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Arbitration

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I. [20.1] INTRODUCTION

Arbitration is a form of alternative dispute resolution (ADR) resulting in awards that bind the disputing parties. Arbitration is an alternative to litigation. In arbitration, as in litigation, a neutral third party issues a binding and enforceable decision to resolve disputes the parties could not settle. Arbitration awards are in some ways similar to, and can be converted into and enforced like, court judgments. Final arbitration awards generally have “the same *res judicata* and collateral estoppel effect as court judgments.” *Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2016 IL App (1st) 142754, ¶73, 59 N.E.3d 41, 405 Ill.Dec. 748, quoting *Peregrine Financial Group, Inc. v. Martinez*, 305 Ill.App.3d 571, 712 N.E.2d 861, 867, 238 Ill.Dec. 757 (1st Dist. 1999). Arbitration differs from nonbinding forms of ADR, such as mediation, neutral evaluation, and step negotiations, which are essentially voluntary processes intended to facilitate negotiated settlements between disputing parties.

“[C]ontractual agreements to submit disputes to arbitration are favored as a matter of both state and federal law.” *Zuniga v. Major League Baseball*, 2021 IL App (1st) 201264, ¶13, 196 N.E.3d 12, 457 Ill.Dec. 888. The Illinois Supreme Court has characterized arbitration as “an effective, expeditious, and cost-efficient method of dispute resolution.” *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 731, 260 Ill.Dec. 541 (2001); *Portage Park Capital, LLC v. A.L.L. Masonry Construction Co.*, 2024 IL App (1st) 240344, ¶14, 258 N.E.3d 35, 482 Ill.Dec. 544. Illinois public policy favors arbitration because it “promotes the economical and efficient resolution of disputes.” *Phoenix Insurance Co. v. Rosen*, 242 Ill.2d 48, 949 N.E.2d 639, 647, 350 Ill.Dec. 847 (2011), citing *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill.2d 435, 530 N.E.2d 439, 443, 125 Ill.Dec. 281 (1988) (legislative policy favors agreements to arbitrate future disputes). The prevailing Illinois and federal statutes that govern and favor arbitration represent a major departure from early 20th century judicial decisions that were hostile to arbitration. These decisions reasoned that agreements to arbitrate future disputes were invalid because they infringed on parties’ constitutional right to access the courts. *See, e.g., Cocalis v. Nazlides*, 308 Ill. 152, 139 N.E. 95, 98 – 99 (1923).

Arbitration is governed by the agreement of the disputing parties. Whether a dispute is subject to arbitration depends on the parties’ arbitration agreement. “[P]arties who execute a contract containing a valid arbitration clause are irrevocably committed to arbitrate all disputes clearly arising under the agreement.” *Timmerman v. Grain Exchange, LLC*, 394 Ill.App.3d 189, 915 N.E.2d 113, 119, 333 Ill.Dec. 592 (5th Dist. 2009), quoting *TDE Ltd. v. Israel*, 185 Ill.App.3d 1059, 541 N.E.2d 1281, 1284, 133 Ill.Dec. 843 (1st Dist. 1989). Parties may mutually agree to waive an arbitration agreement and use litigation to resolve a dispute. However, as discussed in more detail in §20.19 below, if one party to a valid arbitration agreement wishes to arbitrate a dispute that falls within the agreement’s scope, courts must stay litigation and compel arbitration, even over the other party’s objection. If the parties have no valid agreement to arbitrate, or if a dispute falls outside of an arbitration agreement’s scope, a motion to compel arbitration may be denied on the grounds that the dispute is not “arbitrable.” And a court may vacate an arbitration award if it determines that an arbitration was wrongfully allowed to proceed.

Arbitration has several advantages over litigation. First, it enables parties to use expert decision-makers familiar with construction industry norms to resolve their disputes. Construction

arbitrators are typically knowledgeable about construction law and practice and are more likely to produce high-quality decisions than most judges. Further, the parties' contractual agreements or applicable agency rules guide the arbitrator selection process and determine the identity and number of arbitrators who will resolve the dispute. Because the parties have consented to arbitration and they play a role in arbitrator selection, there is an assumption that the parties have "bought in" to the process and therefore will accept the results of the arbitration.

Arbitration can be less time-consuming and more cost efficient than litigation. Parties can streamline the process leading to an arbitration hearing, and the hearing itself can be streamlined. Unlike litigation, arbitration does not rely on strict rules of evidence or civil procedure. And discovery in arbitration, while typically permitted, is usually much more limited than discovery in trial court proceedings. While depositions are common in the arbitration of large-dollar or complex disputes, attorneys are rarely permitted to take as many depositions as they would in litigation. Arbitration relies more heavily on collaborative document exchange and sharing expert witness reports to prepare for arbitration hearings.

Arbitration awards are more "final" than trial court judgments, which can be readily appealed on the merits. Once an arbitration award is confirmed through streamlined judicial processes, it is enforceable as a court judgment. Unlike a trial court judgment, however, an arbitration award typically cannot be appealed for a review on the merits of the arbitrator's decision. A party may ask a court to vacate an arbitration award only on narrow and statutorily prescribed grounds. See 710 ILCS 5/12; 9 U.S.C. §10.

Privately administered arbitration proceedings are also more confidential than most court proceedings. While many judicial filings are publicly available, private arbitration proceedings are generally confidential. Agreements to arbitrate and the rules of agencies that administer arbitrations can also require parties to keep an arbitration award confidential. However, a court proceeding to attack or enforce an arbitration award generally is not confidential.

Arbitration law can be complex. Arbitration of construction disputes may be subject to various statutory authorities, including the Illinois Uniform Arbitration Act (Illinois Act), 710 ILCS 5/1, *et seq.*, and the Federal Arbitration Act (FAA), ch. 392, §1, 61 Stat. 669 (1947). These statutes can apply in both state and federal courts. Agreements to arbitrate are contractual, so the common law of contracts can resolve some questions concerning whether the parties have agreed to submit a particular dispute to arbitration. Sometimes courts resolve threshold questions of arbitrability; in other cases, judges refer that determination to arbitrators. Because federal law can preempt inconsistent state law, federal caselaw addressing who decides whether a case is arbitrable, and on what grounds, can apply. The U.S. Supreme Court and other federal courts have issued many opinions on nuanced and complex issues of arbitrability, which sometimes bind state courts. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 154 L.E.2d 491, 123 S.Ct. 588, 591 – 592 (2002) (recognizing that there exists linguistic confusion over term "arbitrability" and meaning of phrase "question of arbitrability"). Arbitration jurisprudence is ever evolving at both the state and federal level with many thousands of decisions. Readers are cautioned to closely examine all state and federal caselaw that might be germane to client arbitration matters before giving legal advice. Due to the sheer volume of arbitral caselaw, this chapter does not, nor could it, provide comprehensive coverage and analysis of even topics within the scope of this chapter.

Arbitration law also concerns many issues that are beyond the scope of this chapter. Examples include international arbitration; enforcement of foreign arbitration awards; arbitration and class actions; arbitrating statutory rights, including claims under consumer protection acts, claims under the Uniform Commercial Code, mechanics lien claims, statutory warranty claims, and claims under payment and performance bond statutes; arbitration clauses in adhesion contracts; arbitrating with public authorities and the role of sovereign immunity in arbitration; arbitrating tort claims, including claims for contribution and indemnity; and Bankruptcy Code invalidation of arbitration agreements. Other examples include statute of limitation challenges; disputes about arbitration hearing locale; out-of-state lawyers participating in arbitration; arbitrator disclosure obligations; court intervention in arbitrator selection; post-award discovery in motions to vacate; res judicata and collateral estoppel; specific state law defenses to enforcement of arbitration agreements; and assessing fees and costs in arbitration awards. For a thorough examination of these and other unique arbitration law issues, see 8 Philip Lane Bruner and Patrick J. O'Connor, BRUNER & O'CONNOR ON CONSTRUCTION LAW, Ch. 21 (2024 – 2025).

A. [20.2] Party Agreement Required

Arbitration requires party agreement to arbitrate the disputed issues. “A nonsignatory to a contract typically has no right to invoke an arbitration provision contained in that contract.” *Sosa v. Onfido, Inc.*, 8 F.4th 631, 639 (7th Cir. 2021). “It is a fundamental tenet of Illinois law that the parties are bound to arbitrate only those issues they have clearly agreed to arbitrate.” *Guarantee Trust Life Insurance Co. v. Platinum Supplemental Insurance, Inc.*, 2016 IL App (1st) 161612, ¶27, 68 N.E.3d 481, 409 Ill.Dec. 628, *appeal denied*, 80 N.E.3d 2 (2017), quoting *Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App (2d) 141160, ¶19, 32 N.E.3d 80, 392 Ill.Dec. 80. *See Keeley & Sons, Inc. v. Zurich American Insurance Co.*, 409 Ill.App.3d 515, 947 N.E.2d 876, 881, 349 Ill.Dec. 862 (5th Dist. 2011); *Clark v. Foresight Energy, LLC*, 2023 IL App (5th) 230346, ¶25, 228 N.E.3d 988, 471 Ill.Dec. 479. Subject to some exceptions, the general rule is that “parties to an agreement are bound to arbitrate only those issues they have agreed to arbitrate, as shown by the clear language of the agreement and their intentions expressed in that language.” *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 731, 260 Ill.Dec. 541 (2001). *See generally Hartz v. Brehm Preparatory School, Inc.*, 2021 IL App (5th) 190327, ¶41, 183 N.E.3d 172, 451 Ill.Dec. 126 (“arbitration agreement[s] will not be extended by construction or implication”); *Harris v. Run the Call, Inc.*, 2020 IL App (1st) 191215-U, ¶28 (affirming motion to stay arbitration regarding dispute over vested shares because “[e]ven under the broadest reading of the arbitration clause, it still refers only to Harris’ unvested shares, and we will not force a wider interpretation”). Parties frequently disagree about whether a particular claim falls within the scope of a predispute agreement to arbitrate. Parties also challenge whether the contracts that contain arbitration clauses, or the clauses themselves, are valid and enforceable.

Courts will sometimes imply that parties have agreed to arbitrate, even without a party’s signature or other explicit approval of an arbitration agreement. For example, one contract may incorporate by reference an arbitration provision in another document. In *Bricklayers Local 8 of Illinois v. Western Waterproofing Co.*, No. 21-cv-3273, 2023 WL 2652235 (C.D.Ill. Mar. 27, 2023), an FAA decision, a construction company was compelled to arbitrate under the dispute resolution procedures of a collective-bargaining agreement, which the company had not signed, because the company agreed to a project labor agreement that incorporated by reference the

collective-bargaining agreement. *See also Shaw v. First Communications, LLC*, No. 19-cv-08070, 2021 WL 131433, *9 (N.D.Ill. Jan. 14, 2021) (language of employment agreements supports incorporation of its arbitration provision into a separation agreement); *ValuePart, Inc. v. Farquhar*, Case No. 14-cv-3004, 2014 WL 4923179, *9 (N.D.Ill. Sept. 29, 2014) (granting motion to compel arbitration when three agreements, only one of which selected arbitration, all cover same subject matter, *i.e.*, movant’s employment); *Ferenc v. Brenner*, 927 F.Supp.2d 537, 544 (N.D.Ill. 2013) (agreement with “broad arbitration clause” creates “a general framework for all of the parties’ transactions”); *Gore v. Alltel Communications, LLC*, 666 F.3d 1027, 1035 (7th Cir. 2012) (breach of contract claim alleging breaches over period spanned by two separate agreements, only one with arbitration clause, subject to arbitration); *Turner Construction Co. v. Midwest Curtainwalls, Inc.*, 187 Ill.App.3d 417, 543 N.E.2d 249, 251, 135 Ill.Dec. 14 (1st Dist. 1989) (ambiguous language in subcontract was to be interpreted as incorporating arbitration clause contract between owner and contractor). However, Illinois courts have also reached different outcomes when construing disputes that involve multiple agreements. In *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 664 (7th Cir. 2002), the court found that an arbitration clause in an employment agreement between the seller and the buyer of his business did not cover the seller’s claims against the buyer under the parties’ separate acquisition agreement, as the arbitration clause, by its express language, applied to disputes under the employment agreement but not acquisition issues.

Law on the question of whether non-signatories can be compelled to arbitrate has developed around general principles and, in some cases, exceptions to those the general rules. The U.S. Supreme Court has noted, for example, that under the FAA “arbitration agreements may be enforced by nonsignatories through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.” [Internal quotation marks omitted.] *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 207 L.Ed.2d 1, 140 S.Ct. 1637, 1643 – 1644 (2020). In *Dr. Robert L. Meinders, D.C., Ltd. v. United Healthcare Services*, 7 F.4th 555, 562 (7th Cir. 2021), the Seventh Circuit noted that there are “several ‘contract-based doctrines through which a nonsignatory may be bound by an arbitration agreement entered into by others: (1) assumption; (2) agency; (3) estoppel; (4) veil piercing; and (5) incorporation by reference.’ ” Quoting *Dr. Robert L. Meinders, D.C., Ltd. v. UnitedHealthcare, Inc.*, 800 F.3d 853, 857 (7th Cir. 2015). Illinois law is similar. Traditional state law principles, including “assumption, agency, veil piercing, alter ego, waiver, estoppel, third-party beneficiary, and incorporation by reference,” can lead to enforcement of arbitration agreements against non-signatories. *Warciak v. Subway Restaurants, Inc.*, 880 F.3d 870, 872 (7th Cir. 2018). *See also In re Dealer Management Systems Antitrust Litigation*, 362 F.Supp.3d 510, 527 (N.D.Ill. 2019) (“[s]tate law governs who is bound by agreements to arbitrate”). These multiple bases to enforce arbitration agreements against non-signatories under state and federal law have spawned state and federal jurisprudence too numerous to address in detail this chapter.

One clear way for a non-signatory to be bound to an agreement to arbitrate is when the non-signatory’s agent agrees on the principal’s behalf to arbitrate. *Parker v. Symphony of Evanston Healthcare, LLC*, 2023 IL App (1st) 220391, ¶26, 220 N.E.3d 455, 468 Ill.Dec. 147 (recognizing agent’s actual authority, express or implied, can bind agent’s principal to arbitration agreement).

In *Sosa v. Onfido, Inc.*, 8 F.4th 631, 639 (7th Cir. 2021), the Seventh Circuit discussed when an arbitration clause can be invoked by a non-signatory, as a third-party beneficiary, given the

“strong presumption against conferring contractual benefits on noncontracting third parties” under Illinois law. Quoting *Marque Medicos Farnsworth, LLC v. Liberty Mutual Insurance Co.*, 2018 IL App (1st) 163351, ¶12, 117 N.E.3d 1155, 427 Ill.Dec. 218. According to the *Sosa* court, “[t]o overcome that presumption, ‘the implication that the contract applies to third parties must be so strong as to be practically an express declaration.’ ” 8 F.4th at 639, quoting *155 Harbor Drive Condominium Ass’n v. Harbor Point Inc.*, 209 Ill.App.3d 631, 568 N.E.2d 365, 375, 154 Ill.Dec. 365. “It is not enough to show that the ‘parties know, expect, or even intend that others will benefit from the agreement.’ ” 8 F.4th at 639, quoting *Marque, supra*, 2018 IL App (1st) 163351 at ¶12. The intention that a nonparty should qualify as a third-party beneficiary “must be shown by an express provision in the contract identifying the third-party beneficiary by name or by description of a class to which the third party belongs.” 8 F.4th at 639, quoting *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill.App.3d 1017, 905 N.E.2d 920, 924, 329 Ill.Dec. 82 (3d Dist. 2009). While newer, *Sosa* is often cited by Illinois federal courts. See *Moomaw v. GeoSnapShot PTY LTD*, Case No. 3:23-cv-1321-DWD, 2025 WL 870319 (S.D.Ill. Mar. 20, 2024) (whether non-signatory can enforce arbitration agreement is question of contract formation to be decided by court), citing *Sosa, supra*. See *Matricciani v. American Homeowner Preservation, Inc.*, 718 F.Supp.3d 825, 840 – 844 (N.D.Ill. 2024), and *Al-Nahhas v. Rosebud Lending LZO*, No. 22-cv-750, 2023 WL 5509320, **8 – 10 (N.D.Ill. Aug. 25, 2023), both citing *Sosa*, considering third-party beneficiary, agency, and equitable estoppel alleged bases to compel arbitration. See also *Walker v. Walgreens Specialty Pharmacy, LLC*, No. 21 CV 5780, 2023 WL 5334609, *11 (N.D.Ill. Aug. 18, 2023) (considering third-party beneficiary bases for motion to compel arbitration), citing *Sosa, supra*.

In *Coatney v. Ancestry.com DNA, LLC*, 93 F.4th 1014 (7th Cir. 2024), an FAA decision, children whose guardians activated DNA test kits through their accounts on behalf of the children were not bound to arbitrate their claims under an agreement signed by their guardians because the agreement lacked language binding children to the terms, the children lacked knowledge of the terms, and finding direct benefits estoppel did not apply. The *Coatney* court, citing *Sosa*, described third-party beneficiary arguments as a basis to invoke arbitration as “shaky legal ground.” 93 F.4th at 1021. But see *Angelilli v. Activision Blizzard, Inc.*, No. 23-cv-16566, 2025 WL 524276, *12 (N.D.Ill. Feb. 18, 2025) (unlike *Coatney*, in which contract language was directed towards parents, here arbitration agreements were signed by parents when activating gaming accounts on behalf of and for their children, making children third-party beneficiaries and, hence, subject to arbitration agreement).

Illinois state courts have considered who has third-party beneficiary status, and who may compel arbitration, along similar lines as the *Sosa* decision. See *Washington v. Persona Identities, Inc.*, 2024 IL App (3d) 240210, ¶25, 254 N.E.3d 394, 481 Ill.Dec. 111 (3d Dist. 2024) (only intended third-party beneficiary, not incidental one, may enforce arbitration agreement).

Caselaw around whether a non-signatory can be compelled to arbitrate implicates a variety of factual and legal questions, including under state law concepts like assumption and estoppel. In *Dr. Robert L. Meinders, D.C., Ltd. v. United Healthcare Services, Inc.*, 7 F.4th 555 (7th Cir. 2021), a doctor who filed suit against a healthcare provider was compelled to arbitrate under an agreement between the doctor and the provider’s predecessor, even though the defendant provider was a non-signatory to that agreement, because the court found that the provider had assumed and was performing the signatory’s obligations under that agreement. In *Hensiek v. Board of Directors of*

Casino Queen Holding Co., 514 F.Supp.3d 1045, 1054 (S.D.Ill. 2021), an FAA decision, the court considered whether non-signatory employees can be forced to arbitrate due to an arbitration clause in an amendment to an employee stock ownership plan. The court observed that while “[t]he general rule is that non-signatories are not bound to arbitration agreements,” there are exceptions, and courts “will enforce an arbitration agreement against a non-signatory if the party seeking to compel arbitration can show that an exception to this general rule applies.” *Id.*, quoting *A.D. v. Credit One Bank, N.A.*, 885 F.3d 1054, 1060 (7th Cir. 2018). One such exception, which derives from estoppel, can be potentially found when the party seeking to enforce arbitration against a non-signatory can show the non-signatory derived a “direct benefit” from the contract containing an arbitration clause. *Id.* In denying a motion to compel arbitration on estoppel grounds, the *Hensiek* court noted that Illinois law requires contract amendments to be supported by consideration, and in that case, consideration was lacking because the non-signatory employees derived no “direct benefit” from the amendment. *Id.* Other federal courts sitting in Illinois have resolved equitable estoppel questions similarly, though on different grounds. *See generally Dealer Management Systems, supra*, 362 F.Supp.3d at 487 (no equitable estoppel because party seeking to enforce arbitration could not prove detrimental reliance, requirement for compelling arbitration on estoppel grounds); *Warciak, supra*, 880 F.3d at 873 (no detrimental reliance, so party seeking to compel arbitration cannot force arbitration on promissory estoppel grounds). In *MMIE, LLC v. Synectics Media, Inc.*, Case No. 20-cv-3874, 2021 WL 2645570 (N.D.Ill. June 28, 2021), the court permitted a non-signatory to defensively invoke an arbitration clause, based on equitable estoppel, when the claims against it were sufficiently intertwined with the contractual obligations of the signatories to the arbitration clause, particularly as one signatory had a particularly close relationship with the non-signatory, and misrepresentations were made during meetings attended by all the parties.

Illinois state court jurisprudence on estoppel as a basis to compel arbitration continues to develop, but not necessarily in a manner consistent with federal courts’ decisions on estoppel. A few months before this chapter was updated, in *Schultz v. Sinav Ltd.*, 2024 IL App (4th) 230366, ¶146, 248 N.E.3d 10, 478 Ill.Dec. 712, the court reasoned that the “Illinois Supreme Court has squarely rejected the theory of arbitration by estoppel, stating that ‘under basic principles of contract law, only parties to the arbitration contract may compel arbitration or be compelled to arbitrate.’ ” Quoting *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, ¶55, 976 N.E.2d 344, 364 Ill.Dec. 66. The court emphasized that under Illinois common law, only parties to an arbitration agreement can enforce or be bound by its terms. *Schultz, supra*, 2024 IL App (4th) 230366 at ¶146. *But see Peterson v. Devita*, 2023 IL App (1st) 230356, ¶¶45 – 47, 237 N.E.3d 1010, 474 Ill.Dec. 825 (affirmed denial of defendant’s motion to compel arbitration on equitable estoppel grounds because plaintiff’s “causes of action do not rely” on contract containing arbitration agreement and thus “direct benefits estoppel theory” does not apply).

Ultimately, parties are typically not ordered to arbitrate absent some factual or contractual basis implying their consent to arbitrate. *See Woodard v. SmartMatch Insurance Agency, LLC*, No. 23 CV 5246, 2024 WL 4252803 (N.D.Ill. Sep. 20, 2024) (plaintiff’s sworn declaration denying she had ever visited subject website, or had agreed to its terms of service or arbitration clause, created genuine issue of material fact; hence, motion to compel arbitration was denied without prejudice pending limited discovery). *See also Timmerman v. Grain Exchange, LLC*, 394 Ill.App.3d 189, 915 N.E.2d 113, 120, 333 Ill.Dec. 592 (5th Dist. 2009) (contract’s attempt to incorporate by reference rules that included arbitration clause was procedurally unconscionable as contract did not mention

arbitration and rules were not provided to plaintiffs before contract execution); *Tinder v. Pinkerton Security*, 305 F.3d 728, 734 (7th Cir. 2002) (by remaining employed after employer implemented arbitration program, claimant, like all other employees, agreed to arbitrate claims). *See also Mikoff v. Unlimited Development, Inc.*, 2024 IL App (4th) 230513, ¶61, 251 N.E.3d 901, 480 Ill.Dec. 20 (Illinois survival statute, 755 ILCS 5/27-6, claims were properly compelled to arbitration under arbitration agreement formed when decedent’s daughter signed under financial power of attorney for decedent; but Wrongful Death Act, 740 ILCS 180/0.01, *et seq.*, claims were not properly compelled to arbitration because real parties in interest, decedent’s next of kin, including signing daughter, were not parties to arbitration agreement). *But see Nord v. Residential Alternatives of Illinois, Inc.*, 2023 IL App (4th) 220669, ¶53, 242 N.E.3d 954, 477 Ill.Dec. 290 (plain language of decedent’s residence agreement with nursing home, including its arbitration provision, had terminated upon her death and discharge from nursing home, so denial of motion to compel arbitration was affirmed). “While arbitration is a favored method of dispute resolution,” the Illinois Supreme Court “has consistently cautioned that an agreement to arbitrate is a matter of contract.” *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 731, 260 Ill.Dec. 541 (2001). In *Nord*, the court commented that it will not “apply the policy favoring arbitration to excuse poor drafting” of arbitration clauses. 2023 IL App (4th) 220669 at ¶49. Some factual or legal consent to arbitrate is a common theme in jurisprudence that compels arbitration.

B. [20.3] Contractual Election To Arbitrate

Agreements to arbitrate can take many forms. Parties can enter into either a simple or a complex agreement that requires arbitration of the parties’ disputes. The parties may enter into an agreement to arbitrate either before a dispute arises through a predispute contractual agreement or after a dispute arises by voluntarily submitting the dispute to arbitration processes.

Predispute agreements to arbitrate can also take many forms. In recent years, industry standard-form contract documents — including those published by the American Institute of Architects (AIA), the Engineers Joint Contract Documents Committee (EJCDC), the Design-Build Institute of America (DBIA), and ConsensusDocs — allow parties to choose whether they prefer to resolve disputes through arbitration or litigation. If the parties do not elect arbitration, litigation is the default binding dispute resolution method for disputes arising out of the contract.

A predispute arbitration clause based on the Construction Industry Arbitration Rules of the American Arbitration Association (AAA) is set forth below:

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 Construction Industry Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

See AAA, *Standard Arbitration Clauses*, www.adr.org/clauses. Parties who adopt broad, court-tested arbitration clauses such as these minimize the risk of having to litigate whether a dispute falls within an arbitration clause.

At a minimum, a well-drafted arbitration clause should

1. contain a clear and mandatory statement of the parties' intent to arbitrate (*i.e.*, the parties "must" arbitrate, not "may" arbitrate);
2. broadly identify the types of disputes subject to arbitration (*i.e.*, "any controversy or claim arising out of or relating to this contract");
3. provide that a court judgment on the arbitration award may be entered by any court with jurisdiction to maximize the award's enforceability;
4. be self-enforcing so the arbitration process can continue despite a party's objection to arbitrability, unless the arbitration is stayed by a court order; and
5. incorporate a set of agency rules and procedures for initiating and administering the arbitration proceedings.

Agreements to arbitrate sometimes address these additional issues as well:

1. the number, qualifications, or identity of arbitrators;
2. the venue, time frame, and maximum duration of the arbitration hearing;
3. use of expedited procedures for resolving simple disputes and additional rules and procedures for resolving large-dollar or complex disputes;
4. circumstances in which the parties can seek injunctive relief in court;
5. whether federal or state arbitration law applies to the agreement to arbitrate and any arbitrations arising from the contract; and
6. what substantive and procedural law applies to disputes arising from the contract.

There are many good resources to help practitioners customize arbitration clauses to meet the needs of a particular project and contract. One resource is the AAA's ClauseBuilder® Tool (www.clausebuilder.org). Another good resource is the AAA publication *Drafting Dispute Resolution Clauses: A Practical Guide* (2013), https://uat.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf (case sensitive).

C. [20.4] Consistent Dispute Resolution Clauses

Project participants should avoid including inconsistent dispute resolution clauses in multiple contracts on the same project. Inconsistent clauses might require various parties to arbitrate and litigate a problem common to them all in different venues, leading to extra expense and the potential for inconsistent results. Owners should consider adding arbitration clauses in all project-related

contracts, including the agreements with all contractors and vendors and all design professionals. Alternatively, owners who prefer litigation should ensure that all of their project contracts select litigation. Likewise, project participants who agree to arbitrate or litigate with owners should elect the same dispute resolution method in their downstream contracts. This increases the likelihood of successfully joining all parties involved in a dispute or claim in the same binding dispute resolution forum. This can minimize dispute resolution expenses and avoid the potential for related aspects of the same dispute to be resolved differently in different forums.

D. [20.5] Incorporating Agency Rules and Procedures

Instead of attempting to customize a predispute arbitration process in construction contracts, most arbitration agreements incorporate by reference the rules and procedures of alternative dispute resolution service provider agencies that administer arbitrations. Several well-respected agencies offer resources to help practitioners design arbitration clauses and implement arbitration. They include the American Arbitration Association; the AAA's international subsidiary, the International Centre for Dispute Resolution (ICDR), www.icdr.org; JAMS (formerly Judicial Arbitration and Mediation Services), www.jamsadr.com; ADR Systems, www.adrsystems.com; and the International Institute for Conflict Prevention and Resolution (CPR), www.cpradr.org. Parties may incorporate an agency's rules by reference and without charge into a predispute agreement to arbitrate. These rules are typically available on the agencies' websites. Parties may use them even if the parties do not ultimately employ that agency to administer any arbitrations.

Parties should incorporate agency rules and procedures because they provide a procedural framework to decide issues not covered by statute and often not included in the parties' arbitration agreement. Most arbitration agency rules cover topics like the following:

1. identifying qualified, geographically available arbitrators;
2. appointing arbitrators when the parties disagree on selection of arbitrators;
3. determining the number of arbitrators to resolve the dispute;
4. determining whether multiple arbitrations should be consolidated;
5. determining the venue for the arbitration hearing;
6. giving the arbitrators jurisdiction to determine arbitrability;
7. filling vacancies when an appointed arbitrator can no longer serve;
8. removing arbitrators who have or develop conflicts of interest or appearances of bias;
9. granting interim relief, including posting of security for costs and protection of property;

10. collecting deposits for arbitrator fees to avoid adjournment of hearings for nonpayment; and
11. determining which arbitration rules and procedures apply.

Parties enjoy benefits when they use agencies to administer arbitrations, including appointment of professional case managers to address issues like those listed above.

Before the parties designate an ADR agency in a predispute agreement to arbitrate, it is a good idea for them to become familiar with the agency's rules and procedures. This chapter cites examples from the AAA's influential Construction Industry Arbitration Rules. The AAA has also developed its Home Construction Arbitration and Mediation Procedures, which are designed to cost-effectively resolve disputes between a home builder and a single homeowner. Other agencies also have highly regarded arbitration rules and procedures.

Agency rules, including the AAA Construction Industry Arbitration Rules, often establish different arbitration processes based on the dispute's amount in controversy. For example, the AAA Fast Track Procedures use a single arbitrator, no discovery, and, in most cases, a single day of hearing when no party has a disclosed claim or counterclaim that exceeds \$150,000, exclusive of interest, attorneys' fees, and costs. Typically, the AAA Regular Track Procedures apply to disputes between \$150,000 and \$1 million and involve some discovery. The AAA Procedures for Large, Complex Construction disputes are typically applied to cases in which the disclosed claim or counterclaim of either party is at least \$1 million, exclusive of interest, attorneys' fees, and costs. Those procedures presume that the parties will engage in some discovery and that the hearing will result in the arbitrators issuing a "reasoned" award unless the parties agree otherwise. The AAA Construction Industry Arbitration Rules also provide procedures for resolving disputes through document submission, a simple process for resolving smaller disputes in which an in-person hearing is unnecessary. While the AAA proposes that such rules and procedures apply based on the amount in controversy, parties are typically free, by mutual agreement, to select the applicable rules in their predispute contract or postdispute submission to the AAA. JAMS and CPR also publish special rules to govern and expedite construction arbitrations.

Agencies differ on the composition of panels from which arbitrators are selected. The AAA has the largest number of arbitrators in the most locations. While most agencies' construction arbitrator panels consist of attorneys, some arbitrators on the AAA's national construction panel are nonlawyer industry professionals. Most agencies require arbitrators to participate in agency-sponsored continuing education as a condition of remaining on their panels.

An important difference between the rules of JAMS and other ADR agencies is that JAMS requires that the cost of the arbitration, including arbitrator fees, be a joint and several obligation of all parties. Other agencies require only that the cost obligation is several. This can be an issue when one party is unable or unwilling to pay its share of arbitration costs and fees.

As discussed in §20.25 below, incorporating ADR agency rules into contractual arbitration clauses can have an impact on court proceedings that resolve arbitration-related disputes, including whether certain arbitrability questions are delegated to arbitrators (through agency rules that empower them to determine their own jurisdiction) or are reserved for judges.

When selecting arbitration rules and procedures, practitioners should consider the procedural requirements they impose on the parties to ensure they do not impose an unconscionable barrier to arbitration. The First District Court of Appeals has found the incorporation by reference of the AAA's general Construction Industry Arbitration Rules into a construction contract for a small renovation of a single-family home unconscionable, and therefore made the arbitration agreement unenforceable, because they were "ill-suited for and unnecessarily costly for someone suing a company that has done renovation work on [a] residential home" when the AAA also publishes a more appropriate and affordable set of rules, the Home Construction Arbitration and Mediation Procedures. *Bain v. Airoom, LLC*, 2022 IL App (1st) 211001, ¶42, 207 N.E.3d 1015, 462 Ill.Dec. 712.

E. [20.6] Construing Agreements To Arbitrate

Disputes over the meaning of arbitration agreements are resolved according to familiar principles of contract interpretation. *Clanton v. Oakbrook Healthcare Centre, Ltd.*, 2023 IL 129067, ¶30, 226 N.E.3d 1266, 470 Ill.Dec. 470 (affirming denial of defendants' motion to compel arbitration, holding arbitration agreement in nursing home contract terminated upon resident's death, as plain language of contract indicated that agreement, including arbitration provision, did not survive death). Agreements to arbitrate are contractual. *Carr v. Gateway, Inc.*, 241 Ill.2d 15, 944 N.E.2d 327, 329, 348 Ill.Dec. 374 (2011); *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 731, 260 Ill.Dec. 541 (2001); *Zuniga v. Major League Baseball*, 2021 IL App (1st) 201264, ¶13, 196 N.E.3d 12, 457 Ill.Dec. 888. "Arbitration contracts are interpreted in the same manner and according to the same rules as are all other contracts." *State Farm Fire & Casualty Co. v. Watts Regulator Co.*, 2016 IL App (2d) 160275, ¶27, 63 N.E.3d 304, 407 Ill.Dec. 380, citing *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.*, 119 Ill.App.3d 663, 456 N.E.2d 889, 894, 75 Ill.Dec. 68 (2d Dist.1983). See also *Ward v. Hilliard*, 2018 IL App (5th) 180214, ¶18, 116 N.E.3d 1011, 426 Ill.Dec. 711 (existence of agreement to arbitrate between parties depends on state law rules of contract formation); *Tortoriello v. Gerald Nissan of North Aurora, Inc.*, 379 Ill.App.3d 214, 882 N.E.2d 157, 169, 317 Ill.Dec. 583 (2d Dist. 2008) (state law, not federal law or Federal Arbitration Act, ordinarily governs formation of contracts and whether valid arbitration agreement arose); *Ervin v. Nokia, Inc.*, 349 Ill.App.3d 508, 812 N.E.2d 534, 538, 285 Ill.Dec. 714 (5th Dist. 2004) (apply ordinary state-law principles governing formation of contracts in deciding whether parties agreed to arbitrate certain matter). "The primary objective in construing a contract is to give effect to the intent of the parties." *Watts Regulator, supra*, 2016 IL App (2d) 160275 at ¶27 (affirming denial of motion to compel arbitration), quoting *Gallagher v. Lenart*, 226 Ill.2d 208, 874 N.E.2d 43, 58, 314 Ill.Dec. 133 (2007). See also *Clanton, supra*, 2023 IL 129067 at ¶30 (look to parties' intent at time they entered into arbitration agreement, as evidenced by contract as whole).

Sometimes the validity of an arbitration agreement is resolved outside the four corners of the document. For example, like other contracts, "an arbitration agreement may be invalidated under state law contract defenses, such as fraud, duress, and impossibility." *Keefe v. Allied Home Mortgage Corp.*, 2016 IL App (5th) 150360, ¶10, 67 N.E.3d 616, 409 Ill.Dec. 404. See *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 177 L.Ed.2d 403, 130 S.Ct. 2772, 2776 (2010). Procedural or substantive "unconscionability" can also render arbitration agreements unenforceable. *Zuniga, supra*, 2021 IL App (1st) 201264 at ¶14 ("substantive unconscionability exists when contract terms are inordinately one-sided"; "procedural unconscionability exists when

a contract term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware that he or she was agreeing to it”); *Tecnomatic, S.p.A. v. Cave*, 2018 IL App (1st) 161908-U, ¶2 (discussing substantive and procedural unconscionability in context of legal malpractice claim when retainer agreement contained arbitration clause); *Hwang v. Pathway LaGrange Property Owner, LLC*, 2024 IL App (1st) 240534, ¶14, 260 N.E.3d 99, 483 Ill.Dec. 315 (discussing substantive unconscionability of overly one-sided arbitration clause in adhesion contract). In *Turner v. Concord Nursing & Rehabilitation Center, LLC*, 2023 IL App (1st) 221721, 218 N.E.3d 456, 467 Ill.Dec. 121, which was decided under the Illinois Act, the appellate court upheld the trial court’s finding that an arbitration clause was both procedurally and substantively unconscionable. In *Turner*, the agreement was procedurally unconscionable because the signatory, a nursing home resident, had little choice but to accept the arbitration clause, despite contrary language buried in the nursing home admissions packet, and was substantively unconscionable because it deprived him of attorneys’ fees and limited his damages in contravention of the Illinois statutes. 2023 IL App (1st) 221721 at ¶¶21 – 35. In *Dick-Ipsen v. Humphrey, Farrington & McClain, P.C.*, 2024 IL App (1st) 241043, ¶18, a legal malpractice lawsuit, trial court denied defendant attorneys’ motion to compel arbitration after finding that the arbitration provision in the parties’ engagement agreement was procedurally unconscionable, as the agreement did not fully inform the plaintiff concerning the meaning and consequences of the arbitration clause. How such issues are resolved, and by whom, can vary based on whether the issues are decided in state or federal court, by judges or arbitrators, and under state or federal arbitration statutes.

F. [20.7] Breadth of Agreement To Arbitrate

The specific provisions of an arbitration agreement determine which disputes will be arbitrable. Parties can maximize the number of future disputes subject to arbitration by using broad language in arbitration agreements to describe the disputes to be arbitrated.

There is an important exception to the general rule that parties are bound to arbitrate only issues that by clear language they have specifically agreed to arbitrate. That exception exists when an arbitration clause is nonspecific in designating which disputes are arbitrable. *Keeley & Sons, Inc. v. Zurich American Insurance Co.*, 409 Ill.App.3d 515, 947 N.E.2d 876, 881, 349 Ill.Dec. 862 (5th Dist. 2011). Those nonspecific causes, called “generic” clauses, sweep broadly and do not delineate between disputes that are arbitrable and those that are not. “‘Courts have generally construed “generic” arbitration clauses broadly’ and have concluded that ‘parties are obligated to arbitrate any dispute that arguably arises under an agreement containing a “generic” provision.’ ” [Emphasis in original.] *Clark v. Foresight Energy, LLC*, 2023 IL App (5th) 230346, ¶25, 228 N.E.3d 988, 471 Ill.Dec. 479, quoting *Fahlstrom v. Jones*, 2011 IL App (1st) 103318, ¶17, 952 N.E.2d 1227, 352 Ill.Dec. 1.

A “generic” arbitration clause might have language providing that “all claims arising out of or relating to the contract at issue shall be decided by arbitration.” See *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶26, 138 N.E.3d 201, 435 Ill.Dec. 13; *Guarantee Trust Life Insurance Co. v. Platinum Supplemental Insurance, Inc.*, 2016 IL App (1st) 161612, ¶27, 68 N.E.3d 481, 409 Ill.Dec. 628, *appeal denied*, 80 N.E.3d 2 (2017), quoting *Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App (2d) 141160, ¶19, 32 N.E.3d 80, 392 Ill.Dec. 80. See *Keeley & Sons, supra*, 947 N.E.2d at 882 (“any dispute arising out of the interpretation, performance or alleged breach of this

Agreement[] shall be settled by binding arbitration” is generic clause). “[T]he broadest type of arbitration clause . . . provides for arbitration of any dispute ‘arising out of or relating to’ the agreement.” *Kirkpatrick v. Rauner*, 2018 IL App (1st) 180412-U, ¶20, quoting *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill.2d 435, 530 N.E.2d 439, 443, 125 Ill.Dec. 281 (1988). See also *Bass v. SMG, Inc.*, 328 Ill.App.3d 492, 765 N.E.2d 1079, 1085, 262 Ill.Dec. 471 (1st Dist. 2002) (phrase “regarding this agreement” is generic because it is not narrower than “arising out of or related to” agreement).

In *Portage Park Capital, LLC v. A.L.L. Masonry Construction Co.*, 2024 IL App (1st) 240344, ¶23, 258 N.E.3d 35, 482 Ill.Dec. 544, in considering the breadth of a generic “arising out of or relating to” arbitration clause, the appellate court affirmed the trial court’s holding that a mechanics lien claim arose from or related to the contract and its order compelling arbitration of the dispute under that arbitration clause. Noting that the question of whether disputes “arise out of or relate to a contract” can be “murky,” the court rejected both a broad reading (to include any dispute that would not have occurred “but for” the existence of the contract) and a narrow reading (limited to disputes that turned on some “interpretation or construction of the contract”) in favor of what it called an “in between” option, *i.e.*, the dispute “must ‘raise some issue the resolution of which requires a reference to or construction of some portion of the contract itself.’ ” 2024 IL App (1st) 240344 at ¶19, quoting *Terminix International Co. v. Michaels*, 668 So.2d 1013, 1014 (4th Dist. 1996).

The breadth and sweep of an arbitration clause’s language affect how courts resolve challenges to arbitrability. “Where an arbitration clause is ‘generic,’ meaning that it is nonspecific in designating the arbitrable issues, the court is required to examine the wording of the arbitration clause along with the other terms of the contract in which the arbitration clause is found. . . . [A]ny controversy, claim or dispute arising out of or relating to the Establishment Contract, or the breach thereof, shall be settled by arbitration” is generic clause. *Fiala, supra*, 2015 IL App (2d) 141160 at ¶¶19 – 20. Generic arbitration clauses “must be ‘broadly construed.’ ” *Guarantee Trust, supra*, 2016 IL App (1st) 161612 at ¶28 (“all claims, disputes and other controversies arising out of or in any manner relating to this [a]greement” is generic clause), quoting *Fiala, supra*, 2015 IL App (2d) 141160 at ¶21. See also *Clark v. Foresight Energy, LLC*, 2023 IL App (5th) 230346, ¶¶25, 27, 228 N.E.3d 988, 471 Ill.Dec. 479 (“[a]ny dispute *regarding the matters set forth herein* or disputes of any sort or nature whatsoever arising out of this Waiver and Release shall be determined by arbitration” is generic clause [emphasis added by *Clark* court]), quoting *Fahlstrom v. Jones*, 2011 IL App (1st) 103318, ¶17, 952 N.E.2d 1227, 352 Ill.Dec. 1. Including generic arbitration clauses in predispute agreements to arbitrate increases the odds that future disputes will be arbitrable.

Courts closely parse the language used in arbitration clauses, sometimes finding limitations the contracting parties perhaps did not intend. A relatively broad arbitration clause only slightly narrower than a generic arbitration clause might contain the phrase “arising out of the agreement” but also fail to include the phrase “or relating to [the agreement].” *Guarantee Trust, supra*, 2016 IL App (1st) 161612 at ¶27, quoting *Keeley & Sons, supra*, 947 N.E.2d at 881 – 882. See also *Fiala, supra*, 2015 IL App (2d) 141160 at ¶19. Courts have found that such an arbitration clause “is narrower than a generic clause, and any arbitration should be limited to the specific terms of the contract or agreement containing the arbitration clause.” *Id.* In *Liu, supra*, the appellate court

upheld the Circuit Court of Cook County's finding that the plaintiff's claims were not subject to mandatory arbitration because the arbitration agreement in question specified four kinds of arbitrable disputes, and collecting fingerprint data (the subject of the dispute) fell into none of them. 2019 IL App (1st) 182645 at ¶31.

Predispute arbitration clauses sometimes limit arbitration to specific subjects or dollar amounts in controversy or restrict joining other controversies or parties to the arbitration. An example of a limited-scope arbitration clause was included in the 2014 version of the Engineers Joint Contract Documents Committee Document E-500, *Standard Form of Agreement Between Owner & Engineer for Professional Services*, Exhibit H (2014):

All demands for arbitration and all answering statements thereto which include any monetary claims must contain a statement that the total sum or value in controversy as alleged by the party making such demand or answering statement is not more than \$ _____ (exclusive of interest and costs). The arbitrators will not have jurisdiction, power, or authority to consider, or make findings (except in denial of their own jurisdiction) concerning any Dispute if the amount in controversy in such Dispute is more than \$ _____ (exclusive of interest and costs), or to render a monetary award in response thereto against any party which totals more than \$ _____ (exclusive of interest and costs). Disputes that are not subject to arbitration under this paragraph may be resolved in any court of competent jurisdiction.

These arbitration clause limitations may result in litigation and, therefore, are generally not recommended by the authors of this chapter. See Paul M. Lurie, *Removing Roadblocks to Arbitration*, AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON CONSTRUCTION ARBITRATION & ADR (2007); Paul M. Lurie, *Removing Roadblocks to Arbitration*, 22 Punch List, No. 1 (May 1999). Arbitration clauses with such limitations can help parties that wish to petition a court to stay or avoid arbitration. Such limitations can lead to litigation over whether particular disputes are arbitrable. If parties are required to litigate whether a dispute is subject to arbitration, they may lose the cost and time savings presumed inherent in arbitration. Parties that wish to take full advantage of arbitration should consider avoiding these limitations.

Under the facts of one case, the Illinois Supreme Court held that contractual limitations on arbitrability did not show lack of mutuality of obligation, a state law contract doctrine that a wrongful-death plaintiff invoked in an effort to avoid arbitration. In *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, ¶5, 976 N.E.2d 344, 364 Ill.Dec. 66, a case involving a defendant nursing home, the contract required the parties to arbitrate disputes seeking damages over \$200,000 and to litigate lower-value claims in court. The plaintiff, who preferred to litigate a large-dollar claim, argued the \$200,000 limitation in the arbitration agreement made it unenforceable due to a lack of mutuality of obligation among the parties — that the practical effect of the arbitration clause bound the parties to arbitrate only claims likely to be brought by the plaintiff, as the nursing home was unlikely to ever have a claim against the plaintiff seeking more than \$200,000 in damages. The plaintiff argued that the defendant's promise to arbitrate was thus illusory. Reversing the lower court, the Supreme Court held that the plaintiff's promise to arbitrate, even if not met with a reciprocal promise by the defendant to arbitrate, was supported by consideration and therefore

enforceable. 2012 IL 113204 at ¶27 (holding consideration is essential to validity of contract, but mutuality of obligation is not essential). *Accord Hartz v. Brehm Preparatory School, Inc.*, 2021 IL App (5th) 190327, ¶46, 183 N.E.3d 172, 451 Ill.Dec. 126 (consideration renders state law contract defense of lack of mutuality of obligation unavailable, discussing *Carter*). Although the arbitration clause in the nursing home's contract was eventually upheld in *Carter*, the \$200,000 claim amount threshold for arbitration led to some six years of litigation, culminating with a decision of the state's highest court, arguably depriving the nursing home of arbitration's cost and time savings. In contrast to *Carter*, in *Mulligan v. Loft Rehabilitation & Nursing of Canton, LLC*, 2023 IL App (4th) 230187, ¶¶33 – 37, 236 N.E.3d 1084, 474 Ill.Dec. 525, the appellate court found sufficient mutuality of obligation and adequate consideration to support a nursing home arbitration clause that was not clearly one-sided. In *Mulligan*, the arbitration clause did not limit the amount of damages available to the plaintiff, and it required the nursing home to pay its own attorneys' fees and costs and to be responsible for all the arbitrator's fees and costs, facts the court used to distinguish that dispute from *Carter*. But see *Calusinski v. Alden-Poplar Creek Rehabilitation & Health Care Center*, 2022 IL App (1st) 220508, ¶16, 239 N.E.3d 521, 475 Ill.Dec. 623 (arbitration agreement not enforceable because it waived plaintiff's statutory right to attorneys' fees without adequate consideration by defendants).

II. [20.8] ARBITRATION: A STATUTORILY ENFORCED AGREEMENT

As noted in §20.1 above, construction disputes may be subject to various statutory authorities, including the Illinois Uniform Arbitration Act and the Federal Arbitration Act. Understanding the history of these statutes, their scope and limitations, and the reasons for their enactment can help practitioners determine how these arbitration statutes may affect particular disputes.

A. [20.9] Multiple Overlapping Statutes

The Federal Arbitration Act's reach is coextensive with the U.S. Congress's constitutional authority to regulate interstate commerce and thus applies to arbitration of disputes that touch on multiple states. The FAA applies to disputes arising from many construction projects. Generally, it is only arbitrations that arise from Illinois projects and involve only Illinois parties that are clearly subject to the Illinois Uniform Arbitration Act and are not at least arguably governed by the FAA.

1. [20.10] The Illinois Uniform Arbitration Act

Illinois' statutory authority for arbitration is the Illinois Uniform Arbitration Act. The Illinois Act, enacted in 1961, substantially follows the Uniform Arbitration Act (UAA) promulgated by the National Conference of Commissioners on Uniform State Laws (now also known as the Uniform Law Commission) in 1955. *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill.2d 435, 530 N.E.2d 439, 443, 125 Ill.Dec. 281 (1988). See also *Chicago Southshore & South Bend R.R. v. Northern Indiana Commuter Transportation District*, 184 Ill.2d 151, 703 N.E.2d 7, 9, 234 Ill.Dec. 395 (1998) (Illinois has adopted UAA). The Illinois General Assembly expressed its approval of arbitration by adopting the Illinois Act, which provides, inter alia, that an arbitration agreement "is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract," with limited exceptions. 710 ILCS 5/1; *Phoenix Insurance Co. v. Rosen*, 242 Ill.2d 48,

949 N.E.2d 639, 647, 350 Ill.Dec. 847 (2011) (public policy in Illinois favors arbitration). The Illinois Act, if applicable, is deemed part of a contract that contains an arbitration clause. *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶24, 138 N.E.3d 201, 435 Ill.Dec. 13; *Guarantee Trust Life Insurance Co. v. Platinum Supplemental Insurance, Inc.*, 2016 IL App (1st) 161612, ¶26, 68 N.E.3d 481, 409 Ill.Dec. 628, *appeal denied*, 80 N.E.3d 2 (2017); *Weiss v. Fischl*, 2016 IL App (1st) 152446, ¶19, 62 N.E.3d 296, 407 Ill.Dec. 51; *Johnson v. Baumgardt*, 216 Ill.App.3d 550, 576 N.E.2d 515, 521, 159 Ill.Dec. 846 (2d Dist. 1991).

After the Illinois Act became law, arbitration went from a disfavored method of dispute resolution to a preferred method in Illinois. Before it was enacted, the Illinois Supreme Court had held that agreements to arbitrate future disputes were invalid because they infringed on parties' constitutional right to access the courts. *Cocalis v. Nazlides*, 308 Ill. 152, 139 N.E. 95, 98 – 99 (1923). The 1961 passage of the Illinois Act reversed this rule. *Ramonas v. Kerelis*, 102 Ill.App.2d 262, 243 N.E.2d 711, 715 (1st Dist. 1968) (agreements “to arbitrate future disputes arising out of the contract[s], entered into after August 24, 1961, [are] valid and enforceable”). Now the opposite policy prevails in Illinois: the Illinois Act “embodies a legislative policy favoring enforcement of agreements to arbitrate future disputes.” *Donaldson, Lufkin & Jenrette Futures, supra*, 530 N.E.2d at 443; *Radiant Star Enterprise, L.L.C. v. Metropolis Condominium Ass’n*, 2018 IL App (1st) 171844, ¶52, 107 N.E.3d 877, 424 Ill.Dec. 158 (recognizing legislative policy). The Illinois Act “embodies a policy that favors arbitration as a cost-effective method of dispute resolution.” *Guarantee Trust, supra*, 2016 IL App (1st) 161612 at ¶26.

Even among states that have adopted versions of the UAA, statutory differences exist. For example, Illinois has not adopted the 2000 Revised Uniform Arbitration Act (RUAA), which at the time of this writing has been enacted by 22 other states and the District of Columbia and treats some subjects differently than the Illinois Act, *e.g.*, discovery, consolidation, subpoenas, determination of arbitrability, interim remedies, attorneys' fees, and punitive damages. Practitioners should not assume that one state's enactment of the UAA will be identical to the version adopted by another state.

For example, a somewhat controversial amendment to §8 of the Illinois Act requires arbitrators to follow the parties' contract but requires that they “take into account the usages of the trade” in determining the parties' intent. 710 ILCS 5/8(c)(iii). Commentators have wondered whether this amendment would change the scope of judicial review of arbitration awards. However, several unpublished decisions suggest that the amendment did not expand the traditional limited scope of judicial review of arbitration awards. *See generally McGill v. Wortham*, 2015 IL App (5th) 130581-U, ¶19 (declining to expand scope of judicial review in response to amendment and confirming arbitration award); *Private Flooring Enterprises, Inc. v. Powers & Sons Construction Co.*, 2014 IL App (1st) 132102-U, ¶22 (finding arbitrator satisfied §8(c)(iii) and confirming arbitration award). Nevertheless, this amendment illustrates that enacted versions of the Uniform Arbitration Act can vary from state to state.

If Illinois eventually adopts a version of the RUAA, or if an Illinois court or arbitrator must use the law of a state that has adopted the RUAA, the outcome of a particular issue could differ from what is described in this chapter. That is one reason practitioners should validate the caselaw discussed in this chapter to confirm that it applies to any particular dispute.

2. [20.11] The Federal Arbitration Act

The Federal Arbitration Act may also govern arbitration of design and construction disputes, as most construction projects are transactions involving interstate commerce. The term “commerce,” as defined by the FAA, “means commerce among the several States.” 9 U.S.C. §1. If the underlying contract with the arbitration clause “involv[es] commerce,” the FAA may apply and take precedence over state law. *Preston v. Ferrer*, 552 U.S. 346, 169 L.Ed.2d 917, 128 S.Ct. 978, 981 – 983 (2008) (when parties agree to arbitrate all questions arising under contract, FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative); *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, ¶16, 976 N.E.2d 344, 364 Ill.Dec. 66 (noting FAA applied because arbitration agreements at issue evidenced transaction involving interstate commerce); *G3 Analytics, LLC v. Hughes Socol Piers Resnick & Dym Ltd.*, 2016 IL App (1st) 160369, ¶17, 67 N.E.3d 940, 409 Ill.Dec. 485 (agreement involved interstate commerce, as plaintiffs resided in Michigan and defendants were based in Illinois, so FAA, not Illinois law, governed). Most modern construction projects at least arguably involve “commerce” that would trigger application of the FAA, unless an exception applies.

Such an exception might exist when an arbitration clause, as opposed to the entire contract, is specifically made subject to state law. Illinois courts have “held that where parties to a contract agree to arbitrate in accordance with state law, the FAA does not apply, even when involving interstate commerce.” *G3 Analytics, supra*, 2016 IL App (1st) 160369 at ¶13, citing *Tortoriello v. Gerald Nissan of North Aurora, Inc.*, 379 Ill.App.3d 214, 882 N.E.2d 157, 169, 317 Ill.Dec. 583 (2d Dist. 2008) (construing arbitration provision stating “[t]he arbitrator shall determine the rights and obligations according to the substantive laws of the State of Illinois,” and applying Illinois Act rather than FAA); *Glazer’s Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill.App.3d 411, 876 N.E.2d 203, 212, 315 Ill.Dec. 203 (1st Dist. 2007) (citing U.S. Supreme Court decisions holding that application of state arbitration law was not preempted by FAA when contracting parties had agreed arbitration provision would be governed by state law). An exemption exists also in §1 of the FAA, which excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from coverage under the FAA. 9 U.S.C. §1. *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 218 L.Ed.2d 204, 144 S.Ct. 905, 913 (2024) (transportation worker need not specifically work in the transportation industry to fall within §1 exemption from FAA, provided exempt worker plays “ ‘necessary role in the free flow of goods’ across borders”), quoting *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 213 L.Ed.2d 27, 142 S.Ct. 1783, 1790 (2022). *Southwest, supra*, 142 S.Ct. at 1793 (airline ramp supervisor who frequently loaded and unloaded cargo on and off airplanes belonged to class of workers engaged in foreign or interstate commerce). The sometimes complex interactions of state and federal arbitration law are addressed in §§20.13 – 20.16 below.

The FAA and the Illinois Uniform Arbitration Act embody similar policies and were enacted for similar reasons. Like the Illinois Act, the FAA “reflects a ‘liberal federal policy favoring arbitration agreements.’” *Carr v. Gateway, Inc.*, 241 Ill.2d 15, 944 N.E.2d 327, 330, 348 Ill.Dec. 374 (2011), quoting *Borowiec v. Gateway 2000, Inc.*, 209 Ill.2d 376, 808 N.E.2d 957, 962, 283 Ill.Dec. 669 (2004). In 1925, the U.S. “Congress enacted the [FAA] to reverse long-standing judicial hostility to arbitration agreements.” 944 N.E.2d at 330, citing *Borowiec, supra*, 808 N.E.2d at 962. “The basic purpose of the FAA is to overcome the historical reluctance of courts to enforce

agreements to arbitrate.” *Carter v. SSC Odin Operating Co.*, 237 Ill.2d 30, 927 N.E.2d 1207, 1215, 340 Ill.Dec. 196 (2010), citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 130 L.Ed.2d 753, 115 S.Ct. 834, 838 (1995). The U.S. Supreme Court echoed this observation in *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 200 L.Ed.2d 889, 138 S.Ct. 1612, 1621 (2018), noting Congress adopted the FAA in 1925 “in response to a perception that courts were unduly hostile to arbitration.” See also *City of Chicago v. Chicago Loop Parking LLC*, 2014 IL App (1st) 133020, ¶39, 23 N.E.3d 453, 387 Ill.Dec. 761 (FAA’s purpose was “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts”), quoting *Borowiec, supra*, 808 N.E.2d at 962. In passing the FAA, Congress “intended courts to enforce agreements by parties to arbitrate and to place such agreements on the same footing as other contracts.” *Carter, supra*, 927 N.E.2d at 1215, citing *Allied-Bruce Terminix, supra*, 115 S.Ct. at 838. The FAA has helped further this goal, as arbitration is widely embraced in the United States, including with respect to design and construction disputes.

While the jurisprudence under both the FAA and the Illinois Act is similar, the caselaw under the FAA is far more developed, especially regarding arbitrability.

3. [20.12] The International Commercial Arbitration Act

Complicating the already complex landscape of arbitral law, Illinois adopted the Illinois International Commercial Arbitration Act (IICAA), 710 ILCS 30/1-1, *et seq.*, to facilitate arbitration of international business disputes in Illinois. “The IICAA, based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, became effective in 1998.” *Certain Underwriters at Lloyd’s, London v. BCS Insurance Co.*, 239 F.Supp.2d 812, 815 (N.D.Ill. 2003). The IICAA “applies to international commercial arbitration, subject to any agreement in force between the United States and any other country or countries.” 710 ILCS 30/1-5(a).

B. [20.13] Interaction of State and Federal Arbitration Laws

While reaching an arbitration award is usually simpler than using the court system to obtain a judgment, disputes about arbitration and arbitrability can be complex. This complexity is partially due to the Illinois Uniform Arbitration Act and the Federal Arbitration Act, which have common origins, overlap substantially, apply in the same courts, and have given rise to many state and federal court precedents. Both statutes address issues such as the validity and enforceability of agreements to arbitrate, proceedings to stay or compel arbitration, appointment of arbitrators, arbitration hearings, and summary procedures to vacate or confirm awards. FAA caselaw can bind state court judges. Arbitration jurisprudence from one jurisdiction is often viewed as persuasive authority in other venues. Some might argue that the mass of state and federal arbitration precedents forms a unified, ever-evolving body of law. For all of their similarities, however, the Illinois Act and the FAA are different in meaningful ways. See §§20.14 – 20.16 below.

1. [20.14] Similarities and Differences

Illinois courts have recognized the similarities and overlap between these state and federal statutory authorities. The Illinois Uniform Arbitration Act is “for all practical purposes identical

to” the Federal Arbitration Act on certain issues. *Asset Acceptance, LLC v. Tyler*, 2012 IL App (1st) 093559, ¶15, 966 N.E.2d 1039, 359 Ill.Dec. 351. Both statutes are based on the same model arbitration act. Courts interpreting the Illinois Act look to FAA caselaw, in part because of their common origins. *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.*, 119 Ill.App.3d 663, 456 N.E.2d 889, 893, 75 Ill.Dec. 68 (2d Dist.1983). See *Radiant Star Enterprises, L.L.C. v. Metropolis Condominium Ass’n*, 2018 IL App (1st) 171844, ¶58, 107 N.E.3d 877, 424 Ill.Dec. 158 (discussing Illinois Act and FAA similarities). Illinois courts give “considerable weight” to federal court FAA decisions. *Carter v. SSC Odin Operating Co.*, 237 Ill.2d 30, 927 N.E.2d 1207, 1215, 340 Ill.Dec. 196 (2010). Because the model Uniform Arbitration Act tries to make uniform the laws of those states that enact it, the Illinois Supreme Court has stated that judicial decisions from other states are “shown greater than usual deference” by Illinois courts. *Garver v. Ferguson*, 76 Ill.2d 1, 389 N.E.2d 1181, 1183, 27 Ill.Dec. 773 (1979); *Radiant Star Enterprises, supra*, 2018 IL App (1st) 171844 at ¶58 n.8. Even when the Illinois Act governs, practitioners often cite favorable persuasive authority from outside Illinois.

However, the Illinois Act and FAA are not identical, and the state and federal caselaw that interprets them shows the important ways they differ. See, e.g., *Comdisco, Inc. v. Dun & Bradstreet Corp.*, 285 Ill.App.3d 796, 674 N.E.2d 902, 905, 221 Ill.Dec. 109 (1st Dist. 1996) (noting that fact “portions of the [Illinois Act and the FAA] are basically similar should not be misinterpreted as holding that the two statutes are identical,” and questioning whether certain procedural aspects of §4 of FAA applies to state court proceedings). While jurisprudence under the FAA and the Illinois Act is similar, some issues — such as whether courts or arbitrators make initial determinations of arbitrability — receive opposite treatment.

Examples of differences between the Illinois Act and the FAA concern not only who determines arbitrability but also who may arbitrate. For example, some courts applying the FAA have recognized an “agency” exception that allows agents of a signatory to enforce arbitration agreements entered into by their principal even though the agents are not parties to the agreement. See, e.g., *Howells v. Hoffman*, 209 Ill.App.3d 1004, 568 N.E.2d 934, 936 – 937, 154 Ill.Dec. 713 (3d Dist. 1991) (applying FAA holding that stockbroker could enforce arbitration agreement entered into between brokerage and its client). By contrast, courts applying the Illinois Act have not recognized that exception. *Guarantee Trust Life Insurance Co. v. Platinum Supplemental Insurance, Inc.*, 2016 IL App (1st) 161612, ¶39, 68 N.E.3d 481, 409 Ill.Dec. 628, *appeal denied*, 80 N.E.3d 2 (2017), citing *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶32, 53 N.E.3d 218, 403 Ill.Dec. 164 (rejecting argument that agent was intended third-party beneficiary of arbitration clause and finding no compelling reason to depart from general rule that only parties to agreement may enforce it), *appeal denied*, 60 N.E.3d 874 (2016). Another FAA decision, issued by an Illinois federal court, held that a distributor not a party to an agreement containing an arbitration clause must arbitrate because it knowingly benefited from that agreement. *Southern Illinois Beverage, Inc. v. Hansen Beverage Co.*, No. 07-CV-391-DRH, 2007 WL 3046273, *13 (S.D.Ill. Oct. 15, 2007) (discussing equitable estoppel as basis to force non-signatories to arbitrate). FAA jurisprudence is more developed than caselaw under the Illinois Act and tends to result in findings of arbitrability on grounds including the examples above.

Because FAA jurisprudence tends to result in findings of arbitrability, contract drafters sometimes try to increase the odds that a future dispute will be deemed arbitrable by stating in

predispute agreements that the FAA, rather than its state law equivalent, governs the arbitration provision and any disputes arising thereunder. For example, one frequently used standard-form agreement provides that “[i]f the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern.” AIA Document A201-2017, *General Conditions of the Contract for Construction* §13.1.

2. [20.15] Federal Preemption of State Law

Because the Federal Arbitration Act is federal law, it can preempt conflicting provisions in the Illinois Uniform Arbitration Act. U.S. Supreme Court decisions that address FAA preemption bind Illinois state courts, including our Supreme Court, due to the constitutional principle of federal preemption. *Carter v. SSC Odin Operating Co.*, 237 Ill.2d 30, 927 N.E.2d 1207, 1215 – 1216, 340 Ill.Dec. 196 (2010) (FAA preempted Illinois statute that attempted to give nursing home patients judicial forum); *Washington v. Persona Identities, Inc.*, 2024 IL App (3d) 240210, ¶¶12 – 17, 254 N.E.3d 394, 481 Ill.Dec. 111 (recognizing federal preemption can bar Illinois when FAA explicitly or implicitly overrides Illinois statute, but finding no preemption in that case). These principles can also make decisions of lower federal courts addressing FAA preemption relevant in our state courts.

Familiar principles of federal constitutional preemption apply in the context of the FAA and the Illinois Act. In *Carter, supra*, the Illinois Supreme Court explained that the FAA could preempt the Illinois Act in three separate ways: “(1) express preemption — where Congress has expressly preempted state action; (2) implied field preemption — where Congress has implemented a comprehensive regulatory scheme in an area, thus removing the entire field from the state realm; or (3) implied conflict preemption — where state action actually conflicts with federal law.” 927 N.E.2d at 1214. See *Washington v. Persona Identities, Inc.*, 2024 IL App (3d) 240210, ¶13, 254 N.E.3d 394, 481 Ill.Dec. 111 (recognizing express preemption and implied field and conflict preemption). State law cannot thwart the purpose, or hinder the achievement, of policies and goals enacted into law by the U.S. Congress. “Thus, state law is preempted by the FAA to the extent that it actually conflicts with state law, that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” [Internal quotation marks omitted.] *Carter, supra*, 927 N.E.2d at 1215. “The key inquiry in any preemption analysis is to determine the intent of Congress.” 927 N.E.2d at 1214. This inquiry provides a framework to determine whether state law runs contrary to Congress’s goals and policies, as expressed in the statutes it enacts.

Conflict preemption has been used to assess the constitutionality of state arbitration laws. In *Carter*, the Supreme Court found that only “conflict preemption” was at issue. 927 N.E.2d at 1215. It noted that the FAA contains no express preemption provision and indicates no congressional intent to occupy the entire field of arbitration. Thus, the Illinois Act, like the arbitration statutes of other states, can be applied, constitutionally, and govern arbitrations to the extent the Illinois Act does not conflict with the FAA. In *Washington*, the court reached a similar conclusion regarding conflict preemption and express preemption. 2024 IL App (3d) 240210 at ¶19.

Illinois practitioners must be cognizant of how federal precedent may affect Illinois arbitration law. Illinois cases can be cast into doubt by new federal decisions. For example, some Illinois courts have held that when parties to a contract have agreed to arbitrate under state law, the FAA does not

apply, even when interstate commerce is involved. *G3 Analytics, LLC v. Hughes Socol Piers Resnick & DYM Ltd.*, 2016 IL App (1st) 160369, ¶13, 67 N.E.3d 940, 409 Ill.Dec. 485 (when contract selects Illinois law as governing law, Illinois law applies to all of its provisions, including arbitration provision), citing *Glazer's Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill.App.3d 411, 876 N.E.2d 203, 212, 315 Ill.Dec. 203 (1st Dist. 2007). *Glazer's* relied on *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 103 L.Ed.2d 488, 109 S.Ct. 1248 (1989), an influential decision of the U.S. Supreme Court. However, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 131 L.Ed.2d 76, 115 S.Ct. 1212 (1995), the U.S. Supreme Court limited its holding in *Volt Information Sciences*, which arguably undermines the *Glazer's* line of cases. Illinois courts have recognized this development: “*Mastrobuono* has been read to mean that a general choice of law provision in a contract will not extend to the arbitration clause, absent specific evidence the parties intended it to do so.” *State Farm Mutual Automobile Insurance Co. v. George Hyman Construction Co.*, 306 Ill.App.3d 874, 715 N.E.2d 749, 755, 240 Ill.Dec. 62 (4th Dist. 1999); *BEM I, L.L.C. v. Anthropologie, Inc.*, No. 98 C 358, 2000 WL 1849574, *6 (N.D.Ill. Dec. 15, 2000). *Accord FT & T Consulting Inc. v. Cargowise Edi Inc.*, No. 09 C 1141, 2009 WL 1904415, *2 (N.D.Ill. June 30, 2009). This is just one of many examples of the complex interaction of federal and state arbitration jurisprudence.

3. [20.16] Application of Arbitration Statutes

The Illinois Uniform Arbitration Act and the Federal Arbitration Act can both apply to the same dispute. Even when the FAA applies, “[w]hether a binding arbitration agreement exists is determined under principles of state contract law.” *Tinder v. Pinkerton Security*, 305 F.3d 728, 733 (7th Cir. 2002), citing 9 U.S.C. §2. See also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L.Ed.2d 985, 115 S.Ct. 1920, 1924 (1995). *Accord Zuniga v. Major League Baseball*, 2021 IL App (1st) 201264, ¶13, 196 N.E.3d 12, 457 Ill.Dec. 888; *Hartz v. Brehm Preparatory School, Inc.*, 2021 IL App (5th) 190327, ¶41, 183 N.E.3d 172, 451 Ill.Dec. 126; *Arbogast v. Chicago Cubs Baseball Club, LLC*, 2021 IL App (1st) 210526, ¶19, 194 N.E.3d 534, 457 Ill.Dec. 45. Thus, a court might have to decide issues under the FAA and the Illinois Act in the same case.

For example, in *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380, ¶23, 48 N.E.3d 759, 400 Ill.Dec. 472, the court determined that “the question of arbitrability is decided under the substantive law of the FAA, but the court proceedings are governed in accordance with the Illinois rules of procedure, including the procedures set forth in [710 ILCS 5/2(a)], because this case was filed in the circuit court of Illinois.” See also *Comdisco, Inc. v. Dun & Bradstreet Corp.*, 285 Ill.App.3d 796, 674 N.E.2d 902, 905, 221 Ill.Dec. 109 (1st Dist. 1996) (state procedural law, not Federal Rules of Civil Procedure, applied). The applicability of state and federal law can be fact and case specific.

However, the reach of state law is limited. The U.S. Supreme Court rejected the view that state law could bar enforcement of the FAA, even in state law claims brought in state court. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 163 L.Ed.2d 1038, 126 S.Ct. 1204, 1208 – 1209 (2006), citing *Southland Corp. v. Keating*, 465 U.S. 1, 79 L.Ed.2d 1, 104 S.Ct. 852, 861 (1984) (by enacting FAA, Congress declared that national policy favoring arbitration foreclosed state legislative attempts to undercut enforceability of arbitration agreements by requiring judicial resolution of claims). See also *Nandorf, Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 410 F.Supp.3d 882, 886 (N.D.Ill. 2019) (“State law cannot bar enforcement of the FAA, even in the context of state-law claims.”).

The FAA is not just relevant to cases pending in federal courts. When the facts of a dispute trigger application of the FAA, Illinois state courts must sometimes apply the FAA. “The Federal Arbitration Act applies to both state and federal courts.” *Brown v. Delfre*, 2012 IL App (2d) 111086, ¶15, 968 N.E.2d 696, 360 Ill.Dec. 203. Illinois courts have issued similar holdings. The FAA creates “federal substantive law that is applicable in both federal and state courts.” *Copper Bend Pharmacy, Inc. v. OptumRx, Inc.*, 2021 IL App (5th) 210083-U, ¶24; *Ford Motor Credit Co. v. Cornfield*, 395 Ill.App.3d 896, 918 N.E.2d 1140, 1149, 335 Ill.Dec. 327 (2d Dist. 2009), citing *Southland*, *supra*, 104 S.Ct. at 859 (FAA creates body of federal substantive law that applies in state and federal court). See generally *R.A. Bright Construction, Inc. v. Weis Builders, Inc.*, 402 Ill.App.3d 248, 930 N.E.2d 565, 571 – 572, 341 Ill.Dec. 355 (3d Dist. 2010) (Illinois state court holding FAA preempts Illinois statute). Indeed, the U.S. Supreme Court has long recognized that “[e]nforcement of the [FAA] . . . is left in large part to the state courts.” *Badgerow v. Walters*, 596 U.S. 1, 212 L.Ed.2d 355, 142 S.Ct. 1310, 1322 (2022)

Typically, state courts enforce the FAA when a dispute involves interstate commerce but does not trigger federal court subject-matter jurisdiction. Even though the FAA is a federal statute, it does not supply federal question subject-matter jurisdiction. The FAA applies in federal courts only if an independent jurisdictional ground gives the parties access to the U.S. district courts. *Badgerow*, *supra*, 142 S.Ct. at 1311, citing *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 170 L.Ed.2d 254, 128 S.Ct. 1396, 1402 (2008) (parties to arbitration agreement must have “independent jurisdictional basis” to petition federal court for relief under FAA). Typically, federal subject-matter jurisdiction in construction cases is obtained through diversity jurisdiction. *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 181 F.Supp.2d 914, 919 (N.D.Ill. 2002) (FAA does not create independent federal question jurisdiction). Federal subject-matter jurisdiction in a petition to compel arbitration under §4 of the FAA is determined by looking through the petition to the jurisdictional basis of the underlying substantive controversy. *Vaden v. Discover Bank*, 556 U.S. 49, 173 L.Ed.2d 206, 129 S.Ct. 1262, 1265 (2009) (text of §4 requires federal courts to “look through” petition to underlying controversy to assess whether subject-matter jurisdiction exists), *rev’d on other grounds*. But see *Badgerow*, *supra*, 142 S.Ct. at 1321 (“look-through” approach does not apply to petitions to confirm or vacate arbitration awards under §§9 and 10 of FAA, which require federal courts to look only to petition itself when assessing jurisdiction, so petitions involving nondiverse parties involving state law should be resolved by state courts). When jurisdiction is lacking in federal court, state courts may have to rule on FAA issues.

III. [20.17] ENFORCEMENT OF ARBITRATION AGREEMENTS

When a party argues that it wrongfully faces either arbitration or litigation claims, the Illinois Uniform Arbitration Act and the Federal Arbitration Act empower courts to compel or stay arbitration proceedings or to stay court proceedings pending the outcome of arbitration proceedings. See 710 ILCS 5/2 (“Proceedings to compel or stay arbitration”); 9 U.S.C. §3 (“Stay of proceedings where issue therein referable to arbitration”), 4 (“Failure to arbitrate under agreement”). If a respondent facing an arbitration claim does not believe it is subject to a valid obligation to arbitrate, it should obtain a court ruling to confirm that the dispute is not arbitrable. Failure to do so can waive its objection to the nonarbitrability of the dispute. Similarly, if a plaintiff

initiates litigation, a defendant who believes the plaintiff's claim is subject to a valid arbitration agreement may seek a court ruling to stay the litigation and to compel arbitration. Different arbitration laws apply different rules as to whether a party may or must appeal a court order denying or compelling arbitration.

A. [20.18] Presumption Favoring Arbitration

Motions to compel or stay arbitration proceedings are decided against a backdrop of caselaw that recognizes pro-arbitration public policy. "Illinois considers arbitration to be a favored method of dispute resolution." *Smith v. Jones*, 2025 IL App (5th) 231136, ¶30, 259 N.E.3d 962, 483 Ill.Dec. 257. "Illinois public policy favors arbitration." *Portage Park Capital, LLC v. A.L.L. Masonry Construction Co.*, 2024 IL App (1st) 240344, ¶14, 258 N.E.3d 35, 482 Ill.Dec. 544; *State Farm Fire & Casualty Co. v. Watts Regulator Co.*, 2016 IL App (2d) 160275, ¶28, 63 N.E.3d 304, 407 Ill.Dec. 380, citing *City of Centralia, Illinois v. Natkin & Co.*, 257 Ill.App.3d 993, 630 N.E.2d 458, 460, 196 Ill.Dec. 523 (5th Dist. 1994) (describing arbitration as "favored method" of dispute resolution). That does not mean that courts determine that all actions are arbitrable. "The presumption of arbitration is overcome where an express provision in an arbitration agreement excludes certain claims from arbitration." *Watts Regulator, supra*, 2016 IL App (2d) 160275 at ¶28, citing *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 89 L.Ed.2d 648, 106 S.Ct. 1415, 1419 – 1420 (1986). "The pro-arbitration policy is not intended to render arbitration agreements more enforceable than other contracts, and it does not operate in disregard of the intent of the contracting parties." *Hartz v. Brehm Preparatory School, Inc.*, 2021 IL App (5th) 190327, ¶41, 183 N.E.3d 172, 451 Ill.Dec. 126. See also *Morgan v. Sundance, Inc.*, 596 U.S. 411, 212 L.Ed.2d 753, 142 S.Ct. 1708, 1713 (2022), quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 18 L.Ed.2d 1270, 87 S.Ct. 1801, 1806 n.12 (1967) (policy favoring arbitration makes "arbitration agreements as enforceable as other contracts, but not more so"). However, the fact that public policy favors arbitration as a method of resolving disputes might lead some "close call" arbitrability disputes to be resolved in favor of arbitration.

B. [20.19] Motions To Compel or Stay Arbitration

The Illinois Uniform Arbitration Act and the Federal Arbitration Act both invest courts with the power to compel or stay arbitration proceedings. The Illinois Act empowers circuit courts, "upon application of a party to a dispute, to compel or stay arbitration, or to stay court action pending arbitration." *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 731, 260 Ill.Dec. 541 (2001). Specifically, §2 of the Illinois Act provides that, upon a party's application, the trial court may compel or stay arbitration or stay a court action pending arbitration. 710 ILCS 5/2(a), 5/2(b). The FAA similarly entitles parties to petition courts to compel or stay arbitration proceedings. It provides that any party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" may seek an order to compel arbitration. 9 U.S.C. §4. A companion FAA provision states that, when a lawsuit is brought on any arbitrable issue, the court shall "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. §3.

Courts typically decide motions to stay or compel arbitration on a summary basis, without lengthy discovery or evidentiary hearings. Requiring parties to litigate over their right to arbitrate

could negate the cost and schedule efficiencies that streamlined arbitration proceedings should promote. For this reason, §2(a) of the Illinois Act directs circuit courts to “proceed summarily” in determining the issues. 710 ILCS 5/2(a). That provision has been interpreted to mean “court[s] should act expeditiously and without a jury trial to make a substantive determination of whether a valid arbitration agreement exists.” *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380, ¶25, 48 N.E.3d 759, 400 Ill.Dec. 472, citing *Onni v. Apartment Investment & Management Co.*, 344 Ill.App.3d 1099, 801 N.E.2d 586, 591, 279 Ill.Dec. 912 (2d Dist. 2003), and *Comdisco, Inc. v. Dun & Bradstreet Corp.*, 285 Ill.App.3d 796, 674 N.E.2d 902, 905, 221 Ill.Dec. 109 (1st Dist. 1996). *But see CSC Partners Management, LLC v. ADM Investor Services, Inc.*, 2021 IL App (1st) 210136, ¶28, 197 N.E.3d 168, 458 Ill.Dec. 755 (finding court that fails to first make substantive determination on whether valid arbitration agreement exists cannot compel arbitration); *Ross v. Hesdorffer*, 2017 IL App (1st) 171070-U, ¶27 (trial court was required to hold evidentiary hearing to determine whether agreement to arbitrate was validly formed). Motions to compel or stay arbitration are typically viewed as presenting threshold issues for expeditious resolution.

Motions to compel or stay arbitration are generally resolved summarily by treatment similar to motions on the pleadings. Procedurally, federal courts view a motion to compel arbitration as a motion to dismiss for failure to state a claim on which relief can be granted. *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 597 (3d Cir. 2004). In deciding a motion to compel arbitration, a court may consider the pleadings, documents of uncontested validity, and affidavits submitted by the parties and decide the matter similar to a summary judgment standard. *Nationwide Insurance Company of Columbus, Ohio v. Patterson*, 953 F.2d 44, 45 n.1 (3d Cir. 1991). Illinois practice is similar. *See, e.g., Sturgill, supra*, 2016 IL App (5th) 140380 at ¶21 (motion to compel arbitration and to dismiss or stay judicial proceedings is similar to a motion to dismiss under §2-619(a)(9) of the Code of Civil Procedure, 735 ILCS 5/2-619(a)(9)).

Motions to compel or stay are resolved on narrow grounds. According to the Illinois Supreme Court, “[w]hen presented with a motion to stay litigation pending arbitration under section 3 of the FAA, the court’s inquiry is limited to whether an agreement to arbitrate exists and whether it encompasses the issue in dispute.” *Jensen v. Quik International*, 213 Ill.2d 119, 820 N.E.2d 462, 465, 289 Ill.Dec. 686 (2004). Caselaw decided under the Illinois Act is similar. Under Illinois’ statute, a motion to compel arbitration “raises a sole and narrow issue — whether there is an agreement between the parties to arbitrate the dispute at issue.” *Guarantee Trust Life Insurance Co. v. Platinum Supplemental Insurance, Inc.*, 2016 IL App (1st) 161612, ¶26, 68 N.E.3d 481, 409 Ill.Dec. 628, *appeal denied*, 80 N.E.3d 2 (2017). “When presented with a motion to stay or dismiss an action and to compel arbitration, the trial court’s inquiry is limited to ‘certain gateway matters,’ such as whether the parties have a valid arbitration clause, and if so, whether the issues in dispute fall within the scope of the arbitration clause.” *Hartz v. Brehm Preparatory School, Inc.*, 2021 IL App (5th) 190327, ¶¶42, 43, 183 N.E.3d 172, 451 Ill.Dec. 126 (trial court “recognized its authority was limited to whether a valid arbitration clause existed”). This allows courts to decide motions seeking to compel or stay arbitration proceedings in summary fashion.

When a court compels arbitration to proceed, a question sometimes arises whether the court should dismiss or merely stay the underlying litigation. While defendants might wish for claims against them to be dismissed, plaintiffs may prefer to keep litigation pending to confirm and potentially enforce any future arbitration award on their claims.

In response to a motion to stay under 9 U.S.C. §3, the Illinois Supreme Court ruled that “[i]f the court finds that an agreement to arbitrate exists and the issue presented is within the scope of that agreement, a stay under section 3 of the FAA is mandatory.” *Jensen, supra*, 820 N.E.2d at 465. However, in *Griffith v. Wilmette Harbor Ass’n*, 378 Ill.App.3d 173, 881 N.E.2d 512, 519 – 520, 317 Ill.Dec. 344 (1st Dist. 2007), after finding the dispute fell within the scope of the arbitration clause, the court dismissed the claims against those movants under 735 ILCS 5/2-619(a)(9) based on “the exclusive remedy of arbitration.” Quoting *Travis v. American Manufacturers Mutual Insurance Co.*, 335 Ill.App.3d 1171, 782 N.E.2d 322, 325, 270 Ill.Dec. 128 (5th Dist. 2005).

The Supreme Court has clarified that when a court finds that a lawsuit involves claims that are arbitrable and orders them to be resolved through arbitration, if one party requests the underlying litigation be stayed, rather than dismissed, the FAA requires that the court must grant a stay. *Smith v. Spizzirri*, 601 U.S. 472, 218 L.Ed.2d 494, 144 S.Ct. 1173, 1178 (2024). See, e.g., *Celltrace Communications Ltd. v. Acacia Research Corp.*, 689 Fed.Appx. 6 (2d Cir. 2017) (commenting that “[w]e expect appeals [seeking to overturn dismissal of litigation while arbitration proceeds] to grow increasingly rare and soon become extinct” because litigation should generally be stayed rather than dismissed pending arbitration), citing *Katz v. Cellco Partnership*, 794 F.3d 341, 343 (2d Cir. 2015) (FAA requires stay of proceedings when all claims are arbitrable and stay is requested). However, anecdotal evidence in the Circuit Court of Cook County suggests that such federal court rulings may not prevent state trial courts from dismissing, rather than staying, litigation pending the outcome of arbitration proceedings.

Also, when a “federal district court denies a motion to compel arbitration,” the Supreme Court ruled that “[t]he district court must stay its proceedings” if the losing party initiates an interlocutory appeal pursuant to §16(a) of the FAA. *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 216 L.Ed.2d 671, 143 S.Ct. 1915, 1918 (2023) (district court erred by declining to stay proceedings during pendency of interlocutory appeal from denial of motion to compel arbitration because appeal divested district court of its control over those aspects of case involved in appeal).

Orders on motions to compel or stay arbitration are immediately appealable under Illinois state practice, but parties need not take an immediate appeal. “An order granting or denying a motion to compel or stay arbitration is an interlocutory order appealable under [Supreme Court] Rule 307(a)(1).” *MHR Estate Plan, LLC v. K & G Partnership*, 2016 IL App (3d) 150744, ¶15, 67 N.E.3d 878, 409 Ill.Dec. 423. *Accord Gaines v. Ciox Health, LLC*, 2024 IL App (5th) 230565, ¶24, and *CSC Partners Management, supra*, 2021 IL App (1st) 210136 at ¶22.

This approach is logical. It gives a party ordered to resolve a dispute in an incorrect forum an option other than having to proceed in that forum on the merits. However, the Illinois Supreme Court has clarified that “a party who decides not to file an appeal from an interlocutory order of the circuit court denying a stay of arbitration does not lose the opportunity to contest the arbitrability of the dispute in a subsequent appeal from a final judgment of the court confirming the arbitration award.” *Salsitz, supra*, 761 N.E.2d at 729 – 730, citing S.Ct. Rule 307’s optional interlocutory appeal language. In Illinois, a party may wait until after final judgment is entered to appeal an order granting or denying a motion to compel or stay arbitration.

C. [20.20] Waiver of Right To Litigate

When arbitration demands are filed on non-arbitrable claims, the question of what a respondent must do to object, and in what time frame, can arise. The best practice is for the respondent to object promptly, ideally in its first arbitration filing, and to seek a court order confirming that the dispute is not subject to arbitration. Just as a party can waive a right to arbitrate by participating in litigation, participating in arbitration can sometimes waive a party's right to litigate.

"Any issue regarding the nonarbitrability of a dispute is waived by participating in the arbitration proceedings" unless the party objects at "the earliest possible moment to save the time and expense of a possibly unwarranted arbitration." *Village of Posen, Illinois v. Illinois Fraternal Order of Police Labor Council*, 2014 IL App (1st) 133329, ¶32, 17 N.E.3d 195, 384 Ill.Dec. 622, quoting *First Health Group Corp. v. Ruddick*, 393 Ill.App.3d 40, 911 N.E.2d 1201, 1210, 331 Ill.Dec. 971 (1st Dist. 2009). "The objection should be made at the earliest opportunity and must occur no later than the filing of the answer." *Craveable Hospitality Group, LLC v. Tadros*, 2020 IL App (1st) 191460-U, ¶28, quoting *Duemer v. Edward T. Joyce & Associates, P.C.*, 2013 IL App (1st) 120687, ¶50, 995 N.E.2d 321, 374 Ill.Dec. 182. A timely objection to arbitration preserves the objecting party's right to challenge an arbitration award, even when the parties participate in arbitration proceedings. *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 733, 260 Ill.Dec. 541 (2001).

In *Salsitz*, the plaintiff timely objected to the arbitration proceeding both with the arbitrator and in court. The plaintiff filed a complaint for declaratory and injunctive relief seeking to stay and permanently enjoin arbitration on the grounds that no arbitration agreement existed. Although the arbitration proceeded nevertheless, the Supreme Court held that the plaintiff, having attempted various procedural options to oppose arbitration and having timely made a record of its objections to arbitration, did not waive its objections to the arbitrability of the dispute. In *Salsitz*, the Supreme Court contrasted the facts before it with the facts in *Tri-City Jewish Center v. Blass Riddick Chilcote*, 159 Ill.App.3d 436, 512 N.E.2d 363, 365, 111 Ill.Dec. 247 (3d Dist. 1987), in which a party's untimely objection to arbitrability was waived because the objection was raised, opportunistically, after the arbitration award was issued. See also *First Health Group*, *supra*, 911 N.E.2d at 1210 (plaintiff waived arbitrability issue by failing to raise it, at any time, during arbitration). Accord *Craveable Hospitality*, *supra*, 2020 IL App (1st) 191460-U at ¶28 (waiver found when respondent's objection to arbitrability occurred after he actively participated in arbitration for over 15 months without objection). Participating in arbitration without objection will generally lead to waiver of any right to object to the arbitrability of the dispute.

D. [20.21] Waiver of Right To Arbitrate

Parties that favor litigation sometimes argue that their opponents have waived a contractual right to arbitrate, often due to the opponent's in-court conduct, *i.e.*, participation in litigation. Such cases give rise to two questions: who decides the waiver issue, and on what grounds? These questions illustrate the complexity of arbitration law. Although the U.S. Supreme Court has addressed these questions, the issues have nevertheless received different treatment in state and federal courts, including splits of authority among various federal circuit courts of appeals.

1. [20.22] Who Decides Whether a Party Waived a Right To Arbitrate?

Questions like whether a party has a right to arbitrate — and whether an arbitrator or a judge decides that question — can turn on how the issue is framed and which court decides the question. Distinctions are made around issues of “procedural” and “substantive” arbitrability, whether any gateway questions exist, and whether the question is a waiver of a party’s right to arbitrate. Whether a trial court or an appellate court is faced with waiver-related questions can also be material, as the record to be reviewed by the latter is created by proceedings before the former.

The United States Supreme Court has acknowledged that court proceedings that address whether a party has a right to arbitrate, and the courts’ use of the term “arbitrability,” can suffer linguistic confusion over the term’s proper use. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 154 L.Ed.2d 491, 123 S.Ct. 588, 592 (2002), an oft-cited but inconsistently applied decision, the Court made fine distinctions with which other courts continue to grapple. Before addressing the substance of the case, the Court recognized that “[l]inguistically speaking, one might call any potentially dispositive gateway question a ‘question of arbitrability.’” *Id.* This is an important observation. Many courts, state and federal, at both trial and appellate levels, address whether a party has a right to arbitrate and use the word “arbitrability,” perhaps inconsistently.

In *Howsam*, the Court clarified that it conceives the phrase “question of arbitrability” narrowly, *i.e.*, describing circumstances “where contracting parties would likely have expected a court to have decided the gateway matter.” *Id.* One example of a matter to be decided by judges, according to the Court, is whether the parties are bound to arbitrate a particular dispute based on an arbitration clause in a concededly binding contract. Its rationale includes that a party cannot be required to arbitrate a dispute it has not agreed to submit to arbitration. So the Supreme Court certainly views courts as having a role in assessing arbitrability.

The issue, however, becomes more nuanced when the challenge to arbitrability is based on procedural issues or a party’s conduct, perhaps constituting waiver of a right to arbitrate. In *Howsam*, the Court went on to note that “‘procedural’ questions which grow out of the dispute and bear on its final disposition’ are presumptively *not* for the judge, but for an arbitrator, to decide.” [Emphasis in original.] 123 S.Ct. at 592, quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 11 L.Ed.2d 898, 84 S.Ct. 909, 918 (1964). Such procedural questions include “allegation[s] of waiver, delay, or a like defense to arbitrability.” 123 S.Ct. at 592, quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 74 L.Ed.2d 765, 103 S.Ct. 927, 941 (1983). Thus, while *Howsam* arguably appeared to hold that arbitrators decide questions of waiver, its progeny continues to evolve — sometimes inconsistently — as courts grapple with these complex issues. The Seventh Circuit interpreted *Howsam* narrowly, to apply only to “waiver, delay, or like defenses arising from non-compliance with contractual conditions precedent to arbitration.” *Al-Nahhas v. 777 Partners LLC*, 129 F.4th 418, 426 (7th Cir. 2025), quoting *JPD, Inc. v. Chonimed Holdings, Inc.*, 539 F.3d 388, 393 – 394 (6th Cir. 2008). “Courts, not arbitrators, decide whether a party has waived the right to compel arbitration” through conduct during litigation. 129 F.4th at 424. *See also Lukis v. Whitepages Inc.*, 535 F.Supp.3d 775, 786 (N.D.Ill. 2021) (if litigant moved to compel arbitration on second day of trial, it would be absurd were court obliged to adjourn trial so arbitrator can decide whether litigant waved its objection to judicial forum). Placing the Court’s observation in context, in *Howsam*, the issues included whether the

alternative dispute resolution agency's rules — which imposed a six-year time limit for arbitration — applied and whether that question was to be resolved by a court or an arbitrator. The Court held that an arbitrator should apply the time limit rule to the underlying dispute. 123 S.Ct. at 593.

Some Illinois state court decisions seem to track *Howsam*, *supra*, referring procedural questions to arbitrators. In *Evans v. Chicago Newspaper Guild-CWA*, 2020 IL App (1st) 200281, ¶17, 174 N.E.3d 964, 447 Ill.Dec. 598, the plaintiff alleged the defendant forfeited its right to arbitration by failing to timely file the steps outlined in the section of a collective-bargaining agreement that selected arbitration. The *Evans* court cited *Howsam* for the proposition that arbitrators decide procedural questions. 2020 IL App (1st) 200281 at ¶16. The court also cited *Amalgamated Transit Union, Local 900 v. Suburban Bus Division of Regional Transportation Authority*, 262 Ill.App.3d 334, 634 N.E.2d 469, 474, 199 Ill.Dec. 630 (2d Dist. 1994), for the proposition that procedural questions regarding whether an arbitration was properly invoked are for arbitrators. *Id.* In *Evans*, the court ultimately held that “the question of whether defendant forfeited its right to arbitration is a procedural question to be resolved by the arbitrator, not the circuit court.” 2020 IL App (1st) 200281 at ¶17. The *Evans* court did not, however, explicitly frame the question to be decided as one of waiver.

By contrast, some Illinois appellate courts have held that judges — rather than arbitrators — have the authority to determine whether a party has waived a contractual right to arbitrate. In *Dustman v. Advocate Aurora Health, Inc.*, 2021 IL App (4th) 210157, ¶34, 192 N.E.3d 47, 455 Ill.Dec. 630, the court thoroughly considered and rejected the plaintiff's arguments that the defendants had waived their right to arbitration. The court determined that ignored requests for mediation and arbitration did not impliedly waive the defendants' rights to arbitrate (as such acts did not clearly and unmistakably show an intent to waive this right) and, had such waiver occurred, it could be retracted because the time for arbitration had not yet expired. *See also Glazer's Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill.App.3d 411, 876 N.E.2d 203, 214 – 215, 315 Ill.Dec. 203 (1st Dist. 2007) (circuit court, rather than arbitration panel, had authority to decide waiver issue); *Northeast Illinois Regional Commuter R.R. v. Chicago Union Station Co.*, 358 Ill.App.3d 985, 832 N.E.2d 214, 295 Ill.Dec. 63 (1st Dist. 2005) (rejecting contention that court improperly decided waiver issue rather than leaving it to be addressed by arbitrators); *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill.App.3d 1089, 746 N.E.2d 294, 298, 253 Ill.Dec. 846 (1st Dist. 2001) (trial court must engage in factual inquiry to determine if party's actions constitute waiver, something which would have nothing to do with deciding merits of case). These courts explicitly framed the question to be decided as one of “waiver,” *i.e.*, whether one party waived its right to arbitrate.

Illinois courts have distinguished *Glazers*, *Northeast Illinois Regional Commuter R.R.*, and *Schroeder* on the basis of what could be described as the posture of the case and the framing of the arbitrability issue to be decided, *i.e.*, waiver of the right to arbitrate or waiver of the right to object to arbitration. *Sterling Global Solutions, LLC v. Parrillo*, 2017 IL App (1st) 170397-U, ¶24 (distinguishing *Glazers*, *Northeast Illinois Regional Commuter R.R.*, and *Schroeder* on basis they addressed “whether a party waived its right to have a dispute resolved in arbitration,” whereas “[h]ere, we are presented with an entirely different scenario — whether Parrillo waived her right to object to arbitration”). In *Sterling*, the trial court denied a motion to vacate the arbitration award

and confirmed the award, finding that “nowhere in the arbitration hearing transcript did Parrillo’s counsel state that he objected to the proceedings because there was no arbitration agreement,” even though it had filed a motion with the trial court to stay the arbitration proceedings. 2017 IL App (1st) 170397-U at ¶16. The trial court found that “all of Parrillo’s issues should have been addressed by the arbitrator.” 2017 IL App (1st) 170397-U at ¶18. Affirming the trial court, the appellate court found, in essence, that Parrillo should have done more to object to arbitrability before the arbitrator.

Thus, *Sterling* seems more in line with *Evans, supra*, and *Howsam, supra*, which suggest that procedural questions, including perhaps waiver, are for the arbitrator, than with *Dustman, supra*, *Glazers, supra*, *Northeast Illinois Regional Commuter R.R., supra*, and *Schroeder, supra*, which suggest that courts can decide questions of waiver. Looking for a basis to reconcile these cases can seem challenging. There is room to advocate based on facts and how the issues are framed.

Other state and federal courts addressing *Howsam, supra*, have seemed to struggle to interpret its meaning consistently. Some courts have disputed whether the U.S. Supreme Court had even intended, in *Howsam*, to speak to the issue of a party’s waiver of a right to arbitrate based on that party’s in-court conduct; some courts follow *Howsam* literally and refer questions of waiver to arbitrators; and other courts continue to decide questions of waiver, even after *Howsam*.

Some decisions suggest, almost, that the *Howsam* court’s use of the term “waiver,” in describing the kinds of questions reserved for arbitrators, was a slip of the pen. *Al-Nahhas, supra*, 129 F.4th at 426 (reasoning that *Howsam*’s “dicta on waiver” is not part of its holding). For example, in *Ford Motor Credit Co. v. Cornfield*, 395 Ill.App.3d 896, 918 N.E.2d 1140, 1154, 335 Ill.Dec. 327 (2d Dist. 2009), the court explained, in dicta, that “the majority of federal appellate courts that have considered this issue have concluded that the *Howsam* Court’s use of the term ‘waiver’ referred to a party’s lack of compliance with contractual conditions precedent to arbitration, rather than waiver based on prior litigation or conduct inconsistent with the right to arbitrate, which has traditionally been ruled upon by the court.” See *Freed v. Weiss*, 2013 IL App (1st) 122815-U, ¶41 (“having reviewed *Howsam*, we agree that *Howsam* does not address the type of waiver at issue here”), citing *Ford Motor; Niles Township Support Staff, Local 1274, IFT/AFT, AFL-CIO v. Niles Township High School District Number 219*, 2014 IL App (1st) 131044-U, ¶17 (citing *Ford Motor* and reasoning *Howsam*’s use of the term “waiver” refers to “a party’s lack of compliance with contractual conditions precedent to arbitration,” not waiver). Thus, cases like *Ford Motor* and its progeny seem to question whether *Howsam* even addresses who decides waiver of a right to arbitrate through things like in-court conduct.

Some federal courts have relied on *Howsam* to conclude that arbitrators should determine when a party has waived its right to arbitration based on its litigation conduct. See, e.g., *National American Insurance Co. v. Transamerica Occidental Life Insurance Co.*, 328 F.3d 462, 466 (8th Cir. 2003) (presumption is arbitrator should decide allegations of waiver); *Stockman v. Massage Envy Franchising, LLC*, No. 23-cv-01510, 2024 WL 1376060, *4 (N.D.Ill. Mar. 30, 2024) (citing *Howsam* and ruling arbitrator must decide whether litigant waived its right to arbitrate through in-court conduct); *Grzanecki v. Darden Restaurants*, No. 19 C 05032, 2020 WL 1888917, *4 (N.D.Ill. Apr. 16, 2020) (district court refused to address plaintiff’s arguments regarding waiver, which should be determined by arbitrator).

However, the federal court trend — including in the Seventh Circuit — might be the opposite. *See generally Lukis v. Whitepages Inc.*, No. 19 C 4871, 2021 WL 1600194, *5 (N.D.Ill. Apr. 23, 2021) (calling *Transamerica Occidental Life Insurance* an “outlier” and performing waiver analysis). Federal courts have continued, after *Howsam*, to judicially decide waiver issues rather than refer them to arbitrators. *See, e.g., Al-Nahhas v. 777 Partners LLC*, 129 F.4th 418, 426 (7th Cir. 2025) (reasoning that waiver through litigation conduct was not part of *Howsam* and affirming the district court’s authority to decide waiver on those grounds); *Kawasaki Heavy Industries, Ltd. v. Bombardier Recreational Products, Inc.*, 660 F.3d 988, 994 (7th Cir. 2011) (court performed waiver analysis and held that party did not waive its right to arbitrate by its litigation conduct); *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 12 (1st Cir. 2005) (waiver due to litigation conduct is for court and not for arbitrator). U.S. District Courts in Illinois have decided matters of waiver rather than referring them to arbitrators. *Al-Nahhas v. Rosebud Lending LZO*, No. 22-cv-750, 2023 WL 5509320, *11 (N.D.Ill. Aug. 25, 2023) (finding arbitration was waived by in-court conduct including discovery and not raising arbitration clause for more than year); *Noe v. Smart Mortgage Centers*, No. 21 CV 1668, 2021 WL 4283027, *3 n.7 (N.D.Ill. Sept. 21, 2021) (court determination arbitration was not waived by in-court conduct); *United Ironworkers, Inc. v. Travelers Property Casualty Co. of America*, Case No. 3:18-CV-553-NJR-DGW, 2019 WL 77334, *7 (S.D.Ill. Jan. 2, 2019) (conducting waiver analysis and determining defendant had not acted inconsistently with right to arbitrate and finding no waiver); *Martinez v. Utilimap Corp.*, Case No. 3:14-cv-310-JPG-DGW, 2015 WL 3932151, *8 (S.D.Ill. June 25, 2015) (discussing *Howsam*, but court decided whether party waived its right to enforce arbitration clause by participating in litigation).

Illinois courts have not completely embraced *Howsam*’s explicit yet confusing apparent statement that arbitrators — rather than courts — should decide whether a party waived its right to arbitrate. *See, e.g., Glazer’s, supra*, 876 N.E.2d at 214 – 215. In *Glazer’s*, the court declined to follow *Howsam* and cited *Northeast Illinois Regional Commuter R.R., supra*, and *Schroeder, supra*, to support its holding that the circuit court had discretion to decide whether a party had waived its right to arbitrate. In *Glazer’s* and in *Ford Motor, supra*, and its progeny, the courts cited a split among courts and gave various other reasons not to follow the *Howsam* precedent. *See also Dustman, supra* (court undertaking waiver analysis); *Clanton v. Oakbrook Healthcare Centre, Ltd.*, 2022 IL App (1st) 210984, ¶42, 207 N.E.3d 1139, 462 Ill.Dec. 836 (citing *Glazer’s* and implying that trial courts can determine whether defendants waived their contractual right to arbitrate). Yet, *Evans, supra*, and *Sterling, supra*, seem to track *Howsam* in that both cases looked to arbitrators to resolve procedural question of what impact waiver-like conduct had on the right to arbitrate.

Against this judicial backdrop, if a party’s actions are framed as a question of “waiver,” an Illinois trial court may or may not conclude that it has authority to rule on the issue. One who wishes an arbitrator to decide whether waiver-like conduct defeats a party’s right to arbitrate might wish to frame the question as one of procedure rather than waiver. Also, for the reasons discussed in §20.28 below, if the question is framed as a different species of arbitrability issue, an Illinois court may leave the issue for an arbitrator. These kind of fine legal and factual distinctions further serve to illustrate the complexity of arbitration law.

2. [20.23] Basis for Arguing That a Party Waived Arbitration

Setting aside the question of who decides whether waiver has occurred, like other contractual rights, Illinois appellate courts have found that a right to arbitrate can be waived. *Village of Bartonville v. Lopez*, 2017 IL 120643, ¶38, 77 N.E.3d 639, 413 Ill.Dec. 34; *TSP-Hope, Inc. v. Home Innovators of Illinois, Inc.*, 382 Ill.App.3d 1171, 890 N.E.2d 1220, 1223, 322 Ill.Dec. 301 (4th Dist. 2008). Still, appellate courts do not blithely conclude that a party has abandoned a contractually negotiated right to arbitrate. “Illinois courts disfavor a finding that a party has waived its right to arbitrate,” thus “waiver of a contractual right to arbitration ‘is not to be lightly inferred.’” *Glazer’s Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill.App.3d 411, 876 N.E.2d 203, 214 – 215, 315 Ill.Dec. 203 (1st Dist. 2007) (waiver found after company unsuccessfully sought substantive relief and moved for arbitration under circumstances suggesting impermissible forum shopping), quoting *Atlas v. 7101 Partnership*, 109 Ill.App.3d 236, 440 N.E.2d 381, 383, 64 Ill.Dec. 829 (1st Dist. 1982).

Parties who believe they have a right to arbitrate should try to bring issues they believe to be arbitrable before an arbitrator for decision. “The crucial inquiry in determining whether a party has waived its contractual right to arbitrate is whether the party has acted inconsistently with its right to arbitrate.” *Lopez, supra*, 2017 IL 120643 at ¶47. “A party acts inconsistently with an agreement to arbitrate by submitting substantive issues under the agreement to the trial court for consideration before invoking an arbitration clause or seeking an order compelling arbitration.” *Caterpillar Inc. v. Century Indemnity Co.*, 2019 IL App (3d) 190032, ¶28, 139 N.E.3d 142, 435 Ill.Dec. 471. See also *Glazer’s, supra*, 876 N.E.2d at 215, quoting *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill.App.3d 1089, 746 N.E.2d 294, 301, 253 Ill.Dec. 846 (1st Dist. 2001) (waiver of right to arbitrate found when party eventually advocating for arbitration had opposed another party’s prior motion to compel arbitration, had failed to file demand for arbitration, and had engaged in discovery). In *D-B Cartage, Inc. v. Olympic Oil, Ltd.*, 2019 IL App (1st) 190343-U, the court applied a three-prong approach to determine whether a party waived its right to arbitrate. “The relevant question is whether the party asserting a right to arbitration (1) admitted the existence of a contract for arbitration, (2) submitted any arbitrable issues under the contract to a court of law for decision, and (3) participated extensively in the trial court proceedings.” 2019 IL App (1st) 190343-U at ¶35. “A party acts inconsistently with its right to arbitrate when it submits arbitrable issues to a court for decision.” *TSP-Hope, supra*, 890 N.E.2d at 1223, citing *Cencula v. Keller*, 152 Ill.App.3d 754, 504 N.E.2d 997, 999, 105 Ill.Dec. 712 (2d Dist. 1987) (finding waiver when defendant submitted arbitrable issues to court and did not raise arbitration clause until nine months after complaint was filed); *Smith v. Jones*, 2025 IL App (5th) 231136, ¶31, 259 N.E.3d 962, 483 Ill.Dec. 257 (collecting cases demonstrating that Illinois courts have held that party abandoned its right to arbitration by filing substantive pleadings prior to invoking arbitration clause). Asking a judge to resolve an issue that should be decided by arbitrators can often constitute waiver.

However, what in-court conduct constitutes waiver is not always clear-cut. “The existence of a waiver is determined by the types of issues submitted, not by the number of papers filed with the court.” *Kostakos v. KSN Joint Venture No. 1*, 142 Ill.App.3d 533, 491 N.E.2d 1322, 1325, 96 Ill.Dec. 862 (1st Dist. 1986) (no waiver when defendants filed answer containing no counterclaims, submitted no substantive issues for court determination, and did not propound interrogatories or take depositions). “[W]aiver of the right to compel arbitration is determined by the types of issues

submitted to the court for resolution and not the form of the documents in which those issues are raised.” *Watkins v. Mellen*, 2016 IL App (3d) 140570, ¶15, 54 N.E.3d 879, 403 Ill.Dec. 738. “A party is entitled to file an answer and plead affirmative defenses, while also asserting the right to arbitrate, without constituting waiver.” *Caterpillar, supra*, 2019 IL App (3d) 190032 at ¶34. Pleading in response to a complaint, asserting affirmative defenses, filing motions, and requesting court relief will therefore not always lead to a finding that the filing party has waived its right to arbitrate. *See generally Caterpillar, supra*, 2019 IL App (3d) 190032 at ¶29 (no waiver due to filing answer and affirmative defenses, demanding jury trial, answering cross-claims, and attending court hearings, as insurer requested stay of litigation and raised arbitration at pleading stage); *Jenkins v. Trinity Evangelical Lutheran Church*, 356 Ill.App.3d 504, 825 N.E.2d 1206, 1210, 292 Ill.Dec. 195 (3d Dist. 2005) (no waiver when party unsuccessfully moved to compel arbitration, raised court’s lack of jurisdiction in its answer, and filed affirmative defense raising arbitration); *Kessler, Mercier, & Lochner, Inc. v. Pioneer Bank & Trust Co.*, 101 Ill.App.3d 502, 428 N.E.2d 608, 613, 57 Ill.Dec. 58 (1st Dist. 1981) (no waiver when defendant set up arbitration agreement as affirmative defense and counterclaimed, in alternative, that if court found that parties to action were not subject to arbitration agreement, action at law be allowed for damages for failure to pay for architectural services). A party sued on a dispute it believes to be subject to arbitration faces a challenge, to be sure, in terms of how to plead and assert that right — and how to conduct itself in court proceedings — to avoid any suggestion of waiver, while simultaneously not losing substantive ground in the event the dispute is eventually resolved in court.

Illinois courts have found that parties that file counterclaims do not waive a right to arbitrate. For example, in *TSP-Hope, supra*, 890 N.E.2d at 1223 – 1224, the court held that the defendant did not waive the right to arbitrate by filing an answer and counterclaim as this was required to prevent forfeiture of a mechanics lien. The defendant had little choice but to make those filings, so doing so was not inconsistent with a right to have the merits of the claim resolved by arbitration. *See also LaHood v. Central Illinois Construction, Inc.*, 335 Ill.App.3d 363, 781 N.E.2d 585, 587, 269 Ill.Dec. 788 (3d Dist. 2002) (by immediately seeking stay of mechanics lien action pending arbitration, contractor preserved its right to compel arbitration). *But see Illinois Concrete-I.C.I., Inc. v. Storefitters, Inc.*, 397 Ill.App.3d 798, 922 N.E.2d 542, 547, 337 Ill.Dec. 419 (2d Dist. 2010) (general contractor’s filing of demand for subcontractor to sue to foreclose mechanics lien waived general contractor’s right to seek arbitration; nothing compelled general contractor to make this litigation demand, which was inconsistent with right to arbitrate).

Similarly, that a party participates in some discovery does not always mean it has waived a contractual right to arbitrate. In *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶24, 53 N.E.3d 218, 403 Ill.Dec. 164, *appeal denied*, 60 N.E.3d 874 (2016), the court held that a defendant’s participation in discovery, alone, was insufficient to constitute waiver. The court noted the defendant “responded to plaintiff’s discovery requests and complied with the circuit court’s discovery orders, but did not propound their own discovery requests or depose any witnesses prior to asserting their right to arbitrate,” and thus “defendants’ participation was merely responsive and not inconsistent with the right to arbitrate.” *Id.*

Merely playing defense and responding to litigation claims may not evidence an intent to waive one’s right to arbitrate. “A party does not waive the right to arbitrate if the party’s actions are merely responsive to the opposing party’s claims, thereby demonstrating the retention of an intent

consistent with the right to arbitrate.” *Johnson & Bell, Ltd. v. Scherer*, 2024 IL App (1st) 230709-U, ¶30, citing *TSP-Hope, supra*, 890 N.E.2d at 1224, and *Atlas, supra*, 440 N.E.2d at 383 (actions that constitute “limited legal maneuverings” do not waive right to arbitrate). In *Scherer*, the defendant’s act of filing a motion to dismiss on the basis that the plaintiff had failed to attach the parties’ contract to the complaint was not found to be waiver.

In *TSP-Hope, supra*, the court summarized some circumstances in which Illinois courts have found that parties waived their contractual right to arbitrate through in-court conduct:

- filing a motion for summary judgment (*Applicolor, Inc. v. Surface Combustion Corp.*, 77 Ill.App.2d 260, 222 N.E.2d 168, 171 (1st Dist. 1966));
- answering a complaint, participating in discovery for two years, and asserting arbitration in response to a motion for summary judgment (*Epstein v. Yoder*, 72 Ill.App.3d 966, 391 N.E.2d 432, 437, 29 Ill.Dec. 169 (1st Dist. 1979));
- answering a complaint with claims of setoffs against the plaintiff, participating in discovery, and waiting 13 months and 22 months from when plaintiff filed complaints against the two separate defendants before asserting a right to arbitration (*Gateway Drywall & Decorating, Inc. v. Village Construction Co.*, 76 Ill.App.3d 812, 395 N.E.2d 613, 616 – 617, 32 Ill.Dec. 282 (5th Dist. 1979));
- filing an answer claiming additional credits, filing a bill of particulars listing the additional credits, and waiting over 9 months before asserting the arbitration right (*Cencula, supra*, 504 N.E.2d at 999 – 1000);
- engaging in discovery, opposing an earlier attempt to compel arbitration, and failing to file for arbitration when given the opportunity (*Schroeder Murchie Laya Associates, supra*, 746 N.E.2d at 302); and
- filing a complaint seeking complete relief without mentioning arbitration and requesting arbitration only after the trial court and appellate court denied its request for a temporary restraining order and the other party had moved to dismiss the complaint (*Glazer’s, supra*, 876 N.E.2d at 215 – 216). 890 N.E.2d at 1223 – 1224.

Like many cases considering whether a party waived a right to arbitrate, these decisions address whether in-court conduct constitutes waiver. However, waiver jurisprudence is intensely fact-specific, and the cases are often distinguished on the facts.

Illinois courts also consider whether a party delayed in asserting its right to arbitrate, and whether the delay caused any prejudice to the opposing party, when they analyze waiver. *Kostakos, supra*, 491 N.E.2d at 1325 – 1326. In *Midland Funding LLC v. Hilliker*, 2016 IL App (5th) 160038, ¶¶26 – 33, 68 N.E.2d 542, 409 Ill.Dec. 689, a party sought to move a dispute into arbitration after 18 months of litigation. In response, the court noted that “[s]election of a forum in which to resolve a legal dispute should be made at the earliest opportunity” and that “[t]he failure of a party to move promptly for arbitration is compelling evidence” of waiver. 2016 IL App (5th) 160038 at ¶32. All things being equal, parties sued in court on arbitrable claims should lodge their objections to litigation promptly.

However, when both parties contributed to the delay in resolving questions concerning a party's right to arbitrate, courts may find that the delay did not constitute a waiver of the right to arbitrate. *Caterpillar, supra*, 2019 IL App (3d) 190032 at ¶29 (trial court did not abuse discretion finding that defendants did not waive right to arbitrate when inaction of both parties allowed pending motions regarding arbitrability to stall in trial court). *See also City of Centralia, Illinois v. Natkin & Co.*, 257 Ill.App.3d 993, 630 N.E.2d 458, 461, 196 Ill.Dec. 523 (5th Dist. 1994) (three-year delay, encompassing time period in which parties were attempting to settle their dispute, did not constitute waiver of right to arbitrate).

Federal Arbitration Act jurisprudence on this issue is similar in some ways to jurisprudence under the Illinois Uniform Arbitration Act. While “the FAA favors the enforcement of private arbitration agreements, . . . the court may refuse to enforce an arbitration agreement on the ground that the party seeking enforcement has waived such right.” [Citation omitted.] *Bovay v. Sears, Roebuck & Co.*, 2013 IL App (1st) 120789, ¶28, 994 N.E.2d 665, 373 Ill.Dec. 896 (waiver found when motion for arbitration was filed after decade of litigation, resulting in expense and prejudice to opponent), quoting *In re Toyota Motor Corp. Hybrid Brake Marketing, Sales, Practices & Products Liability Litigation*, 828 F.Supp.2d 1150, 1162 (C.D.Cal. 2011) (waiver found when manufacturer litigated action for two years, engaged in extensive discovery, filed motions with court, negotiated and sought protective orders, and did not timely move to compel arbitration and plaintiffs would suffer prejudice). Similar to Illinois law, the FAA provides that waiver of a right to arbitrate, while possible, “is not to be lightly inferred.” *In re Tyco International Ltd. Securities Litigation*, 422 F.3d 41, 44 (1st Cir. 2005), quoting *Restoration Preservation Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 61 (1st Cir. 2003).

However, federal waiver jurisprudence is not consistent across all circuits. “Federal courts considering purported waivers of the right to arbitrate have employed a variety of overlapping approaches to the issue.” *Bovay, supra*, 2013 IL App (1st) 120789 at ¶29. *See, e.g., Tyco, supra*, 422 F.3d at 44 (no bright-line rule for waiver of arbitral rights exists; each case must be judged on its unique facts); *Louisiana Stadium & Exposition District v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010) (focusing on three factors: timeliness, amount of court activity, and prejudice); *In re Pharmacy Benefit Managers Antitrust Litigation*, 700 F.3d 109, 117 (3d Cir. 2012) (focusing on motion to compel arbitration's prejudice on nonmoving party and “six nonexclusive factors to guide the prejudice inquiry”), quoting *Gray Holdco, Inc. v. Cassidy*, 654 F.3d 444, 451 (3d Cir. 2011); *Johnson Associates Corp. v. HL Operating Corp.*, 680 F.3d 713, 717 (6th Cir. 2012) (waiver stems from “two courses of conduct,” taking actions inconsistent with arbitration and delaying motion for arbitration until opposing party is prejudiced), quoting *Hurley v. Deutsche Bank Trust Company Americas*, 610 F.3d 334, 338 (6th Cir. 2010); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986) (waiver requires knowledge of existing right to arbitrate, acts inconsistent with that right, and prejudice to opposing party). The Supreme Court, however, has recently clarified “that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA.” *Morgan v. Sundance, Inc.*, 596 U.S. 411, 212 L.Ed.2d 753, 142 S.Ct. 1708, 1714 (2022). As in Illinois, federal waiver jurisprudence is intensely fact-specific and, particularly given the various approaches to assessing waiver, presents the opportunity for the parties to distinguish cases based on legal and factual grounds.

E. [20.24] Who Determines Arbitrability, and on What Basis?

Parties frequently disagree on whether a dispute is subject to a valid arbitration agreement. To make that determination, someone may have to interpret the arbitration clause, analyze whether a condition to arbitration has been fulfilled, or decide whether the agreement to arbitrate is itself valid. When parties disagree on arbitrability, a question arises: does the court or an arbitrator decide whether the dispute is arbitrable? The issue is complex and subject to considerable nuance (like the adjacent, tangentially related issue of who decides whether a party waived its right to arbitrate, which is addressed in §20.22 above). The answer can depend, in part, on whether the agreement empowers the arbitrator to determine arbitrability. The answer can depend on whether the arbitrability challenge is directed at the validity of the entire contract or just the validity of the arbitration clause or to the question of whether the facts of the particular dispute fall within the scope of an arbitration clause.

1. [20.25] Delegation of Arbitrability Determination to Arbitrator

Parties have the ability to agree whether a judge or arbitrator will determine arbitrability, under state and federal law. “Under the [Federal Arbitration Act] and the Illinois [Uniform Arbitration] Act, courts have recognized that parties are free to agree to submit the question of arbitrability itself to arbitration.” *Bahuriak v. Bill Kay Chrysler Plymouth, Inc.*, 337 Ill.App.3d 714, 786 N.E.2d 1045, 1050, 272 Ill.Dec. 211 (2d Dist. 2003). See *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 202 L.Ed.2d 480, 139 S.Ct. 524 (2019) (when parties’ contract delegates question of arbitrability to arbitrator, court may not override that delegation, even if it thinks argument that arbitration agreement applies to dispute is wholly groundless); *New Prime Inc. v. Oliveira*, 586 U.S. 105, 202 L.Ed.2d 536, 139 S.Ct. 532, 538 (2019) (“delegation clause gives an arbitrator authority to decide even the initial question whether the parties’ dispute is subject to arbitration”); *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 732, 260 Ill.Dec. 541 (2001) (recognizing there are instances when “parties agree to submit the question of arbitrability itself to arbitration”); *Metropulos v. FW Associates, LLC*, 2017 IL App (1st) 163196-U, ¶19 (recognizing parties may agree to submit issue of arbitrability to arbitration); *Craveable Hospitality Group, LLC v. Tadros*, 2020 IL App (1st) 191460-U, ¶41 (parties may agree to submit question of arbitrability to arbitration).

Courts have described the question of “who decides” arbitrability questions (*i.e.*, the “division of labor between courts and arbitrators”) as a “perennial question” and “especially challenging” when the arbitration clause delegates questions of arbitrability to arbitrators. *Mikoff v. Unlimited Development, Inc.*, 2024 IL App (4th) 230513, ¶34, 251 N.E.3d 901, 480 Ill.Dec. 20. In *Mikoff*, an FAA decision, the court recognized the tension created by the issue discussed in §20.26 below: whether an arbitrability challenge is directed to the entire contract or just the arbitration clause. There, the court cited the U.S. Supreme Court for the propositions that a challenge to only the delegation clause can be resolved by the court but “a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.” *Id.*, citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 163 L.Ed.2d 1038, 126 S.Ct. 1204, 1210 (2006) (challenge to contract as whole goes to arbitrator), and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 177 L.Ed.2d 403, 130 S.Ct. 2772, 2777 (2010) (recognizing parties can agree to arbitrate arbitrability).

The “who decides” delegation question can be more complex in multiple contract situations. When the parties executed only one contract, if it “contains an arbitration clause with a delegation provision, then, absent a successful challenge to the delegation provision, courts must send all arbitrability disputes to arbitration.” *Coinbase, Inc. v. Suski*, 602 U.S. 143, 218 L.Ed.2d 615, 144 S.Ct. 1186, 1194 (2024). However, in the event of conflicting contractual provisions on the issue of delegation in which the “parties have agreed to *two* contracts — one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitrability disputes to the courts — a court must decide which contract governs.” [Emphasis in original.] *Id.*

When assessing whether the parties empowered an arbitrator to determine his or her own jurisdiction, *i.e.*, delegation of the arbitrability determination to the arbitrator, the parties’ intent is important under both state and federal court decisions.

Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, see, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S.Ct. 1212, 1216, 131 L.Ed.2d 76 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985), so the question “who has the primary power to decide arbitrability” turns upon what the parties agreed about *that* matter. [Emphasis in original.] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L.Ed.2d 985, 115 S.Ct. 1920, 1923 (1995).

The Illinois Supreme Court has ruled similarly, stressing the importance of the parties’ intent in terms of the arbitrator’s authority. “Generally, the nature and extent of an arbitrator’s power will depend upon what the parties agree to submit to arbitration.” *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill.2d 435, 530 N.E.2d 439, 445, 125 Ill.Dec. 281 (1988), quoting *Board of Trustees of Community College District No. 508, County of Cook v. Cook County College Teachers Union, Local 1600, AFT, AFL/CIO*, 74 Ill.2d 412, 386 N.E.2d 47, 50, 24 Ill.Dec. 843 (1979). When parties intend to delegate arbitrability to an arbitrator, reviewing courts review the arbitrator’s decisions deferentially. See, e.g., *Village of Oak Lawn v. Oak Lawn Professional Firefighters Association, Local 3405 IAFF*, No. 1-09-3575, 2011 WL 10068742, *12 (1st Dist. June 30, 2011) (when parties agree to submit question of arbitrability itself to arbitration, courts should review the decision on that issue as deferentially as they would review any other decision arbitrator makes on matters parties intend to arbitrate). *Accord Anderson v. Golf Mill Ford, Inc.*, 383 Ill.App.3d 474, 890 N.E.2d 1023, 1028, 322 Ill.Dec. 104 (1st Dist. 2008). See also *Peterson v. Devita*, 2023 IL App (1st) 230356, ¶30, 237 N.E.3d 1010, 474 Ill.Dec. 825, citing *Henry Schein, supra*, 139 S.Ct. at 528 (when parties clearly delegate arbitrability to arbitrator, court may not disregard that intent, even if arguments for arbitration are “wholly groundless”).

However, the Illinois Supreme Court has cautioned that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.” *Salsitz, supra*, 761 N.E.2d at 732, quoting *First Options of Chicago, supra*, 115 S.Ct. at 1924 (parties may agree to arbitrate arbitrability if there is clear and unmistakable evidence of agreement to submit question to arbitration). *Accord Walkenshaw v. Aspen Marketing Services, Inc.*, 2011 IL App (1st) 110528-U, ¶12. See also *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146 (11th Cir. 2015) (parties may agree to commit even threshold determinations to arbitrator); *VRG*

Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P., 717 F.3d 322, 325 (2d Cir. 2013) (questions of arbitrability should be sent to arbitrators if parties unmistakably expressed their intention to do so). See *Policemen’s Benevolent & Protective Association of Illinois, Unit 156A — Sergeants v. City of Chicago*, 2018 IL App (1st) 171089-U, ¶28 (finding that nothing indicated parties intended to submit question of arbitrability to arbitration). In *Mulligan v. Loft Rehabilitation & Nursing of Canton, LLC*, 2023 IL App (4th) 230187, ¶28, 236 N.E.3d 1084, 474 Ill.Dec. 525, the court found an arbitration clause that empowered the arbitrator to resolve “all claims or controversies arising out of or in any way relating to the *Agreement*” did not delegate the question of arbitrability to the arbitrator because that clause refers to the contract rather than the arbitration clause. [Emphasis in original.] Even when arbitrability is clearly and broadly delegated by contract to arbitrators, that does not mean courts have no role to play. 2023 IL App (4th) 230187 at ¶19 (most sweeping delegation clause cannot send issues of contract formation to arbitrators “because, until the court rules that a contract exists, there is simply no agreement to arbitrate”).

Incorporating the rules of an arbitration provider can be a delegation of authority to arbitrators to resolve questions of arbitrability, if the rules delegate that authority. American Arbitration Association Construction Industry Arbitration Rule R-9(a) provides: “The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.” In *Wilcosky v. Amazon.com, Inc.*, No. 19-cv-05061, 2021 WL 410705, *11 (N.D.Ill. Feb. 5, 2021), the court observed that “the consensus view of federal case law is that the incorporation by reference of the AAA Rules is clear and unmistakable evidence of an intention to arbitrate arbitrability.” Similarly, in *Crooms v. Southwest Airlines Co.*, 459 F.Supp.3d 1041, 1055 (N.D.Ill. 2020), the court observed that “[s]everal Circuit Courts have ruled that incorporating AAA Rules constitutes ‘clear and unmistakable evidence’ that the parties agreed to arbitrate the question of arbitrability.” See generally *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 203 L.Ed.2d 636, 139 S.Ct. 1407, 1417 (2019) (acknowledging parties “are free to authorize arbitrators to resolve such questions”). See also *Allscripts Healthcare, LLC v. Etransmedia Technology, Inc.*, 188 F.Supp.3d 696, 701 (N.D.Ill. 2016) (citing AAA Commercial Arbitration Rule 7(a) and finding incorporation of AAA Rules into arbitration clause “clearly and unmistakably delegates authority to the arbitrators to decide [arbitrability]”). See also *Copper Bend Pharmacy, Inc. v. OptumRx*, 2023 IL App (5th) 220211-U, ¶55 (noting incorporation of AAA rules “has been found sufficient to delegate jurisdiction to the arbitrator for issues related to the existence, scope, validity, and arbitrability,” but interpreting contrary language in arbitration clause to override delegation of arbitrability that might otherwise apply due to incorporation of AAA rules).

Especially when the arbitrators have been given authority to determine their own jurisdiction, as in the AAA Construction Industry Arbitration Rules, the arbitrator’s determination of arbitrability should be given deference under the Illinois Uniform Arbitration Act and the Federal Arbitration Act. *Salsitz, supra*, 761 N.E.2d at 732, citing *First Options of Chicago, supra*, 115 S.Ct. at 1923 (court must defer to arbitrator’s arbitrability decision when parties have submitted question of arbitrability to arbitration).

2. [20.26] Challenges to the Validity of an Agreement To Arbitrate

When a party challenges the validity of an agreement to arbitrate, the nature of the challenge can determine whether the issue is resolved by a judge or an arbitrator. This can depend on whether the challenge is directed to the entire contract or to the arbitration clause specifically.

Under the Federal Arbitration Act, if a party specifically challenges the validity of the arbitration clause, a court must consider that threshold challenge before potentially referring the matter to an arbitrator. “Unless a party specifically challenges the validity of the agreement to arbitrate, both sides may be required to take all their disputes — including disputes about the validity of their broader contract — to arbitration.” *New Prime Inc. v. Oliveira*, 586 U.S. 105, 202 L.Ed.2d 536, 139 S.Ct. 532, 538 (2019). The rationale given is that, like other contracts, agreements to arbitrate “may be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 177 L.Ed.2d 403, 130 S.Ct. 2772, 2776 (2010), quoting *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 134 L.Ed.2d 902, 116 S.Ct. 1652, 1656 (1996). Thus, if an arbitration clause is challenged based on fraud in the inducement of the arbitration clause itself, courts must consider that challenge. *Rent-A-Center, supra*. If a valid agreement to arbitrate is determined to exist, there might then be a basis to refer aspects of the dispute for arbitrator determination. A contrary rule that immunizes arbitration agreements from judicial challenge on such grounds “would . . . elevate [arbitration agreements] over other forms of contract.” 130 S.Ct. at 2778, quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 18 L.Ed.2d 1270, 87 S.Ct. 1801, 1806 n.12 (1967). “In *Prima Paint*, the Supreme Court held that, in the context of a fraud in the inducement challenge, the ‘making’ of an agreement for arbitration is at issue when there is an independent challenge to the arbitration clause itself.” *Spahr v. Secco*, 330 F.3d 1266, 1271 (10th Cir. 2003). This rationale is based in part on the specific language of the FAA. Because §2 of the FAA provides that a “‘written provision’ . . . ‘to settle by arbitration’ . . . is ‘valid, irrevocable, and enforceable’” and the provision does not mention the validity of the contract in which the arbitration agreement is contained, courts have held that they have authority to hear only challenges specific to the validity of the agreement to arbitrate, and not challenges to the contract as a whole. *Rent-A-Center, supra*, 130 S.Ct. at 2778, quoting 9 U.S.C. §2. The rationale of these cases seems to be, generally, that if the court is concerned that the parties did not, in fact, agree to include an arbitration clause in their contract, the court itself should make a determination before potentially referring the dispute to arbitration.

If the challenge is directed to the entire contract, rather than just to the arbitration clause, under the FAA, courts must treat the arbitration clause as valid and leave any challenge to the validity of the entire contract to the arbitrator. *New Prime, supra*, 139 S.Ct. at 538, citing *Rent-A-Center, supra*, 130 S.Ct. at 2778. *See also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 163 L.Ed.2d 1038, 126 S.Ct. 1204, 1210 (2006) (regardless of whether challenge is brought in federal or state court, challenge to validity of contract as whole, and not specifically to arbitration clause, must go to arbitrator); *Prima Paint, supra*, 87 S.Ct. at 1807 (claim of fraud in inducement of entire contract was for arbitrators under arbitration clause providing for reference of any controversy or claim arising out of or relating to agreement or breach thereof). Part of the basis for distinguishing challenges to an entire contract from challenges to an arbitration provision is that “an arbitration provision is severable from the remainder of the contract.” *Buckeye Check Cashing, supra*, 126 S.Ct. at 1209. The rationale of these cases seems to be, generally, that if no one disputes that a contract contains an arbitration clause, it is appropriate for an arbitrator, rather than a court, to assess whether the contract is valid and enforceable.

Illinois state law courts have relied on federal precedent in issuing similar rulings. “[W]hen a party challenges the enforceability of a contract as a whole, as opposed to the arbitration provision alone, the issue of the contract’s validity proceeds to arbitration.” *G3 Analytics, LLC v. Hughes*

Socol Piers Resnick & DYM Ltd., 2016 IL App (1st) 160369, ¶18, 67 N.E.3d 940, 409 Ill.Dec. 485, citing *LRN Holding, Inc. v. Windlake Capital Advisors, LLC*, 409 Ill.App.3d 1025, 949 N.E.2d 264, 269, 350 Ill.Dec. 776 (3d Dist. 2011) (citing United States Supreme Court and other federal precedent). See *Mikoff v. Unlimited Development, Inc.*, 2024 IL App (4th) 230513, ¶54, 251 N.E.3d 901, 480 Ill.Dec. 20 (plaintiff's attack on agreement as whole, and not on arbitration agreement in particular, dispute is one arbitrator must address).

In some FAA cases, federal courts have themselves resolved the issue when the challenge to arbitrability “naturally goes to both the entire [agreement] and the specific agreement to arbitrate,” particularly when the capacity to contract is in question. *Mayorga v. Ronaldo*, 491 F.Supp.3d 840, 854 (D.Nev. 2020) (when party challenges contract on basis that party lacked mental capacity to enter into contract, analytical formula developed in *Prima Paint, supra*, cannot be applied because “[u]like a claim of fraud in the inducement, which can be directed at individual provisions in a contract, a mental capacity challenge can logically be directed only at the entire contract”). See also *Burgoon v. Narconon of Northern California*, 125 F.Supp.3d 974, 983 (N.D.Cal. 2015) (it is “the Court’s duty, and not the arbitrator’s, to assess Plaintiffs’ assertions of mental incapacity and undue influence”). Likewise, in one recent Illinois decision, the appellate court noted that an arbitration clause would be procedurally unconscionable and unenforceable if the signatory were compelled to sign at a time when she lacked the capacity to understand what she was signing and the rights she was bargaining away. *Sanders v. Oakbrook Healthcare Centre, Ltd.*, 2022 IL App (1st) 221347, ¶34, 225 N.E.3d 16, 469 Ill.Dec. 614 (case remanded to circuit court for evidentiary hearing on capacity). The capacity of a party to contract is one of numerous issues that might need to be considered to determine the scope of a challenge to an arbitration clause.

3. [20.27] Does the Dispute Fall Within the Arbitration Clause?

A common “arbitrability” question is whether the facts of a particular dispute fall within an arbitration clause’s description of matters to be arbitrated. A different procedure is used to answer this question for cases governed by the Illinois Uniform Arbitration Act than for those subject to the Federal Arbitration Act. Under the FAA, courts generally make this arbitrability determination. Under the Illinois Act, if it is clear whether a dispute falls within the scope of an arbitration clause, courts resolve the issue and may order either arbitration or litigation to proceed. If it is unclear whether the facts of the dispute trigger the arbitration clause, under the Illinois Act, courts generally allow arbitrators to decide the issue. See *Clark v. Foresight Energy, LLC*, 2023 IL App (5th) 230346, ¶17, 228 N.E.3d 988, 471 Ill.Dec. 479, citing *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶24, 138 N.E.3d 201, 435 Ill.Dec. 13. But even when the Illinois Act applies, an arbitrator’s determination is subject to appeal to the courts, which may vacate arbitration awards if they determine that no arbitration agreement exists.

a. [20.28] Under the Illinois Uniform Arbitration Act

The Illinois Supreme Court has held that, if the Illinois Uniform Arbitration Act applies, it is sometimes appropriate for a court to determine, in the first instance, whether the facts of a dispute fall within the ambit of an arbitration clause. *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 728 – 729, 260 Ill.Dec. 541 (2001), citing *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill.2d 435, 530 N.E.2d 439, 443, 125 Ill.Dec. 281 (1988). See also *United Cable Television Corp.*

v. Northwest Illinois Cable Corp., 128 Ill.2d 301, 538 N.E.2d 547, 550, 131 Ill.Dec. 172 (1989) (explaining circumstances when issue is resolved by courts instead of arbitrators). Courts will typically make this determination only if presented with a motion to compel or stay arbitration proceedings, and only if the court determines that the language of the agreement clearly resolves the issue. If the dispute clearly does — or does not — fall within the scope of an arbitration clause, courts facing motions to compel or stay arbitration will rule accordingly.

According to the Illinois Supreme Court, if the “language of the arbitration agreement is clear, and it is apparent that the dispute sought to be arbitrated falls within the scope of the arbitration clause, the court should decide the arbitrability issue.” *Donaldson, Lufkin & Jenrette Futures, supra*, 530 N.E.2d at 443. *See also Guarantee Trust Life Insurance Co. v. Platinum Supplemental Insurance, Inc.*, 2016 IL App (1st) 161612, ¶26, 68 N.E.3d 481, 409 Ill.Dec. 628 (if it is clear that dispute falls within scope of arbitration clause or agreement, court must compel arbitration; if it is clear that dispute does not fall within arbitration clause or agreement, court must deny motion to compel), *appeal denied*, 80 N.E.3d 2 (2017).

When, however, the arbitrability question is not resolved by the clear language of the arbitration agreement, Illinois courts may take the opposite approach. When the Illinois Act governs, arbitrators determine initially whether the subject of a dispute falls within the scope of an arbitration agreement when it is debatable whether the facts of a dispute bring it within the ambit of an arbitration clause. *Salsitz, supra*, 761 N.E.2d at 728 – 729. If it is unclear whether the dispute falls within the scope of an arbitration clause, courts facing motions to compel or stay will refer the issue to an arbitrator for his or her determination.

The approach to this issue under the Illinois Act stems from *Donaldson, Lufkin & Jenrette Futures, supra*, 530 N.E.2d at 445 – 446, in which the Illinois Supreme Court followed the lead of other states that have adopted the Uniform Arbitration Act. In *Donaldson*, the court held that “when the language of an arbitration clause is broad and it is unclear whether the subject matter of the dispute falls within the scope of [the] arbitration agreement, the question of substantive arbitrability should initially be decided by the arbitrator.” 530 N.E.2d at 445. *Accord United Cable Television, supra*, 538 N.E.2d at 550 (when terms of arbitration clause are so broad that it is not clear whether dispute falls within its scope and parties disagree on scope of arbitration provision, question of parties’ intent on scope, if reasonably debatable, should be submitted to arbitrator for decision as to arbitrability); *MHR Estate Plan, LLC v. K & G Partnership*, 2016 IL App (3d) 150744, ¶20, 67 N.E.3d 878, 409 Ill.Dec. 423 (if scope of agreement is reasonably in doubt, then meaning of arbitration clause should be determined by arbitrators); *Illinois State Toll Highway Authority v. International Brotherhood of Teamsters, Local 700*, 2015 IL App (2d) 141060, ¶24, 43 N.E.3d 1206, 398 Ill.Dec. 296 (when it is unclear whether dispute falls within arbitration agreement, question should initially be decided by arbitrator); *Equistar Chemicals, LP v. Hartford Steam Boiler Inspection & Insurance Company of Connecticut*, 379 Ill.App.3d 771, 883 N.E.2d 740, 744 – 745, 318 Ill.Dec. 509 (4th Dist. 2008) (question of arbitrability, which turned on application and interpretation of contract, was for arbitrator to determine in first instance).

In other words, courts use a three-pronged approach to determine whether there is an agreement between the parties to arbitrate the dispute at issue:

(1) if it is clear that the dispute falls within the scope of the arbitration clause or agreement, the court must compel arbitration; (2) if it is clear that the dispute does not fall within the arbitration clause or agreement, the court must deny the motion to compel; and (3) if it is unclear or ambiguous whether the dispute falls within the scope of the arbitration clause, the matter should be referred to the arbitrator to decide arbitrability. *Guarantee Trust, supra*, 2016 IL App (1st) 161612 at ¶26, citing *Donaldson, Lufkin & Jenrette Futures, supra*, 530 N.E.2d at 445 – 446.

Of course, even if the issue is referred to an arbitrator, its arbitrability decision is subject to an “ultimate determination of arbitrability by the court” because “[a] court may vacate an arbitration award if it determines there was no arbitration agreement.” *Salsitz, supra*, quoting *Donaldson, Lufkin & Jenrette Futures, supra*, 530 N.E.2d at 446 (“it was the express intention of the drafters of the Uniform Arbitration Act that the arbitrator initially interpret the arbitration clause in unclear cases, subject to the ultimate determination of arbitrability by the court”). Thus, even when an arbitrator initially determines arbitrability, the determination is subject to court review.

b. [20.29] Under the Federal Arbitration Act

By contrast to the procedure under the Illinois Uniform Arbitration Act, under the Federal Arbitration Act trial courts generally decide whether the subject of a dispute falls within the scope of an arbitration clause. According to the U.S. Supreme Court, “a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court” to decide under the FAA. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 154 L.Ed.2d 491, 123 S.Ct. 588, 592 (2002). See *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 177 L.Ed.2d 567, 130 S.Ct. 2847, 2855 – 2866 (2010) (whether parties have agreed to submit particular dispute to arbitration is typically issue for judicial determination). This is particularly true if the arbitration agreement does not designate the arbitrator as the one to decide questions of its own jurisdiction. *BG Group PLC v. Republic of Argentina*, 572 U.S. 25, 188 L.Ed.2d 220, 134 S.Ct. 1198, 1202 (2014) (if contract is silent on who is to determine threshold question of arbitrability, courts determine question under FAA); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 89 L.Ed.2d 648, 106 S.Ct. 1415, 1418 (1986) (unless parties clearly and unmistakably provide otherwise, question of whether parties agreed to arbitrate is to be decided by court, not arbitrator). This is one example of how jurisprudence under the FAA and under the Illinois Act differ in meaningful ways.

When Illinois courts decide arbitrability of disputes subject to the FAA, they follow federal FAA precedent — even when it differs from cases decided under the Illinois Act. This is clear from numerous state court decisions. For example, in *Caudle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 959, 614 N.E.2d 1312, 1316, 185 Ill.Dec. 627 (5th Dist. 1993), the court noted that “if the [FAA] applies, the court itself is to decide whether an issue is arbitrable,” but “[i]f the [Illinois Act] applies, there are areas . . . where the court, on the question of arbitrability, must defer to the arbitrator.” Under the FAA, “the trial court is charged with determining questions of arbitrability, specifically whether the parties are bound by an arbitration clause and whether the arbitration clause applies to a specific controversy.” *Ford Motor Credit Co. v. Cornfield*, 395 Ill.App.3d 896, 918 N.E.2d 1140, 1149, 335 Ill.Dec. 327 (2d Dist. 2009). When “the arbitration clause at issue states that the rules governing the arbitration are controlled by the FAA, it is the court that decides, initially, ‘the

*question of arbitrability.’ ” [Emphasis in original.] Sturgill v. Santander Consumer USA, Inc., 2016 IL App (5th) 140380, ¶23, 48 N.E.3d 759, 400 Ill.Dec. 472, quoting Hollingshead v. A.G. Edwards & Sons, Inc., 396 Ill.App.3d 1095, 920 N.E.2d 1254, 1258, 336 Ill.Dec. 664 (5th Dist. 2009). Procedurally, courts make the arbitrability determination when one party files a motion to stay litigation pending arbitration under §3 of the FAA, 9 U.S.C. §3. *Jensen v. Quik International*, 213 Ill.2d 119, 820 N.E.2d 462, 465, 289 Ill.Dec. 686 (2004). *Accord LRN Holding, Inc. v. Windlake Capital Advisors, LLC*, 409 Ill.App.3d 1025, 949 N.E.2d 264, 266, 350 Ill.Dec. 776 (3d Dist. 2011); *Ragan v. AT&T Corp.*, 355 Ill.App.3d 1143, 824 N.E.2d 1183, 1187, 291 Ill.Dec. 933 (5th Dist. 2005). Therefore, even in state court matters, before relying on Illinois caselaw decided under the Illinois Act, practitioners should determine whether the FAA governs and whether FAA jurisprudence dictates a different approach from state caselaw.*

F. Unique Arbitration Law Issues

1. [20.30] Availability of Designated Arbitrators or Arbitral Forum

When an arbitrator or arbitral forum designated in a predispute arbitration clause is not available when a dispute arises, the enforceability of the clause may be called into question.

Section 5 of the Federal Arbitration Act, which anticipates that a designated arbitrator may be unavailable, provides a mechanism for appointing a substitute:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator. 9 U.S.C. §5.

However, there are limitations on when §5 of the FAA applies. The “procedure provided in [FAA] section 5 may not be employed to circumvent the parties’ designation of an exclusive arbitral forum” or to “salvage the arbitration agreement” when an arbitral forum, “integral to the agreement to arbitrate,” becomes unavailable. *Keefe v. Allied Home Mortgage Corp.*, 2016 IL App (5th) 150360, ¶20, 67 N.E.3d 616, 409 Ill.Dec. 404.

In one case, the Illinois Supreme Court invalidated an arbitration provision that selected a forum that later became unavailable. In *Carr v. Gateway, Inc.*, 241 Ill.2d 15, 944 N.E.2d 327, 336 – 337, 348 Ill.Dec. 374 (2011), a class action was brought against a computer manufacturer, which moved to enforce an arbitration provision. However, by that time, the forum designated in the arbitration agreement, the National Arbitration Forum (NAF), had stopped accepting consumer arbitrations. The arbitration agreement specifically incorporated the NAF rules and procedures. The arbitration agreement did not include any provision for naming a substitute arbitration agency or

arbitrator. The defendant moved to appoint a substitute under §5 of the FAA, but the plaintiff argued the arbitration clause was void. The Illinois Supreme Court focused on whether designation of NAF as the arbitral forum was “integral” to the parties’ agreement to arbitrate, or something less. *Id.* “[T]he mere fact parties name an arbitral service to handle arbitrations and specify rules to be applied does not, standing alone, make that designation integral to the agreement.” 944 N.E.2d at 335. *See, e.g., Brown v. Delfre*, 2012 IL App (2d) 111086, ¶27, 968 N.E.2d 696, 360 Ill.Dec. 203 (“Nothing in this agreement evidences that the choice of NASD/FINRA was so integral to the agreement that the agreement to arbitrate would be void if FINRA declined jurisdiction.”). But based on the facts, the *Carr* court held that selection of NAF was an integral part of arbitration provision and that the unavailability of NAF invalidated the arbitration provision. 944 N.E.2d at 336 – 337.

Carr explains what courts consider when a contractually selected arbitral forum becomes unavailable. To determine if a designated arbitral forum is “integral” to the parties’ agreement to arbitrate, Illinois courts must look “to the essence of the agreement.” *Keefe, supra*, 2016 IL App (5th) 150360 at ¶21; *Brown, supra*, 2012 IL App (2d) 111086 at ¶16. Section 5 of the FAA, which provides for the appointment of substitute arbitrators, “may not be employed to circumvent the parties’ designation of an exclusive arbitral forum.” *Keefe, supra*, 2016 IL App (5th) 150360 at ¶20, citing *Carr, supra*, 944 N.E.2d at 333.

Illinois courts inquire whether the designated arbitral forum was a mere logistical issue or an important inducement for a party to agree to the arbitration clause. “If the designation of the arbitral forum and the agreement to arbitrate are of equal importance, then the designation of the arbitral forum is integral and an alternate forum may not be substituted.” *Keefe, supra*, 2016 IL App (5th) 150360 at ¶21, citing *Carr, supra*, 944 N.E.2d at 331, and *Brown, supra*, 2012 IL App (2d) 111086 at ¶16. However, “where the designation of an arbitral forum is ‘only an ancillary, logistical concern and the primary consideration is the intent to arbitrate disputes, allowing a court to appoint a substitute arbitrator fulfills the parties’ agreement to arbitrate.’” *Keefe, supra*, 2016 IL App (5th) 150360 at ¶20, quoting *Carr, supra*, 944 N.E.2d at 333. Parties often enter into construction contracts that provide for binding arbitration through the unedited language of standard contract forms. In those cases, the specified forum may not be integral to the agreement to arbitrate.

In *Keefe, supra*, another case involving unavailability of the designated arbitral forum, NAF, the court noted that the arbitration agreement did not use explicit language to indicate that NAF was the exclusive arbitral forum. Nevertheless, the court invalidated the agreement to arbitrate based on its unavailability. Because the arbitration clause mandated that disputes “shall” be arbitrated under the NAF Code of Procedure and specifically directed that claims be filed with NAF using NAF forms, the court held that the parties intended to arbitrate their disputes exclusively before NAF using its then-existing rules. 2016 IL App (5th) 150360 at ¶22. Due to the unavailability of NAF as an arbitral forum and the parties’ inability to use its rules, the court found the parties’ arbitration agreement unenforceable.

2. [20.31] Forum-Selection Clauses and Statutes

When the same contract contains an arbitration clause and a forum-selection clause, questions regarding the enforceability of the forum-selection can arise.

Generally, forum selection clauses are enforced. In an important decision, *Atlantic Marine Construction Co. v. United States District Court for Western District of Texas*, 571 U.S. 49, 187 L.Ed.2d 487, 134 S.Ct. 568, 581 (2013), the Supreme Court unanimously upheld a forum-selection clause in a construction contract between a contractor and a subcontractor. The Court found that forum-selection clauses should ordinarily be enforced, as the parties have agreed, unless the clause violates a strong state public policy. According to the Seventh Circuit Court of Appeals, “as *Atlantic Marine* holds, a contractual choice of forum is now considered controlling except in unusual cases.” [Internal quotation marks omitted.] *In re Mathias*, 867 F.3d 727, 733 (7th Cir. 2017).

As the Supreme Court recently emphasized, a forum-selection clause “may have figured centrally in the parties’ negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, ‘the interest of justice’ is served by holding parties to their bargain.” *J.P. Morgan Chase Bank, N.A. v. McDonald*, 760 F.3d 646, 651 (7th Cir. 2014), citing *Atlantic Marine*, *supra*, 134 S.Ct. at 583.

Many states have anti-forum-selection statutes, including Illinois. The Illinois Building and Construction Contract Act, 815 ILCS 665/1, *et seq.*, renders forum-selection provisions in construction contracts, which are to be performed in Illinois, void and unenforceable if the provision requires dispute resolution proceedings to take place in another state. This statute, however, might be preempted by the Federal Arbitration Act if the parties are engaged in interstate commerce. *See R.A. Bright Construction, Inc. v. Weis Builders, Inc.*, 402 Ill.App.3d 248, 930 N.E.2d 565, 571 – 572, 341 Ill.Dec. 355 (3d Dist. 2010), in which the court held that if a contract involves interstate commerce, the FAA preempts the Illinois Building and Construction Contract Act and the forum-selection clause is valid as agreed to between the parties. Worth noting, however, is that the Illinois Building and Construction Contract Act also renders void as unenforceable “[a] provision contained in . . . a construction contract to be performed in Illinois that makes the contract subject to the laws of another state” and that this choice-of-law aspect of the statute does not seem to be preempted by, or offend, the FAA. 815 ILCS 665/10.

IV. [20.32] ARBITRATION PROCEEDINGS

As with litigation, arbitration proceedings start with a filing made by the claimant. Arbitration is usually initiated under a predispute agreement when a party files a “demand for arbitration” with the alternative dispute resolution agency named in the agreement under that agency’s rules. A demand for arbitration is a legally operative document that commences arbitration proceedings when filed.

However, filing an arbitration demand does not necessarily stop the running of all deadlines for taking legal action, including some statutes of limitation or repose. For example, filing an arbitration demand does not toll the deadlines for perfecting or foreclosing liens under the Illinois Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.* Similarly, state insurance statutes and insurance policies may provide deadlines for making claims and taking other legal action.

A. [20.33] Conditions Precedent

Before filing an arbitration demand, lawyers should be cognizant of conditions precedent to arbitration that may exist in the parties' underlying contracts. For example, a pitfall for the unwary is created by American Institute of Architects standard-form contract documents that require submission of certain disputes to the architect, or another contractually designated "Initial Decision Maker," for an initial nonbinding decision. See AIA Document A201-2017, *General Conditions of the Contract for Construction*, §15.2 (Initial Decision). These AIA forms also provide that these initial decisions can become final and nonbinding if not timely appealed through the binding dispute resolution process stipulated by contract. AIA contract documents also give preclusive effect to the architect's decisions about aesthetic effect, making these decisions nonarbitrable.

In many cases, arbitrators decide procedural issues like whether conditions precedent to the bringing of arbitration claims were met. Such preconditions may include fulfillment of mediation obligations, expiration of limitation periods, timely notice, or decisions of design professionals on time or cost. These threshold issues, which are sometimes characterized as questions of "procedural arbitrability" for arbitrators to decide, can differ from "substantive arbitrability" issues, like waiver, which courts sometimes decide. See generally *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 154 L.Ed.2d 491, 123 S.Ct. 588, 592 (2002) ("“procedural” questions which grow out of the dispute and bear on its final disposition’ are presumptively *not* for the judge, but for an arbitrator, to decide” [emphasis in original]), quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 11 L.Ed.2d 898, 84 S.Ct. 909, 918 (1964); *Ford Motor Credit Co. v. Cornfield*, 395 Ill.App.3d 896, 918 N.E.2d 1140, 1150, 335 Ill.Dec. 327 (2d Dist. 2009) ("trial court's role in determining the arbitrability of a dispute does not apply to gateway procedural issues"). See also *Evans v. Chicago Newspaper Guild-CWA*, 2020 IL App (1st) 200281, ¶16, 174 N.E.3d 964, 447 Ill.Dec. 598 (finding that timeliness of following steps in grievance process is procedural question to be determined by arbitrator as opposed to condition precedent to invoking right to arbitration that may be resolved by courts).

B. [20.34] Initiating Arbitration

Most alternative dispute resolution agencies allow parties to file demands for arbitration online through their websites. Administering agencies require only a submittal of a basic form that sets forth the general nature of the claim and the amount claimed. In many cases, particularly those involving complex disputes or large disputed sums, the simple statement of claim form is supplemented by a rider that provides a more detailed explanation of the dispute. Most arbitrators will honor a party's request for a more detailed statement of the opponent's claim or counterclaim. Answering statements need not be filed or filed in any particular form. However, if no answer is filed, the claimant will likely seek a response; most arbitrators will grant that request. If the parties require an arbitrator with special expertise, they should describe the nature of the expertise they require in their initial filings with the ADR agency administering the arbitration.

Even if the predispute agreement requires the arbitration proceedings to be administered by an ADR agency, the parties may ignore that requirement and attempt to arbitrate using the agency rules or no rules. However, without an ADR agency to administer the arbitration under its rules, disputes about how the arbitration will proceed, and whether it will proceed, may occur. If there

are no applicable agency rules and no ADR agency to administer the process, should the respondent resist arbitration, the claimant must move for a court order compelling arbitration. By contrast, if a claimant successfully files a demand for arbitration with an ADR agency, the arbitration process can begin to move forward over the objection of the respondent. In that case, it is the respondent, rather than the claimant, that must seek court intervention to stop the arbitration.

Most arbitrations arise from predispute arbitration clauses in the underlying contracts. When disputing parties have no predispute agreement to arbitrate, they may initiate arbitration by filing a “voluntary submission” of the dispute to arbitration agencies. For example, the American Arbitration Association has forms on its website, www.adr.org/rules-forms-and-fees, that permit parties to agree to voluntarily submit a dispute to arbitration.

C. [20.35] Joinder and Consolidation

Questions of when additional parties can be joined to a pending arbitration, and whether several arbitration proceedings may be consolidated, are typically determined through some combination of contract language, alternative dispute resolution agency rules, and applicable caselaw.

For example, American Institute of Architects contract documents provide that, subject to ADR agency rules, either party may consolidate an arbitration conducted under the arbitration agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s). See AIA Document A201-2017, *General Conditions of the Contract for Construction*, §15.4.4 (Consolidation or Joinder).

The American Arbitration Association’s procedure for consolidation and joinder, set forth in AAA Construction Industry Arbitration Rule R-7, provides that, in the event of consolidation and joinder disputes, a single arbitrator will be appointed to decide whether related arbitrations should be consolidated or parties joined. Disputing parties and reviewing courts might more willingly accept resolution of these issues by an arbitrator, appointed under ADR agency rules, than by an agency case administrator employee. This limited purpose arbitrator generally will not continue to serve and resolve the dispute’s merits.

Parties sometimes seek court intervention in consolidation and joinder disputes. The Illinois Supreme Court has ruled that two arbitrations or court proceedings will not be consolidated based solely on a court’s or arbitrator’s inability to join all parties to a dispute in a single forum. *Board of Managers of Courtyards at Woodlands Condominium Ass’n v. IKO Chicago, Inc.*, 183 Ill.2d 66, 697 N.E.2d 727, 730, 231 Ill.Dec. 942 (1998). Subject to exceptions, “the general rule is that agreements to arbitrate will be enforced despite the existence of claims by third parties or of pending multiparty litigation.” *Id.* “[A]greements to arbitrate will be enforced even in multiparty litigation where only some of the parties are subject to arbitration agreements.” *American Economy Insurance Co. v. Accelerated Rehabilitation Centers, Ltd.*, 2022 IL App (1st) 211410-U, ¶16 n.3. “[A]greements to arbitrate will be enforced even when the arbitration process delays multiparty litigation.” *Semler v. Lund*, 2019 IL App (1st) 172611-U, ¶8. Citing *Woodlands*, the Illinois

appellate court summarized the rule as follows: “if two parties in a multiparty litigation have an agreement to arbitrate, that contract must be honored between them, even if the other parties are not subject to arbitration.” *CSC Partners Management, LLC v. ADM Investor Services, Inc.*, 2021 IL App (1st) 210136, ¶35, 197 N.E.3d 168, 458 Ill.Dec. 755.

D. [20.36] Venue and Locale

The parties may provide in the predispute agreement for a particular venue for a hearing. Unless the venue chosen has no relationship to the parties or witnesses, a contractually determined venue will generally be upheld. Note that the Building and Construction Contract Act renders void and unenforceable a provision in a construction contract to be performed in Illinois that may make the contract subject to the laws of another state or requires dispute resolution proceedings to take place in another state. 815 ILCS 665/10.

Sometimes, at the outset of arbitration proceedings, disputes about the locale of the arbitration hearing can arise. This issue is often conclusively resolved by a predispute arbitration clause that identifies where the hearing will be held. However, American Arbitration Association Construction Industry Arbitration Rule R-12(a) provides: “When the parties’ arbitration agreement is silent with respect to locale and the parties are unable to agree upon a locale, the locale shall be the city nearest to the site of the project in dispute, as determined by the AAA, subject to the power of the arbitrator to finally determine the locale.” This rule shows how alternative dispute resolution agency administration of arbitration proceedings can help parties. Agency rules on issues like hearing locale can create predictability, minimize disputes over threshold issues, reduce the likelihood of litigation over such issues, and facilitate arbitrator resolution of claims on their merits.

Disputes over hearing locale are another example of how caselaw can affect arbitration. Courts have held that AAA Construction Industry Arbitration Rules for determining hearing locale, and decisions made under those rules, bind the parties and courts. *See, e.g., Stancioff v. Hertz*, 10 Mass.App.Ct. 843, 406 N.E.2d 1318, 1319 (1980) (trial court acquired jurisdiction to enter judgment on arbitration award when parties could not agree on hearing locale and AAA chose Massachusetts as site of arbitration under agency rules). *But see Chicago Southshore & South Bend R.R. v. Northern Indiana Commuter Transportation District*, 184 Ill.2d 151, 703 N.E.2d 7, 9 – 10, 234 Ill.Dec. 395 (1998) (distinguishing *Stancioff* and holding that Illinois court lacked subject-matter jurisdiction over confirmation proceedings because arbitration clause required arbitration in Indiana). *But see Lopez v. American Legal Funding LLC*, 2013 IL App (1st) 120763-U, ¶94 (distinguishing *Chicago Southshore*, which was based on “all the circumstances of [that] factually unusual case,” while acknowledging that *Chicago Southshore* remains good law).

E. [20.37] Arbitrator Selection

Alternative dispute resolution agency case administrators generally assist with arbitrator selection. They typically use the amount in controversy to determine whether one or three arbitrators are required under the agency’s rules. Based on the parties’ claim submittals and answering statements, they determine the experience required of the arbitrators. Names of qualified arbitrators and their biographies are then submitted to the parties, who rank or strike the submitted

names. Unless the parties request otherwise, after three lists are submitted, ADR agency rules generally permit the agencies to administratively appoint arbitrators subject only to a party's objection for cause. The best practice is for the attorneys to agree on arbitrators. Administrative appointments may satisfy no one.

Arbitrators may be selected in other ways. In one process, called “ad hoc” arbitrator selection, each party selects a party-appointed arbitrator; then the two party-appointed arbitrators appoint a third “umpire” arbitrator. Some ADR agencies reduce their administrative fees if the agency is not involved in selecting arbitrators and the parties use the ad hoc process. By agreement, administering agencies will usually provide a service to help the parties select arbitrators even if they provide no other administering services. The agency's service may also include assistance if a vacancy occurs on a panel or other forms of assistance requested by the parties.

Some criticize the ad hoc procedure because party-appointed arbitrators may have allegiance to their appointer and act as advocates for that side. In this situation, the only “neutral” is the umpire chosen by the party appointees. Ideally, under ad hoc procedures, the party appointees will be “neutral” and not controlled by the parties that appoint them. Under American Arbitration Association Construction Industry Arbitration Rules, unless the parties agree otherwise, all party-appointed arbitrators are considered neutral and can be removed if they are found to have violated the agency's neutrality standard. See AAA Construction Industry Arbitration Rules R-15, R-20.

All administering agencies require arbitrators being considered to disclose their relationships with the parties or lawyers for the parties that may appear to affect the arbitrators' neutrality. An administering agency may remove an arbitrator if it discovers the arbitrator's failure to make a required disclosure. See Lawrence R. Mills et al., *Vacating Arbitration Awards: A Real-World View of the Case Law*, 9 Disp.Resol.Mag., No. 4, 23 (Summer 2005). For a thorough discussion of the extent of an arbitrator's obligations to disclose prior relationships with the parties and their attorneys, see *Midwest Generation EME, LLC v. Continuum Chemical Corp.*, 768 F.Supp.2d 939 (N.D.Ill. 2010), a decision in which one of the authors of this chapter participated.

F. [20.38] Customizing the Process

Arbitrations can be expensive and time consuming when the process is not customized to meet the parties' need for a quick, cost-effective award made by a construction industry expert.

Every party's counsel should be interested in achieving an award quickly with the least cost and with a decision that even the losing party can accept. These goals can be achieved by agreement when all the parties share these common interests. If the parties' interests diverge, good arbitrators can facilitate the discovery process. A broad-form arbitration clause and rules like the American Arbitration Association Construction Industry Arbitration Rules do not interfere with achieving these goals.

Another way to customize arbitrations is to use a mediator to help design the process. A mediator can perform this function before the parties decide whether they want the mediator to participate in settlement discussions. The mediator can help reduce the amount of discovery and

motion practice. The mediator has the power to confidentially discuss with the attorneys the real issues and what they need in the arbitration. The mediator could also help the parties determine the number and identities of arbitrators and the venue for arbitration hearings. This role of the mediator is contemplated by AAA Construction Industry Arbitration Rule R-10.

Once the arbitrators are in place, they become responsible for designing the arbitration process, within limits set by the parties and based on their own experience. In both large and small cases, after a demand for arbitration is filed, the parties should work with the arbitrators to customize the arbitration using best practices to improve the speed and efficiency of the process. For example, the parties and arbitrator may create their own discovery rules in general — and rules for the exchange of electronically stored information in particular — and customize the process to reduce hearing times. See James M. Gaitis, ed., *THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION* (4th ed. 2017). The parties and their counsel are more likely to accept the outcome of the arbitration — and be willing to use arbitration again — if the process is well designed and acceptable to them. The arbitrators usually design the process at the prehearing conference with the input of counsel.

The parties also can agree on variations to traditional arbitration, including “high-low” or bracketed arbitration and “final offer” or “baseball” arbitration. In high-low arbitration, the parties agree in advance on the upper and lower range in which the award must fall. This process avoids devastating results for either party. In baseball arbitration, each party presents its last and best offer to the arbitrator, who must choose one offer. This process gives the parties an incentive to act reasonably in their “offers.”

G. [20.39] Prehearing Conferences

After an arbitration demand is filed, the parties typically participate in conference calls with an agency case administrator and then with the arbitrator. The first call usually relates to arbitrator selection, arbitrator fees and expenses, and the expenses of the administering alternative dispute resolution agency. The call with the arbitrator provides the parties an opportunity to design a custom arbitration process. Common subjects discussed include statements of claims, defenses, and counterclaims; which rules apply; what law applies to both arbitral and substantive issues; confidentiality and privacy; adding additional parties; bifurcation and consolidation of issues and parties; exchange of documents and electronic data; inspections, site visits, and testing; exchange of potential witness names and information; fact depositions, including how many are necessary; identification of experts and the timing of expert disclosures; target hearing dates and ways to minimize hearing times; submission of prehearing and post-hearing briefs; the form of award; and entry of a scheduling order to address decisions made on these subjects.

H. [20.40] Agency Fees

Administering agencies post their fee schedules online. The fees are generally based on the amount of the claim or counterclaim plus arbitrator compensation. Most agencies have a procedure by which the filing fee may be partially refunded depending on when in the process the claim is withdrawn. If no amount is stated in the claim, most agencies will assess a minimum fee.

As the arbitration proceeds through prehearing and hearing procedures, the agencies will increase fees depending on the actual amounts claimed by the parties. However, arbitration service provider agencies such as American Arbitration Association, the International Institute for Conflict Prevention and Resolution, and JAMS are sometimes also willing to sell specific services, such as arbitrator selection, that are not based on the amount of the claim.

Arbitrators' fees are generally determined by the hourly rate set by the arbitrators themselves and are added to the administrative fees charged by the administering agency. Arbitrator costs, including travel expenses, are also billed to the parties. Some arbitrators charge a cancellation fee if the hearing is canceled shortly before the anticipated hearing dates.

All administering agencies and most experienced arbitrators will require a deposit of anticipated fees before the first date of hearing. If all the deposits are not made, under AAA rules, for example, the arbitrators have the right not to proceed with the hearing. To avoid cancellation, one party may advance the deposit of another party. AAA Construction Industry Arbitration Rule R-59.

I. [20.41] Discovery

The Illinois Uniform Arbitration Act and the Federal Arbitration Act do not specifically create rights to traditional discovery. However, some agency rules specifically allow discovery in larger cases. One goal of arbitration is to limit the discovery methods and procedures typically available in court, including expensive and time-consuming depositions. Arbitration assumes that the parties want a quicker and less expensive resolution of the dispute than would occur in most courts. Parties develop confidence in the process based on the quality of the arbitrators and the role the parties have in their selection. Construction arbitration often contemplates that most of the relevant documents are contained in the parties' project files, both electronic and paper, portions of which the parties will exchange, and that any testifying expert will prepare a written analysis of the expert's findings and methodology. Based on these assumptions, the arbitrators may decide whether and to what extent additional discovery should be allowed. Good arbitrators work with counsel to create an agreed discovery protocol. The parties are incentivized to do so under threat that if they reach no agreement, the arbitrators will impose their own protocol.

In an optimal arbitration, the disputing parties agree and understand that information exchange processes like discovery should be conducted in a more efficient and streamlined fashion than in court proceedings. However, it is common today for many lawyers to treat arbitration as another form of litigation that is expensive and time-consuming. There is nothing inherent in the arbitration process that should make arbitration "look like" litigation. Attorneys interested in increasing the efficiency of the arbitration process should become familiar with the College of Commercial Arbitrators' *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, www.ccarbitrators.org/cca-protocols.

When the amount in controversy is low, the arbitrator is less likely to allow any depositions or interrogatories. The best practices seek alternative methods of discovering information that might otherwise be sought through these means. For example, if the purpose of the proposed deposition is to pin down a party's position, that can be accomplished with witness statements and expert reports rather than by cross-examination at a deposition. While arbitrators encourage exchanging relevant documents, requests for admission of facts have no place in arbitration.

Some arbitrators let the parties conduct whatever discovery they mutually agree on as long as the time until the hearing date is reasonable. Other arbitrators want to control the cost and time of discovery to ensure that the process is not similar to litigation and is quicker and less expensive. Arbitrators who limit discovery do so because they believe that vast amounts of prehearing discovery are unnecessary for a fair award. See Charles J. Moxley, Jr., *Discovery in Commercial Arbitration: How Arbitrators Think*, 63 Disp.Resol.J., No. 3 (Aug. – Oct. 2008) (also available on various websites). Regardless of the particular arbitrator’s preferred approach, one can assume that discovery in arbitration will be limited as compared to litigation.

Depending on the amount in controversy, different discovery rules may apply. For example, under the American Arbitration Association rules, when the disclosed claim or counterclaim of any party is \$1 million or more, exclusive of claimed interest, attorneys’ fees, and arbitration fees and costs, there is a presumption that some discovery will be allowed. “The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator may place such limitations on the conduct of such discovery as the arbitrator shall deem appropriate.” AAA Construction Industry Arbitration Rule L-4(d). However, under the AAA Construction Industry Arbitration Rules’ Regular Track Procedures, there is no assumption that any discovery will be allowed. But “[t]he arbitrator may, on application of a party or on the arbitrator’s own initiative . . . require the parties to exchange documents.” AAA Construction Industry Arbitration Rule R-24(b). Under the Regular Track Procedures, most arbitrations will order an exchange of information but may severely limit taking depositions. Under either the Procedures for Large, Complex Construction Disputes or the Regular Track Procedures, most arbitrators will not allow written interrogatories.

“Unlike the FAA, which may or may not allow for non-party pre-arbitration document production,” the Illinois Act expressly allows arbitrators to compel testimony and production of documents by subpoena. *McGreal v. AT&T Corp.*, 892 F.Supp.2d 996, 1009 (N.D.Ill. 2012). Specifically, §7(a) of the Illinois Act provides that “arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence.” 710 ILCS 5/7. However, §7(a) states that parties may apply to a court for enforcement of a subpoena so issued “in the manner provided by law for the service and enforcement of subpoenas in civil cases.” *Id.* “This language suggests that notwithstanding their quasi-judicial powers, arbitrators must ultimately turn to courts to achieve compliance with certain orders.” *Board of Education of City of Chicago v. Illinois Educational Labor Relations Board*, 2013 IL App (1st) 122447, ¶29, 3 N.E.3d 343, 378 Ill.Dec. 63.

Some arbitrators believe, with federal case authority, that they can compel nonparty witnesses to appear before them to give testimony or produce documents. *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577 – 578 (2d Cir. 2005) (arbitrator’s subpoenas to nonparty’s former counsel and document custodians, to appear before arbitration panel to testify and produce certain documents, were valid and enforceable under FAA). See also *Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC*, 804 F.Supp.2d 808, 811 (N.D.Ill. 2011) (“[a]ny rule there may be against compelling non-parties to participate in [pre-arbitration] discovery cannot apply to situations . . . in which the non party is ‘summon[ed] in writing [pursuant to the FAA] to attend before [the arbitrators] or any of them as a witness and . . . to bring with him . . . [documents] which may be deemed material as evidence in the case’”), quoting *Stolt-Nielsen*, *supra*, 430 F.3d at 577 – 578.

This issue is not clear-cut, however, and can under the FAA hinge on whether the nonparty is called as a witness at a hearing or was merely subpoenaed to produce documents. Section 7 of the FAA states that “the arbitrators . . . 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.” 9 U.S.C. §7. Citing this language, the court in *Broumand v. Joseph*, 522 F.Supp.3d 8, 24 (S.D.N.Y. 2021), noted that “[t]he Second Circuit — like the Third, Ninth, and Eleventh Circuits — has held that this language does not provide arbitrators with the authority to order nonparties to provide documents unless the nonparty ‘is called as a witness at a hearing.’ ” Quoting *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 218 (2d Cir. 2008).

In *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1158 – 1159 (11th Cir. 2019), the Eleventh Circuit held that §7 does not authorize arbitrators to compel nonparties to produce documents or provide testimony outside an arbitration hearing. Interestingly in this post-COVID era of videoconferencing, the court also held that arbitrators lack authority to compel a witness to appear via videoconference, emphasizing that the language of §7, which was drafted in 1925, long before the advent of videoconferences, requires witnesses to appear in the physical presence of the arbitrator.

Ultimately, the power of an arbitrator to compel nonparty witnesses to testify at an arbitration hearing and/or produce documents is an evolving area of state and federal law and jurisprudence. See generally *Alliance Healthcare, supra* (federal district court sitting in Illinois lacked authority to enforce subpoena, which directed nonparty witnesses to appear before member of arbitration panel in Northern District of California). See *Washington National Insurance Co. v. OBEX Group LLC*, 958 F.3d 126 (2d Cir. 2020) (upholding summonses requiring nonparties to testify before arbitration panel and to bring with them specified documents); *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210 (2d Dist. 2008) (FAA does not authorize arbitrators to compel prehearing document discovery from entities that are not parties to arbitration proceedings); *Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89 (2d Cir. 2006) (reversing district court decision ordering compliance with arbitrator’s subpoena).

With three-person arbitration panels, it is common for the chair of the panel to handle discovery disputes, with the agreement of the other arbitrators and the parties. Under this procedure, the other arbitrators are typically not involved unless the parties insist on their involvement or the panel chair believes their involvement is necessary.

J. [20.42] The Hearing

Advocacy in construction arbitration differs from advocacy in litigation because arbitrators have expertise in construction law and practice. Judges and juries rarely have this expertise. Even critics of arbitration agree that having experts decide complex and technical construction issues is an advantage that arbitration has over litigation. Because of their expertise, arbitrators may not need the same legal briefing that a judge unfamiliar with construction law and disputes may require. Especially when presenting expert testimony, arbitrators should not be treated as inexperienced jurors or judges. Arbitrators want witnesses to get to outcome-determinative points. If this is not happening, most arbitrators will direct the parties to become more efficient.

Many arbitrators believe that the most efficient way to understand the differences between experts is to have all experts in the hearing room when each testifies. Under this procedure, which requires agreement, the experts may ask questions of each other and respond to questions from arbitrators or the lawyers. This procedure is sometimes called “dueling experts,” “hot tubbing,” or “concurrent expert evidence.” See Stanley P. Sklar, *Innovations in Arbitration: Using Tandem Witness Examination When Experts Collide*, 2 ADR Currents, No. 1, 14 (Winter 1996 – 1997).

Advocates must determine their strategy based on their perception of the expertise of the panel and the time allotted for the hearings. Most members of the American Arbitration Association’s National Construction Panel of Arbitrators “are actively engaged in the construction industry with attorney arbitrators generally devoting at least half of their practice to construction matters.” AAA, *Construction Industry Arbitration Rules and Mediation Procedures*, p. 11 (2024), https://go.adr.org/rs/294-SFS-516/images/ConstructionRules_Print%20Final.pdf (case sensitive). It is not unusual for a construction arbitration panel to have one or more nonlegally trained members, often called “industry professionals,” who may be architects, engineers, or contractors. A minority of the AAA’s National Construction Panel members are not lawyers. If nonlawyers are on the panel, the advocates must think differently about the burden of persuasion, especially on issues about expert opinions.

Unless the parties have agreed otherwise, neither the rules of evidence nor the rules of civil procedure apply to arbitrations. Arbitrators have little tolerance for objections to exclude evidence during the hearing because they feel competent to give proper weight to evidence. This approach differs greatly from jury trials, in which exclusion of evidence is necessary because people unfamiliar with the construction process have a more difficult time distinguishing unreliable evidence. Most arbitrators will ask the lawyers to inform the other party what evidence they intend to submit and will decide any objections before the hearing begins. The arbitrators discuss with the parties during prehearing conferences the order of witnesses. Arbitrators are tolerant of innovative forms of taking testimony, including phone and videoconferencing and sworn witness statements, and are not bothered by taking witnesses out of order. Their paramount concern is that no lawyer be surprised by testimony and that no new issues get injected into the case without proper notice to all and an opportunity to prepare a rebuttal.

A tactic used to reduce hearing time is to set time limits for testimony. The limits may be to a party’s case or to a class of testimony. Usually, there is some flexibility allowed, especially when cross-examination consumes a large amount of time on one side of a case.

Transcripts of hearings are not required for an enforceable award. However, many courts will not consider a motion to vacate an award without a transcript and record. Parties can obtain a “formal” record if they have arranged for a court reporter. But live, in-person court reporters producing paper transcripts can be expensive. However, in arbitration, the record can be less formal; the parties can stipulate that an electronic record, created by an off-site certified computer-aided real-time reporter, can serve as the official record. Under this procedure, the court reporter is not in the hearing room but listens to the testimony via conference phone and streams the testimony back to the computers connected to the system. The computers may be in the hearing room or remotely located in clients’ offices. This achieves considerable cost savings. Those services are

available from Courtroom Connect, www.courtroomconnect.com, and West's LiveNote, <https://legal.thomsonreuters.com/en/products/livenote-stream>. The court reporters used in this procedure should be certified CART (computer-assisted real-time) reporters to ensure the quality of the transcription.

An out-of-state attorney's participation in an Illinois arbitration does not invalidate an award even if the conduct violates the rules prohibiting the unauthorized practice of law. *Colmar, Ltd. v. Fremantlemedia North America, Inc.*, 344 Ill.App.3d 977, 801 N.E.2d 1017, 1021 – 1022, 280 Ill.Dec. 72 (1st Dist. 2003).

K. [20.43] Ex Parte Hearings

Unlike court procedure, and as a matter of alternative dispute resolution agency policy, a party's failure to appear does not automatically result in a default award against that party. Arbitrators typically require a prove-up with evidence that will support claims made against absent parties.

L. [20.44] Form of Arbitration Award

The parties to an arbitration proceeding can determine the form of the award to be issued. The basic form is simple and merely lists the claim and disposition, usually by line item. The reasoned form of arbitration award, which is probably the most popular form of opinion, explains the award but does not necessarily cite cases as a court opinion would. American Arbitration Association Construction Industry Arbitration Rule R-48 provides, in pertinent part:

- (a) Any award shall be in writing and signed by a majority of the arbitrators. Signatures may be executed in electronic or digital form. The award shall be executed in the form and manner required by law.**
- (b) In all cases, unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any monetary awards and, if there are non-monetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each non-monetary claim or counterclaim.**
- (c) The parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact, or conclusions of law no later than the conclusion of the first Preliminary Management Hearing. If the parties agree on a form of award other than that specified in R-48(b) of these Rules, the arbitrator shall provide the form of award agreed upon. If the parties disagree with respect to the form of the award, the arbitrator shall determine the form of award.**

The AAA's Procedures for Large, Complex Construction Disputes presume the arbitrators will issue a reasoned award unless the parties agree otherwise. Awards rarely include findings of fact and conclusions of law, especially when the amount in controversy does not justify paying the arbitrators to prepare that type of award.

M. [20.45] Interim and Final Awards

Most agencies that administer arbitrations do not have standard rules that limit the maximum time from filing of the arbitration demand to the final award. However, once the hearing closes, most rules require the arbitrators to make an award within 30 days. For example, under American Arbitration Association Construction Industry Arbitration Rule R-47, “[t]he award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing.” Therefore, the parties and arbitrator should determine in the prehearing conference whether oral argument and closing briefs are considered part of “the hearing,” as this can determine the deadlines by which the arbitrators must issue their arbitration awards.

Arbitrators are sometimes empowered to enter interim awards. For example, AAA Construction Industry Arbitration Rule R-38(a) provides that “[t]he arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.” Interim awards may also address interim subjects like rulings on motions or the results of bifurcated hearings, which may not end the arbitration proceedings or result in a final award. Interim awards are not final awards and do not start clocks running for vacatur or confirmation under the arbitration statutes. If the arbitrators have a right to award attorneys’ fees, it is common for the arbitrators to issue the economic award as an interim award, then hold a hearing on legal fees, and then issue a final award that includes both the economic award and legal fees.

Not understanding the difference between interim and final awards is a pitfall for the unwary. See Bruce E. Meyerson, *Interim Relief in Arbitration: What Does the Case Law Teach Us?*, 34 *Alternatives to High Cost Litig.* 131 (Oct. 2016).

N. [20.46] Award Remedies

Arbitrators generally have much broader power than courts to fashion remedies. However, parties seeking nonmonetary relief should know that any award must ultimately be enforced by a court. Awards that might be difficult to enforce may, in fact, prove difficult to enforce.

Arbitrators’ power to fashion remedies is not unlimited. At least one intermediate Illinois appeals court held that arbitrators may not award damages after reforming a written contract to conform to an oral agreement between the parties. *First Merit Realty Services, Inc. v. Amberly Square Apartments, L.P.*, 373 Ill.App.3d 457, 869 N.E.2d 394, 400, 311 Ill.Dec. 720 (1st Dist. 2007) (vacating arbitration award in which arbitrators reformed parties’ written agreement).

If these remedies are allowed by contract, arbitrators have the power to award punitive damages and attorneys’ fees. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 131 L.Ed.2d 76, 115 S.Ct. 1212, 1219 (1995) (holding arbitral award of punitive damages should have been enforced as within scope of contract); *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 181 Ill.2d 373, 692 N.E.2d 1167, 1175, 230 Ill.Dec. 1 (1998) (citing *Mastrobuono* and remanding with directions to circuit court to order further arbitration on issue of punitive damages).

O. [20.47] Modification of Award by Arbitrator

After they issue a final award, the arbitrators have jurisdiction only to correct ministerial mistakes. For that reason, some arbitrators will circulate draft awards to the parties for comment. Other arbitrators may ask each party to submit their proposed award for the arbitrators' consideration while the arbitrators prepare their final award.

American Arbitration Association Construction Industry Arbitration Rule R-52(a) provides that "[w]ithin 20 calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any party, upon notice to the other parties, may request that the arbitrator, through the AAA, clarify the award or correct any clerical, typographical, technical, or computational errors in the award," but "[t]he arbitrator is not empowered to redetermine the merits of any claim already decided." Therefore, in the typical instance, a request to modify or correct an arbitration award would first be made to the arbitrator and, only if relief is not granted, to the court.

V. [20.48] CONFIRMING, VACATING, AND CORRECTING AWARDS

Both federal and state laws limit the grounds on which parties may seek to vacate arbitration awards. Such grounds are generally limited to defects in the process, not mistakes on the merits of the arbitrator's decision. All arbitration statutes require summary proceedings, not substantive hearings on the merits, to confirm arbitration awards. The time limits for a party to file a petition to confirm or vacate awards depend on the law that applies to the case.

A. [20.49] Confirming an Award

Arbitration awards are not legally enforceable until they become court judgments, but parties sometimes comply with awards not confirmed in court. Without a judgment, the amount of an award cannot create a priority for a judgment creditor. Once an award is issued, depending on the applicable law, interest will sometimes accrue on the judgment confirming the award after the judgment is entered. Interest rarely accrues on the award before a court confirms the award. While the parties may agree that an award will be confidential, that confidentiality does not bind third parties and often is lost if the parties file court proceedings to vacate or confirm an award.

The Illinois Uniform Arbitration Act imposes no deadlines or limitations periods to confirm arbitration awards. Section 11 of the Illinois Act provides:

Confirmation of an award. Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13. 710 ILCS 5/11.

"The purpose of this section is to encourage parties voluntarily to treat arbitration awards as final and binding." *United Steelworkers of America, AFL-CIO-CLC v. Danly Machine Corp.*, 658 F.Supp. 736, 738 (N.D.Ill. 1987) (no deadline to confirm award). *But see Peregrine Financial Group, Inc. v. Futronix Trading, Ltd.*, 401 Ill.App.3d 659, 929 N.E.2d 1226 – 1229, 341 Ill.Dec. 147 (1st Dist. 2010) (applying five-year limitation under 735 ILCS 5/13-205).

By contrast, §9 of the Federal Arbitration Act provides a one-year period to confirm arbitration awards. *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 149 (4th Cir. 1993), citing 9 U.S.C. §9. Under the FAA, “[a]ctions to confirm arbitration awards . . . are straightforward proceedings in which no other claims are to be adjudicated.” *City of Chicago v. Chicago Loop Parking LLC*, 2014 IL App (1st) 133020, ¶52, 23 N.E.3d 453, 387 Ill.Dec. 761, quoting *Asset Acceptance, LLC v. Tyler*, 2012 IL App (1st) 093559, ¶25, 966 N.E.2d 1039, 359 Ill.Dec. 351. The summary proceeding “merely makes what is already a final arbitration award a judgment of the court.” 2014 IL App (1st) 133020 at ¶52, quoting *Ottley v. Schwartzberg*, 819 F.2d 373, 377 (2d Cir. 1987). Circuit courts lack authority to not enter a judgment confirming the award; that is their only option, unless there are grounds to vacate, modify, or correct the award. 2014 IL App (1st) 133020 at ¶52. Under §9 of the FAA, “[t]he only decision before a court when deciding whether to enter judgment confirming an arbitration award is whether there is any basis to vacate, modify or correct that award under section 10 or 11 of the FAA and, if not, the court ‘must’ enter the judgment.” *Id.*, quoting 9 U.S.C. §9. “[O]nce confirmed, [arbitration] awards become enforceable court orders, and, when asked to enforce such orders, a court is entitled to require actions to achieve compliance with them.” 2014 IL App (1st) 133020 at ¶46, quoting *Zeiler v. Deitsch*, 500 F.3d 157, 170 (2d Cir. 2007).

B. Challenging an Award

1. [20.50] Time To Challenge an Award

Under the Federal Arbitration Act, an attack on an award must be filed and served by motion within three months from the date of the award. 9 U.S.C. §12. Under the Illinois Uniform Arbitration Act, a motion to vacate must be filed within 90 days of the award. 710 ILCS 5/12(b).

2. [20.51] Grounds for Vacatur of an Award

Under both the Federal Arbitration Act and the Illinois Uniform Arbitration Act, arbitration awards will be overturned only in extraordinary circumstances. Because “[a]rbitration is regarded as an effective, expeditious, and cost-efficient method of dispute resolution,” wherever possible, Illinois courts “construe arbitration awards so as to uphold their validity.” *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 731, 260 Ill.Dec. 541 (2001). In *Hjerpe v. Thoma*, 2017 IL App (4th) 160844, ¶¶21 – 22, 80 N.E.3d 872, 414 Ill.Dec. 729, a case reviewed under the Illinois Act, the court noted that “[o]ur review of an arbitration award is nothing like the scope of our review of a trial court’s decision” and explained that public policy guides this deferential approach (“Because the parties chose in their contract how disputes would be decided, judicial modification of such an award would deprive the parties of this choice.”). The usual ground for vacatur relates to the arbitrator’s failure to disclose bias.

Under the FAA, courts vacate awards only

(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).

The grounds for vacatur under the Illinois Act, 710 ILCS 5/12, are basically similar in concept, if not in precise language, to those of the FAA — except for §12(a)(5) of the Illinois Act, which has no FAA analog. The grounds under the Illinois Act are as follows:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any one of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under [710 ILCS 5/2] and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by the circuit court is not ground for vacating or refusing to confirm the award. 710 ILCS 5/12(a).

See generally In re Marriage of Haleas, 2017 IL App (2d) 160799, ¶20, 79 N.E.3d 271, 413 Ill.Dec. 922 (discussing these grounds for vacating awards under Illinois Act and finding no valid grounds to modify or vacate award, as arguments attacking arbitrators' findings are beyond purview of court's limited review).

Before vacating an award under the “evident partiality” standard, courts require proof of “clear evidence of impropriety” by arbitrators. *Midwest Generation EME, LLC v. Continuum Chemical Corp.*, 768 F.Supp.2d 939, 945 – 946 (N.D.Ill. 2010) (refusing to permit post-arbitration discovery and explaining that “only non-speculative, reasonably certain evidence of impropriety will suffice to allow post-arbitration discovery” of arbitrator’s alleged bias). *See also Sphere Drake Insurance Ltd. v. All American Life Insurance Co.*, 307 F.3d 617, 621 (7th Cir. 2002) (“only evident partiality, not appearances or risks, spoils an award”); *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673 (7th Cir. 1983) (arbitrator’s failure to disclose prior business relationship with one party to arbitration was at worst technical violation and did not justify setting aside arbitration award on evident partiality grounds). The evident partiality standard for vacating arbitration awards is very difficult to satisfy.

3. [20.52] Manifest Disregard of the Law

Some Illinois courts have also recognized “manifest disregard of the law” as a potential basis for judicial review of an arbitration award. “Review [of an arbitration award] under the ‘manifest disregard of the law’ standard requires that the arbitrators deliberately disregarded what they knew to be the law.” *First Health Group Corp. v. Ruddick*, 393 Ill.App.3d 40, 911 N.E.2d 1201, 1214, 331 Ill.Dec. 971 (1st Dist. 2009) (no indication arbitrator chose to not follow law), quoting *Anderson v. Golf Mill Ford, Inc.*, 383 Ill.App.3d 474, 890 N.E.2d 1023, 1029, 322 Ill.Dec. 104 (1st Dist. 2008) (party challenging award failed to prove manifest disregard). Manifest disregard requires more than a “mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law.” *Quick & Reilly, Inc. v. Zielinski*, 306 Ill.App.3d 93, 713 N.E.2d 739, 743, 239 Ill.Dec. 208 (1st Dist. 1999), quoting *Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992). See also *McKinzie v. Alpha Kappa Alpha Sorority, Inc.*, 2018 IL App (1st) 172337-U, ¶38; *County of Tazewell v. Illinois Fraternal Order of Police Labor Council*, 2015 IL App (3d) 140369, ¶16, 31 N.E.3d 782, 391 Ill.Dec. 807; *First Health Group Corp. v. Ruddick*, 393 Ill.App.3d 40, 911 N.E.2d 1201, 1214, 331 Ill.Dec. 971 (1st Dist. 2009); *Anderson, supra*, 890 N.E.2d at 1029. See also *Morgan v. Silver Financial Capital, Inc.*, 2025 IL App (1st) 241488-U, ¶27 (arbitrator’s interpretation of language of agreement within context of what he understood law to be did not evidence deliberate disregard of law). This is another high bar for vacating arbitration awards, which are not subject to much review on the merits.

Similarly, some litigants argue “manifest disregard of the law” should be a common-law addition to the four statutory grounds for vacatur under the Federal Arbitration Act. Some commentators believe this ground was rejected by the U.S. Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 170 L.Ed.2d 254, 128 S.Ct. 1396, 1404 (2008), which limited bases for vacatur to those set forth in the FAA. However, in a later decision, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 176 L.Ed.2d 605, 130 S.Ct. 1758, 1768 n.3 (2010), the Court declined to decide whether manifest disregard survived *Hall Street Associates* “as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth” in the FAA.

There is a split among the federal circuit courts of appeals whether manifest disregard is an independent basis for vacatur or just an extension of the four grounds enumerated in the FAA. *Friedler v. Stifel, Nicolaus, & Co.*, 108 F.4th 241, 249 (4th Cir. 2024) (“circuit courts are split on the continuing validity of claims of manifest disregard as a basis for vacatur”), citing *Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 481 n.7 (4th Cir. 2012) (collecting cases). Illinois federal court precedents, decided under the FAA, have not foreclosed manifest disregard of the law as a possible basis for vacating arbitration awards. See, e.g., *Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC*, No. 16 C 8306, 2017 WL 1397553, *6 (N.D.Ill. Apr. 19, 2017) (discussing standard and finding no manifest disregard of law); *Boldischar v. Reliastar Life Insurance Co.*, No. 14 C 6844, 2016 WL 3997596, *4 (N.D.Ill. July 26, 2016) (finding no manifest disregard and discussing standard); *Renard v. Ameriprise Financial Services, Inc.*, 778 F.3d 563, 568 (7th Cir. 2015) (discussing manifest disregard of law and stating that “[s]imple mistake of law is not enough”); *Alliance Healthcare Services, Inc. v. Argonaut Private Equity, LLC*, No. 11 C 3275, 2012 WL 2277906, *4 (N.D.Ill. June 12, 2012) (citing *Stolt-Nielsen, supra*, for proposition that

Supreme Court has not decided whether manifest disregard of law is appropriate reason to vacate award). In one of the most important recent decisions to address this issue, the U.S. Court of Appeals for the Fifth Circuit declined to resolve this issue. *McKool Smith, P.C. v. Curtis International, Ltd.*, 650 Fed.Appx. 208, 212 (5th Cir. 2016) (expressly declining to decide whether manifest disregard is statutory basis for vacatur under FAA). See also *Jones v. Michaels Stores, Inc.*, 991 F.3d 614, 616 (5th Cir. 2021) (discussing uncertainty around manifest disregard and describing it as “a freestanding ground for vacatur, untethered to any of the FAA’s four grounds for vacatur”); *United States Trinity Energy Services, L.L.C. v. Southeast Directional Drilling, L.L.C.*, 135 F.4th 303 (5th Cir. 2025) (manifest disregard of law is not valid, freestanding ground for vacating arbitration award under FAA). A U.S. Supreme Court decision is needed to resolve the issue of whether manifest disregard is a basis for vacatur of arbitration awards.

4. [20.53] Arbitration Awards That Violate Public Policy

In Illinois, an arbitration award is not enforceable if the award contravenes paramount considerations of public policy. This public policy exception is rooted in the common law. The Illinois Supreme Court has held that “[j]ust as we will not enforce a private agreement which is repugnant to established norms of public policy, we may not ignore the same public policy concerns when they are undermined through the process of arbitration.” *State of Illinois (Department of Central Management Services) v. American Federation of State, County & Municipal Employees, Council 31*, 2016 IL 118422, ¶41, 51 N.E.3d 738, 401 Ill.Dec. 907, quoting *Board of Trustees of Community College District No. 508, County of Cook v. Cook County College Teachers Union, Local 1600, AFT, AFL/CIO*, 74 Ill.2d 412, 386 N.E.2d 47, 52, 24 Ill.Dec. 843 (1979). To vacate an arbitration award on this basis, a court must make two findings. First, it must ask “whether a well-defined and dominant public policy can be identified,” and if so, it must ask “whether the arbitrator’s award, as reflected in his interpretation of the agreement, violated the public policy.” *State of Illinois, supra*, 2016 IL 118422 at ¶41, quoting *American Federation of State, County & Municipal Employees, AFL-CIO v. Department of Central Management Services*, 173 Ill.2d 299, 671 N.E.2d 668, 674, 219 Ill.Dec. 501 (1996). See also *Melena v. Anheuser-Busch, Inc.*, 219 Ill.2d 135, 847 N.E.2d 99, 111, 301 Ill.Dec. 440 (2006) (enforcement of arbitration provision did not contravene public policy behind Workers’ Compensation Act); *City of Chicago v. IBEW, Local No. 9*, 2022 IL App (1st) 210850, ¶10, 239 N.E.3d 526, 475 Ill.Dec. 628 (public policy exception is narrow and to be considered unenforceable under exception, arbitration awards “must clearly violate some well-defined and dominant public policy”), citing *AFL-CIO, supra*, 671 N.E.2d at 674.

5. [20.54] Judicial Review of Arbitration Awards Is Extremely Limited

While both the Illinois Uniform Arbitration Act and the Federal Arbitration Act provide grounds for judicial appeal of arbitration awards, courts seldom overturn arbitration awards on their merits. The Illinois Supreme Court has described judicial review of an arbitrator’s award under the Illinois Act as “extremely limited.” *State of Illinois (Department of Central Management Services) v. American Federation of State, County & Municipal Employees, Council 31*, 2016 IL 118422, ¶28, 51 N.E.3d 738, 401 Ill.Dec. 907, quoting *Griggsville-Perry Community Unit School District No. 4 v. Illinois Educational Labor Relations Board*, 2013 IL 113721, ¶18, 984 N.E.2d 440, 368 Ill.Dec. 494; *Village of Posen, Illinois v. Illinois Fraternal Order of Police Labor Council*, 2014

IL App (1st) 133329, ¶35, 17 N.E.3d 195, 384 Ill.Dec. 622. “[T]he party who asserts that an arbitration award is invalid has the burden of proving such contention . . . by clear, strong and convincing evidence.” [Citations omitted.] *Wilcox Co. v. Bouramas*, 73 Ill.App.3d 1046, 392 N.E.2d 198, 203, 29 Ill.Dec. 641 (1st Dist. 1979). A substantial body of state and federal caselaw explains that arbitration awards that resolve the merits of a dispute are intended to be final and, barring extenuating circumstances, ought not be overturned by courts.

Limited judicial review follows the parties’ intentions in selecting arbitration as the binding method of dispute resolution. “Limited judicial review [of arbitration awards] fosters the long-accepted and encouraged principle that an arbitration award should be the end, not the beginning of litigation.” *GPS USA, Inc. v. Performance Powdercoating*, 2015 IL App (2d) 131190, ¶18, 26 N.E.3d 574, 389 Ill.Dec. 484, quoting *First Health Group Corp. v. Ruddick*, 393 Ill.App.3d 40, 911 N.E.2d 1201, 1209, 331 Ill.Dec. 971 (1st Dist. 2009); *Munizzi v. UBS Financial Services, Inc.*, 2021 IL App (1st) 201237, ¶23, 202 N.E.3d 358, 460 Ill.Dec. 816, quoting *Perkins Restaurants Operating Co. v. Van Den Bergh Foods Co.*, 276 Ill.App.3d 305, 657 N.E.2d 1085, 1088, 212 Ill.Dec. 740 (1st Dist. 1995). Limited judicial review “respects the parties’ decision to have disputes settled by an arbitrator rather than a judge . . . and gives effect to the intent of the legislature in enacting the Uniform Arbitration Act,” namely, to provide finality for disputes submitted to arbitration. [Citation omitted.] *State of Illinois, supra*, 2016 IL 118422 at ¶28. *See also Village of Posen, supra*, 2014 IL App (1st) 133329 at ¶35. When “the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept.” *Griggsville-Perry, supra*, 2013 IL 113721 at ¶18, quoting *American Federation of State, County & Municipal Employees, AFL-CIO v. State of Illinois, Department of Mental Health*, 124 Ill.2d 246, 529 N.E.2d 534, 538, 124 Ill.Dec. 553 (1988).

But arbitrators’ authority is not unlimited. While they may look for guidance from many sources, an arbitrator’s award is legitimate only if it draws its essence from interpretation and application of the contract containing the arbitration clause. *Griggsville-Perry, supra*, 2013 IL 113721 at ¶19, quoting *American Federation, supra*, 529 N.E.2d at 538. Whether an arbitrator has exceeded its authority and reached a decision not based on the contract is a question of law. *Griggsville-Perry, supra*, 2013 IL 113721 at ¶20. However, in Illinois, courts must presume the arbitrator did not exceed his or her authority and, wherever possible, construe the award to uphold its validity. *Weiss v. Fischl*, 2016 IL App (1st) 152446, ¶19, 62 N.E.3d 296, 407 Ill.Dec. 51.

Alleged grounds to vacate arbitration awards should be raised with the arbitrator and, if necessary, in circuit court proceedings to vacate awards. “An arbitrator’s decision should not be reversed based on contentions not presented to him and raised for the first time on appeal. Failure to raise issues before the arbitrator results in their waiver.” *Kropp Forge Co. v. Industrial Commission*, 225 Ill.App.3d 244, 587 N.E.2d 1095, 1100, 167 Ill.Dec. 480 (1st Dist. 1992). A party may not raise for the first time on appeal issues not presented in circuit court proceedings to vacate an arbitration award. *Cantor Fitzgerald & Co. v. Walton*, 2016 IL App (1st) 152946-U, ¶37, *appeal denied*, 77 N.E.3d 81 (2017), citing *Wilcox, supra*, 392 N.E.2d at 203.

C. [20.55] Modifying or Correcting an Award

Both the Illinois Uniform Arbitration Act and the Federal Arbitration Act empower courts to correct awards that contain obvious miscalculations or mistakes upon application of a party to the arbitration. *Shearson Lehman Bros. v. Hedrich*, 266 Ill.App.3d 24, 639 N.E.2d 228, 232, 203 Ill.Dec. 189 (1st Dist. 1994).

Under §13 of the Illinois Act, the court may modify or correct an award only if (1) there is an evident miscalculation of figures or an evident mistake in the description of any person or thing referred to in the award, (2) the arbitrator decided a matter not submitted to the arbitrator and the award can be corrected without affecting the merits of the decision on the matters submitted, or (3) the award is imperfect in a matter of form not affecting the merits of the controversy. 710 ILCS 5/13(a). A party must petition a reviewing court to modify or correct an award, if at all, within 90 days after delivery of a copy of the award. *Id.*

Under §11 of the FAA, a court may issue an order modifying or correcting an award, upon application of any party to the arbitration, (1) when 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; (2) when the arbitrators have awarded on a matter not submitted to them, unless it is a matter not affecting the merits of the decision on the matter submitted; and (3) when the award is imperfect in matter of form not affecting the merits of the controversy. 9 U.S.C. §11.

