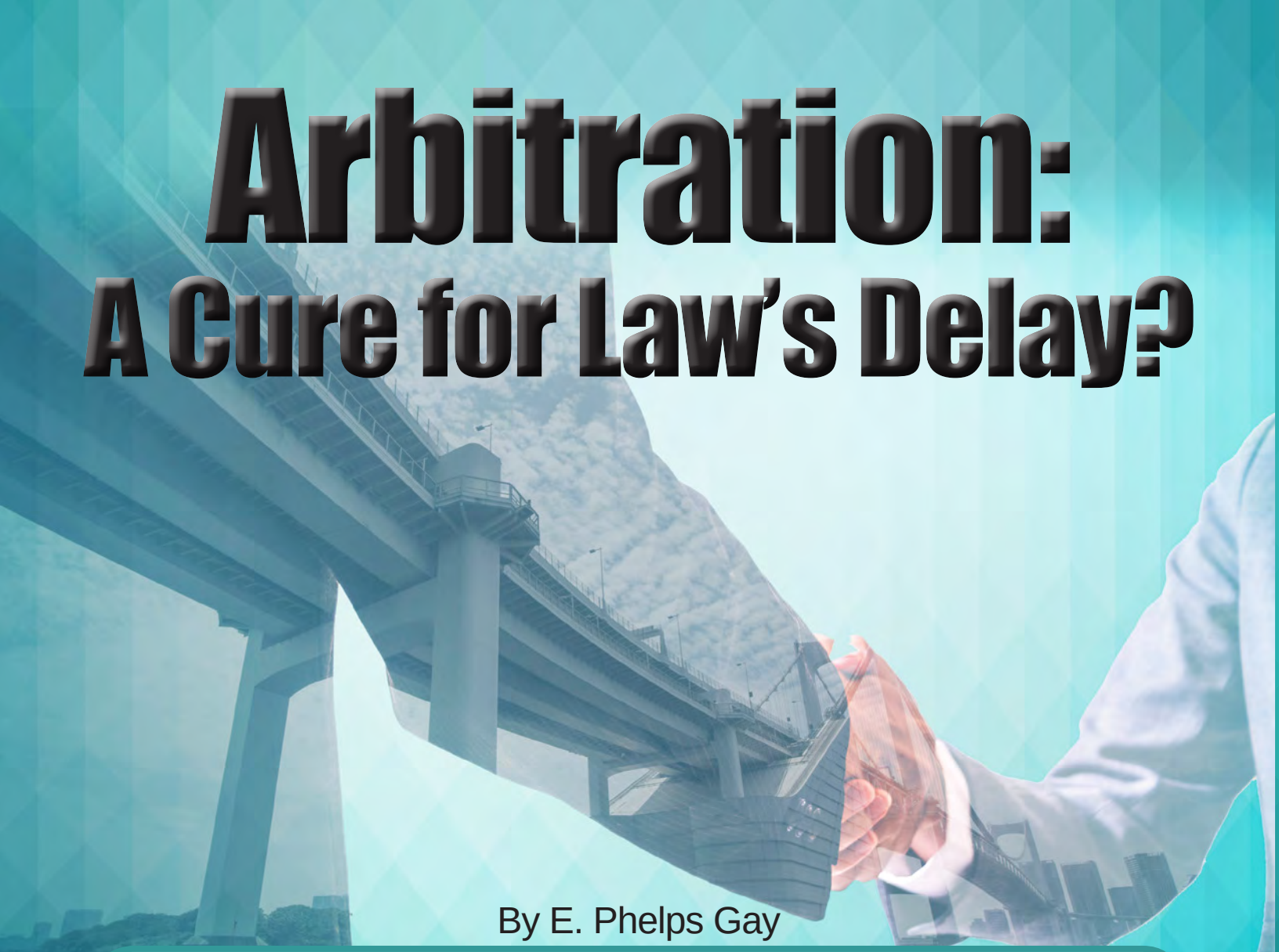
Arbitration: A Cure for Law's Delay?



By E. Phelps Gay

In his "to be or not to be" soliloquy, Hamlet enumerates the "whips and scorns" of time from which he might be released. These include the "oppressor's wrong, the proud man's contumely, the pangs of despised love," and, of course, "the law's delay." Indeed, the law's delay occupies a prominent place in world literature, not least in Charles Dickens's Bleak House, where the interminable chancery suit of Jarndyce and Jarndyce has become "so complicated that no man alive knows what it means." The parties "understand it least," and "no two Chancery lawyers can talk about it for five minutes, without coming to total disagreement as to all the premises."

After an eternity, the case ends when the lawyers' fees are discovered to have consumed the entire estate forming the subject of the dispute.

To the rescue comes . . . arbitration. Its advantages feature the "speedy disposition of differences through informal procedures without resort to court action."[1] Instead of becoming enmired in lengthy, costly and risky litigation before unknown and unpredictable fact-finders, the parties can choose their own arbitrator, limit discovery and obtain a quick hearing. They can also keep their dispute private and confidential. The arbitrator's decision (all agree) will be final, eliminating the expense and uncertainty of appeals. Finally, the arbitrator's decision can be transformed into an enforceable judgment. All in all (some say), this seems vastly preferable to the law's delay.

As an arbitrator, I believe many disputes can be resolved quickly and efficiently through this process, which under both Louisiana and federal law is "favored."[2] We know that many commercial, construction, consumer and maritime contracts include agreements to arbitrate in the event a dispute arises. Arbitration provisions also appear in energy, insurance, employment and real estate agreements. Some lawyers even include arbitration clauses

in their retainer agreements, although the Louisiana Supreme Court has imposed strict rules surrounding that course of action in light of the fiduciary duties attorneys owe to clients and the significant rights a client would be giving up.[3]

Herewith a few basic questions and answers about arbitration, which you may find useful and informative.

Are arbitration agreements valid and enforceable?

Yes. Under the Louisiana Binding Arbitration Law, a provision in any contract to settle a controversy by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[4] The Louisiana statute tracks the Federal Arbitration Act, which applies to arbitration agreements affecting interstate commerce.

A determination whether the parties have agreed to arbitrate involves two considerations — (1) whether there is a valid agreement between the parties; and (2) whether the dispute falls within the scope of that agreement. A court may apply ordinary principles of state contract law to determine whether the parties have formed a valid agreement to arbitrate.[5]

Do you have to sign a contract for an arbitration agreement to be enforceable?

Generally, yes, but there are exceptions. To be subject to arbitral jurisdiction, a party must ordinarily be a signatory to a contract containing an arbitration clause.[6] Arbitration is a matter of contract, and a court cannot compel a party to submit to arbitration if he or she did not agree to it.[7] However, under certain legal theories, a court may compel arbitration by a non-party. These theories include agency, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary, waiver, and equitable estoppel.[8] It should be noted that Louisiana courts have respected the distinction between corporate entities and their members, deciding not to compel an individual to arbitrate simply because that person is the sole member of a limited liability corporation.[9]

Also, Louisiana law does not absolutely require written acceptance of an arbitration agreement. When an agreement lacks a signature, the actions and conduct of the party or parties who did not sign may show the effect or validity of the agreement.[10]

In accordance with settled Louisiana law, a signing party cannot avoid arbitration by claiming he or she did not read or understand the contract.[11]

What about arbitration clauses hidden or buried in fine print?

Depending on the circumstances, these may be invalidated. In *Duhon v. Activelaf, L.L.C.*, 16-0818 (La. 10/19/16), 192 So.3d 762, the Louisiana Supreme Court struck down as adhesionary and unenforceable an arbitration provision requiring patrons of a Lafayette indoor trampoline park to arbitrate any dispute. The court found the provision was "camouflaged" within an 11-sentence paragraph, nine of which did not relate to arbitration, and thus did not comply with the standards earlier set forth in *Aguillard v. Auction Management Corp.*, 04-2804 (La. 6/29/05), 908 So.2d 1. The court also criticized the lack of mutuality in the agreement since it referred only to the patron's obligation to arbitrate, not to any obligation on the part of the business owner.[12]

Can the right to arbitration be waived?

Yes, but waiver is not favored, and there is a presumption against it.[13] Waiver has been defined as a "voluntary and intentional relinquishment of a known claim."[14] Neither answering a judicial complaint nor a period of delay in filing an arbitration demand necessarily constitutes a waiver, especially in the absence of prejudice to the opposing party.[15] However, waiver may be possible where a party has resorted to judicial remedies and has allowed a significant period of time to elapse before demanding arbitration, so as to indicate an intent to litigate instead of arbitrate.[16]

What if someone simply refuses to arbitrate?

You can petition the court for an order directing the parties to proceed to arbitration.[17]

What if the arbitration agreement contains no method for appointing an arbitrator?

If no method of appointing an arbitrator is provided in the contract, the court in the parish where the arbitration is to be held "shall designate and appoint an arbitrator or arbitrators or an umpire as the case may require . . . ."[18]

What if, despite an arbitration agreement, someone files suit?

File an exception of prematurity and a motion to stay.[19] Under the statute, if suit is brought on any issue referable to arbitration, the court "shall" stay the action until an arbitration has been had in accordance with the terms of the agreement, provided the stay applicant is not in default in proceeding with the arbitration.[20]

How many arbitrators are usually chosen?

The parties may select a sole arbitrator to resolve their dispute, which is commonly done in smaller, less complicated cases. In larger cases, the parties often select a panel of three persons.

Is arbitration really less expensive than litigation?

Generally, but not always. The parties have to pay for the arbitrator or arbitrators, and they have to pay filing fees to any entity administering the arbitration, such as the American Arbitration Association.[21]

Do you have to use the American Arbitration Association to administer the arbitration?

No, although typically an arbitration is administered by a professional arbitration institution such as the AAA or JAMS (an acronym for Judicial Arbitration and Mediation Services, Inc.). The AAA has promulgated detailed rules and procedures for arbitration of commercial, construction, consumer, employment and international disputes. These can be found at *www.adr.org*.

What is discovery like in arbitration?

Excessive discovery (particularly depositions) is generally discouraged, but the arbitrator enjoys a degree of latitude in handling discovery depending on the nature of the case and the agreement of the parties. For example, Rule 22 of the AAA Commercial Arbitration Rules provides that the arbitrator "shall manage any necessary exchange of in-

formation among the parties with a view to 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."

Can you file dispositive motions in an arbitration proceeding?

Yes, but they are viewed with caution, since the purpose of arbitration is to give the parties a fast and fair hearing. Rule 33 of the AAA Commercial Arbitration Rules provides that the arbitrator "may allow" the filing of, and make rulings upon, a dispositive motion "only 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."

Is an arbitration hearing different from a trial?

Yes and no. Arbitrators may compel the attendance of witnesses and the production of records. Parties to the arbitration "may offer evidence as is relevant and material to the dispute and shall produce evidence as the arbitrator may deem necessary to an understanding and determination of the dispute." But conformity to the code of evidence shall not be required, except for laws pertaining to testimonial privileges. The arbitrator shall determine the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed to be cumulative or irrelevant.[22]

Like a trial, an arbitration hearing involves presentation of evidence in the form of testimony and exhibits. Claimant presents evidence to support its claim, and Respondent presents evidence to support its defense. The arbitrator may require witnesses to testify under oath, and the witnesses may be examined by counsel for the adverse party and by the arbitrator. Since there is no appeal, many arbitrations are conducted without a stenographer, but under the rules any party desiring a stenographic record may make appropriate arrangements and bear the expense.[23]

Arbitrators generally enjoy broad discretion in conducting the proceedings.[24]

What is an arbitration award?

An award is simply the decision of the arbitrator or the arbitration panel. It is generally produced within 30 days of the close of the hearing. Arbitration awards may include an order for the payment of money, a declaration as to a matter in dispute, an order for a party to do or refrain from doing something, an order for specific performance of a contract, or an order setting aside or canceling a deed or other document.

Are arbitration awards enforceable?

Yes. Because of the strong public policy favoring arbitration, awards are presumed to be valid.[25] At any time within one year after the award is made, any party may apply to the court in the parish where the award was made for an order confirming it. Upon the granting of an order confirming an award, a judgment may be entered which has the same force and effect as a judgment in any action.[26]

Can an arbitration award be vacated?

It's possible, but rare. The burden of proof is on the party attacking the award.[27]

Awards can be vacated on only a few narrow grounds, namely: (1) where the award was procured by corruption, fraud or undue means; (2) where there was evident partiality or corruption on the part of the arbitrators or any of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.[28]

For example, in one case the Louisiana 5th Circuit Court of Appeal found that the arbitration panel exceeded its powers in granting a defendant surgeon's motion to strike live testimony four days before the hearing. The panel decided to review the experts' opinions through deposition transcripts and ultimately ruled in favor of the surgeon on the merits. Finding there was no authority which would prevent plaintiff from calling live witnesses, the court held the panel should not have denied plaintiff's request for a continuance because one of her experts could not attend the hearing on the date scheduled.[29]

A motion to vacate must be filed within three months of the award.[30]

But what if the arbitrator or arbitration panel makes a mistake on the facts or the law?

Two years ago, the Louisiana Supreme Court reiterated its prior ruling that an error of law or fact is not sufficient to invalidate an arbitration award.[31] The purpose of arbitration is thwarted when parties seek judicial review on grounds that the panel "just got it wrong on the law."[32] Because the record in that case contained no evidence that the panel had willfully misbehaved or imperfectly executed their authority, nor that they had denied the parties due process or consciously disregarded Louisiana law, the award could not be vacated.

Can an award be modified or corrected?

Yes. This can be done if (1) there was an evident material miscalculation of figures or a material mistake in the description of any person, thing or property referred to in the award; (2) the arbitrators awarded on a matter not submitted to them, unless it was a matter not affecting the merits of the decision; or (3) the award is imperfect in matter of form not affecting the merits of the controversy."[33]

Does the Louisiana Arbitration Law apply to labor contracts?

No.[34]

What about federal preemption of state law?

The U.S. Supreme Court has held that the substantive provisions of the Federal Arbitration Act preempt state law as to arbitration agreements in contracts affecting interstate commerce. To the extent federal and state law differ, the Federal Arbitration Act will apply.[35] Any inconsistency between the federal act and Louisiana law must be resolved in favor of the federal act.[36]

So what's so great about arbitration?

Like most choices, it depends on what you want. If you want robust, broad discovery, wide-ranging motion practice, trial by jury, and an opportunity to appeal, and you do not mind bearing the expense at-

tending all these options, you should look to our courts. We have a lot of good judges and conscientious jurors. You may be subjecting yourself to the slings and arrows of "the law's delay," but, at the end of the day, you may find fairness and justice (or not). On the other hand, if you want efficiency, speed, privacy, confidentiality, closure and a "decider" who is well-versed in a particular area of law, you might well prefer to arbitrate. I can attest that the process works.

Of course, you might prefer to mediate, which is another story for another day — or perhaps for another writer in this issue of the *Louisiana Bar Journal*.

FOOTNOTES

1. Firmin v. Garber, 353 So.2d 975, 977 (La. 1977). *See also,* National Tea Co. v. Richmond, 548 So.2d 930, 933 (La. 1989).

2. La. R.S. 9:4201, *et seq.* Louisiana's favored treatment of arbitration agreements echoes the Federal Arbitration Act. 9 U.S.C. §1 *et seq.*, on which it is based. *See, e.g.*, Aguillard v. Auction Management Corp., 04-2804 (La. 6/29/05), 908 So.2d 1; University of Louisiana at Monroe Facilities, Inc. v. JPI Apartment Development, 151 So.3d 126 (La App. 2 Cir. 2014), *writ denied,* 158 So.3d 818 (La. 2/6/15); and Hill v. Hornbeck Offshore Services, Inc., 799 F. Supp. 8 (E.D. La. 2011). The Federal Arbitration Act reflects "a congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

3. Hodges v. Reasonover, 12-0043 (La. 7/2/12), 103 So.3d 1069. While there is no *per se* rule against arbitration clauses in attorney-client retainer agreements, such agreements are subject to higher scrutiny than ordinary commercial contracts due to the fiduciary duties involved. Attorneys must fully disclose the terms and scope of the arbitration clause and explicitly set forth the rights the parties will be giving up, such as the right to broad discovery, trial by jury, and appeal, as well as the upfront costs of arbitration. Attorneys must also advise clients of their right to seek independent counsel before signing the contract.

4. La. R.S. 9:4202; 28 U.S.C. §2 (2017).

5. Prasad v. Bullard, 10-291 (La. App. 5 Cir. 10/12/10), 51 So.3d 35; Am. Heritage Life Ins. Co. v. Lang, 321 F.3d 533 (5 Cir. 2003).

6. Bridas S.A.P.I.C. v. Government of Turkmenistan, 345 F.3d 347 (5 Cir. 2003), *cert denied*, 541 U.S. 937, 124 S.Ct. 1660, 158 L.Ed.2d 37 (2004).

7. Lakeland Anesthesia, Inc. v. United Healthcare of Louisiana, Inc., 03-1662 (La. App. 4 Cir. 3/17/04), 871 So.2d 380, *writs denied*, 04-969 and 04-972 (La. 6/25/04), 876 So.2d 834; Horseshoe Entertainment v. Lepinski, 40,753, (La. App. 2 Cir. 3/8/06), 923 So.2d 929, *writ denied*, 06-0792 (La. 6/2/06), 929 So.2d 1259; O'Neal v. Total Car Franchising Corp., 44,793 (La. App. 2 Cir. 12/16/09), 27 So.3d 317.

8. Arthur Andersen, L.L.P. v. Carlisle, 556 U.S. 624, 631, 129 S.Ct. 189, 173 L.Ed.2d 832 (2009). *See also,* Sturdy Built Homes, L.L.C. v. Carl E. Woodward, L.L.C., (La. App. 4 Cir. 12/14/11), 82 So.3d 473, 478, *writ denied*, 12-0142 (La. 3/23/12), 8 So.3d 94; Rodney Henry v. New Orleans Saints, L.L.C., 15-5971 (E.D. La. 5/18/16). For more on this subject, *see* Anthony M. DiLeo, "The Enforceability of Arbitration Agreements by and against Non-Signatories," *J. Am. Arbitration*, Tulane Arbitration Inst., (Vol. 2, Issue 1, 2003).

9. Prasad v. Bullard, 10-291 (La. App. 5 Cir. 10/12/10), 51 So.3d 35.

10. Hurley v. Fox, 520 So.2d 467, 469 (La. App. 4 Cir. 2/10/88); Alford v. Johnson Rice & Co., L.L.C., 773 So.2d 255, 258 (La. App. 4 Cir. 11/15/00); In re Succession of Taravella, 734 So.2d 149, 151 (La. App. 5 Cir. 4/27/99); Marino v. Dillard's Inc., 413 F.3d 530 (5 Cir. 2005).

11. Aguillard v. Auction Management Corp., 04-2804 (La. 6/29/05), 908 So.2d 1, 7. A party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending he did not read it, understand it, or that the other party failed to explain it to him. Tweedel v. Brasseaux, 433 So.2d 133, 137 (La. 1983).

12. The U.S. Supreme Court has recognized that under the "savings clause" in 9 U.S.C. §2, state contract law applies to assess whether agreements to arbitrate are valid and enforceable. AT&T Mobility, L.L.C. v. Conception, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 686-87, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902 (1996).

13. Lorusso v. Landrieu Enterprises, Inc., 02-2346 (La. App. 4 Cir. 5/21/03), 848 So.2d 656.

14. Standard Company of New Orleans, Inc. v. Elliott Construction Company, Inc., 363 So.2d 671 (La. 1978).

15. Lorusso v. Landrieu Enterprises, Inc., *supra*; Rauscher Pierce Refsnes, Inc. v. Flatt, 632 So.2d 807, 810 (La. App. 4 Cir. 1994); Matthews-McCracken Rutland Corp. v. City of Plaquemine, 414 So.2d 756, 757 (La. 1982); Electrical Instrumentation Unlimited v. McDermott, 627 So.2d 702 (La. App. 4 Cir. 1993); Lincoln Builders, Inc. v. Raintree Inv. Corp. Thirteen, 37,965 (La. App. 2 Cir. 1/28/04), 866 So.2d 326, 331.

16. Hospital Service District No. 3. of the Parish of Lafourche v. Fidelity and Deposit Company of Maryland, 99-2773 (La. App. 1 Cir. 1/16/01), 809 So.2d 145, *writ denied*, 01-0679 (La 4/27/01); Simpson v. Pep Boys-Manny, Moe & Jack, Inc., 03-0358 (La. App. 4 Cir. 4/10/03), 847 So.2d 617.

17. La. R.S. 9:4203.

18. La. R.S. 9:4204.

19. La. C.C.P. art. 926(A)(1). *See, e.g.,* Town of Homer, Inc. v. General Design, Inc., 42,027 (La. App. 2 Cir. 5/30/07), 960 So.2d 310, *writ denied*, 07-1820 (La. 11/09/07), 967 So.2d 510. Another option is to file an exception of no cause of action. Barkley Estate Community Ass'n v. Huskey, 09-268 (La. App. 5 Cir. 1/12/10), 30 So.3d 992.

20. La. R.S. 9:4202. This tracks the language of the Federal Arbitration Act, 9 U.S.C. §3. *See, e.g.,* Coleman v. Jim Walter Homes, Inc., 6 So.3d 179 (La. 3/17/09); Long v. Jeb Beithaupt Design Build, Inc., 44,002 (La. App. 2 Cir. 2/25/09), 4 So.3d 930.

21. The American Arbitration Association allows parties whose income is below 200 percent of federal poverty guidelines to seek a waiver of the initial filing fee.

22. La. R.S. 9:4206. This language is tracked in Rule 34 of the AAA Commercial Arbitration Rules.

23. AAA Commercial Arbitration Rules 32 and 34.

24. Hennecke v. Canepa, 96-0772 (La. App. 4 Cir. 5/21/97), 700 So.2d 521, 522.

25. National Tea Co. v. Richmond, 548 So.2d 930, 932-33 (La. 1989); Dicorte v. Landrieu, 08-0249 (La. App. 4 Cir. 9/10/08), 993 So.2d 799.

26. La. R.S. 9:4212 and 9:4214.

27. Robert S. Robertson, Ltd. v. State Farm Ins. Companies, 05-435 (La. App. 5 Cir. 1/17/06), 921 So.2d 1088.

28. La. R.S. 9:4210. A district court may not vacate an arbitrators' award unless specifically authorized by statute. Johnson v. 1425 Dauphine, L.L.C., 10-0793 (La. App. 4 Cir. 12/1/10), 52 So.3d 962.

29. Webb v. Massiha, 08-0226 (La. App. 5 Cir. 9/30/08), 993 So.2d 345. *See also,* Mayeaux v. Skyco Homes, 13-1053 (La. App. 3 Cir. 7/2/14), 11 So.3d 7.

30. La. R.S. 9: 4213.

31. Crescent Property Partners, L.L.C. v. American Mfrs. Mutual Ins. Co., 14-0969 (La. 1/28/15), 158 So.3d 798. In this case, the Louisiana 4th Circuit Court of Appeal vacated an arbitration award on grounds that the arbitrators had erroneously found that a construction peremption statute could be applied retroactively. Taking no position on the peremption issue, the Louisiana Supreme Court reversed, reaffirming the principle that judges are not allowed to substitute their judgment for that of arbitrators chosen by the parties.

32. 158 So.3d at 808.

33. La. R.S. 9:4211.

34. Under La. R.S. 9:4216, "Nothing contained in this Chapter shall apply to contracts of labor or to contracts for arbitration which are controlled by valid legislation of the United States." The same is true under the Federal Arbitration Act.

35. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 2, 115 S.Ct. 834, 130 L.Ed.2d 73 (199); Hodges v. Reasonover, 12-0043 (La. 7/2/12), 103 So.3d 1069, 1072; FIA Card Services, N.A. v. Weaver, 10-1372 (La. 3/15/11), 62 So.3d 709, 712; Collins v. Prudential Ins. Co. of America, 99-1423 (La. 1/19/00), 752 So.2d 825, 827.

36. Blount v. Smith Barney Shearson, Inc., 96-0207 (La. App. 4 Cir. 2/12/97), 695 So.2d 1001.

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