# I. Alternative Dispute Resolution

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## A. Introduction

The Supreme Court decided its first case involving a bilateral investment treaty (BIT), holding in *BG Group PLC v. Republic of Argentina*[1] that whether an investor had to exhaust a local litigation requirement in the treaty prior to instituting international arbitration was a question that, under American law, was presumptively to be decided in the first instance by international arbitrators and not U.S. courts. Meanwhile, federal courts have followed recent Supreme Court precedents by continuing to broaden the reach of the Federal Arbitration Act (FAA),[2] preempting state laws that directly or indirectly limit, burden, or otherwise interfere with party autonomy to consent to arbitration. A section of this article focuses on recent cases in the telecommunications industry where courts

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1. 134 S. Ct. 1198 (2014).
2. 9 U.S.C. §§ 1–16.

have relied upon the FAA's preemptive effect to dismiss purported class actions and compel parties to arbitrate their disputes.

In other recent developments, following the Supreme Court's decision last term in *American Express Co. v. Italian Colors Restaurant*,[3] the Second Circuit[4] overturned a ruling by the U.S. District Court for the Southern District of New York invalidating a class action waiver in a wage action under the Fair Labor Standards Act of 1938[5] (FLSA), holding that such waivers do not violate the National Labor Relations Act of 1935[6] (NLRA) despite the contrary ruling of the National Labor Relations Board (NLRB) in *D.R. Horton, Inc.*[7] The Ninth Circuit held that parties cannot in their arbitration agreements exclude the right of federal courts under the FAA to review arbitral decisions.[8] In a novel case, the Third Circuit held Delaware's statute establishing a private arbitration program run by chancery court judges paid by the state and conducted in state courthouses during normal court business hours was unconstitutional because the arbitral proceedings were not open to the public.[9] Finally, this article summarizes the recent changes to the AAA Commercial Arbitration Rules and adoption by the AAA of optional Appellate Rules.

### B. Supreme Court Decision in *BG Group v. Argentina*

On March 5, 2014, the U.S. Supreme Court rendered a seven-to-two decision reinstating a $185 million arbitration award in favor of the BG Group against Argentina under the U.K.–Argentina BIT.[10] The Supreme Court held the D.C. Circuit erred in deciding, de novo and without deference to the tribunal's award, the issue of the arbitrators' jurisdiction. The decision had been anxiously awaited in international arbitration circles because the case reflects the first instance in which the Supreme Court has interpreted a BIT.

#### 1. Background

The dispute between BG Group and Argentina arose as a result of the economic crisis in Argentina in 2001–2002. Argentina changed its law for calculating gas tariffs from dollars to pesos, setting the currency conversion at one-third of the prevailing market rate. BG Group sought arbitration under the BIT, which contained a somewhat unusual local litigation clause requiring disputes be submitted to an Argentine court for a period of eighteen months. After eighteen months, if the dispute was not resolved, BG Group could file an international

3. 133 S. Ct. 2304 (2013).
4. *See* Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013).
5. 29 U.S.C. §§ 201–219.
6. 29 U.S.C. §§ 151–169.
7. 357 N.L.R.B. No. 184 (Jan. 3, 2012), *enforced in part*, 737 F.3d 344 (5th Cir. 2013).
8. *See In re* Wal-Mart Wage & Hour Emp't Practices Litig., 737 F.3d 1262 (9th Cir. 2013).
9. *See* Del. Coalition for Open Gov't, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013).
10. BG Group PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014).

arbitration. Contending that local litigation was "futile," BG Group proceeded immediately to submit its dispute to arbitration in Washington, D.C., under the FAA pursuant to United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. The tribunal concluded it had jurisdiction, holding that exhaustion of the eighteen-month local litigation requirement was not required. On the merits, the arbitrators held that Argentina had denied the BG Group fair and equitable treatment under the BIT and awarded $185 million in damages.

This award was confirmed by the U.S. District Court for the District of Columbia under the New York Convention and the FAA. Argentina appealed, and the D.C. Circuit reversed, finding that the eighteen-month local litigation requirement demonstrated Argentina intended that a court rather than an arbitrator would decide the issue of arbitrability. The D.C. Circuit therefore proceeded to review the arbitrators' award de novo. It concluded the arbitrators had no jurisdiction because the eighteen-month local litigation requirement was not exhausted and vacated the $185 million award.

### 2. Analysis of Decision

For the majority, the question before the Court "is who—court or arbitrator—bears primary responsibility for interpreting and applying Article 8's local court litigation provision."[11] The answer to that question determined whether the court could review the arbitrators' interpretation of the contract de novo, or whether the reviewing court had to show deference to the arbitral award. In answering the question, the Court initially treated the BIT as if it were an ordinary contract between private parties, disregarding arguments by some amicus parties that the Court should look to the Vienna Convention for the Law of Treaties for guidance interpreting the BIT. The majority held that where a federal court is requested to vacate or confirm an award made under the FAA, even one involving an international treaty, "it should normally apply the presumptions supplied by American law."[12]

Citing almost exclusively to American law, the Supreme Court pointed to the distinction drawn by its prior decisions between substantive questions of arbitrability, i.e., whether the parties had agreed to arbitrate a particular dispute, which issue was to be decided by courts, and procedural preconditions to arbitration, which were to be decided by arbitrators. Examining the language of the BIT's dispute resolution provision, the Court concluded there was nothing to suggest that the parties had intended to alter the ordinary American presumptions about courts deciding questions of arbitrability and arbitrators deciding procedural questions such as the time for commencing arbitration. Finding the BIT was silent as to whether the parties intended to give courts or arbitrators primary authority to interpret and apply a threshold provision, the Court applied its

11. *Id.* at 1206.
12. *Id.* at 1208.

ordinary presumptions. It then held that "the local litigation requirement is highly analogous to procedural provisions that both this Court and others have found are for arbitrators, not courts, primarily to interpret and to apply."[13]

The Court accordingly found that the D.C. Circuit had erroneously applied a de novo standard of review in annulling the arbitral award, rather than the more deferential standard required when the issue was left to the arbitrators to decide in the first instance. The Court proceeded to examine whether, under the highly deferential standard that should have been applied, the arbitrators had "exceeded their powers."[14] Finding they had not, the Court concluded the arbitrators' jurisdictional determinations were lawful and reversed the D.C. Circuit, reinstating the $185 million award against Argentina.

### 3. Impact of the Supreme Court's Decision

The Supreme Court requested the advice of the Solicitor General before deciding whether to grant certiorari in *BG Group*. The Solicitor General recommended that the case not be reviewed because it involved a narrow legal issue that was unlikely to impact many cases, including existing BITs negotiated by the United States. The issue in the BG Group only arises in the limited circumstance where an investment dispute is seated in the United States and subject to review under the FAA. Worldwide, fewer than forty investment cases are filed on average each year, and at most only a few such cases in any year are seated in the United States and subject to review under the FAA. Most investment arbitrations in the United States are conducted under the Washington Convention by the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and exempt from judicial review under the terms of the Convention. Notwithstanding the advice of the Solicitor General, however, the Court granted certiorari because of "the importance of the matter for international commercial arbitration. . . ."[15]

The Supreme Court's decision holds that American and not international law should be applied for international investment arbitrations reviewable under the FAA.[16] The opinion further holds that international investment treaty interpretation should be conducted, at least in the first instance, as if the treaty were "an ordinary contract between private parties."[17] The Court confirms, consistent with its domestic decisions under the FAA, that (1) substantive issues of arbitrability are resolved by courts under a de novo standard of review while (2) procedural issues, including procedural preconditions to arbitration, are to be decided by arbitrators, subject to later deferential review by a court on such grounds as are permitted by the New York Convention and FAA.

13. *Id*. at 1207.
14. *Id*. at 1212 (internal quotation marks omitted).
15. *Id.* at 1205.
16. *Id*. at 1208.
17. *Id.* at 1206.

The Supreme Court's decision resolves, as a matter of American law, the proper construction of pre-arbitral waiting periods and local litigation requirements, at least in BITs having provisions similar to the provisions of the U.K.–Argentina BIT. Finding that preconditions to arbitration are procedural in nature, such provisions are presumptively for arbitrators to construe (and waive under Article 32 of the Vienna Convention on the Law of Treaties). The arbitral tribunal's resolution of the construction issue can be reviewed by federal courts, but only under the FAA's deferential standard of review.

In principle, the Court's decision, to the relief of many international arbitration specialists, largely leaves intact the autonomy of arbitrators to decide international disputes free from interference by U.S. courts. Under the FAA, U.S. courts should not intervene at the outset where the dispute involves a precondition to arbitration because such clauses are, following the Supreme Court's decision in *BG Group*, presumptively for the arbitrators and not the courts to decide. Further, based on the Supreme Court's recent decision in *Oxford Health Plans LLC v. Sutter*,[18] a tribunal's decision on the proper construction of a contract is unlikely to be disturbed under the FAA's deferential standard of review regardless of whether the arbitrator "gets it wrong" as long as the arbitrator makes a good faith attempt to construe the contract properly.

Sovereigns, such as Argentina, seeking to raise a jurisdiction defense based on failure to exhaust a precondition to arbitration may in the future decline to seat their arbitrations in the United States, contending that the United States is not a "neutral" forum. Although three international arbitral tribunals have recently required exhaustion of Argentina's eighteen-month local litigation clause, the Supreme Court's decision conclusively decides that issue against Argentina (and arguably against other nations that elect to include similar provisions in their BITs) as a matter of American law.[19] Sovereigns might legitimately be concerned that the Supreme Court's decision could influence the outcome of an arbitral decision if the arbitration were seated in the United States. At a minimum, parties should be concerned that the Supreme Court's decision impacts the precise manner in which a jurisdictional defense must be pled in an international

18. 133 S. Ct. 2064 (2013).

19. The majority opinion asserted that a preponderance of the international case law favors its treatment of local litigation clauses as procedural issues to be resolved by arbitrators. Chief Justice Roberts argued in his dissent, however, that a majority of recent arbitral decisions has found local litigation clauses are a jurisdictional bar to arbitration unless exhausted. *See BG Group*, 134 S. Ct. at 1218 (Roberts, C.J., dissenting) (citing ICS Inspection & Control Servs. Ltd. v. Argentine Republic, PCA Case No. 2010-9, Award on Jurisdiction, ¶ 262 (Feb. 10, 2012) (holding identical treaty provision was a jurisdictional "consent to arbitration" provision); Daimler Financial Servs. AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, ¶¶ 193, 194 (Aug. 22, 2012) (holding Most Favored Nation provision could not be utilized to avoid eighteen-month local litigation clause in Argentine-Germany BIT); Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, ¶ 116 (Dec. 8, 2008) (holding similar litigation requirements in other Argentine BITs were jurisdictional consents to arbitrate)). One commentator has described the recent international case law on this issue as "consistently inconsistent." Mike McClure, *Consistently Inconsistent: Another MFN Case, Another Split Decision, Another Contrasting Decision (ICSID),* Practical Law Company (Sept. 5, 2012), http://us.practicallaw.com/about/9-521-2506.

arbitration if it is seated in the United States and subject to being confirmed or annulled under the FAA. The discussion in the concurring opinion of Justice Sotomayor and the dissenting opinion of Chief Justice Roberts suggests that failure to assert a challenge to the arbitrability of a claim under the rubric of American case law may impact the success of the defense when it is later reviewed by an American court, even if the underlying legal dispute has no connection to the United States or American law.[20]

### C. Recent Trends

Recent decisions of the Supreme Court have broadly construed the scope of the FAA to preempt state laws that directly relate to arbitration and seek to limit or place restrictions on party autonomy to consent to arbitration.[21] Similarly, absent a contrary congressional command, federal law, such as the effective vindication doctrine, is construed narrowly to avoid impinging on parties' freedom to contract for binding arbitration.[22] As a result, more types of disputes can be arbitrated than ever before, and parties are free with limited exceptions to design custom arbitration provisions to best resolve specific types of disputes.[23] This section focuses on how the telecommunications industry has utilized highly specialized arbitration provisions in a variety of circumstances to resolve disputes through binding arbitration that in the past were often subject to class action litigation, jury trials, or both. It discusses recent cases where the federal courts have held the FAA mandates arbitration of claims filed as class actions under Federal Rule 23.

20. See the dissenting opinion of Chief Justice Roberts in *BG Group* in which he challenges Justice Sotomayor's contention that "Argentina's conduct confirms that the local litigation requirement is not a condition on consent, for rather than objecting to arbitration on the ground that there was no binding arbitration agreement to begin with, Argentina actively participated in the constitution of the arbitral panel and in the proceedings that followed." *BG Group*, 134 S. Ct. at 1223 n.2 (Roberts, C.J., dissenting) (internal quotation marks omitted). Chief Justice Roberts notes: "Argentina *did* object to the tribunal's jurisdiction to hear the dispute." *Id.* Argentina's objection followed traditional international law practice, but Justice Sotomayor appears to suggest that if Argentina contended the local litigation provision was a condition on consent, it should have objected to arbitrability in the language required under American case law, and perhaps even launched a U.S. court challenge to the tribunal's jurisdiction under the FAA before the arbitration commenced. Of course, as a result of the *BG Group* decision, any future attempt to launch a pre- or post-arbitral challenge to arbitrability of a local litigation provision, unless that provision (i) is explicitly worded as a "condition on consent" or (ii) is otherwise plainly distinguishable from the provision in the U.K.–Argentina BIT, is likely to fail as a matter of law. While international law on this point continues to develop (*see* n.19, *supra*), the Supreme Court's decision precludes further development of the issue as a matter of American law except for the circumstance involving an express "condition on consent" that the Court explicitly left open, or to factually disparate treaty language.

21. *See, e.g.,* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

22. *See, e.g.,* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

23. Limits on party autonomy to design arbitration clauses primarily involve the ability to modify requirements of the FAA, as discussed below in Section 3 of this article. Arbitral institutions may also refuse to recognize provisions in contracts that purport to modify the institution's rules of arbitration.

### 1. Use of Arbitration by the Telecommunications Industry

#### *a. Wireless Telephone Contracts*

The telecommunications industry has often been at the forefront of efforts to utilize arbitration clauses in consumer contracts to avoid or minimize Federal Rule 23 class action litigation and class arbitration. For example, a number of telecommunication companies have developed highly customized and sophisticated arbitration provisions in their consumer cell phone contracts to limit exposure to class action litigation and class arbitration.[24] Significant time and effort was devoted to developing arbitration clauses that would withstand challenge under state unconscionability law or the federal "effective vindication" doctrine.

Arbitration clauses in AT&T's and Verizon's consumer cell phone contracts provide, for example, that in small claims, the service provider will pay the filing fees and advances on costs required to initiate arbitration if the customer cannot afford to pay.[25] Advancing fees and costs of arbitration avoids the risk that such charges, which can be more than the total amount of small claims in some consumer arbitrations, would render the arbitration clause unconscionable under state law or, with respect to federal statutory claims, would run afoul of the federal "effective vindication" doctrine.[26] Similarly, the contracts specifically authorize customers to bring claims to any federal, state, or local regulatory agency to make clear that the arbitration clause does not preclude statutory claims or bar governmental agencies from pursuing relief on behalf of a customer against the carrier, thereby avoiding issues with the effective vindication doctrine or state consumer protection laws.[27]

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24. AT&T's Wireless Customer Agreement provides for arbitration by the American Arbitration Association (AAA) under the Rules for Commercial Disputes and for Consumer-Related Disputes. *Wireless Customer Agreement*, AT&T § 2.2(3), http://www.att.com/shop/en/legalterms.html?toskey=wirelessCustomerAgreement#disputeResolutionByBindingArb [hereinafter *AT&T Wireless Customer Agreement*]. The Verizon Customer Agreement provides for arbitration under the AAA Wireless Industry Arbitration (WIA) Rules, the Better Business Bureau (BBB) Rules for Binding Arbitration, or small claims court, unless the claim exceeds $10,000, in which case only the AAA WIA Rules apply. *See How Do I Resolve Disputes With Verizon Wireless?,* Customer Agreement, VERIZON, § (2), http://www.verizonwireless.com/b2c/support/customer-agreement [hereinafter *Verizon Disputes Provision*]. Interestingly, Verizon also provides for AAA appellate review of awards over $10,000. *Id.* A discussion of the new AAA appellate procedure is contained in Section E, *infra*.

25. AT&T's Wireless Customer Agreement provides that it will reimburse customers for arbitration filing fees in claims less than $75,000. In addition, if a customer is unable to initially pay the fee to file the claim, AT&T will pay the fee directly upon receiving a written request from a customer. AT&T also agrees to reimburse all administration and arbitrator fees unless the arbitrator finds that either the substance of the claim or the relief sought in the demand for arbitration is frivolous or brought for an improper purpose. *See AT&T Wireless Customer Agreement*, *supra* note 24, § 2.2(3). Verizon agrees to pay the filing fee if the customer advises he or she cannot pay. *See Verizon Disputes Provision, supra* note 24, § (4).

26. The Ninth Circuit in *Ferguson v. Corinthian Colleges, Inc*., 733 F.3d 928, 936 (9th Cir. 2013), held that the effective vindication exception does not extend to state statutes. The effective vindication exception rests on the principle that other federal statutes stand on equal footing with the FAA. Federal courts " 'have no earthly interest (quite the contrary) in vindicating' a state law." *Id*. (quoting Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting)).

27. *AT&T Wireless Customer Agreement*, *supra* note 24, § 2.2(1); *Verizon Disputes Provision*, *supra* note 24, § (1).

Customers have the right to have the arbitration held in the county or parish where they maintain their account billing address.[28] The customer agreements typically give the consumer the right to decide whether the arbitration will be based solely on documents, or whether there will be a hearing at which testimony will be provided.[29] AT&T's Wireless Customer Agreement provides the customer with access to online forms to simplify filing a request for arbitration.[30] The customer agreements provide an attorney fee shifting provision in the event that the consumer prevails.[31]

The AT&T Wireless Customer Agreement contains a waiver of the right to pursue relief as part of a class or other representative proceeding. It provides in boldface type: "YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING."[32] Similarly, the Verizon Customer Agreement provides (also in boldface type):

> THIS AGREEMENT DOESN'T ALLOW CLASS OR COLLECTIVE ARBITRATIONS EVEN IF THE AAA OR BBB PROCEDURES OR RULES WOULD. NOTWITHSTANDING ANY OTHER PROVISIONS OF THIS AGREEMENT, THE ARBITRATOR MAY AWARD MONEY OR INJUNCTIVE RELIEF ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF WARRANTED BY THAT PARTY'S INDIVIDUAL CLAIM. NO CLASS OR REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL THEORIES OF LIABILITY OR PRAYERS FOR RELIEF MAY BE MAINTAINED IN ANY ARBITRATION HELD UNDER THIS AGREEMENT.[33]

The time and energy the wireless telecommunications industry has devoted to drafting customized, highly specialized arbitration provisions has prevented class action litigation as well as arbitration of disputes on a class basis. By reducing, if not eliminating, its exposure to consumer class action litigation and arbitration, the industry has reduced its litigations costs and exposure to class

28. *AT&T Wireless Customer Agreement*, *supra* note 24, § 2.2(3); *Verizon Disputes Provision*, *supra* note 24, § (2).

29. *AT&T Wireless Customer Agreement*, *supra* note 24, § 2.2(3); *Verizon Disputes Provision*, *supra* note 24, § (2).

30. *AT&T Wireless Customer Agreement*, *supra* note 24, § 2.2(2)-(3).

31. The AT&T Wireless Customer Agreement provides that if the arbitrator finds in favor of the customer, and the award is greater than AT&T's last settlement offer (or in the event of no settlement offer), the customer is entitled to receive the amount of the award or $10,000, whichever is greater, plus twice the amount of the customer's reasonable attorney fee. *AT&T Wireless Customer Agreement*, *supra* note 24, § 2.2(4). The Verizon Disputes Provision contains similar language, offering a payment amount of $5,000 if Verizon does not prevail or the award is greater than Verizon's settlement offer, plus payment of reasonable attorney fees. *Verizon Disputes Provision*, *supra* note 24, § (6).

32. *AT&T Wireless Customer Agreement*, *supra* note 24, § 2.2(6).

33. *Verizon Disputes Provision*, *supra* note 24, § (3).

action damage claims. Since individual claims generally involve small amounts of money, compelling individual arbitration of such claims generally allows the claims to be settled inexpensively.

The key point is that rather than utilizing a generic, "one size fits all" arbitration provision, the industry designed a highly customized procedure to address a specific litigation risk, namely, consumer class actions. One of the strengths of arbitration as a dispute resolution mechanism is that parties are free to design a dispute resolution process that closely addresses a specific liability risk with (1) a particular party, (2) a particular group, or (3) a particular industry. Economy and efficiency is gained by streamlining the dispute resolution process to best address and most effectively resolve a specific liability risk.

The telecommunications industry utilizes arbitration provisions in a number of other contexts to limit or eliminate its exposure to class litigation and jury trials.

*b. CSC Text Messaging—Decision in* In re A2P SMS Antitrust Litigation

A case reflecting the telecommunication industry's aggressive use of arbitration to prevent class action litigation is *In re A2P SMS Antitrust Litigation*.[34] There, plaintiffs filed a class action alleging the wireless communication industry was violating the antitrust laws by engaging in illegal boycotts, price-fixing, and conspiracy to monopolize the market for transmission of text messages between consumers and businesses or institutions in connection with the leasing of common short codes (CSC), which are five- or six-digit numbers used for the purpose of sending advertisement text messages.[35] To obtain a CSC lease, prospective CSC lessees must first submit a registrant sublicense agreement (RS agreement) through the Common Short Code Administration website, which is operated by Neustar, Inc. The RS agreement contains an arbitration provision requiring all disputes to be resolved under the AAA Commercial Arbitration Rules.

Each of the plaintiffs in the *In re A2P SMS Antitrust Litigation* class action and each of the putative class members are, or would be, signatories of the RS agreement. Plaintiffs sought to avoid the arbitration clause in the RS agreement, however, by naming as defendants only parties who were not signatories to the RS agreement. Neustar was named, for instance, only as a non-joined co-conspirator.

The defendant telecoms moved to compel arbitration with plaintiffs even though they did not sign the RS agreement.[36] Arbitration is a matter of contract and parties cannot usually be compelled to submit to arbitration any dispute which they have not agreed to arbitrate.[37] In certain circumstances, however, a party can be compelled to arbitrate a dispute without signing a contract con-

34. No. 12 CV 2656(AJN), 2013 WL 5202824 (S.D.N.Y. Sept. 16, 2013).
35. *Id.* at *1–3.
36. *Id.* at *18–20.
37. *See, e.g.*, United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

taining an arbitration clause.[38] Courts have recognized five theories arising out of common law principles of contract and agency law that could provide a basis for binding non-signatories to arbitration agreements: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.

In *In re A2P*, the telecoms argued that even though they were not parties to the RS agreement, plaintiffs were and should therefore be estopped to deny the application of the arbitration clause to the dispute. The court stated:

> Under principles of estoppel, signatories to an arbitration agreement can be compelled to arbitrate their claims with a nonsignatory where a careful review of the relationship among the parties, the contracts they signed . . . , and the issues that had arisen among them discloses that the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.[39]

Applying a two-part "intertwined-ness" test, the court held (1) the plaintiffs' claim arose under the subject matter of the RS agreement containing the arbitration clause, and (2) there was a close relationship between the plaintiffs and the non-signatory telecoms, requiring that plaintiffs arbitrate their claims even though the telecoms were not signatories to the arbitration agreement.[40] The court also rejected plaintiffs' claims that the arbitration filing fee and administrative fees made arbitration cost-prohibitive.[41]

*c. Internet Cable Service—Decision in* Damato v. Time Warner Cable, Inc.

In *Damato v. Time Warner Cable, Inc.*, subscribers to Time Warner Cable, Inc.'s (TWC) cable Internet service brought a class action against TWC for breach of their subscriber agreement based on the imposition of a modem lease fee that required subscribers to pay $3.95 per month to lease TWC's modem.[42] Plaintiffs alleged that the new charge was a veiled price hike for Internet service

38. Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416–17 (4th Cir. 2000).

39. *In re A2P*, 2013 WL 5202824, at *10 (quoting Denney v. BDO Seidman, LLP, 412 F.3d 58, 70 (2d Cir. 2005) (alteration in original) (internal quotation marks omitted).

40. *Id.* at *7–8. For more on the issue of non-signatories binding signatories, see *Walter v. Mark Travel Corp.*, No. 09-1019-EFM, 2013 WL 5276143, at *5–6 (D. Kan. Sept. 18, 2013). There, a signatory argued that the court erred in allowing the assignee of a signatory (but a non-signatory itself) to compel arbitration with a signatory. *Id.* at *5. The court rejected the signatory's argument that the Supreme Court's holding in *Stolt-Nielsen,* i.e., that class arbitration may not be imposed on parties whose arbitration clause does not reflect an intent to consent to class arbitration, supports the argument that an assignee who did not sign the arbitration agreement may not compel a signatory to arbitrate. *Id.* at *6. The court based this ruling on the fact that the differences between bilateral and class action arbitration are far greater than the differences between arbitrating with a signatory and arbitrating with an assignee of the signatory. *Id.*

41. *In re A2P,* 2013 WL 5202824, at *25–26. Although there was "much dispute between the parties as to what the fees and administrative costs associated with arbitration would actually amount to in this case," *id.* at *25 n.19, the court held that even if they were as high as plaintiffs claimed, they would still be less than the recovery sought given the antitrust provisions allowing for attorney fees and treble damages. *Id.* at *25.

42. Damato v. Time Warner Cable, Inc., No. 13-CV-994 (ARR)(RML), 2013 WL 3968765, at *1 (E.D.N.Y. July 31, 2013).

in violation of several promises TWC made to its customers. These included giving notice thirty days in advance of any price or service change, not charging for modems, and not raising prices for customers subject to a set price plan.[43] TWC moved to stay or dismiss the class action pending arbitration based on an arbitration clause in the subscriber agreement.[44]

In opposition to the motion to stay or dismiss, plaintiffs challenged the validity of the arbitration clause on three grounds: judicial estoppel, illusoriness, and unconscionability.[45] Plaintiffs argued that TWC should be judicially estopped from compelling arbitration because in other lawsuits, TWC did not invoke the arbitration agreement and chose instead to litigate.[46] The court rejected this argument as "totally without merit," holding that a party can waive its right to arbitration in one case and compel it in another.[47]

Plaintiffs contended that the arbitration clause was illusory because the subscriber agreement gave TWC the power to amend the arbitration clause unilaterally. As such, its promise to arbitrate was empty and thus could not serve as consideration.[48] The court refused to consider this argument because it was related to a potential defect in the contract as a whole, not specifically to the arbitration clause, and accordingly that defense needed to be decided by the arbitrator.[49]

Finally, plaintiffs asserted numerous state-law unconscionability arguments, including that arbitration of individual claims was cost-prohibitive and accordingly unconscionable.[50] The court ultimately rejected all arguments based on unconscionability. Its decision demonstrates how difficult it can be to prove that consumer arbitration on an individual basis will involve fees that are prohibitively high. Plaintiffs contended that the administrative fee for a $10,000 claim under the AAA Commercial Arbitration Rules was $775, plus a "final fee" of $200 if the case proceeded to a hearing. In addition, the AAA Rules require the parties to bear the cost of the arbitrators, which plaintiffs estimated would be $1,899 per day. The court found the plaintiffs failed to prove that these were the actual fees and costs applicable because the AAA Commercial Rules incorporated the Supplemental Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses

43. *Id.*
44. *Id.*
45. *Id.* at *4–7.
46. *Id.* at *4.
47. *Id.*
48. *Id.* at *5. The ADR Committee reported previously on the Fourth Circuit's decision in *Noohi v. Toll Bros., Inc.*, 708 F.3d 599 (4th Cir. 2013), voiding an arbitration clause that required claimants to arbitrate disputes but allowed the respondent company to elect between arbitration and litigation. The court held the FAA did not preempt Maryland's requirement that an arbitration clause be supported by consideration independent of the consideration supporting the underlying contract. Most states do not impose a requirement that the underlying contract and the arbitration clause be supported by separate consideration. As a result, under Maryland law, mutuality respecting the requirement to arbitrate is generally a requirement, whereas the opposite is true in most states.
49. *Damato*, 2013 WL 3968765, at *5.
50. *Id.* at *10–12.

utilizing standardized, systematic application of arbitration clauses for consumer goods where the terms of the agreement are non-negotiable. Under the Supplemental Procedures, the filing fee is a maximum of $125, and the consumer is liable for half the arbitrator's fee, to a maximum of $375. Further, there was a possibility of getting further fees waived if the consumer could show hardship. In these circumstances, the court held plaintiffs had not proven the fees were unconscionable, as they were less than the fees that would be imposed if the case were tried in a federal court.[51] As a result, the class action was stayed pending arbitration of all plaintiffs' claims for money damages.[52]

*d. Decision in* Versmesse v. AT&T Mobility LLC

*Versmesse v. AT&T Mobility LLC*[53] reflects the investment AT&T Mobility has made in arbitration as a means to resolve employment disputes with its executives and senior managers. It also validates AT&T Mobility's cutting-edge use of mechanized processing for obtaining and demonstrating employee consent to mandatory employment arbitration agreements.

Versmesse worked as a business account executive for AT&T for more than three years before she was terminated. Her lawsuit alleged violations of Title VII,[54] the Americans with Disabilities Act,[55] the Family and Medical Leave Act,[56] and other claims. AT&T moved to dismiss, arguing Versmesse had agreed to arbitrate her claims. AT&T introduced affidavit evidence that it implemented an arbitration program in late 2011 for all of its management-based employees in the United States. AT&T designed and sent an email informing each employee of the creation of the arbitration program. The email advised employees how to go online and elect to opt out of the program if they did not agree to arbitration. If employees did not opt out within approximately two months of receiving the notice, they were deemed to consent to arbitration, waiving their right to a jury trial of any claims against AT&T. Employees were assured that it was up to them to decide whether to participate or opt out, and there would be no adverse consequences for declining to participate in the arbitration program. A hotline was established for employees to call if they were being pressured or retaliated against in conjunction with making their decision.

51. *Id.* at *12.

52. *Id.* at *13. The federal court class action remained pending for possible consideration of injunctive action, because the arbitration clause excluded injunctive relief from the scope of arbitration. Nevertheless, compelling arbitration of damage claims on an individual basis may well result in the dismissal of the injunction claims as plaintiffs' counsel may not be prepared to arbitrate so many of the individual claims in order to preserve claims for class treatment of the injunction claims. At a minimum, TWC gained an important strategic advantage that would assist it to settle the case less expensively.

53. No. 3:13 CV 171, slip op. (N.D. Ind. Mar. 4, 2014).

54. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

55. 42 U.S.C. §§ 12101–12113.

56. 29 U.S.C. §§ 2601–2654.

Versmesse opposed the motion to dismiss, submitting her own affidavit in which she denied having received notice of the arbitration program, including the requirement to affirmatively opt out if she did not want to participate. In response, AT&T demonstrated through affidavits that an original notice and two follow-up notices of the arbitration program had been sent to Versmesse's email address.[57] Using information gathered from its computer system, AT&T was further able to demonstrate that someone using Versmesse's email address and password had accessed the notice of the arbitration program.[58]

The district court granted the motion to dismiss and compelled arbitration, holding the bare allegations in Versmesse's affidavit that she did not receive notice of the arbitration agreement were not sufficient to overcome AT&T's specific and affirmative testimony that the notices were sent to her email address and that someone using her email address and password had accessed the email regarding the arbitration agreement. The court held that the parties' mutual consent to arbitrate was sufficient consideration for the opt-out arbitration agreement to be enforceable.

This case demonstrates AT&T's commitment to an opt-out arbitration program for settlement of disputes with its management employees. It also demonstrates the usefulness of computerized forms for documenting receipt and review of communications necessary to make an opt-out program successful. With opt-in programs, it is easier to prove a party's consent to arbitration because there is generally a signed agreement, typically contained within an employment agreement. Opt-out programs are more likely to generate higher participation rates, but since there is often no signed, written form recording consent to arbitration, it is essential to the success of that program that one can demonstrate receipt and (hopefully) review of the arbitration forms. It is possible to place cookies and other markers in documents to record when a user opens the form and record how long the form remains open, what pages are reviewed, and so forth. This can be very compelling evidence if later introduced to prove knowledge of the employee respecting the arbitration agreement.

As discussed below, however, there is a split between the courts and the NLRB concerning the validity of opt-out arbitration programs that limit or bar employees from arbitrating disputes as part of a class.

### 2. Developments Respecting Class Action Employment Arbitration

As a result of the Supreme Court's holding in *American Express Co. v. Italian Colors Restaurant*,[59] the Second Circuit in *Sutherland v. Ernst & Young LLP*[60]

57. The computer records demonstrated emails were sent to Versmesse on December 5, 2011 at 4:03:47 a.m., on December 15, 2011 at 4:03:42 a.m., and on January 18, 2012 at 12:03:00 a.m. Slip op. at 5.

58. AT&T was able to establish from computer records that someone logged in with Versmesse's username and password and accessed the Arbitration Agreement email and the accompanying page containing the actual agreement on December 5, 2011 at 7:14:32 a.m. *Id.*

59. 133 S. Ct. 2304 (2013).

60. 726 F.3d 290 (2d Cir. 2013).

was compelled to reverse the holding of the district court that the FLSA prohibited waivers of class arbitration. The district court had relied on the Second Circuit's decision in *American Express* in finding that the FLSA and NLRA invalidated waivers of class arbitration. After the Supreme Court overturned the Second Circuit's application of the "effective vindication" doctrine, the remaining grounds articulated by the district court for invalidating the class arbitration waiver were insufficient.

The Supreme Court's decisions make clear that there must be a "contrary congressional command" to trump the FAA's liberal policy of granting parties autonomy to contract for arbitration, including waivers of class arbitration.[61] In reversing the district court, the Second Circuit joined the Fourth,[62] Fifth[63] and Eighth[64] Circuits—every circuit to rule on the issue so far—in holding that the FLSA contains no such contrary congressional command that would preclude waiver of class arbitration.[65] The Second Circuit noted the FLSA's statutory authorization of suits by "one or more employees for and in behalf of himself or themselves or other employees similarly situated" did not grant a right to class adjudication because the statute also required employees with a FLSA claim to affirmatively opt in to any collective action.[66] The Second Circuit agreed with the Eighth Circuit that "[e]ven assuming Congress intended to create some 'right' to class actions, if an employee must affirmatively opt in to any such class action, surely the employee has the power to waive participation in a class action as well."[67]

The Second Circuit also held that the Supreme Court's decision in *Italian Colors* "compels the conclusion that Sutherland's class-action waiver is not rendered invalid by virtue of the fact that her claim is not economically worth pursuing individually."[68] Plaintiff's effective vindication theory, namely that it would be prohibitively expensive to pursue individual arbitration as her potential recovery would be dwarfed by the costs, was plainly rejected by the Supreme Court in *Italian Colors*.[69] Finally, the Second Circuit rejected plaintiff's alternative argument that the NLRB in *D.R. Horton, Inc.*[70] held that a waiver of the right to pursue a FLSA claim collectively in any forum violates the NLRA. Like the Eighth Circuit, the Second Circuit declined to follow the NLRB for two reasons. First, the Second Circuit concluded it owed no deference to the

61. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987).
62. *See* Adkins v. Labor Ready, Inc., 303 F.3d 496, 506 (4th Cir. 2002).
63. *See* Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004).
64. *See* Owen v. Bristol Care, Inc., 702 F.3d 1050, 1052–55 (8th Cir. 2013).
65. *See Sutherland*, 726 F.3d at 296.
66. *Id.* at 296–97 (quoting 29 U.S.C. § 216(b)).
67. *Id.* at 297 (quoting Owen v. Bristol Care, Inc., 702 F.3d at 1052–53) (alteration in original) (internal quotation marks omitted).
68. *Id.* at 298.
69. *Id.*
70. 357 N.L.R.B. No. 184 (Jan. 3, 2012), *enforced in part*, 737 F.3d 344 (5th Cir. 2013).

Board's remedial preferences where such preferences "potentially trench upon federal statutes and policies unrelated to the NLRA."[71] Second, the court suggested *D.R. Horton* may have been decided by the NLRB without a proper quorum.[72]

Although the NLRB's holding in *D.R. Horton* has been rejected by every Circuit Court to consider the issue, NLRB administrative judges continue to invalidate arbitration agreements that contain provisions waiving the right to class arbitration. In *Domino's Pizza, LLC*,[73] the NLRB held that Domino's opt-out arbitration program was unlawful under Section 8(a)(1) of the NLRA because it required employees to arbitrate their disputes on an individual basis unless the employee elected to opt out within thirty days of employment. The administrative law judge held that she was compelled to follow the NLRB's decision in *D.R. Horton* notwithstanding (1) the holding of the D.C. Circuit that the decisions of the NLRB were invalid because it lacked a quorum due to the fact that two members were improperly appointed by President Obama without the advice and consent of the Senate, and (2) the decision of the Fifth Circuit holding that *D.R. Horton* was wrongly decided by the NLRB. The administrative law judge stated that arguments respecting the authority of the NRLB and the validity of *D.R. Horton* had to be presented to the NLRB. Unless the NLRB reversed its position, or the Supreme Court reversed the NLRB, the administrative judge felt she had no discretion and had to invalidate the Domino's opt-out arbitration program.[74]

In fact, *D.R. Horton* and many other NLRB decisions could be invalidated by the Supreme Court because the Court granted certiorari to review the D.C. Circuit's decision in *Canning v. NLRB*.[75] Court observers at the oral argument held on January 13, 2014, thought the position advocated by the Solicitor General in favor of the president's power to make "recess appointments " when the Senate considered itself in session was not well-received by the majority of justices.[76] A ruling is expected later this term. If the president's appointments to the NLRB are invalidated, the NRLB's decision in *D.R. Horton* may no longer be good law—without regard to whether the NLRB's interpretation of the NLRA as barring waivers of class arbitration would withstand Supreme Court review in light of the Court's decision in *American Express*.

71. *Sutherland*, 726 F.3d at 297 n.8 (quoting Hoffman Plastic Compounds, Inc., v. NLRB, 535 U.S. 137, 144 (2002)) (internal quotation marks omitted).

72. *Id*. (citing Canning v. NLRB, 705 F.3d 490, 499 (D.C. Cir. 2013) (holding President Obama's appointments constitutionally invalid)).

73. No. 29-CA-103180, slip op. (NLRB Mar. 27, 2014).

74. *Id*. at 5.

75. 705 F.3d 490 (D.C. Cir.), *cert. granted*, 133 S. Ct. 2816 (2013).

76. Lyle Denniston, *Argument Recap: An Uneasy Day for Presidential Power,* BLOOMBERG LAW (Jan. 13, 2004), http://www.scotusblog.com/2014/01/argument-recap-an-uneasy-day-for-presidential-power/.

### 3. Ninth Circuit Holds Parties Cannot Lawfully Contract to Waive Federal Court Review of Arbitral Awards Under the FAA

Although the Supreme Court has read the FAA expansively to increase party autonomy in consenting to customized arbitration agreements, there are limits beyond which principles of freedom of contract do not extend. The Ninth Circuit held in *In re Wal-Mart Wage and Hour Employment Practices Litigation* that the parties exceeded those limits in a dispute between class action plaintiffs' lawyers over their attorney fees.[77] The lawyers contracted to arbitrate their fee claims, providing that the arbitration would be both "binding" and "non-appealable."

Perhaps not surprisingly, when the arbitrator awarded one group of the class action lawyers $6 million and another group $11 million, the $6 million group sought to annul the award. This prompted the $11 million group to assert that the district court lacked jurisdiction because of the "non-appealable" language in the arbitration agreement. The district court found it had jurisdiction and held there was no basis for vacatur. The $6 million group then appealed to the Ninth Circuit, where the $11 million group disputed the court's jurisdiction to hear the appeal under § 10 of the FAA. The Ninth Circuit noted that the arbitration agreement purported to waive the right to any review of the arbitral award by a federal court, and thus the question presented was whether parties, by contract, could alter the statutory review provisions enumerated in § 10 of the FAA.[78]

The Ninth Circuit began its analysis with the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[79] which held that the statutory grounds for judicial review in the FAA are exclusive and may not be supplemented by contract. The Ninth Circuit reasoned that if the remedies provided in §§ 10 and 11 of the FAA could not be supplemented by contract, the Supreme Court's holding also compelled the conclusion that judicial review similarly could not be waived by virtue of a contractual provision.[80] In this regard, the Ninth Circuit compared FAA § 10, the language of which "carries no hint of flexibility,"[81] to FAA § 5, which on its face invites modification of the procedure for appointing arbitrators by stating the section applies "if no method [is] provided [in the arbitration agreement]. . . ."[82] The court concluded that "[p]ermitting parties to contractually eliminate all judicial review of arbitration awards

77. 737 F.3d 1262 (9th Cir. 2013).

78. *Id.* at 1267. Other Circuit Courts have treated language stating an award is non-appealable as only waiving review of the merits of the arbitration. *See, e.g.,* Southco, Inc. v. Reell Precision Mfg. Corp., 331 F.App'x 925, 927–28 (3d Cir. 2009); Rollins, Inc. v. Black, 167 F.App'x 798, 799 n.1 (11th Cir. 2006). The Tenth Circuit construed a provision that stated "*[j]udgment* upon the award rendered by the arbitrator shall be final and nonappealable" to prohibit only appellate review of the district court's judgment on a petition to confirm or annul. *See* MACTEC, Inc. v. Gorelick, 427 F.3d 821, 827 (10th Cir. 2005) (emphasis added). Accordingly, the Tenth Circuit held waiver of a right to appeal from the district court was enforceable. The Ninth Circuit expressed no opinion concerning whether a no-appeal clause that precludes only appellate review is enforceable.

79. 552 U.S. 576, 578 (2008).

80. *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 737 F.3d at 1268.

81. *Id.* (quoting *Hall St. Assocs.*, 552 U.S. at 587).

82. *Id.* (quoting 9 U.S.C. § 5) (alterations in original).

would not only run counter to the text of the FAA, but would also frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration."[83] Accordingly, the court proceeded to review the district court's order confirming the arbitral award and affirmed that judgment.

### 4. Third Circuit Holds Delaware Arbitration Statute Unconstitutional

The Delaware Code was amended in 2009 to permit Chancery Court judges, with the consent of the parties and as an alternative to litigation, to conduct binding arbitrations of business (non-consumer) disputes involving a minimum of $1 million.[84] These arbitrations were to be conducted by sitting Chancery Court judges in the courthouse during regular court hours. An award rendered by the Chancery Court judge could be appealed to the Delaware Supreme Court, but review was limited to the deferential standard outlined in the FAA. Both the Delaware Code and the court rules governing the arbitration procedure barred public access to the court-conducted arbitral proceedings. Attendance at the proceedings was limited to the parties and their representatives, and all materials and communications produced during the hearings were confidential unless an appeal was filed with the Delaware Supreme Court.

On October 23, 2013, the Third Circuit struck down these provisions as contrary to the First Amendment in *Delaware Coalition for Open Government, Inc. v. Strine.*[85] The Third Circuit held that the secret arbitral procedure abridged the right of public access to trials since the arbitrations were government sponsored and conducted by sitting judges in government courthouses during normal business hours. The decision noted that the "place and process" of Delaware's proceeding "have historically been open to the press and general public."[86] Further, the Third Circuit held that the benefits of openness "weigh strongly" in favor of access to the arbitrations while the drawbacks of openness are "relatively slight."[87]

On January 21, 2014, Strine, in his capacity as Chancellor of the Delaware Court of Chancery, filed a petition for a writ of certiorari with the Supreme Court.[88] As grounds for granting certiorari, Chancellor Strine argued: (1) the lower courts are deeply divided over how to apply the Supreme Court's "Experience and Logic Test" to determine whether public access is required, and (2) arbitration lacks the long tradition of public access needed to satisfy the experience leg of the test.[89] The U.S. Chamber of Commerce, Business Roundtable, NASDAQ, and New York Stock Exchange, as amici curiae, filed briefs in sup-

83. *Id.*
84. DEL. CODE ANN. tit. 10, §§ 347, 349.
85. 733 F.3d 510 (3d Cir. 2013).
86. *Id.* at 518 (quoting Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8 (1986) (internal quotation marks omitted)).
87. *Id.* at 519.
88. Petition for Writ of Certiorari, Strine v. Del. Coalition for Open Gov't, Inc., No. 13-869 (U.S. Jan. 21, 2014).
89. *Id.* at 18–22, 23–29.

port of the petitioner. On March 24, 2014, the Supreme Court denied the writ of certiorari,[90] leaving the Third Circuit's opinion as final.

The invalidation of Delaware's arbitration procedure raises potential problems. Some empirical research indicates that only a few arbitrations had actually been conducted under the Chancery Court arbitration procedure. Hence the number of parties that may be directly affected by the decision may be small. However, any parties that contracted to use the Delaware program should now consider alternative procedures. Such clients might be better advised to consider a potential agreement amendment before any dispute arises. Otherwise, issues of mutual mistake might cloud resort to the arbitration clause if and when it comes into play. A mutual mistake argument in most jurisdictions would require proof that confidentiality was material to the agreement to arbitrate. It might be difficult for the parties to provide pre-agreement evidence on that point. Indeed, uncertainty might extend to the very availability of arbitration of disputes under the contract. A party that decides it wishes to avoid arbitration of a particular dispute under the subject agreement might claim that, since the agreed arbitration forum is now unavailable, there is no enforceable agreement to arbitrate and the dispute defaults to litigation.

### D. AAA Amends Commercial Arbitration Rules

On October 23, 2013, the AAA amended its Commercial Arbitration Rules. One of the major themes in arbitration in the last few years is that amendments to the rules of various arbitration institutions have resulted in all the institutions having increasingly similar rules. That is certainly true with the AAA's new Commercial Arbitration Rules. Many of the new rules the AAA has adopted appear in one form or another in the rules of other arbitral institutions. For most parties, when it comes time to select an arbitral institution, differences in arbitration rules and procedures are not a major factor distinguishing the AAA from its competitors.

In its materials promulgating the amendments, the AAA classified certain changes as "Significant Changes" and a number of others as "Additional Changes." This report summarizes the "Significant Changes." Those readers directly involved in or considering an AAA commercial arbitration should review all of the recent amendments.

The new rules focus on the pre-hearing process and address the arbitrator's authority to manage discovery and deal expressly with the arbitrator's authority to consider and decide dispositive motions.

#### 1. Discovery

Rule 21 now calls upon the arbitrator to schedule a preliminary hearing "as soon as practicable after the arbitrator has been appointed." The objective of

90. *Del. Coalition for Open Gov't, Inc.*, 733 F.3d at 510, *cert. denied*, 2014 WL 271920 (U.S. Mar. 24, 2014).

this preliminary hearing is to establish procedures that will achieve a fair, efficient, and economical resolution of the dispute. In this regard, the new rule contains a caution to avoid provisions that "import procedures from court systems that will add to the costs and delay arbitration." Discussion at this preliminary hearing should cover: (1) whether all necessary and appropriate parties are included; (2) whether more detailed statement of claims, counterclaims, or defenses will be sought; and (3) whether threshold or dispositive issues exist that can be decided without considering the entire case. The rule requires issuance of a written order laying out decisions made or agreements reached during the hearing.

Rule 22 sets standards for management of discovery, calling for "achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses." Although the parties must produce any documents on which they intend to rely, Rule 22 also permits the arbitrator to require parties to respond to "reasonable" document requests provided those documents are (1) not otherwise readily available to the party seeking the documents, (2) reasonably believed by the party seeking the documents to exist, and (3) relevant and material to the outcome of a disputed issue.

Rule 22 also addresses electronically stored information (ESI), stating that the producing party only has to make that information available "in the form most convenient and economical for" the producing party. However, if arbitrators find good cause, they can require otherwise. When dealing with ESI, the arbitrator can set reasonable search parameters and weigh the need for ESI against the cost of locating and producing it.

The arbitrator's power to authorize the propounding of interrogatories, formerly referenced in what is now Rule L-3 of the "Procedures for Large, Complex Commercial Disputes," no longer exists. However, those procedures continue to empower the arbitrator to permit depositions and document requests.

Rule 58 addresses the arbitrator's power to impose sanctions where a party fails to comply with its obligations under the rules or with an order of the arbitrator. The sanctions can include limiting a party's participation in the arbitration or an adverse determination of an issue or issues. However, sanctions may not include a default. Under the current rules, requests for fees incurred in bringing discovery motions regularly arise. The new Rule 58 does not address this subject directly, but seems to contemplate the possibility of fees for abusive discovery tactics.

These new rules do not limit the arbitrator's ability to permit wide-ranging and expansive discovery in any individual case. However, the AAA is clearly seeking closer control of discovery and the costs associated with it.

### 2. Dispositive Motions

Rule 33 authorizes the arbitrator to hear and decide dispositive motions "if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."

Prior versions of the AAA rules did not expressly discuss the arbitrator's authority to hear summary judgment-type motions. It was often argued that the arbitrator had no such authority. The new rules end that controversy. Under Rule 33, respondents can now seek to dispose of claims to which they have defenses as a matter of law (e.g., the statute of limitations). They can also challenge claims on the ground that claimants are unable to provide evidence necessary to support required elements. Arbitrability disputes can also be summarily adjudicated under Rule 33.

### 3. Emergency Measures/Injunctions

Under Rule 38 of the new rules, the arbitrator can order emergency measures unless the parties' agreement provides otherwise. Formerly, unless the arbitration agreement specifically permitted such relief, the arbitrator could take such action only when the parties agreed to the measures.

The new rules provide for emergency relief prior to appointment of an arbitrator. If so requested, the AAA must appoint a single emergency arbitrator within one day. The parties then have one day to challenge appointment of that emergency arbitrator. Within two days of appointment, the emergency arbitrator must establish a schedule for consideration of the application for emergency relief. The schedule must provide a reasonable opportunity for all parties to be heard. Upon a showing that immediate and irreparable loss or damage will result in the absence of emergency relief and that the moving party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief. The emergency arbitrator may not serve as a member of the merits arbitration panel unless the parties otherwise agree, but the emergency arbitrator's decision may not be modified absent a showing of changed circumstances.

## E. AAA Optional Appellate Arbitration Rules

Effective November 1, 2013, the AAA's new Appellate Arbitration Rules allow parties to elect, as part of their arbitration provision or by stipulation, to appeal arbitral decisions to a new AAA Appeal Tribunal selected from the AAA appellate panel. This Appeal Tribunal will review alleged errors of law that are material and prejudicial to a party and "clearly erroneous" determinations of fact. If the AAA Appeal Tribunal reverses the underlying arbitration decision, its decision becomes the final and binding decision in the case.

The ADR Committee's survey of PUCAT industry companies noted very limited interest in an appeal procedure for AAA arbitrations. Many parties select arbitration because of the "finality" of the result, save for an annulment proceeding under the FAA or a similar state arbitration act. The appeal process, if elected, places an additional step in the process of confirming and enforcing an award, adding time and cost to the arbitral process. On the other hand, it allows a broader (but still narrow) review of the arbitral award than permitted

under the FAA as construed by the Supreme Court in *Oxford Health Plans LLC v. Sutter*[91] and other decisions.

The ADR Committee predicts that Rule 33 allowing dispositive motions is the new AAA rule that will have the greatest impact on arbitration over the next few years. It is entirely unclear, however, whether that impact will be beneficial from a time and cost perspective. The new rule is likely to engender disputes over the proper standard for granting summary disposition, possibly increasing the risk that a court will later annul an award granted by this procedure. In addition, the existence of the rule is likely to increase significantly the number of parties that file for summary disposition of claims. If the result is that many of the claims fail, the overall time and cost of arbitration could actually increase.

There is a risk that widespread use of summary disposition in arbitration will make arbitration even more like litigation. However, arbitration does not have all the tools provided by the Federal Rules of Civil Procedure and similar state laws to make summary disposition a reasonably successful means of more speedily resolving disputes. For example, the AAA's elimination of interrogatories, while perhaps a good thing in and of itself for arbitration, removes one of the key tools used by litigators to move a case toward summary disposition. The absence or limited availability of third party discovery in arbitration is another handicap that limits the ability of arbitrators to grant summary disposition. Finally, unlike the judge who cares not where his next case is coming from, the commercial arbitrator must balance the need to get appointed in the next case against the prehearing disposition of a claim that is certain to leave one party disgruntled. If typical arbitrator caution toward granting summary disposition continues notwithstanding this new rule, it will mean that much time and money is wasted briefing summary judgment motions without a corresponding benefit of a large number of cases being disposed at a preliminary stage. There could be more cost with limited benefit. Despite this risk, the pressure from many parties to provide an early "off ramp" from arbitration resulted in adoption of new Rule 33.

91. 133 S. Ct. 2064 (2013).