The Federal Arbitration Act

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A. Introduction

Following is an overview of the Federal Arbitration Act of 1925 ("FAA" or the "Act") and its key provisions. The materials examine impact of the Act and the courts' interpretation of it to preempt state statutes that might otherwise invalidate pre-dispute arbitration agreements. The materials also examine cases in which the FAA was applied to employment contracts, and survey the various grounds for vacating arbitration awards, which is currently a more robust area of litigation. Also examined is an arbitrator's power to subpoena witnesses and documents in both the hearing and prehearing context. The materials also discuss the retroactive effect of the Dodd-Frank Act of 2010, which includes an anti-arbitration provision for whistleblower claims brought under the anti-retaliation provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A. Finally, practical considerations of arbitration are considered in light of benefits and drawbacks of arbitration as a form of alternative dispute resolution.

B. The Origins of the FAA

The FAA was originally enacted in 1925 to overcome the American judiciary's long-standing refusal to enforce agreements to arbitrate disputes, and to place such agreements on the same footing as other contracts. The hostility of U.S. courts towards arbitration agreements grew out of the practice of English courts of opposing anything (including arbitration) that would deprive those courts of jurisdiction. See, e.g., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270-71 (1995) (discussing historical background of FAA); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (same); see also Bernhardt v. Polygraphic Co., 350 U.S. 198, 211, n. 5 (1956) (Frankfurter, J., concurring) (internal quotation omitted) (noting that American jurists who originally adhered to the anti-arbitration disposition of English courts did so "'stand[ing] ... upon the antiquity of the rule'" prohibiting enforcement of arbitration clauses, instead of on "'its excellence or reason.'").

Because Congress saw value in arbitration, which it determined utilized the expertise of the arbitrator to decide factual issues and was swifter than litigation in resolving disputes, Congress enacted the FAA to legislatively overrule the courts' refusal to enforce arbitration agreements. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 195, 415 (1967); Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989). Thus, the central purpose of the Act was to force courts to enforce agreements to arbitrate, just as they would enforce any other contract provision. The FAA therefore reflects a national policy favoring arbitration and the enforcement of agreements to arbitrate disputes. See Southland Corp. v. Keating, 465 U.S. 1, 28 (1984); Gilmer, 500 U.S. at 25.

C. The FAA's Coverage and Exemption Provisions

The primary provisions of the Act – Sections 1 and 2 – identify the types of arbitration agreements that are subject to the reach of the FAA. As a threshold matter, courts assessing whether to enforce an agreement to arbitrate must decide whether the Act encompasses the contract in question. The issue hinges on the interplay between the FAA's "coverage" and

"exemption" provisions. The Act's coverage provision states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The FAA's "exemption" provision further provides:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, *but nothing herein contained shall 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 (emphasis added). The Act also provides for the stay of proceedings in federal district courts when an issue in the proceeding is subject to arbitration, see 9 U.S.C. § 3, and for court orders to compel arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, see 9 U.S.C. § 4.

As seen above, the FAA requires courts to enforce agreements to arbitrate where, *inter alia*, the agreement is included in a contract "evidencing a transaction involving commerce." However, the above italicized language states that the universe of contracts subject to the Act does not include "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This clause was the source of dispute as to whether the FAA applied to employment agreements with arbitration provisions. As discussed below in Section II(A), the Supreme Court held that the Act encompassed employment agreements, and thereby preempted any state law that would undermine the enforceability of arbitration agreements.

II. APPLICATION OF THE ACT TO THE STATES AND TO EMPLOYMENT CONTRACTS

Controversy initially existed as to the source of Congress' power to enact the FAA. Some courts believed that, in passing the FAA, Congress had exercised its Article III power to "ordain and establish" federal courts. See Southland Corp. v. Keating, 465 U.S. 1, 28, n. 16, (1984) (O'Connor, J., dissenting). However, the prevailing view held that the FAA was enacted pursuant to Congress' substantive power to regulate admiralty and interstate commerce. See Prima Paint Corp., 388 U.S. at 405. Consistent with this view of the constitutional basis for the Act, the Supreme Court held that the FAA "is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" Id. (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

A. The FAA Applies to the Several States

Confusion also existed as to whether states could enact and enforce anti-arbitration statutes. If permissible, these statutes would empower state courts to refuse to enforce arbitration agreements if the dispute in question was encompassed by the state's statute, which arguably undermines the FAA. The Supreme Court answered this issue in Southland and held that the FAA prevents states from undercutting the FAA through state anti-arbitration statutes. Southland involved a dispute between the franchisor of 7-Eleven convenience stores and the individual franchisees. The franchise agreement included an agreement to arbitrate disputes. Several franchisees filed actions against the franchisor, alleging various tort and contract causes of action, as well as violations of the disclosure requirements of the California Franchise Investment Law. The franchisor eventually moved to compel arbitration pursuant to the franchise agreement. When the trial court rejected the franchisor's motion to compel arbitration with respect to claims under the Franchise Investment Law, the intermediate appellate court reversed the trial court because it determined that any construction of the Franchise Investment Law that invalidated the parties' arbitration agreement would conflict with Section 2 of the FAA. However, the California Supreme Court later reversed the appellate court, holding that the Franchise Investment Law did not violate the FAA and that the state statute (which renders void any provision purporting to bind a franchisee to waive compliance with any provision of the Franchise Investment Law) requires judicial consideration, not arbitration, of claims brought under that statute.

The Supreme Court reversed the California Supreme Court and found a direct conflict between the FAA and the state statute. The Court noted that the FAA announced a national policy favoring arbitration, and noted that the Act disempowered states from imposing judicial resolution on claims that the parties agreed to resolve by arbitration. The Court further found that the FAA, which was predicated on Congressional authority under the Commerce Clause, had created a body of federal substantive law, not procedural law, that was applicable in both state and federal courts. Thus, and consistent with the Supremacy Clause of the Constitution, the Act requires both federal courts and state courts to enforce arbitration agreements, irrespective of whether conflicting state law exists that might invalidate agreements to arbitrate certain kinds of legal disputes (i.e., state anti-arbitration statutes). See Southland Corp., 465 U.S. at 16 ("In creating a substantive rule applicable in state as well as federal courts, Congress intended [the

FAA] to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").

States were displeased with this interpretation and sought to have Southland Corp. overruled so that states would be empowered to invalidate predispute arbitration agreements if they saw fit. Eleven years later, in Allied-Bruce Terminix, the Court examined whether it should overturn its holding in Southland and instead hold that a state anti-arbitration statute could be applied by a state court for the non-enforcement of an arbitration agreement. Twenty state attorneys general supported the overturning of Southland. Allied-Bruce Terminix involved a termite prevention contract between a homeowner and termite exterminators, which included an arbitration clause to resolve disputes. The homeowner sued the exterminator in state court and the Alabama Supreme Court affirmed a trial court's denial of a stay of the state proceedings to allow for arbitration under the FAA, relying on a state statute that invalidated predispute arbitration agreements. The Alabama Supreme Court held that the FAA only applies if, at the time the parties entered into the arbitration agreement, they "contemplated" substantial interstate activity. Despite some such interstate activities, the Alabama Supreme Court determined that the parties to the termination contract had "contemplated" a transaction that was primarily local and not "substantially" interstate.

The Supreme Court disagreed with the Alabama Supreme Court's narrow reading of the FAA's coverage clause and rejected its use of the "contemplation of the parties" test for purposes of deciding whether a given contract fell within the scope of the Act. The Court first declined to overturn Southland, noting that the Court had already considered and rejected the same arguments regarding the applicability of the FAA to states in that decision, and that Congress had since expanded the scope of arbitration in the eleven years since Southland (which implied to the Court the Congress intended for the Act to be read expansively). The Court stated that the parties did not contest that the exterminator contract transaction "involved" interstate commerce. The Court's analysis therefore focused on whether the language in the Act's coverage provision – the FAA's reference to *a contract evidencing a transaction involving commerce* – limited the FAA's application so as to carve out a "statutory niche in which a State remains free to apply its anti-arbitration law or policy" for matters that did not involve commerce. Id. at 272-273. The Court engaged in statutory interpretation and determined that the phrase "involving commerce" was the functional equivalent of "affecting commerce," which is the term of art used by Congress to signal its intent to exercise its Commerce Clause powers in full. Id. at 273-74. The Court next considered whether the phrase "evidencing a transaction" meant that the parties to the contract in question "contemplated" that the contract would involve interstate commerce, or if the phrase instead meant that the transaction, in fact, actually involved interstate commerce (irrespective of the parties' *ex ante* contemplation). The Court ultimately decided that the latter "commerce in fact" inquiry was the proper interpretation, since, in the Court's view, the "contemplation of the parties" test was unwieldy and inconsistent with the scope of the Act and its legislative history. Id. at 281. The takeaway from the somewhat muddled Allied-Bruce Terminix decision was that an agreement to arbitrate would fall within the FAA's coverage provision if the contract in question actually involved interstate commerce, which is an extremely broad class of commerce.

B. The FAA Applies to Employment Contracts

The holdings in Southland and Allied-Bruce Terminix set the stage for the application of the Act to arbitration clauses in employment contracts. The resolution of that issue hinged on the interpretation of the Act's exemption provision, which states "*nothing herein contained shall 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. The Supreme Court ultimately concluded in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) that this exemption provision was meant to be narrowly interpreted, and further held in Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) that the exemption provision exempts only a limited number of employment contracts.

The Court in Gilmer addressed whether a claim under Age Discrimination in Employment Act of 1967 ("ADEA") can be subject to enforceable arbitration under the FAA. The plaintiff in the case (Gilmer) had, as a condition of employment, registered as a securities representative with the New York Stock Exchange ("NYSE"). The NYSE registration application included an agreement to arbitrate disputes when required by NYSE rules, and NYSE Rule 347 requires arbitration of any controversy regarding a representative's termination of employment. When Gilmer was terminated, he filed an ADEA claim in district court, and his former employer moved to compel arbitration under the FAA. The district court denied the motion, but the Fourth Circuit reversed the decision. The Supreme Court affirmed, holding that the FAA was applicable to force the arbitration of the plaintiff's ADEA claim, noting that there was nothing in the ADEA or its legislative history that evidenced a Congressional intent to preclude the arbitration of such claims. Id., 500 U.S. at 26-27. In reaching this holding, however, the Court expressly did not address the issue of whether an arbitration clause in an employment contract is enforceable under the FAA, since the arbitration clause in Gilmer was not contained in an employment contract and the parties had not raised the issue in prior proceedings. Id., 500 U.S. at 25, n.2.

Ten years later, the Supreme Court resolved the issue left unaddressed in Gilmer and, in a divided 5-4 decision, held in Circuit City Stores, Inc. v. Adams that arbitration clauses in employment agreements are enforceable under the FAA, except in very limited circumstances (i.e., if a worker was engaged in the movement of goods in interstate commerce). 532 U.S. at 119. In Circuit City, the company's employment application required all employment disputes to be settled by arbitration. A former employee who had filled out such an application later filed a state law employment discrimination action against the company. The employer filed in federal court to enjoin the action in state court and compel arbitration under the FAA. While the District Court found in favor of the employer, the Ninth Circuit reversed, and interpreted the Act's exemption provision to exempt all employment contracts from the FAA's reach, not just contracts of seamen, railroad employees, or other transportation-related workers. The Ninth Circuit's holding was directly contrary to numerous other Circuit Court rulings, so the Supreme Court addressed the issue to resolve this split.

The Supreme Court in Circuit City focused on the interplay between the FAA's coverage and exemption provisions. The majority pointed to Allied-Bruce Terminix for the proposition that the Act's coverage provision compels the enforcement of any arbitration clause that

evidences a transaction involving commerce, noting that the phrase "involving commerce" was equivalent to "affecting commerce" and signaled Congress' intent to exercise its commerce power fully. The Court rejected the notion that the coverage provision only applies to commercial contracts, since, if employment contracts were actually excluded from the Act's coverage provision, there would have been no need for Congress to specifically exempt the seamen and railroad employees from the reach of the Act in the FAA's exemption provision. Id. at 1308-09. The Court noted that most Courts of Appeals, with the exception of the Ninth Circuit, had concluded that the FAA's exemption provision is limited to transportation workers, i.e., workers engaged in the actual movement of goods in interstate commerce. The Supreme Court agreed with the other Circuits, noting that the interpretive canon of *ejusdem generis* (under which the residual clause of "any other class of workers engaged in foreign or interstate commerce" should be interpreted so as to give effect to the terms "seamen" and "railroad employees," and should be controlled and defined by reference to those terms) resulted in a reading of the exemption provision that excluded only employment contracts of workers actually engaged in interstate transportation. The Court also rejected arguments from *amici* that its reading of the FAA would preempt state employment laws which restrict the use of arbitration agreements, and pointed to Southland in noting that this issue had already been decided, and Congress had not chosen to act to modify the FAA.

As a result of the progression of this line of case law – beginning with the application of the FAA to the states in Southland and culminating in Circuit City – it is now well established that "[e]mployment contracts, except for those covering workers engaged in transportation, are covered by the FAA." E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289 (2002) (citing Circuit City, 532 U.S. 105). Any litigant seeking to escape the effect of an arbitration clause contained in an employment contract is therefore better served to look to state contract law principles regarding whether the arbitration clause is properly enforceable, and not whether the agreement to arbitrate falls within the scope of the FAA.

III. THE SCOPE OF JUDICIAL REVIEW OF ARBITRATION AWARDS

Arbitration is generally regarded as faster and less expensive than litigation. One factor contributing the speed and reduced cost of arbitration is the fact that the scope of judicial review of arbitration awards is very limited, and a party that prevails before an arbitrator can be far more confident that the arbitration award will hold up on appeal, as opposed to a state or federal court litigant. Nevertheless, challenges to arbitration awards in federal court have been a frequent area of litigation.

A. FAA Provisions for Award Enforcement, Vacatur, and Modification

Sections 9, 10, and 11 of the FAA pertain to procedures for the post-arbitration process of confirming, vacating, or modifying an award. Assuming that a dispute is properly arbitrable and an award has been rendered, these provisions provide for the speedy enforcement or modification of arbitration awards. Section 9 of the Act states:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall

> specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 9.

Section 10 of the FAA provides the bases through which a district court may vacate an arbitration award. These grounds, which include the arbitrator's fraud, improper behavior, or exceeding the scope of her authority, are discussed in greater detail in Section III(A)(1), below. Section 11 of the Act provides for the modification of awards in the following circumstances:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11. An application for any of these orders – confirmation of an arbitration award, vacatur of an award, or modification of an award – receives the streamlined treatment of a motion. This in turn prevents the parties from being forced to file a separate contract action that would normally be necessary to enforce or alter an arbitration award in court.

1. The Act's Statutory Bases for Vacating Arbitration Awards.

The FAA's vacatur provision "show[s] a desire of Congress to provide not merely for any arbitration but for an impartial one." Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 147 (1968). Arbitrators and litigators should remain mindful of instances in which the courts have found cause to vacate an arbitration award and/or refused to grant vacatur, and parties on the losing end of an arbitration may pursue these (limited) avenues of attack on awards.

The FAA provides that an arbitration award may be vacated in the following enumerated instances:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). Section 10 further provides that a court may order a rehearing by the arbitrator, as long as the time within which the award is to be made has not expired. Id. at § 10(b). The FAA requires that "[n]otice of a motion to vacate, modify, or correct an arbitration award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. As discussed more fully below in Section III(B), courts also have recognized a common law doctrine whereby a court may set aside an arbitration award where there has been a "manifest disregard of the law." Because of several recent Supreme Court decisions on vacating arbitration awards, however, the continued viability of this doctrine is uncertain.

Courts have consistently held that the FAA permits district courts to vacate arbitration awards "only under exceedingly narrow circumstances." Dluhos v. Strasberg, 321 F.3d 365, 370 (3d Cir. 2003) (citing 9 U.S.C. § 10); see also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (noting that a party to an arbitration can "still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances."); Century Indem. Co. v. Certain Underwriters at Lloyd's, London, subscribing to Retrocessional Agreement Nos. 950548, 950549, 950646, 584 F.3d 513, 557 (3d Cir. 2009) (same); Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990) ("Judicial review of an arbitration award is extraordinarily narrow.").

Attempts to vacate arbitration awards are unsuccessful in the vast majority of cases, with one commentator estimating that vacatur occurs in no more than 10% of all cases in which an arbitration award is challenged in Court. See 141 A.L.R. Fed. 1, at § 2[a]. The same commentator notes that 9 U.S.C. § 10(a)(4), which deals with arbitrators who exceed their powers under an arbitration agreement or execute them improperly, provides the best hook for litigators seeking to overturn arbitrator's awards. See id. (noting that more arbitrator awards have been vacated because of arbitrators who exceed their powers or imperfectly execute them than all other grounds in 9 U.S.C. § 10(a) combined); see also Stephen L. Hayford, "Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards," 30 Ga. L. Rev. 731, 747-48 (1996) (9 U.S.C. § 10(a)(4) most fruitful avenue of challenging arbitration awards).

a. Vacatur for Awards Procured by Corruption, Fraud, or Undue Means.

A party challenging an arbitration award on the basis of corruption, fraud, or undue means faces a difficult hurdle. As the Fifth Circuit recently noted, the FAA "does not provide for vacatur in the event of any fraudulent conduct, but only 'where the *award was procured* by corruption, fraud, or undue means.'" Taylor v. Univ. of Phoenix/Apollo Group, 487 F. App'x 942 (5th Cir. 2012) (quoting Forsythe Int'l., S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1022 (5th Cir. 1990)). Thus, a party must establish a nexus between the alleged fraud or corruption and the arbitrator's decision, and not merely rely on the existence of the fraud. Id. Similarly, the Sixth Circuit requires that, to vacate an arbitration award under 9 U.S.C. § 10(a)(1), the challenging party must demonstrate "(1) clear and convincing evidence of fraud, (2) that the fraud materially relates to an issue involved in the arbitration, and (3) that due diligence would not have prompted the discovery of the fraud during or prior to the arbitration." Int'l Bhd. of Teamsters, Local 519 v. United Parcel Serv., Inc., 335 F.3d 497, 503 (6th Cir. 2003) (citations omitted). Given this high burden, challenges under this provision are rare and are successful only under fairly egregious circumstances. See, e.g., Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1385 (11th Cir. 1988) (finding an arbitration award was procured through undue means where "[t]he arbitrators' written award, although brief, reflects the influence of [the fraudulent] testimony").

b. Vacatur for the Partiality or Corruption of Arbitrators.

Courts frequently address challenges to arbitration awards on the basis of an arbitrator's alleged partiality to the prevailing party. While fact patterns underlying the alleged improper relationships vary widely, the thrust of the decisions is that arbitrators should place great emphasis on disclosing potential areas of partiality or conflict (e.g., business relationships, past representation of clients) both prior to the commencement of the proceedings, and continuing throughout the arbitration, if necessary.

The Supreme Court has vacated an arbitration award where it found evidence of a substantial business relationship between an arbitrator and the prevailing party that was not disclosed to the losing party. See Commonwealth Coatings Corp. v. Continental Cas. Co., 393 US 145 (1968). In Commonwealth Coatings, a subcontractor and prime contractor had a business dispute over monies owed on a painting job. When the subcontractor filed for

arbitration against the prime contractor, two arbitrators selected a third, supposedly neutral arbitrator. Unbeknownst to the subcontractor, however, the third arbitrator had served as an engineering consultant for the prime contractor. While the business relationship was sporadic in nature, the prime contractor had paid the arbitrator about $12,000 over a period of four of five years, and for services related to the very projects involved in the arbitration. The subcontractor learned of this relationship only after an arbitration award was rendered. According to the Court, the arbitrator/prevailing party's failure to disclose this relationship violated the fairness mandated by the FAA, even though no finding had been made that the arbitrator demonstrated partiality to the prevailing party. As the Court noted in the decision, this outcome was required because the "arbitration process functions best" where prompt and robust arbitrator disclosure creates "an amicable and trusting atmosphere." Id. at 151.

Commonwealth Coatings reflects the ideal that arbitration functions best when arbitrators do not have an apparent reason to be partial to a given party. 9 U.S.C. § 10(a)(2), which provides for vacatur for "evident partiality," seeks to vindicate that interest and maintain the impartiality of arbitration. However, there is no clear consensus among the Circuit Courts of Appeal on what constitutes "evident partiality" for purposes of vacating an arbitration award, and making such a determination is a necessarily fact-intensive inquiry. See Montez v. Prudential Sec., Inc., 260 F.3d 980, 983 (8th Cir. 2001) (collecting cases on split in the circuits). The Circuit Courts of Appeal have fashioned similar, yet somewhat distinct tests for analyzing whether evidence of arbitrator partiality is sufficient to justify vacatur of an arbitration award. For example, in Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007), the Second Circuit held that an arbitration award could be vacated for evident partiality where one of three arbitrators – who was the CEO of a multi-billion dollar company – did not investigate what he knew to be a potential business relationship between his corporation and a parent company of a party to the arbitration, or inform the parties that he had walled himself off from learning more about the potential relationship. Id. at 134-35. The court began its analysis with the proposition that where "[a]n arbitrator . . . knows of a material relationship with a party and fails to disclose it," a reasonable person must conclude that the arbitrator was evidently partial. Id. at 137. The Second Circuit fleshed out an arbitrator's duty to investigate the nature of business relationships with parties, concluding that, "where an arbitrator has reason to believe that a nontrivial conflict of interest might exist," the arbitrator must either investigate the circumstances of that conflict or disclose his or her intention not to investigate those circumstances. Id. at 137-38. According to the Court, an arbitrator's failure to do so would mislead the parties into believing that "no nontrivial conflict exists[]", and thereby undermine the very arbitration process that the FAA seeks to promote. Id. at 137.

In contrast, the Fourth Circuit in ANR Coal Co., Inc. v. Cogentrix of N. Carolina, Inc., 173 F.3d 493, 500 (4th Cir. 1999), took a more narrow view of an arbitrator's obligation to investigate conflicts of interest, and rejected the notion that an arbitration award can be vacated simply because an arbitrator failed to disclose the full extent of a relationship with a party to the arbitration. In reaching this conclusion, the court disagreed with the idea that AAA rules governing commercial arbitration could provide a basis on which a court could vacate an arbitration award, determining instead that "a court may only consider whether the complaining party has demonstrated a violation of the governing statute [here, 9 U.S.C. S 10(a)(2)]" in determining whether to set aside an arbitration award. Id. The Court identified its test for

evident partiality as a four factor examination: (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding. ANR Coal Co., 173 F.3d at 500. The Fourth Circuit noted that "if an arbitrator fails to investigate facts that come to light after the award, and those facts are not trivial, the aggrieved party may use this information to demonstrate evident partiality under 9 U.S.C. § 10(a)(2)." Id. at 499, n.4. However, the Court described satisfying this test as imposing a "heavy burden" and noted that "a party seeking vacatur must put forward facts that *objectively* demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives." Id., 173 F. 3d at 501 (emphasis in the original). Ultimately, the Court concluded that the challenging party had failed to establish grounds for vacatur on the basis of evident partiality, and determined that the facts established nothing more than a trivial relationship between the arbitrator and the prevailing party. Id., 173 F. 3d at 502.

In Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157 (8th Cir. 1995), the Eighth Circuit reversed an order confirming an arbitration award because the arbitrator failed to disclose his job title and because his employer had "ongoing business relationships" with one of the parties. Id. at 158. The Court concluded that such a relationship created "an impression of possible bias" which, under the majority opinion in Commonwealth Coatings, established "evident partiality." Id. at 159. The Court further noted an arbitrator's failure to disclose business dealings between the arbitrator's employer and a party to the arbitration could show evident partiality. Id. (citing Sanko S.S. Co. Ltd., v. Cook Indus., Inc., 495 F.2d 1260, 1261-65 (2d Cir. 1973)). Thus, the Eighth Circuit determined that an arbitrator has an obligation to disclose his business relationships to parties and that, in that particular case, the arbitrator's failure to do so had established "evident partiality" under § 10(a)(2). See id. at 159.

The Ninth Circuit in New Regency Productions, Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1106 (9th Cir. 2007), recognized a more permissive standard for demonstrating evident partiality than other Circuit Courts of Appeal. In New Regency, Nippon Herald and New Regency had entered into a film distribution agreement, which New Regency allegedly violated. After filing for arbitration, Nippon Herald and New Regency jointly selected William J. Immerman, then a Los Angeles attorney and executive for Crusader Entertainment, as their arbitrator. Immerman disclosed to the parties that he had previously arbitrated a case where counsel for Nippon Herald, Charles Shephard, represented a party, and had also negotiated deals "with various executives of New Regency prior to their becoming executives at New Regency." Once he was selected as arbitrator, Immerman further disclosed that an attorney at Shepard's firm had brought suit against Crusader Entertainment and that, although he was not representing Crusader, he would likely be called as a percipient witness. However, in the course of arbitration, Immerman accepted a high-level executive position with a film company that had close ties with New Regency – but Immerman did not disclose this fact to the parties. Immerman largely found in favor of New Regency, and Nippon Herald moved to vacate the award in federal court on grounds of evident partiality when it learned of his undisclosed executive level position. In rejecting this challenge, the Ninth Circuit noted that it had announced its legal standard for demonstrating evident partiality in Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994). Schmitz involved the vacatur of an award for evident partiality where the arbitrator's law firm had represented the parent company of an arbitration party in approximately

20 cases over the course of several decades.[1] Id. at 1044. The court identified the governing legal standard for evident partiality as whether there are "facts showing a 'reasonable impression of partiality[],'" and noted that the standard can be satisfied even where an arbitrator is unaware of the facts showing a reasonable impression of partiality because the arbitrator "may have a duty to investigate independent of [his] ... duty to disclose." Id.

The Ninth Circuit in New Regency Productions concluded that Immerman had a duty to investigate potential conflicts when he accepted the executive position at the film group. The Court noted that the parties could reasonably have expected Immerman to investigate potential conflicts when he took the undisclosed job that included overseeing the legal department of another film company. Id., 501 F.3d at 1109. The Court also determined that the disclosure provisions of various governing arbitration rules, while not binding law, reinforced the holding in Schmitz that arbitrators must run adequate conflict checks and make disclosures to parties. Finally, the Court concluded that the parties could have reasonably expected Immerman to disclose his employment with the film group that possessed close ties to New Regency, the prevailing party. Thus, the Ninth Circuit held that "Immerman had a duty, when he accepted the new job at Yari Film Group during the arbitration, to investigate the possible conflicts that might arise from his new employment. We hold further, in light of that duty, that Immerman's failure to disclose facts that show a reasonable impression of partiality is sufficient to support vacatur, notwithstanding the lack of evidence of his actual knowledge of those facts." Id., 501 F.3d at 1111.

The Eleventh Circuit takes a narrower view of evident partiality than does the Ninth Circuit, and permits the vacatur of an arbitration award on those grounds "only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc., 146 F.3d 1309, 1312 (11th Cir. 1998); see also Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1202 (11th Cir. 1982) (party challenging arbitration award must establish reasonable impression of partiality that is "direct, definite and capable of demonstration rather than remote, uncertain and speculative"). The Eleventh Circuit noted in ADM Investor Services that the application of this test is necessarily a fact-intensive inquiry. Id. at 1313. The Court rejected the challenge to the award on grounds of evident partiality, first noting that there had been no evidence that the arbitrator was actually biased against the challenging party (and thus no actual conflict existed). Turning to the second inquiry of the test, the Court concluded that there was no evidence that the arbitrator – a lawyer at a law firm that had performed legal services for the prevailing party prior to the lawyer's arrival at the firm – had any knowledge of his firm's representation of the prevailing party. Thus, and because of the lack of actual knowledge of the information upon which the alleged "conflict" was

[1] The Court in Schmitz concluded that the lawyer/arbitrator had failed to discharge his duty to investigate because, although he had run a conflict check on the actual parties to the arbitration, he had failed to run a conflict check on one party's parent company, which would have revealed that the parent company had engaged in substantial business with the arbitrator's law firm. Id. at 1044, 1049. As this constituted "constructive knowledge and the presence of the conflict," the Ninth Circuit concluded that his "failure to inform the parties to the arbitration resulted in a reasonable impression of partiality under Commonwealth Coatings." Id. at 1049.

founded (i.e., the arbitrator's firm's provision of legal services to the prevailing party), the court concluded that the challenging party had not satisfied the second "evident partiality" condition. ADM Investor Servs., 46 F.3d at 1313.

c. Vacatur for the Misbehavior of Arbitrators.

As noted above, 9 U.S.C. § 10(a)(3) identifies three types of arbitrator misconduct that can provide a basis for vacatur: the refusal to postpone a hearing without adequate cause, the refusal to hear pertinent, material evidence, or "any other misbehavior by which the rights of any party have been prejudiced." Given the wide latitude afforded to arbitrators in conducting arbitrations, courts have construed the third, "catch all" basis for vacatur narrowly, and consistently decline to vacate awards on this basis. However, successfully vacating an arbitration award for an arbitrator's alleged refusal to postpone a hearing or to hear material evidence is also relatively rare. One such occasion in which vacatur was granted under 9 U.S.C. § 10(a)(3) was the First Circuit's decision in Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901, 763 F.2d 34, 38 (1st Cir. 1985). In Hoteles Condado Beach, an employee exposed himself to a hotel guest and was terminated. The employee's union pursued an arbitration of the matter in which the arbitrator determined that the employee had been fired without cause. In reaching this decision, however, the arbitrator gave no weight to testimony from a criminal proceeding offered by the hotel in which the hotel guest detailed the employee's misconduct. The First Circuit found that the arbitrator's failure to give any weight to this testimony violated 9 U.S.C. § 10(a)(3), since the transcript of the testimony was relevant and the sole evidence available to establish the employee's culpability. In reaching this decision, the court noted that a federal court may vacate an arbitrator's award only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings," but cautioned that awards should not be set aside for failure to hear evidence that is cumulative or irrelevant. Id. at 40 (citing 9 U.S.C. § 10(c)).

Similarly, in Gulf Coast Indus. Workers Union v. Exxon Co., USA, 70 F.3d 847, 850 (5th Cir. 1995), the Fifth Circuit upheld a district court's order to vacate an arbitration award pursuant to 9 U.S.C. § 10(a)(3) based on the arbitrator's improper conduct in misleading a party as to the admission of certain pieces of key evidence. In Gulf Coast, an employee was terminated from Exxon for his possession of a marijuana cigarette on work premises and for his refusal to submit to a drug test. The employee's union challenged the termination and argued that just cause did not exist to terminate his employment. The arbitrator found in favor of the employee, determining that Exxon had failed to establish that the cigarette was actually marijuana. However, the arbitrator had prevented Exxon from presenting evidence regarding the chemical analysis of the cigarette, and misleadingly instructed Exxon that it had already entered the evidence regarding the makeup of the cigarette (and a related drug report) into the record. The Fifth Circuit affirmed the vacatur of the award, noting that the arbitrator both had refused to consider evidence of the employee's positive drug test, and prevented Exxon from presenting additional evidence by misleading Exxon into believing the evidence had been admitted into the record when it had not. Id. at 850.

Much more frequently, however, courts take a narrow view of the extent to which an arbitrator's failure to hear certain evidence can give rise to successful vacatur under 9 U.S.C. §

10(a)(3). The Third Circuit states that vacatur is warranted under this provision only where the arbitrator's refusal to hear testimony "'so affects the rights of a party that it may be said that he was deprived of a fair hearing.'" Century Indem. Co. v. Certain Underwriters at Lloyd's, London, subscribing to Retrocessional Agreement Nos. 950548, 950549, 950646, 584 F.3d 513, 557 (3d Cir. 2009) (quoting Teamsters Local 312 v. Matlack, Inc., 118 F. 3d 985, 995 (3d Cir. 1997)) (rejecting challenge to arbitration award on grounds that arbitration panel failed to consider extrinsic evidence to resolve ambiguities in a contract, since the panel had determined that the contract was clear and unambiguous and no resort to extrinsic evidence was needed). The D.C. Circuit has similarly noted that petitioners seeking to invoke 9 U.S.C. § 10(a)(3) must demonstrate that the excluded evidence was pertinent and material to the controversy, and that the exclusion of the evidence deprived the petitioners of a fundamentally fair hearing. See Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d 813, 817-18 (D.C. Cir. 2007) (rejecting challenge to arbitration award on evidentiary grounds where panel had decided not to hear testimony of a second expert on the workings of a computer program, given that the first expert had adequately provided evidence of those workings).

d. Vacatur for an Arbitrator Who Exceeds Her Power.

As noted above, Section 10(a)(4) of the Act, which focuses on an arbitrator's abuse of power, provides the most frequently cited reason for vacating an arbitration award. See Stephen L. Hayford, "Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards," 30 Ga. L. Rev. 731, 747-48 (1996). Because the inquiry under 9 U.S.C. § 10(a)(4) concerns itself with whether an arbitrator exceeded the scope of her powers as delegated to her by the parties' arbitration agreement, a court will examine the appropriateness of the award in light of the question presented by the arbitration, along with the arbitrator's reasoning in generating that award. Id. at 748; see also Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co., 44 F.3d 826, 830 (9th Cir. 1995) ("When arbitrators rule on a matter not submitted to them, or act outside the scope of the parties' contractual agreement, the award may be overturned because the arbitrators exceeded the scope of their authority."). However, litigants must keep in mind that Section 10(a)(4) of the Act does not empower a court to address the merits of an award. Medicine Shoppe Int'l, Inc. v. Turner Inv., Inc., 614 F.3d 485, 488 (8th Cir. 2010) ("Courts have no authority to reconsider the merits of an arbitration award, even when the parties allege that the award rests on factual errors or on a misinterpretation of the underlying contract.").

The Supreme Court recently discussed the scope of 9 U.S.C. § 10(a)(4) in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1768 (2010), a 5-3 decision in which the Court held that the imposition of class arbitration on parties who had not expressly agreed to class arbitration is inconsistent with FAA. In Stolt-Nielsen, a company that had contracted for shipping services with a shipping company brought a class action antitrust suit against the shipping company for price fixing. The parties eventually agreed that they were required to arbitrate the dispute, but differed as to whether the parties' arbitration agreement permitted class arbitration. They therefore submitted the class arbitration question to a panel of arbitrators. When the panel determined that the arbitration clause allowed for class arbitration, the shipping company moved to vacate this decision in district court, identifying 9 U.S.C. § 10(a)(4) as the statutory basis on which the panel's decision should be overturned. The District Court agreed with the shipping company and vacated the award upon concluding that the arbitrators' award

was made in "manifest disregard" of the law, reasoning that a proper choice of law analysis would have required the arbitrators to apply the rule of federal maritime law requiring contracts to be interpreted in light of custom and usage. The Second Circuit reversed the lower court, holding that, as the shipping company had cited no authority applying a maritime rule of custom and usage against class arbitration, the arbitrators' decision was not in manifest disregard of maritime law.

The Supreme Court reversed the Second Circuit, finding that the arbitration panel had coerced the parties into class arbitration even though the parties had expressly stated that no agreement on that issue had been reached. In reaching this decision, the Court noted that "an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration." Stolt-Nielsen, 130 S. Ct. at 1767-68. The dissenting opinion noted that the Court had addressed an issue that was not yet ripe for review and that the parties' agreement to submit the class question to the arbitration panel necessarily empowered the arbitrators to render a decision on that issue. Id. at 1777. The dissent also took issue with the majority's claim that the panel had imposed class arbitration on "policy" grounds, arguing that the panel instead had grounded its conclusion in New York law, federal maritime law, and decisions made by other panels pursuant to AAA's Supplementary Rules for Class Arbitrations. Id. at 1780.

B. The Questionable Viability of the Manifest Disregard of Law Doctrine

In addition to the foregoing statutory bases for vacatur of arbitration awards, courts have long recognized a common law basis by which an arbitration award may be vacated if the award is found to be in "manifest disregard for the law." This doctrine originated in the dictum of Wilko v. Swan, 346 U.S. 427 (1953) (*overruled on other grounds in* Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989)), and all Circuit Courts of Appeal have since recognized the doctrine in some fashion. As set forth in Wilko, the manifest disregard of law doctrine does not focus on an arbitrator's misinterpretation of the law, but rather on her disregard of the law. Thus, it is the arbitrator's failure to apply the law of which she is fully cognizant that becomes the subject of review and a potential basis for vacating an arbitration award. See, e.g., Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1178 (D.C. Cir. 1991) (noting that "manifest disregard" means "more than error or misunderstanding with respect to the law" and that the error in question "must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator" and found "if arbitrator understood and correctly stated the law but proceeded to ignore it.").

While the doctrine was well-established since Wilko, two recent Supreme Court decisions have cast doubt on its continued viability. See Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008), and Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010). In Hall Street Associates, a tenant won a bench trial to establish its right to terminate a lease with its landlord, and the parties thereafter agreed to arbitrate a related matter regarding indemnification of the costs of cleaning up the lease site. The parties' arbitration agreement required the reviewing district court to vacate, modify, or correct any award if the arbitrator's conclusions of law were erroneous. After the arbitrator decided in favor of the tenant, the district

court vacated the arbitrator's award for legal error, expressly invoking the agreement's legal-error review standard and citing the Ninth Circuit's decision in LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884, 889 (9th Cir. 1997), for the proposition that the FAA leaves the parties "free . . . to draft a contract that sets rules for arbitration and dictates an alternative standard of review." On remand to the arbitrator, the arbitrator reversed its earlier decision and ruled for the landlord, and the district court upheld the award and applied the parties' stipulated review standard. The Ninth Circuit reversed the lower court, holding that the case was controlled by its decision in Kyocera Corp. v. Prudential–Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003), which overruled LaPine on the ground that arbitration agreement terms that set the mode of judicial review are unenforceable since the FAA provides the exclusive grounds for vacatur. The Supreme Court agreed with the Ninth Circuit that the FAA's statutory grounds for vacatur (or modification) of an award were exclusive and that parties could not contract around them by fashioning a different standard of judicial review in an arbitration clause.

In the wake of the Supreme Court's holding that the FAA provides the exclusive grounds upon which an arbitration award can be vacated, it remains unclear as to whether the "manifest disregard of law doctrine" – which is not grounded in the FAA, but rather owes its existence to the dictum in Wilko – still survives as an independent basis for vacating awards. The Supreme Court did little to clarify the issue in Stolt-Nielsen. As noted in Section III(A)(1)(d), above, the Supreme Court in Stolt-Nielsen reversed the Second Circuit and held that an arbitration panel had improperly forced the parties into class arbitration, and that vacatur pursuant to 9 U.S.C. § 10(a)(4) was necessary. In discussing that provision, the Court included the following footnote:

> We do not decide whether "'manifest disregard'" survives our decision in Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 585, 128 S. Ct. 1396, 170 L.Ed.2d 254 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10. AnimalFeeds characterizes that standard as requiring a showing that the arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." Brief for Respondent 25 (internal quotation marks omitted). Assuming, *arguendo*, that such a standard applies, we find it satisfied for the reasons that follow.

Stolt-Nielsen, 130 S. Ct. at 1768, n.3.

Despite this lack of clear guidance from the Supreme Court on the continued validity of the doctrine, some Circuit Courts of Appeal continue to recognize the "manifest disregard" doctrine as a basis for vacatur. For example, the Second Circuit in Schwartz v. Merrill Lynch & Co., Inc., 665 F.3d 444, 452 (2d Cir. 2011), held that the manifest disregard doctrine had survived Hall Street Associates and Stolt-Nielsen. The Second Circuit noted that its formulation of the standard was consistent with the standard assumed *arguendo* by the Supreme Court in the Stolt-Nielsen footnote, and described that standard as involving a court's consideration of, first, whether the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable, and, second, whether the arbitrator knew about the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it. Id. at 452. In

contrast to the Second Circuit, the Eighth Circuit has concluded that Hall Street Associates means that "an arbitral award may be vacated only for the reasons enumerated in the FAA." Med. Shoppe Int'l, Inc. v. Turner Inv., Inc., 614 F.3d 485, 489 (8th Cir. 2010) (rejecting argument that arbitrator disregarded the law, since, in light of Hall Street Associates, "[i]n the absence of an enumerated ground for vacation of the arbitrator's order, we decline to review the merits of his conclusions"). Thus, practitioners seeking bases upon which an arbitration award may be vacated should explore this issue further and determine which courts continue to recognize the "manifest disregard of law" doctrine.

IV. THE FAA AND THE SCOPE OF DISCOVERY IN ARBITRATION PROCEEDINGS

The previous sections have focused on the applicability of the FAA to employment disputes and the grounds on which an adverse arbitration award can be vacated. Prevailing in any arbitration, however, can hinge on a parties' access to relevant evidence in advance of the arbitration hearing. Thus, a pivotal issue in any arbitration is the scope of prehearing discovery afforded by the arbitrator to the parties. As a general matter, discovery in arbitration is far more limited than in federal or state court litigation. This is because the relatively robust pretrial discovery available to litigants in federal and state courts arguably conflicts with the central purpose of arbitration, since permitting significant discovery would make arbitration more expensive and less efficient. The scope of discovery in arbitration is governed by the parties' arbitration agreement and/or the arbitrator's discretion. Restricted discovery can be especially disadvantageous to employment discrimination plaintiffs and whistleblowers, since such cases necessarily turn on issues of motive and intent, and are increasingly document-intensive cases that can necessitate numerous depositions. From an employer's perspective, limited discovery can minimize the costs of frivolous claims, since they will not be forced to engage in full bore discovery before they can file dispositive motions to dispose of a given claim.

A. Subpoenas

The FAA includes only one provision relating to the parties' ability to secure relevant evidence and/or testimony. See 9 U.S.C. § 7. This provision pertains to the arbitrator's power to subpoena witnesses for the arbitration hearing and to compel the witness to bring relevant documents with them, and therefore does not bear on prehearing discovery. The provision states:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or

> punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7.

While this provision is expansively written and permits the arbitrator to subpoena "any person," the scope of the arbitrator's power to subpoena witnesses is arguably limited, however, because Rule 45 of the Federal Rules of Civil Procedure only authorizes a court to enforce an arbitrator's subpoena within its territorial jurisdiction. Specifically, Rule 45 (subsections (b) and (c)) limits a district court's subpoena enforcement power to an area equivalent either to within 100 miles of the courthouse, or within the state in which the hearing is being conducted. However, Section 7 of the FAA requires a litigant seeking to enforce an arbitration subpoena to file the petition for enforcement in the district court in which the arbitrator(s) sits, regardless of where the witness in question resides. Thus, a conflict can arise if a witness resides outside of the Rule 45 territorial reach of the district court in which the arbitrator sits, as that witness cannot be compelled to attend the hearing (since Rule 45 does not permit that court to compel the witness's attendance as it would exceed the court's territorial reach). Courts have reached varying conclusions on this issue, and the issue remains unresolved. Compare Legion Ins. Co. v. John Hancock Mut. Life Ins. Co., 33 F. App'x 26, 28 (3d Cir. 2002) ("In light of the territorial limits imposed by Rule 45 upon the service of subpoenas, we conclude that the District Court did not commit error in denying John Hancock's motion to enforce the arbitration subpoena against SCIS, which, as a nonparty located in Florida, lies beyond the scope of the court's subpoena enforcement powers."), with In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 872 (8th Cir. 2000) ("Whether or not Transamerica is correct in insisting that a subpoena for witness testimony must comply with Rule 45, we do not believe an order for the production of documents requires compliance with Rule 45(b)(2)'s territorial limit. This is because the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel.").

B. The FAA and Prehearing Discovery

Circuit Courts of Appeal have differed as to whether Section 7 of the Act authorizes arbitrators to compel *pre-hearing* document discovery from third-party entities. The Eighth Circuit has held that "that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing." In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 870-71 (8th Cir. 2000). However, the Third Circuit addressed 9 U.S.C. § 7 and came to the opposite conclusion:

> The only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party "to attend before them or any of them as a witness *and* in a proper case *to bring with him or them* any book, record, document or paper which may be deemed material as evidence in the case." 9 U.S.C. § 7(emphasis added). The power to require a non-party "to bring" items "with him" clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the

> items are simply sent or brought by a courier. In addition, the use of the word "and" makes it clear that a non-party may be compelled "to bring" items "with him" only when the non-party is summoned "to attend before [the arbitrator] as a witness." Thus, Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.

Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004). The Second Circuit agreed with this rationale in Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 212 (2d Cir. 2008), and held that the FAA does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding. However, the Fourth Circuit has taken a middle path and determined that a party can compel pre-hearing discovery for third party documents upon a showing of "special need or hardship," which requires, at a minimum, that the party show that the information it seeks is otherwise unavailable. COMSAT Corp. v. Nat'l Science Found., 190 F.3d 269, 276-77 (4th Cir. 1999).

It is also worth noting that some states have adopted versions of the Uniform Arbitration Act, which differs from the Federal Arbitration Act, and these state statutes explicitly grant arbitrators the power to issue pre-hearing document production subpoenas on third parties. See, e.g., 10 Del. Code § 5708(a) ("The arbitrators may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts, and all other documents and evidence, and shall have the power to administer oaths."); 42 Pa. C.S.A. § 7309 ("The arbitrators may issue subpoenas in the form prescribed by general rules for the attendance of witnesses and for the production of books, records, documents and other evidence.").

Other than Section 7 of the Act, the FAA does not address prehearing discovery between the parties to an arbitration. Instead, the scope of discovery in arbitration is governed by the parties' arbitration agreement and the arbitrator's authority to grant or withhold discovery. Owing to the substantial discretion conferred on arbitrators to conduct discovery matters, the American Arbitration Association ("AAA") rules on discovery are relatively vague and give an arbitrator wide latitude to fashion the scope of discovery as they see fit. For example, the AAA rules for arbitrating employment matters provide:

> The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.
>
> The AAA does not require notice of discovery-related matters and communications unless a dispute arises. At that time, the parties should notify the AAA of the dispute so that it may be presented to the arbitrator for determination.

AAA Employment Arbitration Rules and Mediation Procedures, Rule 9 (Nov. 1, 2009).

V. RETROACTIVE EFFECT OF THE DODD-FRANK ACT'S BAN ON PREDISPUTE ARBITRATION AGREEMENTS

As described more fully above, the Supreme Court has interpreted the FAA, in conjunction with the Supremacy Clause of the U.S. Constitution, to preempt state law purporting to invalidate predispute arbitration agreements. See Southland, 465 U.S. at 16 ("In creating a substantive rule applicable in state as well as federal courts, Congress intended [the FAA] to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."). Obviously, the conflict between state anti-arbitration statutes and the FAA does not exist where the anti-arbitration policy at issue is set forth in federal law. This is the case with the Sarbanes-Oxley Act ("SOX") anti-retaliation provision, 18 U.S.C. § 1514A, in which Congress prohibited predispute arbitration clauses.

In 2010, Congress passed the Wall Street Reform and Consumer Protection Act – popularly known as the Dodd-Frank Act – to address the root causes of the financial sector collapse of 2008. As a component of its comprehensive framework to ensure corporate accountability and compliance, the Dodd-Frank Act strengthened and created numerous whistleblower protections. As one component of the strengthening of these protections, Section 922 of the Dodd-Frank Act excludes SOX whistleblower claims from the reach of pre-dispute arbitration agreements. See 18 U.S.C. §§ 1514A(e) The U.S. Department of Labor Administrative Review Board and some courts have addressed the issue of the retroactive effect of Dodd-Frank's ban on arbitration of SOX claims, often reaching conflicting decisions on the issue. Compare Taylor v. Fannie Mae, 839 F. Supp. 2d 259, (D.D.C. 2012) (holding arbitration ban does not apply retroactively) and Blackwell v. Bank of America Corp., No. 7:11-2475, 2012 WL 1229673, at *3 (D.S.C. Mar. 22, 2012) (same) with Pezza v. Investors Capital Corp., 767 F. Supp. 2d 225 (D. Mass. 2011) (applying ban retroactively) and Wong v. CKX, Inc., --- F. Supp. 2d ---, No. 2012 WL 3893609, 2012 WL 3893609 (S.D.N.Y. Sept. 10, 2012) (same).

Each court has evaluated the question of retroactive effect according to the framework established by the Supreme Court in Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37-38 (2006) and Landgraf v. USI Film Prods., 511 U.S. 244, 271 (1994). Under Fernandez and Landsgraf, in the absence of an express statement of Congressional intent, a court applies the normal rules of statutory construction to infer the intent of Congress as to the statute's temporal reach. If Congress' intent is unclear, the court then inquires "whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment." Id. If so, the court applies the presumption against retroactivity. All courts that have addressed the issue have determined that Congress did not state any express intent regarding the retroactive application of the pre-dispute arbitration provision and that Congress' intent with respect to the ban's retroactivity is unclear. Courts disagree, however, about whether retroactive application of the pre-dispute arbitration ban would affect the substantive rights of the parties – prohibiting retroactive application – or if it would affect procedural rights, in which case retroactive application is acceptable under Landsgraf.

In Pezza v. Investors, the first case to address the issue, the court held that the provision voiding pre-dispute arbitration bans, as applied to SOX whistleblower claims, applied

retroactively. 767 F. Supp. 2d at 233-34. The Pezza court acknowledged that Section 922 affected contractual and property rights because it would effectively void a contractual provision agreed upon by the parties in the employment agreement, and conceded that the presumption against retroactivity would usually apply in such instances because these statutes related to "matters in which predictability and stability are of prime importance." Id. at 233 (quoting Landgraf, 511 U.S. at 271 (1994)). However, the court determined that retroactive application was nonetheless appropriate because the arbitration ban was essentially a jurisdictional statute. Id. The court explained that the parties did not claim that the choice of venue – the Financial Industry Regulatory Authority or a court – would affect the substantive result of the case, and thus "conclude[d] that Section 922 of the Act should also be applied to conduct that arose prior to its enactment." Id.

Like Pezza, the court in Wong v. CKX, Inc., --- F. Supp. 2d ---, 2012 WL 3893609 (S.D.N.Y. Sept. 10, 2012) concluded that while that retroactive application of the arbitration ban could fall within the category of cases that affect contractual and property rights, it "more appropriately falls within the second category because it . . . 'principally concerns the type of jurisdictional statute envisioned in Landsgraf,' and does not affect the substantive rights of either party." Id. at *9 (internal citation omitted). Wong relied on precedent from the Supreme Court that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute[,]" but rather submits "their resolution to an arbitral, rather than judicial forum." Id. At 9 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).

Pezza and Wong are now outnumbered by decisions holding that a retroactive application of the pre-dispute arbitration ban would affect the parties' substantive, rather than procedural rights, and is therefore improper. In Taylor v. Fannie Mae, one of the only published cases on the issue, the court emphasized that, at the time the plaintiff signed the dispute resolution policy in 2010, "the parties had the right to contract for the arbitration of Sarbanes-Oxley claims. 839 F. Supp. 2d at 263. Further, the agreement the plaintiff signed specifically provided that the arbitration clause applied to all claims associated with legally protected rights that directly or indirectly related to the termination of his employment. Id. The court thus "fail[ed] to see how a retroactive application would not impair the parties' rights possessed when they acted." Id.

The Henderson court likewise held that the Dodd-Frank Act's provision was not retroactive, disagreeing with the Pezza court's conclusion that retroactive application of Section 922 affected only the conferral of jurisdiction and not substantive contract rights. 2011 WL 3022535, at *3-4. Instead, the Nevada court found, the "retroactive application of Dodd-Frank's SOX provisions would not merely affect the jurisdictional location in which such claims could be brought; it would fundamentally interfere with the parties' contractual rights and would impair the 'predictability and stability' or their earlier agreement." Id. In contrast to Wong's reliance on Mitsubishi Motors, Henderson emphasized that the Supreme Court "has explicitly indicated on numerous occasions that the right of parties to agree to arbitration is a contractual matter governed by contract law." Id. at *4 (citing AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)); see also Blackwell, 2012 WL 1229673, at *2 (quoting same).

VI. PRACTICAL CONSIDERATIONS IN ARBITRATION

Arbitration has the intrinsic appeal of providing parties to a dispute with a cost-effective and efficient method of resolution. As with any form of dispute resolution, however, there are drawbacks to the arbitration process. Some of the most common issues for consideration in assessing the value of arbitration for a given dispute are as follows:

- An arbitrator's time costs money. Unlike state or federal judges, arbitrators typically charge on an hourly basis for time spent on an arbitration, and some arbitrators can charge rates of up to $1,000 per hour. If the matter is especially discovery intensive and/or involves significant dispositive motions practice, which has become more common, the time spent by an arbitrator in addressing these issues can equate to large fees. On the other hand, the mounting costs associated with the time an arbitrator will spend addressing these issues can push parties to dispense with arguably meritless and/or harassing motions practice, since the parties may be paying the arbitrator's fees as well as attorneys' fees.

- As a general rule, discovery is far more limited in arbitration than in state or federal court. While depositions are generally available to parties in arbitration, it is much more likely that only a handful of depositions, at most, will be granted to a requesting party (compared to the ten depositions granted to a party as a matter of right in FRCP 30). This limitation on the number of depositions can be an excellent source of cost-savings for the parties, since depositions are one of the most expensive aspects of litigation. At the same time, a party seeking to prove their case or defend against an action can find themselves unable to gather critical information (or lock an opposing party into their story before the hearing), which, in employment cases that frequently turn on motive or intent, can have significant impact on a party's chance to prevail.

- An arbitration hearing is less formal in many respects. The hearing is not conducted in a courtroom, there are often no court reporters, and witnesses need not be sworn in. Arbitration typically dispenses with the formal rules of evidence, which serves to speed up the process and encourages the admission of all relevant evidence. However, this also results in the admission of evidence that would normally be excluded as not "trustworthy" – e.g., issues of hearsay or foundation – and may thereby undermine a party's ability to effectively challenge questionable evidence. In general, the informality of the proceedings puts the parties, the witnesses, and even the attorneys at ease and often results in a more efficient and less adversarial atmosphere.

- Arbitration proceedings and the award are private and can be kept confidential by agreement of the parties. Keeping a dispute out of the public eye or out of the press can have significant advantages, for both individuals and for institutions (although the public nature of a court filing or trial will often motivate a party to resolve a case more quickly). An otherwise confidential arbitration may become

public to some degree, however, as a result of a motion to confirm or vacate an award, but such disclosure will typically be far less than what would be available to the public in litigation with electronic case filings.

- The arbitrator's award is unlikely to be vacated or modified by a court. The finality of such a ruling is appealing for reasons of time and cost, but may prove frustrating to the party on the losing side of an arbitration award who believes the arbitrator clearly "got it wrong."

- The pros and cons of arbitration versus litigation often depend on what kind of dispute it is, and on which side of that dispute a party sits. Arbitration was originally contemplated for and is uniquely well suited to business-to-business disputes where extensive motions practice and discovery are unnecessary and a resolution can be arrived at fairly and efficiently without resort to a lengthy court process. Judicial enforcement of arbitration provisions in contracts governing employees and consumers, however, has changed that dynamic, as such cases arguably necessitate more discovery and result in longer, more contentions arbitration proceedings that more closely mimic court proceedings. The resulting "spillover" of these practices into the business-to-business arena has caused concern by business users regarding the rising cost and decreased efficiency of arbitration.