The Enforceability of Contractual Agreements to Arbitrate:

A Survey of the Last Three Years of Jurisprudence

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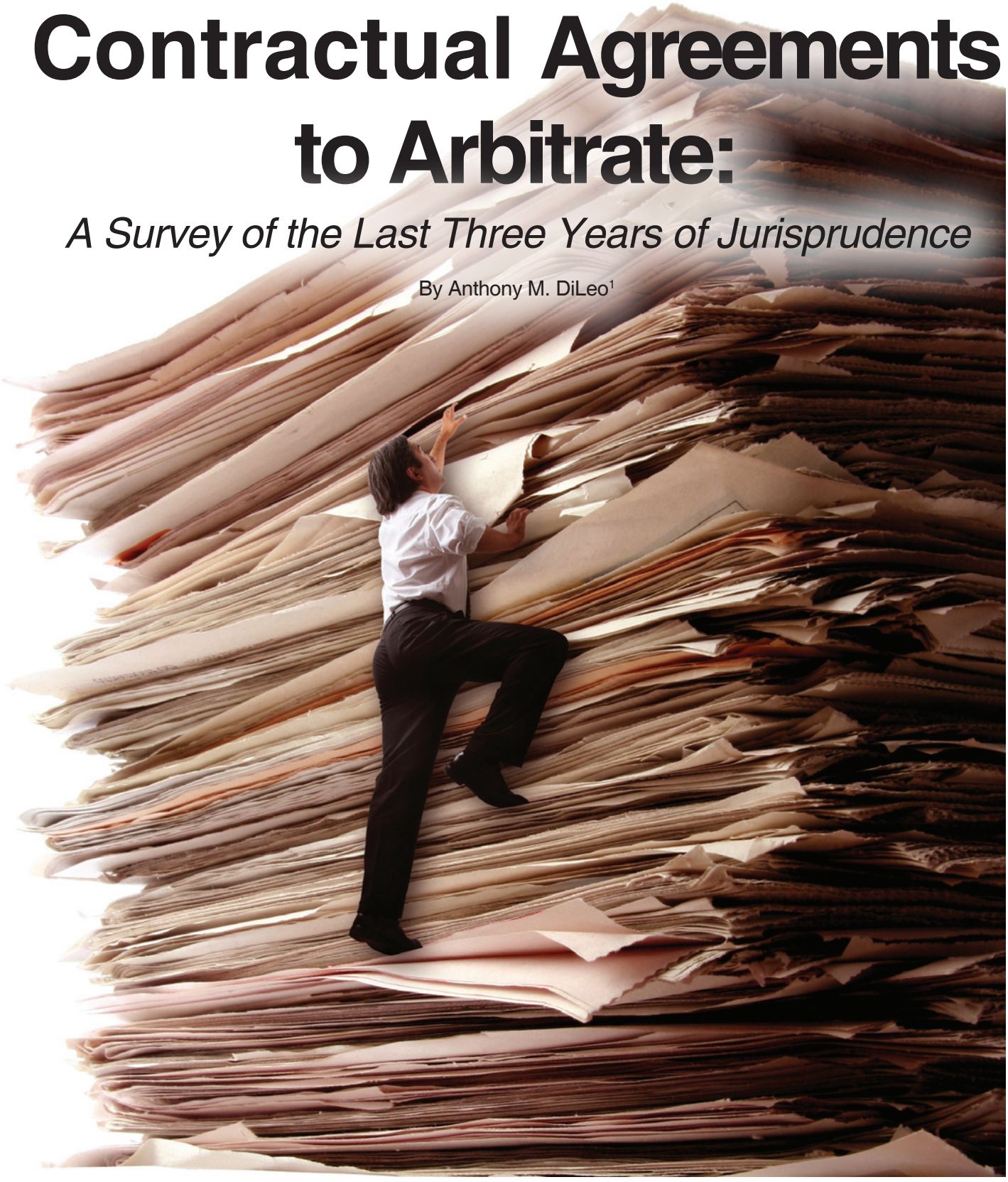

Arbitration is a widely accepted and frequently adopted method of dispute resolution and is often included in contracts drafted by many practitioners. A large number of practitioners have participated in and sought the benefits of an arbitration proceeding to resolve a dispute.[2] This summary examines some of the key precedents over the past several years and is a guide to lawyers either drafting the specific language of an arbitration provision or applying one once a dispute exists.[3] Because awards of arbitrators are confidential,[4] the only reported decisions involving arbitration are those where one party challenges its obligation to arbitrate or the award of the arbitrator.

Though parties have asserted arguments to persuade the courts to narrow the application of the Federal Arbitration Act (FAA), those efforts have been largely unsuccessful. Many opinions have been rendered during the past three years that are precedent for state and federal courts in this state, and a number of the most prominent decisions are reviewed in this article. Following are the applicable statutes.

The FAA, 9 U.S.C. §2, provides:

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

The Louisiana Binding Arbitration Law, La. R.S. 9:4201, provides:

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

The majority of decisions address some variation of the argument that a particular circumstance allows a party to avoid the applicability of these statutory provisions. Recent court opinions continue to uphold arbitration,[5] infrequently allowing the petitioner to avoid a contractual agreement to arbitrate or avoid the results of that arbitration.[6]

United States Supreme Court

This survey of recent arbitration jurisprudence begins with an analysis of the United States Supreme Court's landmark decision in *Buckeye Check Cashing, Inc. v. Cardegna*.[7] This opinion, which narrowed the grounds to challenge arbitration, has been embraced in Louisiana Binding Arbitration Law (LBAL) jurisprudence and has reinforced the trend toward interpreting the LBAL to closely follow federal court interpretations of the FAA. In *Buckeye*, the court addressed whether a challenge to the validity of a contract itself provided a basis for avoiding arbitration and whether such a challenge would permit a party to litigate the enforceability of the contract in the courts. Clarifying prior holdings, the court ruled that when questions of validity are involved, unless the arbitration clause is itself directly and independently challenged as unenforceable, the validity of the contract in its entirety is a matter for the arbitrator to decide.[8] The court also concluded that its decision was applicable whether the challenge was brought in state or federal court, as long

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2. Such as informal procedure, confidentiality of the proceedings, a voice in arbitration selection, and a duty of arbitrator disclosure of any prior relationship to lawyers, parties or witnesses, and no formal rules of discovery. Parties may also decide the level of detail in the award to be issued. Rule 42 of the American Arbitration Association (*www.adr.org*). The United States Supreme Court explained the benefits of arbitration as follows:

> The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . .

Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 US. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, p. 13 (1982)). Thus, "by avoiding the delay and expense of litigation, [arbitration] will appeal to big business and little business alike, corporate interests and individuals." Allied-Bruce Terminix, 513 U.S. at 280 (quoting S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924)).

3. Most attorneys adopt the standard form of an arbitration provision found at the American Arbitration Association Web site (*www.adr.org*). See R-1 of the American Arbitration Association. However, arbitration provisions in contracts can vary due to the permitted flexibility of arbitration. For examples of drafting issues, see "Drafting Dispute Resolution Clauses: A Practical Guide" found at *www.adr.org*. A minority of clauses may contain some revision to the standard clause. See also, "Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins" at *www.adr.org*.

4. Arbitrators are bound by confidentiality, but the parties are not. Rule R-23 of the American Arbitration Association states: "The arbitrator and the American Arbitration Association shall maintain the privacy of the hearings unless the law provides to the contrary." *See* ITT Educational Services, Inc. v. ARCE et al, No. 07-20438 (5 Cir. 6/27/2008), where the United States 5th Circuit Court of Appeals upheld as valid a contractual agreement to keep the arbitrator's findings as confidential and upholding the district court ordering permanent injunctive relief to enforce the contractual provision of confidentiality.

5. The Louisiana Supreme Court has explained, "[a]rbitration is a substitute for litigation. The purpose of arbitration is settlement of differences in a fast, inexpensive manner before a tribunal chosen by the parties." Nat'l Tea Co. v. R.R. Richmond, 548 So.2d 930, 933 (La. 1989); Firmin v. Garber, 353 So.2d 975, 978 (La. 1977) (arbitration is for "the speedy resolution of disputes outside the court system"). *See also, e.g.*, Thomas v. Desire Cmty. Housing Corp., 773 So.2d 755, 759 (La. App. 4 Cir. 7/19/00) ("we also recognize that arbitration is a substitute for litigation and that its purpose is to settle disputes in a fast, inexpensive manner before a tribunal chosen by the parties").

6. The court has described the presumption favoring arbitration as a matter of state and federal law as a "heavy" one. Aguillard v. Auction Management Corp., 908 So.2d 1, 40 (La. 2005), superceded by La. C.C.P. art. 2083, as amended by 2005 La. Acts, No. 205 § 1, effective Jan. 1, 2006, with respect to the right to interlocutory appeal.

7. 546 U.S. 440, 126 S.Ct. 1204, (2006).

8. *See also*, Downer, *infra*.

as the FAA was implicated.

Prior to *Buckeye*, other United States Supreme Court decisions over the past several years continued to expand the scope of arbitrable issues and restrict the ability of parties to challenge arbitration decisions in litigation. The court has, in addition to vesting authority in the arbitrator to decide the overall validity of a contract, also held other issues of contract interpretation are to be decided by the arbitrator, including whether class certification is permitted under an arbitration agreement,[9] and whether critical issues in arbitration agreements, such as a time limit on the availability of arbitration[10] or the limitation of damages under RICO,[11] may render an arbitration agreement unenforceable.

The court has continued to support a broad interpretation of the FAA's "involving commerce" test, thereby applying the FAA to previously litigated disputes.[12] The term "involving commerce," according to the court, applies broadly to encompass a wide range of transactions.

Extending this reasoning further, the court recently ruled in early 2008 in *Hall Street Assoc., LLC v. Mattel, Inc.* that the FAA contains the *exclusive* statutory grounds for judicial review of an arbitration award in FAA cases, thereby precluding parties from supplementing by agreement the statutory grounds for modification or vacatur of an award under the FAA.[13] The court declined Hall's request to review whether there had been legal error by the arbitrator on the merits, which is not recognized as one of the specifically enumerated grounds in the FAA.[14] Still, the court, in a complex 6-3 opinion

with two dissenting opinions, noted the parties' flexibility in arbitration:

> . . . the FAA lets parties tailor some, even many, features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and substantive law. *Hall*, 128 S.Ct. at 1404.

Also, earlier this year, the Supreme Court clarified the reach of the FAA where primary jurisdiction is vested by state statute in a forum *other than* the federal courts. In *Preston v. Ferrer*,[15] an attorney who claimed he was owed fees for services to a television performer initiated arbitration proceedings to seek recovery of those fees. When the performer objected to the arbitration, the California Superior Court stayed the arbitration unless and until the Labor Commissioner determined she lacked jurisdiction to

9. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

10. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

11. Pacificare Health Sys., Inc. v. Book, 538 U.S. 401 (2003).

12. The Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003). In Circuit City Stores v. Saint Clair Adams, 532 U.S. 105, 2008 WL 762537, (2001), the court noted that when it issued its decision in Allied-Bruce Terminix Companies, Inc. v. Dobson, and when it considered the significance of Congress' use of the words "involving commerce," "the court interpreted [Section 2 of the Federal Arbitration Act] as implementing Congress' intent 'to exercise [its] commerce power' Allied-Bruce." The Federal Arbitration Act "was enacted pursuant to Congress' substantive power to regulate interstate commerce . . . and that the Act was applicable in state courts and pre-emptive of state laws hostile to arbitration. . . . Relying upon . . . the evident reach of the words 'involving commerce,' the court interpreted Section 2 [of the Federal Arbitration Act] *as implementing Congress' intent 'to exercise [its] commerce power to the full*'" (emphasis added).

13. Hall Street Assoc., LLC v. Mattel, Inc., 128 S.Ct. 1396, 2008 WL 762537 (2008), implicitly overruling Gateway Technologies v. MCI, 64 F.3d 993, 997 (C.A. 5th 1995). *See* Hall p. 1403, footnote 5, noting the split in the federal circuits. In Gateway, the U.S. 5th Circuit had upheld in 1995 the parties' contractual agreement to expand review, beyond the FAA, into "errors of law" which allowed the district court a *de novo* review, a precedent now presumably overruled by Hall. One federal court has already ruled that "manifest disregard" is not a basis for vacatur. Robert Lewis Rosen Associates v. Webb, 2008 WL 2662015 (SDNY July 7, 2008).

14. Buckeye, *supra* at n.4. One day after Hall was decided, a Louisiana court issued its opinion in Rent-A-Center v. Barker, No. 07-1414, 2008 WL 818949, (M.D. La. 2008), citing Gateway, *infra*, the 5th Circuit ruling of 1995. See footnote 10 *supra*. In Rent-A-Center, now on appeal to the 5th Circuit, the trial court upheld a contractual provision creating a standard of review to be "the same as that applied by an appellate court reviewing a decision of a trial court. . ." The forthcoming opinion of the 5th Circuit should demonstrate application of Hall to cases in this circuit. Contractual provisions that seek to convert arbitration functionally into a trial court with a right of appeal are now largely invalid.

15. Preston v. Ferrer, 128 S.Ct. 978, 169 L. Ed. 2d. 917, 76 USLW 3437 (2008).

hear the matter. The California Court of Appeal[16] agreed, stating that the California Talent Agencies Act (TAA) vested the Labor Commissioner with exclusive original jurisdiction over the dispute, and that *Buckeye* did not apply because it did not involve an administrative agency with exclusive jurisdiction over a disputed issue. The Supreme Court disagreed and concluded that the FAA pre-empted the TAA. Deciding this novel issue, the court explained that when the parties to a contract agree to arbitrate all issues arising under the contract under the FAA, the FAA supersedes state law lodging primary jurisdiction in another forum, whether judicial or administrative. The Supreme Court held that *Buckeye* was largely determinative, because removing administrative proceedings from the ambit of the FAA would undercut the strong national preference for the "streamlined proceedings" and "expeditious result"[17] accorded the parties by the FAA.

The conclusion of these decisions applying the FAA is that the evolution of federal arbitration jurisprudence continues to reaffirm its breadth and durability when challenged.

5th Circuit and Federal Trial Courts

The 5th Circuit Court of Appeals adopted the U.S. Supreme Court mandate that the presumption to arbitrate governs all cases in which the availability of arbitration is at issue. In *Downer v. Siegel*,[18] a group of shareholders filed suit against their broker on grounds of fraud in the inducement, asserting a challenge to the contract as a whole. The case was removed to federal court and stayed pending arbitration over the objections of the plaintiffs on grounds the arbitration agreement did not apply to actions based on fraud. The broker initiated arbitration proceedings, successfully seeking a declaratory judgment that he was not liable to his clients. On a motion for confirmation of the award, the district court vacated the award holding the arbitration provision was not applicable to private investments between broker and clients.

Reversing the trial court on appeal, the 5th Circuit held:

> A presumption of arbitrability exists which requires the court to decide in favor of arbitration when "the scope of an arbitration clause is fairly debatable or reasonably in doubt," *Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5 Cir.1985).

Quoting its opinion in *Mar-Len*, the court held:

> The weight of this presumption is heavy: arbitration should not be denied "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue." *Id*. at 636.

The court noted that the arbitration clause in question was worded very broadly and the scope of its application was not expressly limited.[19] Whether there were valid arguments that could put the private transaction outside coverage of the arbitration clause was not the question. Any and all ambiguities must be interpreted to support arbitration. In a separate case, addressing the validity of an arbitration clause under the LBAL, the United States 5th Circuit Court of Appeals has also ruled that consent for binding arbitration can be indicated in writing, orally, or by action or inaction, as specified in the agreed-upon terms of a valid contract,[20] and that employees may be bound by an arbitration agreement, even if they refuse to sign it.[21] [22]

Other decisions of the 5th Circuit relating to the FAA and arbitration statutes of other states reinforce the court's broad support of arbitration.[23] On the procedural front, the court held that the administrative closure of a case by the district court pending arbitration was not a final judgment recognized under the FAA and, therefore, was not reviewable at the appellate level.[24] The court recognized the binding nature of arbitration clauses upon third-party beneficiaries under the FAA, finding that where an arbitration agreement is signed "with, or on behalf" of a patient with dementia, the clear intent of the authorized parties was to bind the

16. Ferrer v. Preston, 145 Cal.App.4th 440, 51 Cal.Rptr.3d 628, (2006), review denied (Feb. 14, 2007).

17. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

18. Downer v. Siegel, 489 F.3d 623 (5 Cir. 2007). The arbitration clause was not itself separately and independently challenged as invalid.

19. The arbitration provision stated: "All controversies which may arise between the client . . . [and RPR,] its officers, directors, agents, representatives or employees, present or former, concerning any account maintained by the client [with RPR] . . . shall be determined by arbitration . . . ."

20. Marino v. Dillard's, Inc., 413 F.3d 530 (5 Cir. 2005). *See also* Armstrong v. Associates Intern. Holdings Corp., in which the 5th Circuit ruled that, under Texas law, an arbitration clause may be added to an at-will employment agreement at the employer's sole discretion, so long as the employee has 30 days' notice of the change and thereafter continues employment. 242 Fed. Appx. 955 (5 Cir. 2007).

21. Omni Hotel Mgmt. Corp. v. Bayer, 235 Fed. Appx. 208 (5 Cir. 2007) (upholding a decision by the United States District Court for the Eastern District of Louisiana which found that employees of a nationwide hotel management corporation were bound by a mandatory arbitration agreement which predicated continued employment on agreement to arbitrate as long as they continued working, even if they failed to sign the agreement or refused to sign it); *see also* Lester v. Advanced Envtl. Recycling Techs., Inc., 248 Fed. Appx. 492, 2007 U.S. App. LEXIS 15972 at * 4-5 (5 Cir. 2007) (unpublished), in which the court held that, under the FAA, the validity of a binding arbitration agreement cannot be challenged on the basis of duress where an employer threatens to refuse the payment of an employee's medical bills as long as the employer has the legal right to do so.

22. Efforts have been made to statutorily overrule the application of arbitration agreements to employer-employee agreements and certain consumer disputes. *See*, S. 2554 and H.R.5129, Title IV C §243 captioned "Unenforceability of Arbitration Clauses in Employment Contracts" (2008). Other recent bills introduced are H.R. 3010, S. 1782, H.R. 6126, H.R. 5312, S. 2838 as to automobiles, consumers, and nursing homes, among other things.

23. A federal appeals court has ruled recently in a case of first impression that an agreement to mediate disputes is not enforceable under the Federal Arbitration Act. The U.S. Court of Appeals for the 11th Circuit reasoned in Advanced Bodycare Solutions, LLC v. Thione International, Inc. (No. 07-12309) and decided April 21, 2008, that the FAA does not apply because mediation does not result in an enforceable award. The ruling preserves the distinction between consensual processes, like mediation, and adjudicatory processes, like arbitration, for purposes of the FAA.

24. The district court in this case closed the case administratively prior to issuing a stay by noting that motions, discovery and additional pleadings would only be accepted after the arbitrator's decision was reached. The 5th Circuit found nothing in the district court's decision to indicate an intent to dismiss the case. South La. Cement, Inc. v. Van Aalst Bulk Handling, B.V., 383 F.3d 297 (5 Cir. 2004).

patient.[25] The court also noted applicability of arbitration to many disputes where a party did not, in fact, sign the arbitration agreement, but sought or derived benefits or obligations under a contract that contained one, though in *Palmer Ventures*, the court found the facts did not support such a holding in that case.[26]

The 5th Circuit supported the presumption in favor of arbitration where a party concurrently signed two agreements, one of which contained an arbitration agreement and one of which did not.[27] Relying upon general principles of contract law, the court recognized that separate agreements executed contemporaneously by the same parties, for the same purposes, as part of the same transaction, must be construed together to enforce arbitration. The 5th Circuit also addressed the assertion of arbitrator bias as a ground for denying enforcement of an arbitration award. The court rejected the "mere appearance of bias" standard for nondisclosure and required a concrete, rather than a speculative, impression of bias to vacate an arbitration award.[28] The court explained in another case that partiality does not exist simply because an arbitrator worked in the same industry as one of the parties to the arbitration agreement. Some explanation of the grounds of decision within the arbitration award is required for a district court to even review a question of the validity of arbitration agreement. The court stated that where the parties had agreed the filing of arbitral findings or other explanation for an award would not be required, remand to the arbitrator for clarification was not appropriate.[29]

Federal courts within the 5th Circuit have played a prominent role in the expansion of arbitration under both the FAA and LBAL. Recognizing the important distinction between binding and nonbinding arbitration agreements, the federal district court in *Tassin* deferred to the Louisiana Legislature's amendment of the LBAL.[30] The court held that amending the name of the statute to insert the word "binding" into the title of the Louisiana arbitration statute demonstrated the Legislature's clear intent to limit applicability of the statute only to those agreements expressly requiring the arbitration to be binding. In *Timber Source, L.L.C. v. Cahaba Valley Timber Co*., the arbitration agreement in question required both parties to "accept the non-binding arbitration" or the case would be referred to the district court. Based upon the statutory change to the title of the act, the court denied a motion to compel, explaining that Louisiana does not recognize nonbinding arbitration.[31] Another trial court has held that an arbitration award is *res judicata*.[32]

Louisiana Supreme Court

Louisiana law closely follows federal law in all pertinent respects with regard to the validity and enforceability of arbitration agreements, and therefore federal and state court opinions are, for the most part, consistent.[33]

In a prominent arbitration decision, *Aguillard v. Auction Mgmt. Corp*.,[34] the Louisiana Supreme Court resolved a split in Louisiana appellate circuits by adopting the presumption favoring arbitration

25. JP Morgan Chase & Co. v. Conegie ex rel. Lee, 492 F.3d 596 (5 Cir. 2007).

26. In Palmer Ventures, LLC v. Deutsche Bank AG, No. 06-30584, 2007 WL 4105219 (5 Cir. Nov. 19, 2007), the court held that to compel arbitration a nonsignatory must show reliance on an arbitration agreement and must demonstrate that claims against the signatory and non-signatory are intertwined. In that case, the court denied the argument of Deutsche Bank that it could demand arbitration where its indirect subsidiary, Deutsche Bank Securities, Inc., had an agreement with the plaintiff, Palmer Ventures, and that agreement contained an arbitration provision. Because the defendant, Deutsche Bank, did not demonstrate "substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract," arbitration was denied. *See also* A. DiLeo, "The Enforceability of Arbitration Agreements By and Against Non-Signatories: A Review of the Jurisprudence," *Journal of American Arbitration*, May 2003.

27. Safer v. Nelson Fin. Group, Inc., 422 F.3d 289 (5 Cir. 2005). The party signed a new account information form, containing an arbitration clause, and an advisory agreement, not containing an arbitration clause. The ruling explained that the two documents together represented the full effect of the parties' relationship.

28. Positive Software Solutions, Inc. v. New Century Mortgage Corp., 476 F.3d 278 (5 Cir. 2007), stated that there must be a "concrete, not speculative, impression of bias. . . ." The relationship which the arbitrator failed to disclose was that he acted as co-counsel in unrelated litigation with the attorney representing New Century and he failed to disclose the relationship despite numerous opportunities. In contrast, however, the American Arbitration Association's instructions to arbitrators require very broad disclosure of all past or present relationships. Rule R-16(a) of the American Arbitration Association states:

> Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

29. Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C., 487 F.3d 255 (5 Cir. 2007) (per curiam).

30. Tassin v. Ryan's Steakhouse, 509 F. Supp. 2d 585 (M.D. La. 2007). "The review of awards is 'exceedingly deferential.' A reviewing court must . . . resolve all doubts in favor of arbitration." *Id*. at 588.

31. Timber Source, L.L.C. v. Cahaba Valley Timber Co., 2007 WL 2332318 (E.D. La., Aug. 13, 2007). If both parties do not accept the non-binding arbitration, the matter will then be referred to a Louisiana court as applicable.

32. Theriault v. FIA, 2008 WL 2787465 (E.D. La. July 17, 2008).

33. Congress has declared, and the U.S. Supreme Court has affirmed, that the Federal Arbitration Act, 9 U.S.C. §1, *et. seq*., has pre-empted conflicting state law. The U.S. Supreme Court set out more than 30 years ago in Southland Corp. v. Keating, 465 U.S. 1, 10 (1984): "national policy 'appli[es] in state as well as federal courts' and foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements."

34. Aguillard v. Auction Mgmt. Corp., 908 So.2d 1 (La. 2005). The court resolved a split in the circuits and upheld the more "liberal" interpretation of the 2nd and 4th Circuits toward enforcing arbitration, as opposed to the "conservative" policy of the 1st and 3rd Circuits.

agreements even in standard form contracts. The court reaffirmed that Louisiana courts are statutorily limited to determining whether a valid agreement to arbitrate was made and whether a party has failed to comply with that agreement. Under the LBAL, all other matters, including waiver, must be submitted to the arbitrator. Where a party applies for a stay of litigation, demonstrates that a written arbitration agreement exists and that the issue is referable to arbitration under the agreement, the stay of litigation pending arbitration must be granted.[35] The court concluded: "We . . . adopt the United States Supreme Court's interpretation of the federal arbitration law." 908 So.2d at 22.

The Louisiana Supreme Court also has examined the issue of appealability of arbitration rulings. Consistent with 5th Circuit and United States Supreme Court holdings, the Louisiana Supreme Court ruled that a judgment compelling arbitration is an interlocutory decision and, therefore, not immediately appealable.[36]

Louisiana Appellate Courts

More recent Louisiana appellate court decisions have begun to apply these landmark decisions from higher courts in decisions that are relevant to Louisiana practitioners, though the full impact of these recent significant decisions is yet to be seen. Since the Louisiana Supreme Court confirmed Louisiana law in favor of a presumption of arbitration in *Aguillard* in 2005, Louisiana appellate courts have applied these principles in a wide variety of cases.

Louisiana appellate courts have generally found that the terms and remedies intended by the parties will be upheld.[37] Consistent with that, the termination of a contract under a valid cancellation provision also cancels any obligation to arbitrate disputes arising from the contract, as differentiated from a case where the validity of a contract is challenged, which is a question for the arbitrator.[38] Post-*Aguillard*, arbitration clauses will not usually be found to be adhesionary[39] or unenforceable,[40] though consumers have prevailed in some cases. Similarly, the Louisiana 1st Circuit, though applying the standards for unconscionability in accordance with the *Aguillard* ruling, held an arbitration clause requiring proceedings to be paid for by a client and limiting the client's remedy to arbitration, while simultaneously allowing the opposing party a full range of remedies, is unconscionable.[41] In some cases, the court asked whether it was clear from their written agreement that the parties intended to arbitrate and declined to hold that arbitration applied to the dispute.[42] In contrast, the scope of enforcement of arbitration provisions is broad, encompassing even non-signing third-parties[43] in many instances and incorporating many devices of contract law.[44] Even a subcontractor not a party to the arbitration agreement is entitled to arbitration once the general contractor invokes its right to arbitrate under the general contract.[45] Moreover, arbitration decisions will ordinarily be upheld as written, despite assertions of "manifest disregard."[46]

The court in *JK Developments, LLC v. Amtek of Louisiana, Inc.*[47] described the

35. Int'l River Ctr. v. Johns-Manville Sales Corp., 861 So.2d 139 (La. 2006) (Dec. 3, 2003). Louisiana appellate court decisions have ruled, often over dissent, that where a party is in default by refusing to perform under a written arbitration agreement, as long as the making of the agreement or the failure to comply is not at issue, La. R.S. 9:4203 provides that a court may order arbitration and issues of waiver are for the arbitrator. Arkel Constructors, Inc. v. Duplantier & Meric, Architects, L.L.C., et al., 965 So.2d 455 (La. App. 1 Cir. 2007), 2007 La. App. Lexis 1459 (7/25/07).

36. St. Bernard Funeral Home, Inc. v. The Doody Group, Inc., 822 So.2d 599, 2002 La. LEXIS 2346 (La. 8/5/02) (Decision without published opinion).

37. *See, e.g.*, Ellis Constr., Inc. v. Vieux Carre Resort Props., L.L.C., 934 So.2d 206 (La. App. 4 Cir. 2006) (holding that remedies will be limited to those intended by parties). See footnotes 2 and 3, *supra*, regarding flexibility of drafting of arbitration provisions.

38. Johnson v. Blue Haven Pools, 928 So.2d 594 (La. App. 1 Cir. 2006).

39. *See, e.g.*, Hoffman, Siegel, Seydel, Bienvenu & Centola, A.P.L.C. v. Lee, 936 So.2d 853 (La. App. 4 Cir. 2006) (ruling that an arbitration agreement was not adhesionary where it was not in a typeface significantly smaller than other provisions, where the party bringing suit was not in an inferior bargaining position, and where the party seeking to overturn the arbitration decision could have selected another service provider. However, an arbitration agreement between a consumer and a large telecommunication provider was found to be adhesionary and unenforceable where the arbitration clause was in exceedingly small print and not set off from prior or subsequent paragraphs contained in a page of at least 3,960 words. *But see* Sutton Steel & Supply Co. v. BellSouth Mobility, Inc., 971 So.2d 1257, 2007-146 (La. App. 3 Cir. 12/12/07), where the court found that considerations of mutuality and prominence in determining whether arbitration clause is unenforceably adhesionary under Louisiana law did not violate the Federal Arbitration Act.

40. *See, e.g.*, CACV of Co., L.L.C. v. Coston, No. 2006 CA 1460, 2007 WL 2713391 (La. App. 1 Cir. 9/19/07) (not designated for publication) (holding that, where failure to respond to notices and requests regarding arbitration results in an arbitral award, a trial court lacks discretion to deny the award on grounds of vacatur); NCO Portfolio Mgmt., Inc. v. Gougisha, No. 07-CA-604, 2007 WL 4553933 (La. App. 5 Cir. 12/27/07) (an arbitration award cannot be challenged for lack of agreement to arbitrate after an applicable statutory time limit for vacatur has passed), *rev'd en banc on other grounds*, 2008 La. App. LEXIS 646 (La. App. 5 Cir. 4/29/08), writ filed May 29, 2008, 2008-C-1146 (en banc court held 6-2 that evidence was insufficient to prove credit card customer consented to arbitration); Dictoguard, Inc. v. Lopeo, 948 So.2d 305 (La. App. 5 Cir. 2006) (holding that a district court exceeds its authority when it awards damages against a party not ordered to pay damages by an arbitrator).

41. Lafleur v. Law Offices of Anthony Buzbee, P.C., 960 So.2d 105, No. 2006 CA 0466, 2007 WL 858859 (La. App. 1 Cir. 2007).

42. Town of Homer, Inc. v. Gen. Design, Inc., 960 So.2d 310 (La. App. 2 Cir. 5/30/07), where the court held that an earlier contract containing an arbitration agreement did not apply to later work without a contract; and Quebedeaux v. Sunshine Homes, Inc., 941 So.2d 162 (La. App. 3 Cir. 2006), finding that a purchase agreement lacking a binding arbitration clause and payment in consideration represented final agreement between the parties and that the binding arbitration clause in a subsequently signed document was not enforceable, even if delivery of mobile home would have been withheld but for signature of subsequent document. In contrast, the court upheld arbitration claims under the New Home Warranty Act. Robert Angel Builder v. Gilbert, 42,340 (La. 2 Cir. 8/15/07), 962 So.2d 1162. However, compare Easterling v. Royal, 963 So.2d 399, at 403 (La. 3 Cir. 2007), where the court declined to order arbitration due to confusion as to the arbitration agreement.

43. *See* DiLeo, *supra*, footnote 26.

44. *See, e.g.*, Gunderson v. F.A. Richard & Assocs., Inc., 937 So.2d 916 (La. App. 3 Cir. 2006) (holding that a non-signatory to an agreement containing an arbitration provision may be bound by that provision under agency or contract law); LaCour's Drapery Co., Inc. v. Brunt Constr., Inc., 939 So.2d 424 (La. App. 1 Cir. 2006) (ruling that an arbitration award against a surety not party to the arbitration remains enforceable).

45. Touro Infirmary v. Sizler Architects, 947 So.2d 740 (La. App. 4 Cir. 11/21/06).

46. Wittich v. Wittich, 948 So.2d 195 (La. App. 5 Cir. 2006) (finding that manifest disregard is not a valid basis for challenging an arbitration award). Recently, a Georgia court held that it was not manifest disregard where an arbitrator misinterpreted the correct law and the court upheld the arbitration award. Savannah Dodge, Inc. v. Bynes, No. A08A0359, 2008 WL 1822370 (Ga. Ct. App. April 24, 2008).

47. In a decision consistent with Hall, the court in JK Developments, LLC v. Amtek of Louisiana, Inc., 2008 WL 793600 (La. App. 1 Cir.), No. 2007, CA 1825, 2007-1825 (La. App. 1 Cir. 3/26/08), confirmed the "extraordinarily narrow" judicial review of arbitration awards and noted that there may be a more liberal review standard in the "fifth, fourth, and third circuits in Louisiana," but declined to follow that jurisprudence.

presumption of arbitration by the courts as requiring a strict adherence to the exclusive and limited authority for judicial modifications of arbitration awards. Finally, addressing the relationship between the filing of a motion to confirm an arbitration award under federal and state law, a Louisiana appellate court agreed that whenever federal arbitration law governs a dispute, confirmation of an award by a state court is also governed by federal law.[48] In *Vishal*, the court concluded that questions of contract validity are for the arbitrator, unless the challenge is specifically to the arbitration provision itself.[49] And, in *Capital One Bank v. White*, the Louisiana 1st Circuit confirmed a credit card arbitration award.[50]

In contrast, the Louisiana 3rd Circuit held in *Wright v. 3P Delivery, LLC*[51] that the Louisiana Arbitration Law does not apply to "contracts of employment of labor."[52] Expressly recognizing that an immediate appeal from a motion denying a request for arbitration is prohibited, the Louisiana 1st Circuit in *Arkel Constructors, Inc. v. Duplantier & Meric, Architects, LLC*,[53] found that the court could convert an appeal into an application for supervisory writs. In the same opinion, the court deferred the question of waiver of an arbitration provision as a question for the arbitrator, not the court. In another exception to non-appealability, the court in *Limousine Livery v. Airport Limousine Service, LLC*[54] allowed the appeal from a request for injunctive relief to proceed despite the existence of an arbitration clause in the contract at issue. The court recognized that the FAA is silent on this issue and that both federal and state courts are split on whether injunctive relief is available when the parties have entered into an enforceable arbitration agreement. After review of the current state of the law, the court decided that, whether or not injunctive relief was authorized, the case before it did not establish the requisite irreparable harm for granting injunctive relief, leaving the question open. Then, in *Simpson v. Pep Boys*,[55] the court found a waiver of arbitration occurred. Still, exceptions to mandatory arbitration are uncommon and the full impact of the recent U.S. Supreme Court decisions is yet to be fully seen.

Conclusion

The decision to incorporate an arbitration provision in an agreement must be weighed as to the perceived benefits to a particular client knowing that an agreement to arbitrate will, in all but the most exceptional cases,[56] be upheld. Practitioners should be aware of and clearly understand the substantive and procedural rules regarding the assertion and defense of claims in arbitration, as federal and state cases confirm that courts will continue to enforce arbitration provisions and awards of arbitrators.[57]

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48. Chase Bank USA, N.A., v. Roach, 978 So.2d 1103, No. 07-1172, 2008 WL 585095 (La. App. 3 Cir. March 5, 2008). The lower court had denied confirmation of the award in Chase's favor because Louisiana law requires confirmation motions to be filed in the parish where the award was made and Chase filed in the parish of Roach's residence. Under federal arbitration law, confirmation can be made in the county where the award was made, the county where the debtor resides or signed the contract, or where designated in the agreement. Federal debt collection law also provides that confirmation must be filed where the debtor resides or where the contract was signed.

49. Vishal Hospitality, LLC v. Choice Hotels, 04-0568 (La. App. 1 Cir. 2006), 939 So.2d 414.

50. No. 2007 CW 2174, 2008 WL 23322 (June 2008).

51. Wright v. 3P Delivery, LLC, 970 So.2d 1171, 2007-683 (La. App. 3 Cir. 10/31/07), relying on Wright v. Round the Corner Restaurants of Louisiana Inc., 252 So.2d 341, 344 (La. App. 4 Cir. 1971) and cases cited therein. *Writ denied* by Wright v. 3P Delivery, LLC, 976 So.2d 718, 2007-2311 (La. 2/1/08) (Feb. 1, 2008) (NO. 2007-C-2311). However, compare Omni Hotel, *infra*. If such an employment agreement affected or involved interstate commerce, it would presumably be governed by the FAA, not by a more limited state statute. *See*, Circuit City, *supra*.

52. Louisiana arbitration law does not apply to "contracts for arbitration which are controlled by valid legislation of the United States." La. R.S. 9:4216.

53. Arkel Constructors, Inc. v. Duplantier & Meric, Architects, LLC, 965 So.2d 455, 2006-1950 (La. App. 1 Cir. 7/25/07).

54. Limousine Livery v. Airport Limousine Service, LLC, 980 So.2d 780 (La. App. 4 Cir. 3/12/08).

55. 847 So.2d 617, 623-24 (La. App. 4 Cir. 4/9/03). Similarly, the court held a waiver occurred when a party refused to pay the arbitration fee, causing a year-long delay. Miller v. Conagra, Inc., 07-0747 (La. App. 3 Cir. 12/5/07), 977 So.2d 915 (La. App. 2007), *writ granted*, 08-0021 (La. 3/7/08), 977 So.2d 915.

56. Key Click Outsourcing, Inc. v. Ochsner Health Plan, Inc., 946 So.2d 174 (La. App. 5 Cir. 2006) (ruling that an arbitrator's decision was void where the arbitrator committed an error of law and refused to enforce a valid agreement between the parties). *Also, Cf.* Wittich, *supra*, that was decided six weeks after Key Click, also by the La. App. 5 Cir., holding that manifest disregard is not a basis for challenging an arbitration award. In Key Click, the contract stated: "the arbitrator shall have no authority to make material errors of law. . . [nor] to make any award which could not have been made by a court of law." However, *see* Hall v. Mattel, *supra*, decided after Key Click. In Hall, the court dealt with a contractual provision similar to that in Key Click. In Hall, the contract provided review "where the arbitrator's conclusions of law are erroneous." 128 S.Ct. 1400-1401. The court rejected Hall's request for "general review for an arbitrator's legal errors." 128 S.Ct. at 1404.

57. A national weekly list of recently decided cases of interest and importance is available via free subscription at *www.adrforum.com/adrupdate*.