Chapter 1

Overview of Arbitration in the Dispute Resolution Process[1]

1-1 HISTORY

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 Ages, there had

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

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

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.

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

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), *appeal filed*, No. 20-02047 (1st Cir. Nov. 4, 2020) (docket checked Jan. 3, 2023).

New Jersey has a rich history of arbitrating a variety of disputes, going back to Colonial times.[7] Following the Quaker tradition of 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 not defined in either the FAA or the applicable New Jersey statutes. In *Barcon Assocs., Inc. v. Tri-Cty. Asphalt Corp.*,[13]

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7. Books and articles discussing the history of arbitration include Carl N. Conklin, *Transformed, not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 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); Jerome T. Barrett & Joseph P. Barrett, A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement, Jossey-Bass, a Wiley imprint (2004); Odiorne, *Arbitration under Early New Jersey Law*, 8 Arb. J. 117 (1953); and Steven A. Certilman, *A Brief History of Arbitration in the United States*, Vol. 3. No. 1, New York Dispute Resolution Lawyer 10 (NYSBA Spring 2010), *available at* http://ssrn.com/abstract=1690512 (last visited Jan 3, 2023). 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 *Hoffman v. Westlecraft*, 79 A. 318 (N.J. S. Ct. 1911), as permitting a contempt order to be entered for failure to honor the agreement. Landon, at 75 describes an earlier case, *Stoll v. Price*, 21 N.J.L. 32 (Sup. Ct. 1847), and others.

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)).

the New Jersey Supreme Court provided a broad, non-exclusive definition: "a substitution, by consent of the parties, of another tribunal for the tribunal provided by the ordinary processes of law" intended to provide a "final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner . . . ." Contrary to the current reality, arbitration is further described as intending to provide "a substitute for and not a springboard for litigation."[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 the fact-finder's own expertise or investigation.[16] *Statewide Commercial Cleaning, LLC v. First Assembly of God*[17] concerns an appraisal "umpire" without discussing arbitration. Nor is an order for a "true-up" process to adjust the purchase price for a corporate transaction an arbitration,[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]

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[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 in this chapter, in § 1-5:2, *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 (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).

Various states and courts have made considered distinctions between arbitration and appraisal or accounting. For example, the Third Circuit has held that Pennsylvania's Lemon Law appraisal process is not arbitration.[21] 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 receives evidence and renders an award. The term is not defined in the FAA. The term "umpire" is used in the 1987 Alternate Procedure for Dispute Resolution Act[24] without any apparent difference intended. A highlight of the arbitration process, as was key to the final holding in *Barcon Associates*, is the impartiality of the arbitrators; hence the term "neutral" may be described in other regimes.[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]

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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 Milligan*, 920 F.3d 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)).

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 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

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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.*, § 1-4:4 (Limitations). *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).

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

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

"arbitration" award, parties appointing professionals to non-standard decision-making positions should be conscious of the distinctions and the consequences of their choice, just as they should be wary of having or selecting a particular statute or "law" to govern the process.

1-3 BENEFITS OF ARBITRATION

Having previously extolled the virtues of mediation,[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 identify conflicts or indicate a preference as to experience, diversity, 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

34. *See* the Preface to this volume.
35. *See* § 1-4.

cases.[36] Confidentiality also may be lost if the parties 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 later. Setting the location and time constraints are common parameters. The best-known arbitration providers (or forums) such as the American Arbitration Association ("AAA"), the International Centre for Dispute Resolution ("ICDR"), JAMS (formerly the Judicial Arbitration & Mediation Services), the International Institute for Conflict Prevention and Resolution ("CPR"), and the International Chamber of Commerce Court of Arbitration ("ICC"), have extensive rules governing the arbitration process, including baselines for discovery, evidence, and timing. Commencing the arbitration may use simplified procedures rather than formal service of process (though that is not necessarily the case—*see* Chapter 2). The parties may agree on other reasonable limits or procedures to be followed by the arbitrator, such as remote hearings, a sealed record, limitations on discovery, accepting affidavits as testimony, or a trip to view sites or to receive evidence in other states. Arbitration can be adapted to meet the parties' needs.

(4) The costs and wasted time that are endemic to litigation can be cut appreciably in arbitration. Often it is counsel who seek extensive discovery, motions, and adjournments; but if they and their clients do not wish to foster such practices, arbitration can be as speedy and inexpensive as

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[36] *See, e.g.*, §§ 1-5:4.8a & 3-3; Appendix 1, 3 & 4. 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).

[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; 3-3; 7-2:1 & 8-3:2.1b.

the parties may desire. Thus the term: "muscular arbitration." It is the rare arbitration that should exceed six months from the date issue is joined, and many can be resolved in a shorter period. Some forum rules allow or encourage the parties to attend the preliminary session at which these parameters are discussed.[38]

(5) Arbitration can take many forms; some alternatives are discussed later in this book.[39] The usual form is a simple presentation of the parties' positions before the arbitrator through documents and witnesses, much as a judge would hear a case in a courtroom. But the procedure may be even simpler, and the case may be decided on documents alone or even over the telephone or Zoom, if that is what the parties had consented to in their arbitration agreement or after the dispute is filed, or was ordered by the arbitrator.[40]

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

(7) When it's over, it's over. This means that, unless the parties initially have agreed that there may

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38. *See, e.g.*, 2022 AAA Commercial Arbitration Rules, R-22(a). The AAA Commercial Rules, in Appendix 1, were amended effective September 1, 2022. The ICDR Rules, in Appendix 3, were amended effective March 1, 2021. To help distinguish the *current* rules, the year of their effective date may be indicated in any footnote citations. Some opinions may refer to the then-current rules, in which case this Handbook may highlight the distinction. The preamble to the rules states that the amended rules govern cases filed on or after their effective date.

39. *See, e.g.*, § 1-4 & Chapter 9.

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

be review of the law applied by the arbitrator,[41] any review of the award, on a motion to confirm or vacate the award, is limited to matters of corruption, fraud, partiality, refusal to consider evidence, and other similar grounds. The nitpicking of appeals for minor evidence problems, with possible reversals and retrials and their attendant expense, are absent in procedures for confirmation or vacatur of an arbitration award. Interlocutory court applications generally are not permitted.[42]

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41. 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, JAMS and other fora have Appellate Arbitration programs. Usually, the lack of appeals is looked upon as a benefit of arbitration, but in specific cases the parties may want to reserve the right of limited judicial or forum review. The NJRUAA gives this option, but review may be limited in other statutes. Although the 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, *Roadway* still effective for proposition that generic choice of law clause cannot supplant FAA). *See, e.g*., Chapter 1, § 1-5:4.11 and Chapter 8, §§ 8-3:7 to 8-3:10.

42. *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); *Arista Mktg. Assocs., Inc. v. Peer Grp., Inc.*, 316 N.J. Super. 517 (App. Div. 1998) (removing party-appointed arbitrator for conflict); *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 Jan. 3, 2023) (court intervening to enjoin testimony at arbitration of expert with a conflict). *Cf. Roselle Borough Bd. of Educ. v. Batts*, No. A-2530-19, 2021 N.J. Super. Unpub. LEXIS 1772 (N.J. Super. Ct. App. Div. Aug. 20, 2021) (interlocutory injunction to adjourn arbitration and appoint arbitrator not proper); *Hook v. Senyszn*, No. A-1359-19T4, 2021 N.J. Super. Unpub. LEXIS 187 (N.J. Super. Ct. App. Div. Feb. 3, 2021) (interlocutory motion to appoint a new arbitrator was outside the jurisdiction of court). An unusual "detour" was permitted outside the labor law context in *Sills Cummis & Gross, P.C. v. Matrix One Riverfront Plaza, L.L.C*., No. A-3630-08, 2009 N.J. Super. Unpub. LEXIS 2944 (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 7, § 7-1:2.2a (drafting the award).

See Chapter 3, § 3-6 and Chapter 7, § 7-1:2.2 (N.J.S.A. 2A:23B-18 permits incorporating pre-award ruling into an interim award, which then may be confirmed). The APDRA

However, the "complete arbitration rule" under the FAA has been held "prudential" rather than jurisdictional.[43]

(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)[44] permits enforcement of an award in domestic courts—often using a process far easier than would be the case for a court judgment.

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

A word or two of caution is necessary, however.

First, lack of care or precision in drafting the arbitration clause and related paragraphs – including "boilerplate" – and documents can cause havoc. This handbook contains a multitude of examples where terms and language frustrated the drafters' purpose. Failing to update contracts as the law develops can be fatal.[45]

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provides for limited interlocutory court appeals. *See* N.J.S.A. 2A:23A-5(a); 2A:23A-6(b) & 2A:23A-7.

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

44. 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).

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

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

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.[46]

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provision was not severed; instead, the entire arbitration clause was held unconscionable and the motion to compel was denied.

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

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

1-4:1 Statutory Mandates

Although the focus of this Handbook is contractual arbitration, a large proportion of arbitrations is the result of statutory or court-rules mandates. For example, in New Jersey some public employees are required by statute to present certain grievances and other disputes to a state-organized mediation or arbitration.[47] 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.[48]

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.[49]

Housing-related disputes between unit owners and condominium associations are governed by a section of the Condominium Act[50] requiring the use of "a fair and efficient procedure" to resolve certain disputes.[51] The Appellate Division in *The Glens of Pompton*

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47. *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).

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

49. *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 Ctr. 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. *Allstate N.J. Ins. Co. v. Legome,* No. A-1886-20, 2022 N.J. Super. Unpub. LEXIS 1344 (N.J. Super. Ct. App. Div. July 26, 2022), addressed allegations of fraud and excess attorneys' fees in consolidated PIP cases. *See also MacFarlane v. Soc'y Hill at University Heights Condo. Ass'n II*, No. A-2792-20, 2022 N.J. Super. Unpub. LEXIS 1221 (N.J. Super. Ct. App. Div. July 6, 2022) (applicability of Condominium Act).

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

51. 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.[52]

There are other arbitration statutes or rules in specialized areas.[53]

1-4:2 Court Rules Mandates

Several statutes have authorized arbitration and mediation as part of Complementary Dispute Resolution ("CDR") programs in New Jersey state and federal courts. These programs are implemented by detailed protocols in the New Jersey Court Rules[54] and the Local Civil Rules of the U.S. District Court for the District of New Jersey.[55] We describe these court-annexed CDR programs in Chapter 9.[56]

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52. *The Glens at Pompton Plains Condo. Ass'n v. Van Kleeff*, No. A-0418-13T4, 2015 WL 9486151 (N.J. Super. Ct. App. Div. May 7, 2015). *See also Bell Tower Condo. Ass'n v. Haffert*, 423 N.J. Super. 507 (App. Div. 2012) (discussing N.J.S.A. 46:8B-14(k)), *certif. denied*, 210 N.J. 217 (2012). Subsequent cases in this matter confirmed the award and dealt with post-arbitration fees. In *Glogover v. Hudson Harbour Condo. Ass'n, Inc.,* No. 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. *See also MacFarlane v. Soc'y Hill at University Heights Condo. Ass'n II*, No. A-2792-20, 2022 N.J. Super. Unpub. LEXIS 1221 (N.J. Super. Ct. App. Div. July 6, 2022) (applying Act).

53. *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); 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); Construction Lien Law, N.J.S.A. 2A:44A-21(b)(3), *see Rinaldo v. Schaad*, No. A-3788-08T3, 2010 N.J. Super. Unpub. LEXIS 2575 (N.J. Super. Ct. App. Div. Oct. 25, 2010) (withdrawing a petition for arbitration under the CLL does not waive contractual arbitration), *certif. denied*, 206 N.J. 329 (2011). In 2022, the "Out-of-network Consumer Protection, Transparency, Cost Containment and Accountability Act," N.J.S.A. 26:2SS-9, *et seq.*, was amended to provide for arbitration of certain disputes.

Federal statutes and rules include the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1382 (discussed in *Steelworkers Pension 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). In 2022, the Centers for Medicare & Medicaid Services issued revised guidance disfavoring mandatory standard arbitration agreements for residents in long-term care facilities. *See* https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/revised-long-term-care-surveyor-guidance (last visited Jan. 5, 2023).

54. *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.

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

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

The Court Rules also specify the process for resolving fee disputes between lawyers and clients,[57] including a limited ability to seek judicial relief[58] or adjudicate malpractice claims.[59] The importance of an attorney's maintaining a correct current address with the state, even after retirement, is illustrated by *Cardillo v. Neary.*[60] Proper service was an issue in *Rubin v. Tress*.[61] An "appeal" of a fee award is addressed in *Skene v. Kenney*;[62] any challenge to an award must go to the Disciplinary Review Board ("DRB"), not the court.

1-4:3 Bankruptcy

The automatic stay provisions of the U.S. Bankruptcy Code[63] are applicable to arbitrations, but not necessarily to guarantors or sureties.[64]

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57. *See* N.J. Ct. R. 1:20A-1 *et seq*. (District Fee Arbitration). Cases discussing fee arbitration include *Kopec v. Moers*, 470 N.J. Super. 133, 269 A.3d 467 (App. Div. 2022) (arbitration clauses in attorney retainer agreements held unenforceable as ambiguous and, e.g., not making proper distinctions between binding arbitration and fee arbitration); *Hood v. Iroka*, No. A-0508-19, 2021 N.J. Super. Unpub. LEXIS 2389 (N.J. Super. Ct. App. Div. Oct. 1, 2021) (conflict of interest; defective "appeal"); *Genova Burns, LLC v. Jones*, No. A-5054-18, 2021 N.J. Super. Unpub. LEXIS 743 (N.J. Super. Ct. App. Div. Apr. 28, 2021) (default); *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) (notice requirements and knowledge).

58. *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). *Cf. Skene v. Kenney*, No. A-2636-20, 2022 N.J. Super. Unpub. LEXIS 1630 (N.J. Super. Ct. App. Div. Sept. 13, 2022) (proper route of "appeal" is DRB); *Hunnell v. McKeon*, No. A-127-20, 2022 N.J. Super. Unpub. LEXIS 1414 (N.J. Super. Ct. App. Div. Aug. 11, 2022) (delay in seeking relief in the arbitration).

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

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

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

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

63. *E.g.*, 11 U.S.C. § 362.

64. *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); *Perkins v. Advance Funding, LLC*, No. 20-15708, 2021 U.S. Dist. LEXIS 168964 (D.N.J. Sept. 7, 2021); *Bay Harbor v. Shaili Mgmt. Corp.*, No. A-3869-18T1, 2020 N.J. Super. Unpub. LEXIS 1510 (N.J. Super. Ct. App. Div. July 27, 2020). The interplay between the FAA and the Bankruptcy Code is discussed in cases such as *In re New Century TRS Holdings*, 407 B.R. 558, 570-71 (Bankr. D. Del. 2009) (discretion to enforce), and *In re Henry*, 944 F.3d 587 (5th Cir. 2019) (same). *FBI Wind Down Inc.*

1-4:4 Limitations

Arbitration is not unlimited, however, and limitations may vary from state to state and court to court. Statutorily mandated binding arbitration is not permitted where there is a constitutional or common law right to a jury.[65] Appraisal has been held by some courts not a form of statutory arbitration.[66] 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.[67] Some matters—such as granting a divorce, determining ethical issues, performing marriages, and appointing receivers—are specifically or by implication reserved for judicial officers.[68] Whether statutes of limitations apply in arbitrations has been questioned, though the reasoning appears to depend on the language of the state's statute.[69]

Liquidating Trust v. Heritage Home Group LLC, 741 Fed. Appx. 104 (3d Cir. 2018), noted the limitations of an arbitration clause to "disputed items".

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

66. *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).

67. *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.

68. *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). Likewise, sitting judges may not "arbitrate" a dispute. *See Heenan v. Sobati*, 96 Cal. App. 4th 995, 117 Cal. Rptr. 2d 532 (2002) (hybrid not permitted; beware of unintended consequences).

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

1-5 CONTRACTUAL ARBITRATION

The overwhelming portion of court opinions regarding arbitration in New Jersey arise in the context of contractual arbitration, that is, arbitration to which parties to a dispute have agreed "in writing"[70]

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[70] 9 U.S.C. § 2. That does not necessarily mean that signatures are required (in domestic cases). *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. LEXIS167240, at *5-7 (D.N.J. Sept. 27, 2018) (dual corporate signatures not required; plaintiff estopped from arguing signature issue, having operated under the franchise agreement for years), *rev'd on other grounds*, 811 Fed. Appx. 100 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 1685 (2021); *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); *accord*, *Cordero v. Fitness Int'l, LLC*, No. A-1662-20, 2021 N.J. Super. Unpub. LEXIS 2740 (N.J. Super. Ct. App. Div. Nov. 10, 2021) (remanding for evidence of notice and electronic signing). *See also, e.g., Imperato v. Medwell, LLC*, No. A-2023-19T1, 2020 N.J. Super. Unpub. LEXIS 1994 (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). Absence of a counter-signature may be an issue. *Hampton v. ADT, LLC*, No. A-0172-20, 2021 N.J. Super. Unpub. LEXIS 764 (N.J. Super. Ct. App. Div. Apr. 30, 2021). Where the documents evidenced that a signature was required, estoppel arguments would not suffice in *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). Issues arising from electronic signatures and claims of forged signatures may require discovery and a plenary hearing and are discussed in other sections. *See, e.g.*, Section 1-5:3.2.

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"), and *Jiangsu Beier Decoration Materials Co. v. Angle World LLC*, 52 F.4th 554 (3d Cir. 2022) (exploring "exchange of letters" language). 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 (2020).

or "in a record"[71] either before the dispute arose or once the dispute has arisen.[72] 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.[73]

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.

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71. 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.

72. 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.

73. 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. A-1482-16T3, 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). *See generally Ward v. Wardgallagher*, No. A-1616-20, 2022 N.J. Super. Unpub. LEXIS 892 (N.J. Super. Ct. App. Div. May 25, 2022) (also "Ward-Gallagher") (confirming award).

1-5:1 The Principal Authorizing Statutes

1-5:1.1 Federal Arbitration Act

Arbitration may have ancient roots,[74] including under the common law, but courts jealous of their own jurisdiction were perceived as being hostile to, or disfavoring, arbitration. The Federal Arbitration Act ("FAA")[75] was enacted in 1925 to reverse that hostility and "place arbitration agreements 'upon the same footing as other contracts.'"[76] Thus, section two of the FAA provides that arbitration agreements covered by the FAA[77] "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.[78] 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

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74. *See* § 1-1.

75. 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 FAA was amended in 2022 to limit pre-dispute arbitration of claims of sexual abuse and harassment arising or accruing after its effective date, March 3, 2022. 9 U.S.C. § 401, *et. seq*. Appendix 5 contains the text of the FAA governing domestic disputes (and the 2022 amendment).

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

77. 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 *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.) *See also Viking River Cruises, Inc. v. Moriana,* 142 S. Ct. 1906 (2022) (ramp supervisors exempt from FAA under Section 1). Courts typically say that, unless waived, 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.*

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

to arbitrability."[79] 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."[80] Although these principles often were articulated first in cases involving labor collective bargaining agreements, they are based on the language of the FAA and are equally applicable in commercial and other arbitration contexts.[81] For example, 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."[82]

Cases in 2022 counsel reading these pro-arbitration pronouncements with care. *Badgerow v. Walters*[83] addressed one of the quirks of the FAA: the absence of a direct jurisdictional grant for motions to confirm or vacate an award pursuant to Sections 9 or 10.[84] Distinguishing *Vaden v. Discover Bank*,[85] which allowed courts to "look through" for purposes of a motion under Section 4,[86] *Badgerow* held that the different language in Sections 4, 9 and 10 required that motions under Section 4 be treated differently than motions under Sections 9 and 10. The "preeminent" purpose of the FAA to overcome bias against arbitration did not justify over-riding the legislative text. The Court was asked to apply a "pro-arbitration" policy analysis to *Morgan v. Sundance, Inc.*,[87]

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

80. *AT&T Techs. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)); *Harris v. Credit Acceptance Corp.*, No. 21-12986, 2022 U.S. Dist. LEXIS 27806, at *20 (D.N.J. Feb. 16, 2022), *aff'd*, No. 22-1404, 2022 U.S. App. LEXIS 27143 (3d Cir. Sept. 28, 2022).

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

82. *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).

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

84. 9 U.S.C. §§ 9 & 10.

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

86. 9 U.S.C. § 4.

87. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022).

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

> "[The] FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules. Our frequent use of that phrase connotes something different. 'Th[e] policy,' we have explained, 'is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.' Or in another formulation: The policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.' Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration."[88]

The Third Circuit has not yet cited *Morgan* for the principle, though cases have said as much.[89] Whether courts relying on earlier use of language such as "strong preference of arbitration"

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88. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (simplified).

89. For example, *Zirpoli v. Midland Funding, LLC*, 48 F.4th 136, 2022 U.S. App. LEXIS 24724, at *10 (3d Cir. 2022), says as much in the context of a delegation analysis: "The policy favoring arbitration is not intended to force arbitration where the parties to a contract did not agree to it . . . . Rather, [the FAA] is merely intended to ensure that courts honor and enforce contractual undertakings to entrust agreed upon questions to arbitrators rather than to courts. By expressly 'plac[ing] arbitration agreements on equal footing with other contracts,' the [FAA] merely 'requir[es] courts to "enforce such agreements according to their terms."'"

will continue to do so, even while acknowledging the result in *Morgan*,[90] is yet to be seen.

These principles are equally applicable to contracts governed by the FAA regardless of whether litigation is pending in federal or state court.[91]

The Third Circuit has explained that state contract law governs not only issues of contract *formation* but also the interpretation of the terms defining the *scope* of the arbitration. *In re Remicade (Direct Purchaser) Antitrust Litigation* 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."[92]

New Jersey courts have accepted these principles,[93] though not yet noting the *Morgan* clarification.

1-5:1.2 New Jersey Arbitration Acts

Although New Jersey traces its arbitration roots to Colonial times,[94] and enacted one of the first modern arbitration acts in 1923,[95] arbitration *currently* is governed by two principal state statutes.

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90. *Stevens v. Equifax Info. Servs., LLC*, No. 21-4840, 2022 U.S. Dist. LEXIS 163121, at * 11 (E.D. Pa. Sept. 9, 2022). The most recent reference to *Morgan* in New Jersey, *Coronel v. Bank of Am., N.A.*, No. 19-8492, 2022 U.S. Dist. LEXIS 147116 (D.N.J. Aug. 7, 2022), does not discuss the issue.

91. *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).

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

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

94. *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)).

95. *See* § 1-1, *supra*.

The 2003 New Jersey Revised Uniform Arbitration Act (the "NJRUAA")[96] by its terms supersedes common law arbitration[97] 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). *Flanzman v. Jenny Craig, Inc*.[98] held that, where no particular procedure is specified and the matter is not being administered under the rules of the AAA, CPR, JAMS, or other provider, an agreement to arbitrate will still be enforced, with the court applying the general rules set forth in the NJRUAA.[99]

The second primary New Jersey statute is the 1987 Alternative Procedure for Dispute Resolution Act ("APDRA").[100] The

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[96] 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). Useful histories of the NJRUAA and the Model Act are found in Laura Kaster, *The Revised Uniform Arbitration Act at 15: The New Jersey Story*, 38 Disp. Res. Mag. 38 (ABA DRS, Winter 2016); Bruce Meyerson, *The Revised Uniform Arbitration Act: 20 Years Later*, 76 Disp. Res. J., No. 1, 1 (AAA, 2022).

[97] 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.

[98] *Flanzman v. Jenny Craig, Inc*., 244 N.J. 119 (2020).

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

[100] 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.[101] 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."[102] The parties must explicitly adopt the APDRA for its provisions to apply; review may be limited to the trial court.[103]

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,[104] 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[105] was largely replaced by the subsequent acts, except for specific labor matters.[106] 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.[107]

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

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

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

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

105. 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).

106. *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).

107. *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

The New Jersey Court Rules contain Appendices discussing the NJRUAA and APDRA and forms of agreement and notice that may be used in connection with each.[108]

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

1-5:1.3a Choice of Law

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

First, the designation must specifically relate to arbitration, as in the arbitration clause; a general choice of law provision is inadequate,[109] though a general clause may suffice if it refers to "or enforcement." The Third Circuit requires a separate designation,[110] though the rule is inconsistently acknowledged.

Second, by reason of the Supremacy Clause in Article VI of the United States Constitution, the FAA is said to preempt application of other statutes where the FAA applies (*e.g.*, in disputes affecting interstate and foreign commerce[111]) except for specific federal statutory exemptions.[112]

"shall." That distinction has been cited in other jurisdictions to indicate legislative purpose in the differing usage in the FAA).

[108] 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.

[109] *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 v. Hudson Specialty Ins. Co*., 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).

[110] *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).

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

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

Third, the arbitration clause may designate the FAA to govern the arbitration, though the effect of this is unclear. Although state courts have accepted FAA standards based on the FAA being designated the law of the arbitration,[113] or lead to preemption,[114] specifying that the FAA applies to the arbitration has not always avoided New Jersey law. In *Grandvue Manor, LLC v. Cornerstone Contracting Corp.*,[115] the Appellate Division affirmed an order compelling arbitration where the AIA contract chose New York law generally and the FAA for the arbitration. The court noted New Jersey public policy required a mutual understanding that the right to court and a jury had been waived, and that this differed from New York law. After hinting that the lack of a jury waiver requirement in New York law might make the choice of New York law unenforceable, because it might violate a fundamental New Jersey public policy, the court ordered arbitration: these were sophisticated parties and the form AIA contract contained a sufficient waiver.[116] In *Arafa v. Health Express Corp*.,[117] the New Jersey Supreme Court reversed an unpublished Appellate Division opinion[118] holding that the exemption in FAA Section 1 for transportation workers rendered the contractual choice of the FAA void. In another case, the reference to the FAA was limited to "the arbitrability of all disputes . . .," which the court held did not encompass the *standard* for determining whether to vacate for an error of law. [119] Cases in this Handbook illustrate how designating a state's law without knowing its arbitration law, or not making

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

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

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

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

[117] *Arafa v. Health Express Corp.*, 243 N.J. 147 (2020).

[118] *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).

[119] *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).

a designation, thereby allowing the court to choose its forum law or to conduct a conflict-of-laws analysis, may have unhappy consequences.

Specifying the FAA as the governing law for the arbitration raised issues in *Harper v. Amazon.com Services, Inc*.[120] The arbitration clause designated the FAA, but the general choice of law clause designated Washington State law with a specific proviso that Washington law would *not* govern the arbitration. When the defendant moved to compel arbitration, the plaintiff argued that Section 1 of the FAA exempted plaintiff from arbitration as a transportation worker.[121] The district court ordered discovery to determine facts relevant to the Section 1 exemption; but the Third Circuit reversed, holding that the court must first solve the choice of law quandary – the FAA, Washington State, or New Jersey (the default arbitration law in a contract formed and performed in New Jersey[122]).

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

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

121. 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, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019), and it remanded for further factual development. *See also Singh v. Uber Tech., 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); *Harper v. Amazon.com Servs., Inc.*, 12 F.4th 287 (3d Cir. 2021), discussed the history.

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

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

1-5:1.3b Alternative Designations

Parties may select procedural rules or statutes to govern their arbitration even though otherwise bound by the FAA.[123] 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.[124] Nor is a choice that would prospectively waive federal statutory rights.[125] 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.[126] Arbitration agreements must be judged on an equal footing with, and according to the same principles as, all other contracts.[127] To the extent New Jersey policy suggests otherwise, the supremacy of the FAA "renders that state policy irrelevant."[128] Specific issues regarding preemption, such as unconscionability and class action waivers, are discussed below.[129]

1-5:1.3c A Word of Caution

Parties must understand the extent to which the chosen law – whether the law of the contract generally or only the law governing

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123. *See, e.g., Volt Info. Scis., Inc. v. Bd. of Trs., Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989). *See also* §§ 1-3 n.40 and 1-5:4.4a.

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

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

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

127. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426-27 (2017). The Kentucky Supreme Court has considered the issue anew on remand in *Kindred Nursing Centers L.P. v. Wellner*, 533 S.W.3d 189 (2017). Recent cases have emphasized that arbitration contracts are on an *equal* footing. *E.g.*, *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).

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

129. *See* Chapter 2, § 2-5.

the arbitration clause (or the default law based on a conflicts-of-laws analysis) – may frustrate or assist their intentions. A body of state law that may provide favorable provisions regarding usury, for example, may create issues for enforcing third-party beneficiary or estoppel principles. Some states' law may require a heightened burden for some arbitration-specific issues, such as 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.

A general choice-of-law section in the so called "container" agreement often also contains a two-part "venue" provision. The first will waive personal jurisdiction defenses as to a given forum, which should be consistent with the state or site of the arbitration. The second, more problematic, may say that all controversies shall be determined "exclusively" in the (state or federal) court in a given county or state. Although courts may read this as being of a piece with the arbitration clause,[130] meaning that arbitration related motions to compel or confirm/vacate must be brought in that venue, courts have seized upon this dual dispute resolution designation as contradictory to and overriding arbitration.[131] A similar problem may occur with multiple documents that ostensibly are part of a single agreement or are part of a series of agreements.[132] The language must be carefully chosen. These issues are discussed further in this Handbook.

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130. *See, e.g., Divalerio v. Best Care Lab.*, No. 20-17268, 2021 U.S. Dist. LEXIS 194896, at *33-35 (D.N.J. Oct. 8, 2021) (multiple documents).

131. *See, e,g., Pei Chuang v. OD Expense LLC, et al.*, 742 Fed. Appx. 670 (3d Cir. 2018).

132. *See, e.g., Field Intel. Inc. v. Xylem Dewatering Sols. Inc.,* 49 F.4th 351, 2022 U.S. App. LEXIS 25561 (3d Cir. 2022) (integration clause did not include "express" language required by prior contract with arbitration clause; arbitration ordered); *cf. Abdurahman v. Prospect CCMC LLC*, 42 F.4th 156 (3d Cir. 2022) ("parties" definition in one created problem; court will not "stretch" language chosen).

1-5:2 Contracts in Which Arbitration is Permitted

Subsequent to a number of decisions, such as *Wilko v. Swan*,[133] holding that arbitration in certain industries or certain matters was inconsistent with the underlying substantive statutes, federal and state courts gradually overruled such prohibitions. Today, virtually every type of contract with an arbitration provision "in writing" or "in a record," using the federal and state statutory language, will be subject to arbitration providing certain conditions are met. Indeed, as identified below, some arbitration provisions may be enforced in contexts perhaps not obvious. Arbitration in international transactions appears especially favored.[134]

The year 2022 saw a notable exception to the general applicability of the FAA. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act was added as a new section of Title 9,[135] effective March 9, 2022, precluding enforcement of pre-dispute arbitration or joint-action waiver agreements regarding sexual assault or sexual harassment under any law. Although the Act indicates it is effective only as to claims that arose or accrues after the effective date, a not-for-publication Law Division opinion has held that public policy warranted applying the non-enforcement provisions to pre-March 2022 claims in an existing lawsuit.[136]

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 so to submit."[137] This requires a two-step analysis. First, is there a contract that includes an arbitration clause? This is in part whether an arbitration contract

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133. *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).

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

135. 9 U.S.C. § 401, *et seq*. The text is in Appendix 5.

136. *Sellino v. Galiher*, No. ESX-L-8519-21 (N.J. Super. Ct. Law Div. May 25, 2022). The case apparently is now being litigated in court. The opinion has not been reported or followed so far in any case located. The Act's effective date precluded arbitration in *Woodruff v. Dollar Gen. Corp.*, No. 21-1705, 2022 U.S. Dist. LEXIS 227578, at *7 (D.N.J. Dec. 19, 2022).

137. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)). *See also Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (discussed earlier this chapter)*; 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).

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.[138] New Jersey courts have adopted the same two-step inquiry.[139] As noted above, this may have been modified by the Third Circuit. Two unusual issues arose in 2022:

First, the New Jersey Supreme Court held that, under the state's Direct Action Statute,[140] the duty to arbitrate may arise as a "statutory claim" from an insurance policy.[141] Where coverage may apply by "operation of law", not the policy contract, the carrier may be bound to arbitrate certain claims with non-policy-holders.[142]

Second, a Chancery Division opinion[143] declined to enforce an arbitration clause in a will on grounds that (1) a will does not satisfy the contract requirements of the NJRUAA and (2) the benefits of

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138. *See Trippe Mfg. Co. v. Niles Audio Corp*., 401 F.3d 529, 532 (3d Cir. 2005) (identifying "two-step inquiry"); *accord MHA, LLC v. UnitedHealth Grp., Inc*., No. 15-7825, 2017 U.S. Dist. LEXIS 42144, at *11 (D.N.J. Mar. 23, 2017). *Pearson v. Valeant Pharms. Int'l, Inc*., No. 17-1995, 2017 U.S. Dist. LEXIS 209102 (D.N.J. Dec. 20, 2017), describes the relative burdens at each step: contract and agency principles under state law at the first, *formation* step; the federal policy favoring a presumption of arbitrability at the second, *scope* step. That is not to say that federal law governs the scope issue. As clarified in *In re Remicade (Direct Purchaser) Antitrust 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.

139. *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).

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

141. *Crystal Point Condo. Ass'n v. Kinsale Ins. Co*., 251 N.J. 437 (July 18, 2022). The Court did not base its decision on third party beneficiary law or other common law bases for enforcing an arbitration agreement to a non-signatory as discussed in the Appellate Division's opinion, *see Crystal Point Condo. Ass'n, Inc. v. Kinsale Ins. Co.*, 466 N.J. Super. 471 (App. Div. 2021).

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

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

the will were not extended to plaintiff under traditional contract or agency principles. Additionally, it noted that New Jersey does not enforce *in terrorem* clauses.[144]

Thus, as a general matter, courts will enforce properly drafted arbitration provisions in labor agreements, employment contracts,[145] employee handbooks, emailed employment policies,[146] consumer transactions,[147] auto contracts,[148] utility contracts,[149] construction, architectural or engineering contracts,[150] franchise

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144. *See Haynes v. First Nat'l State Bank*, 87 N.J. 163, 432 A.2d 890 (1981).

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

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

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

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

149. *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).

150. *Grandvue Manor, LLC v. Cornerstone Contracting Corp.*, 471 N.J. Super. 135 (App. Div. 2022) (check box in AIA contract was sufficient evidence of waiver) (*see* text at fn.123, *supra*); *Tedeschi v. D.N. Desimone Constr., Inc*., No. 15-8484, 2017 U.S. Dist. LEXIS 69695 (D.N.J. May 8, 2017); *Sand Castle Dev., LLC v. Avalon Dev. Grp., LLC*, No. A-3325-16T1, 2017 N.J. Super. Unpub. LEXIS 2701 (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). *Not all courts agree the AIA form satisfies Atalese. See Epstein v. Conboy*, No. A-2135-15T3, 2016 WL 3600251 (N.J. Super. Ct. App. Div. July 6, 2016) (AIA home construction). One author characterizes the *Epstein* case as a "cautionary tale." Adreinne L. Isacoff, *Navigating the Landmines in Home Construction Dispute Resolution*, N.J. Lawyer Magazine 66, at 68 (No. 305, April 2017). However, *Epstein* is a not-precedential, unpublished opinion and preceded the published opinion in *Grandvue*, above.

agreements,[151] commercial leases[152] and sales transactions including accompanying or referenced "terms and conditions,"[153] and partnership and operating agreements (for an L.L.C., for example)[154] and insurance.[155] Retirement account or securities account,[156] credit card,[157] car rental agreements,[158] and other financial agreements also may contain arbitration clauses, but in some cases (*e.g.*, securities) they may be governed by federal regulatory provisions. The Third Circuit also clarified the meaning of employer for ERISA arbitration.[159]

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

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151. *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).

152. *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).

153. *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").

154. *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).

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

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

157. *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).

158. *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).

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

arbitration clauses – for fee or malpractice disputes – in retainers in *Delaney v. Dickey*,[160] but required that attorneys meet the 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.

Drafters of attorney retainer agreements face the additional challenge of clarifying the client's right to file for fee arbitration compared to the mandatory arbitration clause in the retainer. In 2022, the Appellate Division declined to enforce arbitration where that distinction was not made clear – and in fact lead to confusion.[161]

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160. *Delaney v. Dickey*, 244 N.J. 466 (2020), *aff'g as modified*, 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 were to be studied and a recommendation for any rule changes or formal Committee Opinion was to be made by the applicable Supreme Court committee. The Committee Report is at https://www.njcourts.gov/sites/default/files/acpe22.pdf (last visited Jan. 17, 2023). *Cf. Micro Tech Training Ctr. v. Decotiis Fitzpatrick & Cole*, No. A-143-20, 2021 N.J. Super. Unpub. LEXIS 3159 (N.J. Super. Ct. App. Div. Dec. 27, 2021) (declining to apply *Delaney* prospectively).

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). *But see Kamarotos v. Palias*, 360 N.J. Super. 76 (App. Div. 2003) (discussing competing positions and distinctions between arbitrating fee disputes and malpractice claims, questioned by *Smith* district court).

An early case supporting court-ordered arbitration is *Daly v. Komline-Sanderson 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).

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

Non-traditional contexts in which arbitration provisions have been sustained include bylaws for religious societies,[162] funeral contracts,[163] settlement agreements,[164] employment applications,[165] play sites,[166] lease valuations,[167] and freight tariffs.[168]

Play sites regularly have difficulty with their arbitration agreement because of authority, infancy, and agency issues, but selecting JAMS as the forum can be corrected.[169]

Arbitration clauses in unilateral contracts such as separate limited warranties may not be enforced.[170] Some courts have

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[162] *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).

[163] *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).

[164] *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).

[165] *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).

[166] *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 13, 2019) (*Atalese* not satisfied by language waiving "trial").

[167] *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).

[168] *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).

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

[170] *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).

declined to enforce unilateral arbitration amendments in "bill stuffers," but others have disagreed.[171]

Computer contracts continue to have enforcement problems, both because of the design of the web page[172] and the process for "signing" electronically.[173] A company may not be able to rely on the arbitration clause in its standard computer contract to compel arbitration of an ADA claim, where the plaintiff did not enter into the contract (because it would not offer a ride to a disabled person).[174]

Although New Jersey courts had held that certain arbitration clauses were not enforceable as a matter of state public policy,[175] such rulings have been held preempted, as, for example, regarding class-action waivers[176] and regarding health care or nursing contracts,[177] though courts may find ways to avoid the preemption and apply rough justice to preclude arbitration in such contexts.[178] These cases

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

172. *Wollen v. Gulf Stream Restoration & Cleaning, LLC*, 468 N.J. Super. 483, (App. Div. 2021) (home improvement referral service). *Wollen* is distinguished in *Lloyd v. Retail Equation, Inc.*, No. 21-17057, 2022 U.S. Dist. LEXIS 233637 (D.N.J. Dec. 29, 2022) ("PLACE ORDER" button).

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

174. *See O'Hanlon v. Uber Technologies Inc.,* 990 F.3d 757 (3d Cir. 2021).

175. *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.

176. *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).

177. *Marmet Health Care Ctr., Inc. v. Brown,* 565 U.S. 530 (2012); *Silvera v. Aristacare at Cherry Hill, LLC*, No. A-0519-20, 2021 N.J. Super. Unpub. LEXIS 530 (N.J. Super. Ct. App. Div. Mar. 30, 2021); *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). The AAA, JAMS, ABA, AMA, and others have adopted healthcare protocols regarding arbitration. Federal regulations in 2022 prohibit certain nursing care arbitration. *See* above.

178. *See Cottrell v. Holtzberg*, 468 N.J. Super. 59 (App. Div. 2021) (initial cover arbitration agreement not enforced as to subsequent admissions); *Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545 (App. Div. 2016) (denying arbitration because AAA forum not available

may have limited effect going forward, in light of the 2022 amendment to the FAA adding Sections 401 and 402 prohibiting mandatory arbitration clauses regarding sexual abuse and harassment.[179]

Unconscionability issues, as discussed in *Muhammad*, still may be raised in specific contexts and result in severance of unconscionable provisions.[180] Including a shortened statute of limitations in an arbitration clause was held so intertwined as to make the entire clause unconscionable.[181] Although final or proposed federal regulations would have either regulated, limited, or prohibited arbitration in consumer financial, health care, or other transactions, they were revoked.[182] New Jersey's Law Against Discrimination was amended in 2019 to preclude enforcement of waiver of "any substantive or procedural right" in employment contracts.[183] However, the amendment was held preempted by the FAA in *New Jersey Civil Justice Institute v. Grewal*[184] *and Antonucci v. Curvature Newco.*[185] The federal whistleblower act prohibited certain arbitration agreements, but has been held to

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per its then-current HealthCare Policy Statement). Other examples include: *Fung v. Varsity Tutors, LLC*, No. A-3650-17, 2019 N.J. Super. Unpub. LEXIS 960 (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*.

179. 9 U.S.C. § 401 & 402. The act is effective March 2022), but at least one trial court has held this preemption is ineffective for earlier cases. *Sellino v. Galiher*, No. ESX-L-8519-21 (N.J. Super. Ct. Law Div. May 25, 2022). The case apparently is now being litigated in court. The opinion has not been reported or followed so far in any case located.

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

181. *Guc v. Raymours Furniture Co*., No. A-3452-20, 2022 N.J. Super. Unpub. LEXIS 395 (N.J. Super. Ct. App. Div. Mar. 11, 2022). The limitations clause had been held illegal in a prior Supreme Court case involving the same defendant, *Rodriguez v. Raymours Furniture Co.*, 225 N.J. 343 (2016). The company had failed to amend its employment documentation by the time plaintiff was on-boarded in 2018.

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

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

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

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

be preempted.[186] As just noted, the scope of preemption is now limited by 2022 amendments to the FAA.

1-5:3 Contract Formation Elements

1-5:3.1 Generally

Although it is often said that arbitration is a favored means of resolving disputes, in all cases in New Jersey, whether an arbitration provision will be enforced in court will depend on whether the writing satisfies the requirements for contract formation. This is itself a two-part inquiry, given the severability of arbitration clauses from their underlying contract: "[1] whether a valid agreement to arbitrate exists and (2) whether the particular dispute falls within the scope of that agreement."[187]

In both, the writing must evidence "mutual assent" (a) to the contract terms and (b) to resolve covered disputes in arbitration rather than in court proceedings in which a trial by jury may be a constitutional (and sometimes specific statutory) right.[188] Standard contract elements, listed in *Weichert Co. Realtors v. Ryan*,[189] used to judge both, also include consideration, offer and acceptance (as evidenced by words or conduct), and reasonably definite terms.[190]

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

187. *Trippe Mfg. Co. v. Niles Audio Corp*., 401 F.3d 529, 532 (3d Cir. 2005); *accord*, *Martindale v. Sandvik, Inc*., 173 N.J. 76, 92 (2002). A court may not make a better contract than the parties agreed to; nor may the court use the favorability of arbitration to create a pro-arbitration rule. *See Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022). There were several examples in 2022, discussed elsewhere, where drafting created problems.

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

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

190. *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)), *aff'd*, No. A-3057-16T2, 2018 N.J. Super. Unpub. LEXIS 340 (N.J. Super. Ct. App. Div. Feb. 14, 2018) (noting no need for a plenary hearing); *Bernetich, Hatzell & Pascu, LLC v. Med. Records Online, Inc*., 445 N.J. Super 173 (App. Div.) (lack of consideration sufficient for contract formation where services were required by statute), *certif. denied*, 227 N.J. 245 (2016). *Compare Jang Won So v. EverBeauty, Inc*., No. A-3560-16T4, 2018 N.J. Super. Unpub. LEXIS 4 (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 the elements, *available at* https://www.njcourts.gov/sites/default/files/2022-09/4.10C.pdf (last visited Jan. 3, 2023).

The standard of proof indicated in the Model Jury Instructions is a "preponderance of the evidence."[191] As held in *W. Caldwell v. Caldwell*:[192]

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

As set out in *Berg Agency v. Sleepworld-Willingboro, Inc*., as "long as the basic essentials are sufficiently definite, any gaps left by the parties should not frustrate their intention to be bound."[193]

The Third Circuit in *Aliments Krispy Kernels, Inc. v. Nichols Farms*[194] reiterated that the "mutual assent" standard under New Jersey contract formation principles governs and not its prior wording in *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd*.[195] that mutual assent must be "express [and] unequivocal". The difference relates to confusion regarding (1) contract formation and (2) the standard for summary judgment.[196]

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

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191. The New Jersey Model Jury Charge for bilateral contracts, Charge 1.12G, approved 11/98, *available at* https://www.njcourts.gov/sites/default/files/2022-09/1.12G.pdf (last visited Jan. 3, 2023).

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

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

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

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

196. *See* Chapter 2, § 2-5:2.

terms and conditions, consumer purchases, and employment applications and enrollment contracts. Whereas mutual assent may be aptly understood in negotiated contracts by the "meeting of the minds" rubric, in form contracts constructive notice is key. The cases also do not necessarily distinguish the contract formation issue from the arbitration clause formation or scope and delegation issues. The distinctions may be important in light of the severability principle applied by the New Jersey Supreme Court in *Goffe v. Foulke Management Corp.*,[197] and the federal circuit split regarding reconciling formation and delegation,[198] discussed later in this chapter and in Chapter 2.

Where successive or multiple documents may involve the same parties or issues, the Third Circuit has been particularly detailed in its reading of the language of the documents in order to determine the parties' intent.[199]

Consideration has been an issue in cases involving accepting an application for employment or continuing employment.[200]

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

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

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

[200] *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. 3:17-cv-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).

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[201] 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 assent; otherwise broad language does not bring the old boxes into that arbitration clause.[202]

Fraud by a minor customer (as to his age) may not excuse his inability to enter into a contract,[203] unless reliance or estoppel can be shown.[204]

Courts have held that one need not point out an arbitration clause in a contract that is otherwise enforceable.[205]

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,[206] and parties regularly attempt to avoid

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[201] *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).

[202] *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).

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

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

[205] *E.g*., *GAR Disability Advocates, LLC v Taylor*, 365 F. Supp. 3d 522, 531 n.4 (D.N.J. 2019), citing *Bacon v. Avis Budget Grp., Inc.*, 357 F. Supp. 3d 401, 422-23 (D.N.J. 2018), *aff'd,* 959 F.3d 590 (3d Cir. 2020). *But see Delaney v Dickey,* 244 N.J. 466 (2020), *aff'g as modified*, No. A-1726-17, 2019 N.J. Super. Unpub. LEXIS 1814 (N.J. Super. Ct. App. Div. Aug. 23, 2019) (N.J. Rule of Professional Conduct 1.4(c) requires explanation). *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 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.

[206] *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? Failing to fill out the opt-out form may not avoid arbitration. *Levy v. AT&T Serv*s., No. 21-11758, 2022 U.S. Dist. LEXIS 50758 (D.N.J. Mar. 22, 2022). But the argument is raised in other contexts, such as emails and web pages, *see Knight v. Vivint Solar Developer,*

arbitration by arguing they did not receive a copy, were not aware of the arbitration clause, or did not have the clause pointed out or explained to them. In the future, these cases may consider the severability and delegation issues highlighted in *Goffe v. Foulke Management Corp.*,[207] especially concerning the requirement in the Consumer Fraud Act to provide a copy of a consumer contract to the consumer, which issue *Goffe* held was not a matter of contract formation, went to the enforceability of the underlying contract, and was delegated to the arbitrator.

An arbitration provision that is confusing or ambiguous, or that indicates arbitration only as an option, may not be enforced.[208]

LLC, 465 N.J. Super. 416 (App. Div. 2020), or general terms that are incorporated by a valid reference. In *Delaney v. Dickey*, No. A-1726-17, 2019 N.J. Super. Unpub. LEXIS 1814 (N.J. Super. Ct. App. Div. Aug. 23, 2019), *aff'd as modified,* 244 N.J. 466 (2020), the Appellate Division required that a retainer agreement with an arbitration clause must, as a matter of contract formation and ethics rules under the Rules of Professional Conduct, physically include a copy of the arbitration forum's rules. The Supreme Court did not address this.

207. *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). *See also Petrozzino v. Vivint, Inc.*, No. 1:20-cv-01949-NLH-KMW, 2020 U.S. Dist. LEXIS 245134 (D.N.J. Dec. 31, 2020), citing, *MZM*.

208. *See Kernahan v. Home Warranty Adm'r of Florida, Inc.,* 236 N.J. 301 (2019) ("mediation" heading for paragraph; rules reference confusing; typeface small); *Marchak v. Claridge Commons, Inc.*, 134 N.J. 275 (1993) (homeowners warranty claim, clause ambiguous); *Kopec v. Moers*, 470 N.J. Super. 133 (App. Div. 2022) (arbitration clauses in attorney retainer agreements held unenforceable as ambiguous and, e.g., not making proper distinctions between binding arbitration and fee arbitration); *Marano v. Glancey*, No. A-4955-14T2, 2016 WL 687263 (N.J. Super. Ct. App. Div. Feb. 22, 2016), *confirming award on remand*, No. CAM-L-686-15 (July 15, 2016), *aff'd*, No. A-0669-16T2, 2017 N.J. Super. Unpub. LEXIS 3155 (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).

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

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,[209] as will be the case where the parties (or their labor representatives) have specifically bargained for the terms of a dispute resolution mechanism[210] or the check boxes in the AIA form construction contract indicate that a choice was given.[211]

The Third Circuit has held that the waiver language required in *Atalese* is not required in commercial contracts,[212] 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.[213] *Divalerio v. Best Care Laboratory*[214] distinguished among business contracts (to which *Atalese* was inapplicable), consumer contracts, and employment contracts, finding that earlier New Jersey Supreme Court opinions had read broad language in

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2019 N.J. Super. Unpub. LEXIS 2634 (N.J. Super. Ct. App. Div. Dec. 26, 2019) (citing AAA Rule - R-7).

209. *E.g., GAR Disability Advocates, LLC v. Taylor,* 365 F. Supp. 3d 522 (D.N.J. 2019); *Divalerio v. Best Care Lab.*, No. 20-17268, 2021 U.S. Dist. LEXIS 194896 (D.N.J. Oct. 8, 2021) (negotiated); *Silvera v. Aristacare at Cherry Hill, LLC*, No. A-0519-20, 2021 N.J. Super. Unpub. LEXIS 530 (N.J. Super. Ct. App. Div. Mar. 30, 2021). *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, 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).

210. *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*).

211. *Grandvue Manor, LLC v. Cornerstone Contr. Corp*., 471 N.J. Super. 135 (App. Div. 2022) (noting language and sophistication of the parties).

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

213. *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). An attorney's acknowledgment of a contract with an arbitration clause has been held insufficient to waive *Atalese. Perkins v. Advance Funding, LLC*, No. 20-15708, 2021 U.S. Dist. LEXIS 168964 (D.N.J. Sept. 7, 2021), citing *Dispenziere v. Kushner Cos.*, 438 N.J. Super. 11 (App. Div. 2014).

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

employment contracts as sufficient to waive a right to a court or jury hearing. The court did not discuss the section of *Skuse v. Pfizer, Inc*.[215] attempting to reconcile these cases in the context of employment agreements other than statutory claims.

Where an individual is involved, despite obvious sophistication, that presumption may not hold sway,[216] and there may be other instances (particularly in federal court) where a court may require fact-finding to determine whether parties achieved mutual assent.[217] 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,[218] though these formats may help to evidence

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

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

[217] *Guidotti v. Legal Helpers Debt Resolution, LLC*, 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. 17-00820, 2017 U.S. Dist. LEXIS 135891 (D.N.J Aug. 24, 2017), (ordering arbitration and enjoining state court, discovery not required), *aff'd*, 738 Fed. Appx. 72 (3d Cir. 2018).

[218] *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).

knowledge or notice.[219] Clauses that are "illegible,"[220] "onerous to read,"[221] "buried" in a document that does not appear to be a bilateral contract,[222] or indicated by non-contract language[223] preclude mutual assent to contract formation and are not enforceable, although not necessarily in the commercial context.[224] As noted elsewhere, 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.

In *Atalese v. U.S. Legal Services Group, L.P.*,[225] the New Jersey Supreme Court reviewed its prior holdings requiring mutual assent, in the context of a Consumer Fraud Act claim regarding a consumer debt-adjustment services contract, and held that the arbitration agreement must contain language clearly and unambiguously waiving the right to a court or jury determination of their dispute.

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,[226] although

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219. *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).

220. *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).

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

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

223. *See Wollen v. Gulf Stream Restoration & Cleaning, LLC*, 468 N.J. Super. 483, (App. Div. 2021) ("view matching pros").

224. *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*).

225. *Atalese v. U.S. Legal Servs. Grp., L.P*., 219 N.J. 430, 442 (2014) (providing several examples of sufficient language), *cert. denied*, 576 U.S. 1004 (2015). *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 294 (2016) (delegation clause and waiver of issue), described *Atalese* as applying to "a consumer contract." *See also Gras v. Assocs. First 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*, 2018 N.J. LEXIS 7 (Jan. 12, 2018) (as to fees issue only).

226. *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

they may have conflated the two steps of the arbitrability analysis identified earlier in this chapter. In New York, specific waivers are not required;[227] the law in other states may vary. Thus, as discussed elsewhere,[228] 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.[229] The Supreme Court has discussed *Atalese* in the context of a variety of cases without saying that its holding is applicable outside statutory consumer claims.[230]

Continuing to arbitrate a claim may be sufficient evidence of intent to arbitrate despite the absence of *Atalese* waiver language.[231]

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.*[232] discussed a need to inform the parties of the nature of

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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.

227. *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 Grandvue Manor, LLC v. Cornerstone Contr. Corp*., 471 N.J. Super. 135 (App. Div. 2022) (dictum, citing cases) *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).

228. *See*, Chapter 2, *infra.*

229. *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. RA Pain Servs., PA.*, No. A-4092-18T1, 2019 N.J. Super. Unpub. LEXIS 2634, at *14 (N.J. Super. Ct. App. Div. Dec. 26, 2019) (*Atalese* inapplicable) *But see 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).

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

231. *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).

232. *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.

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.[233]

Although challenges have been made to whether *Atalese* and similar cases conflict with the FAA, and are therefore preempted, because they are not based on generally applicable contract principles but instead show a hostility to arbitration, the United States Supreme Court has not yet accepted "full" *certiorari* in any such case.[234] *Atalese* and subsequent New Jersey Supreme Court opinions have taken particular care to find that *Atalese* was following a principle applicable generally to contracts and not one that disfavored arbitration agreements.

1-5:3.2 Means of Indicating Assent

A signature on a written contract is the most direct way to indicate assent, or to be bound, but it is not the only way. Signing electronically or performance also may suffice. Requesting more

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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").

233. *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*, 244 N.J. 466 (2020). The Supreme Court did not adopt this aspect of the Appellate Division opinion.

234. In *Ritz-Carlton Dev. Co. v. Narayan*, 577 U.S. 1056 (2016), the Court granted the writ, vacated the judgment, and remanded to the Supreme Court of Hawaii in light of *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015). The Supreme Court of Hawaii in *Narayan v. Ritz-Carlton Development Co.*, 350 P.3d 995 (Haw. 2015), had held that the intent to arbitrate was ambiguous and the terms were unconscionable (in part because the clause limited discovery and punitive damages). Since these conditions are not uncommon in non-arbitration contracts, they would appear to contradict *DIRECTV*. *Kernahan v. Home Warranty 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), *cert. denied*, 141 S. Ct. 1685 (2021).

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

than one indication of assent may create confusion.[235] A federal district court has held that failure to satisfy a contractual condition for three signatures may be satisfied indirectly and by estoppel.[236] A "contract" in the form of a letter requesting agreement to arbitrate is not enforceable without assent by the party to be bound by, for example, a signature.[237] But conduct after renewing may.[238] The efficacy of mailing the letter, inviting continuing employment, can be an issue.[239]

Skuse v. Pfizer, Inc.[240] clarified the means by which parties may express their assent to an arbitration agreement. The Supreme Court resolved the tension with earlier case law created by the Appellate Division's holding that "acknowledging" receipt by a company-wide email announcing a new policy requiring arbitration was not sufficient for the formation of an arbitration contract.

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

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

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

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

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

238. *See Blessing v. Hoffman*, No. A-416-20, 2021 N.J. Super. Unpub. LEXIS 1100 (N.J. Super. Ct. App. Div. June 10, 2021).

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

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

> and accepted this Agreement through your acceptance of and/or continued employment with the Company.

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

> 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*,[241] which had held that continuing employment could constitute assent to an announced arbitration policy.

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

The Appellate Division reversed, holding that there must be an affirmative acceptance of the arbitration requirement by use of "agree" or similar word. Implied agreement, or agreement by performance, was held "inadequate,"[242] 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."[243] It then reaffirmed *Martindale v. Sandvik, Inc*.[244] for the proposition that continued employment can "constitute sufficient consideration to support certain employment-related agreements," and *Weichert Co. Realtors v. Ryan*,[245] that "assent" to an offer can be by words or "by conduct, creating a contract implied-in-fact."

Given the prior case law, the question became whether it was appropriate to notify employees by emails sending attachments and slides termed "training," and whether the employee need only "acknowledge" receipt of the email notice (by clicking a button in the electronic message) rather than "agree" to be bound by the terms set out in the communications. *Leodori v. CIGNA Corp.*[246] 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

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

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

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

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

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

employees who do not read their emails do so at their own risk. Consistent with standard contract principles, noted above, not reading a contract or clause does not negate contract formation where assent is otherwise present.

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

"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,[247] 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.[248]

Arbitration may not be enforced where it is an alternative and the language is not mandatory, such as by using the term "may".[249] Lack of mutuality, as with only one party having the right to demand arbitration, may raise contract and unconscionability issues.[250]

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247. *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).

248. *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).

249. *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). *But see Delaware River Partners, LLC v. Railroad Constr. Co., Inc*., No. A-2613-20, 2022 N.J. Super. Unpub. LEXIS 1134 (N.J. Super. Ct. App. Div. June 24, 2022) (sophisticated parties; using "finally settled" meant mandatory). Arbitration need not be mutual; consideration may be found in employment or other acts. *Contra Ribe v. Macro Consulting Group, LLC*, No. A-2894-18T4, 2020 N.J. Super. Unpub. LEXIS 468 (N.J. Super. Ct. App. Div. Mar. 8, 2020). Giving unilateral authority to select "method" creates problems. *See Mazzara Trucking & Excavation Corp. v. Premier Design + Build Group, LlC*, No. A-965-20, 2022 N.J. Super. Unpub. LEXIS 74 (N.J. Super Ct. App. Div. Jan. 20, 2022).

250. 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.

In 2021, the Appellate Division, in *Wollen v. Gulf Stream Restoration & Cleaning, LLC*,[251] discussed the requirements for determining assent in a computer contract designed for a contracter referral service. A click-icon saying only "View Matching Pros" was held insufficient to notify the customer that they were entering into a contract with the service; the web design and placement of the link to terms and conditions that included an arbitration clause were, improperly, set after the "click" icon.[252] "Courts consider whether 'the terms are reasonably conspicuous on the webpage so that the user can be fairly charged with constructive notice that continued use will constitute acceptance of the agreement.'"[253] However, activating a cell phone after opening a box with terms and conditions may.[254]

Where the circumstances of "signing" on an iPad remain unclear, including access to the documents being "signed", the Appellate Division has remanded for further proceedings, including a plenary hearing and findings of fact.[255]

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

Issues may also arise regarding the mental or contractual competence[256] or authority of the person approving the contract

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

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

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

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

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

256. *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 (N.J. Super. Ct. App. Div. Apr. 27, 2020), the issue of competence was held delegated to the arbitrator.

with an arbitration clause.[257] The burden of proof in such instances is explored in a variety of cases.[258]

Strowbridge v. Freemen[259] illustrates the hesitancy of courts to enforce arbitration agreements for patients in a nursing home or continuing care facility.

Gayles v. Sky Zone Trampoline Park,[260] illustrates some of the problems in the context of a children's park: a parental sponsor of a trampoline party signed the contractual waivers of liability and arbitration agreement "for" all of the minor guests, but the sponsor had not obtained a written power of attorney from the parents to do so, and the park did not ask. The court held that the park should have been on notice of the likely lack of authority (for a large group of minors) and declined to compel arbitration.

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

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257. *Compare Ondrof v. CSL Summit*, No. A-2223-20, 2021 N.J. Super. Unpub. LEXIS 2806 (N.J. Super. Ct. App. Div. Nov. 15, 2021) (multiple signatures; remand for plenary hearing), and *Hall v. Healthsouth Rehab. Hosp. of Vineland*, No. A-2453-12T4, 2013 N.J. Super. Unpub. LEXIS 1752 (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). Under Pennsylvania law, the Third Circuit held that an agent's authority was either implicit or apparent. *Sugartown Pediatrics, LLC v. Merck Sharp & Dohme Corp. (In re Rotavirus Vaccines Antitrust Litig.)*, 30 F.4th 148 (3d Cir. 2022).

258. *E.g., McDermott v. Genesis Healthcare*, No. A-3565-17, 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).

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

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

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.[261]

Hernandez v. Brinker Int'l Payroll Co., L.P.[262] presents an important review of the "infancy doctrine" and the ability of minors to disaffirm employment (or other) contracts. The two plaintiffs in a federal sexual harassment and LAD case were minors when they signed employment contracts with a restaurant chain. After reviewing the doctrine and the small number of cases (outside New Jersey) that considered the issue, the federal district court decided to enforce the arbitration agreements with the employment contracts. Because the New Jersey Supreme Court in *Hojnowski v. Vans Skate Park*,[263] and other New Jersey cases, had compelled arbitration of a minor's claim when the parent signed the arbitration agreement, the federal court concluded that the strong public policy in favor of arbitration, expressed in both state and federal cases and statutes, warranted an extension compelling arbitration when the minor signed the contracts. Allegations that the minor's signature was fraudulent did not preclude disavowal in absence of reliance.[264]

Where questions in a mass action arose whether individual plaintiffs gave the requisite consent, in part because it was unclear whether differing Terms and Conditions had been provided to them by an agent, the Third Circuit remanded for discovery.[265]

1-5:3.3 Failures in Indicating Assent

After drafting a clause with all the appropriate waiver and notice provisions, a defendant's efforts to compel arbitration still may be frustrated when the formalities of contract formation are not observed – failure to permit a party to read; not allowing a party to consult an attorney; not signing the agreement itself.[266] Although

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

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

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

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

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

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

the defendant need not execute its own form agreement where offer and acceptance are evidenced by other means, as noted in *Leodori v. CIGNA Corp*.,[267] "the omission of [the] signature [of the party relying on the arbitration agreement] is a significant factor in determining whether the two parties mutually have reached an agreement;" but requesting assent by a specific means, as in *Leodori*, or including "no contract" language in a handbook may limit the possibility of assent by other means, such as commencing or continuing employment.

Two 2021 cases illustrate drafting errors. In *Wollen*,[268] discussed immediately above, the web page "click" icon ("View Matching Pros") did not indicate a contractual undertaking. *Knight v. Vivint Solar Developer, LLC*,[269] was remanded to sort out a computer signature that differed from the computer-generated/filled name under the signature line and the plaintiff's assertion that she did not place an "X" in a ("belt and suspenders") box indicating agreement to arbitration.

These cases also indicate that the process may be flawed.[270]

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

On uncontroverted evidence (accepted by the trial court) that the employee requested to have the contract reviewed by an attorney, but was told that he no longer would be employed if he did not

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

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

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

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

sign the arbitration agreement then and there, the courts found a lack of mutual assent and denied arbitration.[271]

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

As already noted, one of the advantages of arbitration is that the parties may, to a large extent,[272] 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,[273] but—along with language such as required by *Skuse, Atalese, Garfinkle* and other cases indicating mutual assent and waiver of statutory or constitutional rights—the following items may have specific relevance for contracts governed by New Jersey law. The terms may address not only the *formation* issues described earlier,[274] such as in *Atalese*, but also the *scope* of the

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

272. 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, but the *same* clause was held so permeated by the unlawful 180-day limitation that the entire clause was stricken. *Guc v. Raymours Furniture Co.*, No. A-3452-20, 2022 N.J. Super. Unpub. LEXIS 395 (N.J. Super. Ct. App. Div. Mar. 11, 2022). In *Kobren v. A-1 Limousine Inc*., No. 16-516, 2016 WL 6594075 (D.N.J. Nov. 7, 2016), the court noted the severance clause and prior decisions that cost-sharing provisions may make arbitration too expensive for a claimant to be able to enforce his or her rights; the court ordered that claimant would be required to pay no more than the filings fees that would be incurred in court. In *Riley v. Raymour & Flanigan*, No. A-2272-16T1, 2017 N.J. Super. Unpub. LEXIS 2651 (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).

273. *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 Jan. 3, 2023); *see also* John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 *Dispute Resolution Journal* 1 (Feb.-Apr. 2003), *available at* https://www.hugheshubbard.com/news/drafting-arbitration-clauses-avoiding-the-7-deadly-sins (last visited Jan. 3, 2023). Although not specifically addressed to drafting arbitration clauses, the Preliminary Hearing Procedures "checklist" in the AAA Commercial Rules, Section "P-2" (*see* Chapter 3, § 3-1.3, and Appendix 1) "suggests issues to include in an arbitration clause."

274. *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

issues to be referred to arbitration and the manner of conducting the arbitration.

1-5:4.1 Location of Clause

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

In a case that should raise concern regarding free-standing arbitration agreements or master agreements that are intended to cover not only an immediate transaction but also all others in the parties' relationship, the Appellate Division in *Cottrell v. Holtzberg*[275] declined to enforce a delegation clause in a free standing, voluntary arbitration agreement with a nursing facility.

The court acknowledged that the agreement would have been enforceable had the claims arisen from an admission that began contemporaneously with execution of the arbitration agreement. However, the claims—part of a five-year battle with a hospital and doctors—arose from a subsequent admission, during which the plaintiff passed away. There was no separate arbitration agreement executed when the plaintiff re-entered the nursing home. Defendant argued that the delegation clause in the earlier agreement was broad enough to require that an arbitrator decide whether this claim should be arbitrated. After all, the arbitration agreement said it was intended to cover any admission to the nursing facility.

The trial and appellate courts would have none of it. There was no arbitration agreement executed upon the second admission, the Appellate Division said, and that was the "agreement" that had

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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).

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

to be analyzed. Not only did the court disregard the delegation clause in the arbitration agreement, a clause that had not been challenged, the court then went on to decide the very issue that the delegation clause reserved for an arbitrator. The scope clause of the earlier arbitration agreement, it said, referred to prior admissions but not to later admissions — despite the initial clause that stated otherwise. It appears the case has settled, and the opinion was not appealed. Parties wishing to have such agreements enforced should review the opinion and ensure that unambiguous, consistent language showing the temporal, future intent is included.

Similar issues arose in the Third Circuit in *Abdurahman v. Prospect CCMC LLC*.[276] The employee signed an arbitration agreement as part of her intake, but her employment/training was with another member of the medical group. She sued that member, and arbitration and delegation were denied.

1-5:4.1a Notice

New Jersey courts have required that parties have reasonable notice of an arbitration clause. The clause cannot be hidden or "buried" in an unusual part of the contract, or in hidden layers of a web page[277] or a referenced document (such as a unilateral warranty[278]) that one would not expect to be a bilateral contract. 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.*,[279] but to do so after 2020 would appear highly risky. Amended arbitration terms are problematic.

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276. *Abdurahman v. Prospect CCMC LLC*, 42 F.4th 156 (3d Cir. 2022). Drafting and cross-referencing might have avoided the issue. *Zirpoli v. Midland Funding, Inc.*, 48 F.4th 136, 2022 U.S. App. LEXIS 24724 (3d Cir. 2022), seems to take a different approach.

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

278. *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)).

279. *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.[280]

Words such as "acknowledge receipt" or "received" may be sufficient in a case such as *Skuse,*[281] where performance is invited to evidence acceptance, but not sufficient where, for example, acceptance is invited by a signature "agreeing" to the terms.[282] The term "may" will not provide sufficient definiteness in some situations[283] but not in others.[284] Terms must be reasonably available or visible to a customer before they sign a rental agreement.[285] Copies of physically signed contracts (as distinct from click signatures on web pages, for example) must be provided to the customer, patient, or employee, especially in an "opt-out" situation.[286] Whether terms and conditions have been provided by an agent may give rise to discovery.[287] Electronically signed contracts should be provided to the customer, if only to assist in evidencing notice of provisions.[288]

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

It is important not to include arbitration provisions in multiple locations, documents, or agreements, such that the intent becomes

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

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

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

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

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

285. *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 considered to be buried or hidden.

286. *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).

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

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

confused or ambiguous. A prime example of this problem arose in *NAACP of Camden County East v. Foulke Management Corp.*,[289] where multiple documents signed at a closing for an auto purchase contained different arbitration provisions with conflicting terms. Adding that one such document's arbitration provision superseded other clauses did not help in a 2016 case, since all documents were signed on the same day and the court could not determine which document ("superseding") was the last signed, nor did a "belt and suspenders" extra check box help.[290] Following *NAACP*, though, a number of auto cases have found that the documentation was properly organized and not confusing or contradictory.[291] Trivial differences should not preclude enforcement.[292]

Under proper circumstances, the arbitration clause in an agreement may be enforced even though a subsequent agreement does not refer to arbitration.[293] However, several 2022 cases highlight the possible problems. As previously noted, the arbitration clause in a group's intake contract may not be enforced against the actual employer (the defendant) where the earlier agreement was not cross-referenced and the definitions of relevant parties was too

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289. *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).

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

291. *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).

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

293. *See Pearson v. Valeant Pharms. Int'l, Inc.*, No. 17-1995, 2017 U.S. Dist. LEXIS 209102 (D.N.J. Dec. 20, 2017) (separation agreement referred to terms to be enforced in earlier agreement) (citing, *e.g., Wein v. Morris*, 194 N.J. 364, 376 (2008)). *But see Cottrell v. Holtzberg*, 468 N.J. Super. 59 (App. Div. 2021) (not enforcing initial arbitration agreement as to second admission). Lumping multiple transactional contracts into one motion to compel will not "hide" that not all had arbitration clauses. *See Connectone Bank v. Bergen Protective Sys.,* No. A-1494-20, 2021 N.J. Super. Unpub. LEXIS 2578 (N.J. Super. Ct. App. Div. Nov. 1, 2021); *Pomum Liber, LLC v. Blue Apple Books, LLC*, No. A-4562-19, 2022 N.J. Super. Unpub. LEXIS 614 (N.J. Super. Ct. App. Div. Apr. 14, 2022).

narrow.[294] Subsequent documents, arguably superseding one with an arbitration clause, create problems.[295]

Overriding its own precedent, the Third Circuit held in a labor case, which might affect non-labor cases, that an arbitration clause without its own termination-continuation clause might not survive post-termination during negotiations.[296] The case has led a district court to deny a motion for a preliminary injunction in an arbitration case.[297]

In *Tharpe v. Securitas Security Services USA*,[298] the court ordered discovery regarding a claim that the cost of an arbitration would render arbitration unenforceable as unconscionable. The Court made further findings that a free standing or unattached arbitration agreement was enforceable; and noted that even after discovery, the court might order arbitration and delegate the unconscionability decision to the arbitrator. After discovery, the court ordered arbitration, noting that the employee bears the burden. Appendix 7 contains additional examples.

1-5:4.1c Adoption by Reference

An arbitration provision in a separate document may be part of an integrated document or adopted by reference,[299] but—keeping

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

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

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

297. *1199 SEIU v. Cranford Rehab & Nursing Ctr*., No. 21-10472, 2022 U.S. Dist. LEXIS 130293 (D.NJ. July 24, 2022).

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

299. *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440 (3d Cir. 2003) (incorporation by reference satisfied international convention); *but compare Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764 (3d Cir. 2013) (remanded). *See also Century Indem. Co. v. Certain Underwriters at Lloyd's*, 584 F.3d 513 (3d Cir. 2009) (finding incorporation). *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. A-4814-17T1, 2019 N.J. Super. Unpub. LEXIS 1162 (N.J. Super. Ct. App. Div. May 21,

in mind the requirements of notice of and assent to any contractual condition—it is important to consider the location[300] and clarity of the reference,[301] the actual delivery of the referenced document, and the timing of the delivery;[302] and the burden of proof.[303] Issues arise regarding references in an employment handbook,[304] corporate training module, or email mailings.[305]

In 2022, the integration clause in a superseding agreement failed to use the "express" language required by the prior document; arbitration was required.[306] Whether an assignment was valid was

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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).

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

301. *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).

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

303. 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)).

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

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

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

sent to the arbitrator.[307] And a general release was held to preclude arbitration required under an earlier agreement.[308]

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

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

Although somewhat dated, an unreported 2015 Appellate Division case, *Arafa v. Ahmend*,[309] illustrates some of the problems. There, the court distinguished between two groups of plaintiffs: one group applied for travel arrangements on the internet and was provided an opportunity to read the terms and conditions before accepting the transaction; the other did not receive the document with the arbitration clause until after they had agreed to purchase the tickets. The first was bound to arbitrate; the second was not.

Whether there has been an incorporation by reference may have to be resolved in a jury trial under the FAA.[310]

Fatal problems in designing a hyperlink to the Terms of Use on a website are illustrated by *Wollen*, discussed above, and *Hite v. Lush Internet, Inc.*[311] The hyperlink required to view the Terms

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307. *Zirpoli v. Midland Funding, LLC*, 48 F.4th 136, 2022 U.S. App. LEXIS 24724, at *10 (3d Cir. 2022).

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

309. *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. 3:17-cv-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.

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

311. *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).

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.*,[312] 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.[313]

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*.[314] The reference must be "clear beyond doubt" and known to the party to be bound, though such knowledge may be imputed under normal contract principles—including the opportunity to read terms that are not "hidden." The court denied the motion to compel arbitration without prejudice pending discovery on the issues identified in the opinion, followed by motions for summary judgment.

1-5:4.1e Carve-Outs

An arbitration provision in a single document may have carve-out provisions for, for example, small claims, probate, bankruptcy, delegation, or injunctive relief, but the document should not contain or be joined by potentially conflicting provisions, such as two "exclusive" jurisdiction provisions.[315] The "Seven Deadly Sins"

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312. *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).

313. *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).

314. *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. Super. Unpub. LEXIS 2356 (N.J. Super. Ct. App. Div. Dec. 9, 2020) (remanded; issues of multiple copies and signatures).

315. *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,

of arbitration agreements[316] 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.[317]

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.[318]

Provisions for emergency court relief may not be necessary where the provider's rules[319] call for a similar emergency arbitrator, hearing and interim award (although judicial enforcement still may be advisable). Since the NJRUAA provides that requesting a preliminary injunction or TRO in court does not waive the right to seek arbitration, a carve out for that relief may not be necessary and may create a problem if the language appears to carve out injunctive relief that may include the final relief to be sought, such as a permanent injunction.[320] The United States Supreme Court granted, then dismissed, *certiorari* in *Henry Schein, Inc. v. Archer &*

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).

316. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Dispute Res. J. 1 (Feb.-Apr. 2003), *available at* https://www.hugheshubbard.com/news/drafting-arbitration-clauses-avoiding-the-7-deadly-sins (last visited Jan. 3, 2023).

317. *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 Easterday v. USPack Logistics, LLC*, No. 15-7559, 2022 U.S. Dist. LEXIS 51990 (D.N.J. Mar. 23, 2022); *Fung v. Varsity Tutors, LLC*, No. A-3650-17T4, 2019 N.J. Super. Unpub. LEXIS 960 (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. A one-sided right to an injunction was held not a bar in *Ribe v. Macro Consulting Group, LLC*, No. A-2894-18T4, 2020 N.J. Super. Unpub. LEXIS 468 (N.J. Super. Ct. App. Div. Mar. 9, 2020).

318. *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).

319. *See, e.g*., 2022 AAA Commercial Rules R-37 & R-38 (Appendix 1) and 2021 ICDR Articles 7 & 27 (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).

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

White Sales, Inc.,[321] 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.[322]

A waiver-of-class-action clause can lead to the loss of the ability to compel arbitration if not clearly stated.[323]

A carve-out or exclusion for questions of jurisdiction or arbitrability[324]—overriding the standard AAA or JAMS rules language—may avoid delay or conflicting rulings.

1-5:4.1f Boilerplate

Be careful of boilerplate provisions in the "container" contract that may defeat the alleged intent of the arbitration clause. This problem may be illustrated by *Castle Realty Management, LLC v. Burbage*,[325] 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.*

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

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

323. *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).

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

325. *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.

Sunoco, Inc.,[326] the defendant attempted (unsuccessfully) to enforce an arbitration clause in the bank credit card agreement for a "Sunoco" gas rewards program. Sunoco was not named or identified in the credit card agreement; its effort to claim third-party beneficiary status was defeated by equivocal definitions of the parties covered by the agreement. The court also rejected arguments that the rewards program documents should be read together with the bank card agreement.

Standard merger or integration clauses must take into account any special "express" language required by prior agreements—or arbitration under the earlier agreement will be precluded.[327]

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,[328] or where tribal law would improperly waive statutory rights.[329] Failing to make a designation may result in the court applying its own law or undertaking a conflict-of-laws analysis—which may not have been what the drafter intended.

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

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

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

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

329. *See Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020). *But cf. Brice v. Plain Green, LLC*, 13 F.4th 823 (9th Cir. 2021) (describing circuit split; court must determine delegation first), *rehearing en banc ordered*, No. 19-15707, 2021 U.S. App. LEXIS 33152 (9th Cir. Nov. 8, 2021), *en banc hearing granted, opinion vacated*, 35 F.4th 1219 (9th Cir. 2022).

and binding or similar words.[330] Including a personal jurisdiction waiver and exclusive court designation in the container contract's choice of law clause may relate only to enforcement of the arbitration agreement, but that designation can create problems with the selection of the arbitration law or a later arbitration clause unless carefully worded.

Termination clauses also may defeat arbitration, though survival language may protect arbitration rights.[331] *See also* Section 1-5:4.2c (post-termination).

1-5:4.2 Scope and Delegation

1-5:4.2a Generally

Various arbitration institutions offer "standard" clauses or protocols for different forms of disputes (*e.g.*, commercial, employment, intellectual property, international) that designate that institution and its rules.[332] Care must be given, though, because they are not necessarily drafted with New Jersey law in mind. The AAA commercial clause may not satisfy the requirements of *Atalese v. U.S. Legal Services Group, L.P.*[333] for consumer or other covered cases. Nor would it likely satisfy *Garfinkel v. Morristown*

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330. *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).

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

332. The standard AAA *commercial* clause states: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." *See* https://adr.org/Clauses (last visited Jan. 3, 2023). The AAA also has "cut and paste" clauses for other types of relationships, including some construction, employment and consumer situations and step-mediation, but they may not satisfy New Jersey's requirements either. The AAA has a free "Clause Builder" website, www.clausebuilder.org (last visited Jan. 3, 2023), to assist in formulating language for several terms, although the Clause Builder did not at last review contain wording to satisfy *Atalese*; the AAA also will "vet" consumer clauses, pursuant to Rule 12 of its Consumer Rules, *see* https://www.adr.org/consumer (last visited Jan. 3, 2023), and that review has been a factor in at least one court's finding a clause satisfactory. *Perez v. Leonard Auto. Enter., Inc*., No. BER-L-588-16, 2016 N.J. Super. Unpub. LEXIS 2631 (N.J. Super. Ct. Law Div. 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). The New Jersey Court Rules Appendix XXIX-B includes a format and language that may be adapted to non-administered consumer and other cases.

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

Obstetrics & Gynecology Assocs., P.A.[334] regarding statutory claims in employment or other covered cases.

The oral arguments in the New Jersey Supreme Court cases decided in the summer of 2020 suggest that the structure of the clause is important: questions by the Justices highlighted the primacy of the initial sentence in the clauses, which evidenced a principal, material agreement to arbitrate. As in *Flanzman v. Jenny Craig, Inc.*,[335] if other details are omitted (as long as certain waiver language is included to satisfy other New Jersey cases discussed elsewhere), which the court characterized as potentially useful but not necessary, then the FAA or NJRUAA may fill in any gaps. The subsections of this part of the Handbook discuss some of the details to add or avoid.

Some aspects must be explicit, such as whether a waiver is to be decided by the arbitrator.[336]

1-5:4.2b Scope

One of the first questions parties must resolve in designing their arbitration provision is the scope of issues that they want to either mediate, arbitrate, or litigate. Courts generally differentiate between "broad" and "narrow" clauses,[337] with the former being distinguished by language such as "any claim or dispute, whether in contract, tort or statute, arising out of or relating to [employment; contract; transaction; services etc.]."[338] The standard

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

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

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

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

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

AAA *commercial* clause[339] may be considered "broad", but it is not tailored to New Jersey and the requirements of *Atalese* or *Garfinkle* with respect to a jury or court waiver or including statutory claims which, as discussed below, may be affected by whether the clause refers to "this agreement" or "my employment," our relationship, or other term.[340] A clause that is too narrow, or does not include certain claims may result in arbitration as to some but not all claims.[341]

The authors suggest that the "scope" issue has at least five aspects: (1) the breadth or coverage of the "disputes" to be arbitrated (*i.e.*, standard broad, intermediate, narrow, carve out, specific etc); (2) the legal basis of the claim, such as contract law, tort law or statutes; (3) temporal, *i.e.*, arising during contract term, after or post-termination; (4) whether limited to "this" contract or others, related or all future relationships; and (5) the persons or entities to be bound, *e.g.*, assignees.[342] The cases illustrate that the language used must express the parties' intention, and boilerplate must not negate that intention.

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339. *See* n. 332, *supra* and Appendix 1, AAA Commercial Arbitration Rules.

340. *See, e.g., Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124 (2001) (statutory employment claim not arbitrable where clause referred to this agreement). *But cf. Emcon Assocs., Inc. v. Zale Corp.*, No. 16-1985, 2016 WL 7232772 (D.N.J. Dec. 14, 2016) (in dictum, excluding commercial claims from *Garfinkel*) (citing, *e.g., Gastelu v. Martin*, No. A-0049-14T2, 2015 WL 10044913, at *14 n.4 (N.J. Super. Ct. App. Div. July 9, 2015)). As noted, the waiver of statutory rights to a jury is subject to particular scrutiny in New Jersey. *See Noren v. Heartland Payment Sys., Inc.*, 448 N.J. Super. 486, 497 (App. Div.) (CEPA), *reconsideration denied*, 449 N.J. Super 193 (App. Div.), *certif. granted*, 230 N.J. 499 (2017) (as to attorneys' fees issues), *vacated in part*, 2018 N.J. LEXIS 7 (Jan. 12, 2018) (as to fees' issue). In a case arising out of Pennsylvania federal court, the Third Circuit affirmed an order confirming an arbitration award concerning federal law where the clause referred to "a dispute" without any reference to waiving statutory rights. *Monfred v. St. Luke's Univ. Health Network*, 767 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).

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

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