *infra.*; *Mitschele v. WILF/Mitschele Joint Venture, et al.*, No. A-0777-18T2, 2020 N.J. Super. Unpub. LEXIS 828 (N.J. Super. Ct. App. Div. May 5, 2020); *Zecca v. Monterey Condo. Ass'n, Inc.*, No. A-4531-18T3, 2020 N.J. Super. Unpub. LEXIS 848 (N.J. Super. Ct. App. Div. May 6, 2020).

1-5:4.10 Award (*e.g.*, Form and Remedies)

Parties may provide that the arbitration may be bifurcated between, *e.g.*, liability and damages, with separate final awards for each.

Although a number of post-hearing matters are dealt with either in a forum's rules or by agreement during the preliminary/organizational sessions of the arbitration, the parties' contract also may state, at least preliminarily, their preference for some of them. For example, they may require that the award be rendered within a set number of days after the hearing is closed different from the provider's rules (although this may create problems and often is waived). Or they may require that the award be reasoned (*i.e.*, stating the basis for the award in varying degrees of detail) or summary (*i.e.*, the result only, without any explanation). The parties may have institutional reasons for this choice, a statute may require one form, or the parties simply may not want to pay the additional fees necessary for the arbitrator to draft a reasoned award. In complex cases, the parties may preliminarily or ultimately designate an award with "findings of fact and conclusions of law" similar to those required in federal bench trials. Chapter 8 deals with these issues in greater detail.

In addition to indicating whether the arbitrator must or may (or may not) shift or allocate the attorneys' fees, expenses, and costs of the arbitration, as discussed above, an arbitration clause also may restrict the remedies (such as 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.[363] Provider rules also may restrict such prohibitions. Some of these issues are discussed elsewhere in this Handbook.

The arbitration clause should include a provision that judgment on the award may be entered or enforced in a court of competent jurisdiction—though the AAA and other rules include such a provision,[364] as does the NJRUAA.[365]

---

363. *See Roman v. Bergen Logistics, LLC*, 456 N.J. Super. 157 (App. Div. 2018) (cannot waive punitive damages in LAD claim).

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

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

1-5:4.11 Appeals

Parties may agree to a statutory or provider provision that allows an appeal or more intense review than otherwise would be permitted.[366]

1-6 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 written permission. New Jersey prohibits an arbitrator who has acted as a mediator, even if initially the arbitrator, from resuming his or her arbitrator role. The parties, however, can expressly permit the mediator/arbitrator to perform both functions and resume the arbitration.[367] 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 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.

---

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

367. *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.)