

# About arbitration

## Arbitration: It's Popping Up Everywhere!

By Chase Boone Saunders 2002 Copyright

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### "Teaching You To Fish"

**There is an old adage that goes something like this: "Give a man a fish and you feed him for a meal, teach a man to fish and you feed him for a lifetime". This presentation is designed to encourage you to use the Internet to fish for the abundance of information about arbitration and other dispute resolution resources. Use these websites and you will be fed for a lifetime in the subject matter under discussion.....and for "free".**

### Common Questions and Answers about Arbitration

"To everything there is a time" reads the first line of my favorite verses in Ecclesiastes. There was a time when litigation meant trial court, exclusively. Put twelve in the box and have at it! But the times, they are a'changing. At this time the word "advocate" should be substituted for the word "litigator" which is far too narrow a term to describe the roles most civil practitioners now must undertake. A modern lawyer spends more time in negotiation and non-jury motion's advocacy than in down and dirty litigation. And increasingly the modern advocate must learn to arbitrate.....regardless of your personal opinion regarding its efficacy! This presentation is a primer for the advocate contemplating or facing arbitration. It provides a means of understanding arbitration as just another dispute resolution process – not something to be feared by some as was the wild, wild West of yore. It provides the advocate with the insights necessary to remove most of its fear and the mystery behind it. After all, arbitration for the advocate is just another mechanism for seeking justice.

# There Ain't Nothing You Can't Arbitrate.....Unless

## (1) Arbitrable Situations

- Q. Under what circumstances might you find your case in arbitration?  
A. Under just about every situation you can imagine such that you have to ask your client for “the papers” in order that you can determine the jurisdiction governing your dispute! Just observe this list:

1. Federal Arbitration Act, 9 U.S.C. Sec 1 et. seq., see text [www.cornell.edu/topics/adr.html](http://www.cornell.edu/topics/adr.html) , It approved arbitration for transactions in “commerce” and set up general rules in 1925.

This statute enabled the American Arbitration Association to establish its organization in 1926. It is the oldest institution in the business and sets the standard. A long list of subject matters and attendant rules appears at their website located at [www.adr.org](http://www.adr.org) under the heading *Rules and Procedures* including the following:

- a) Commercial disputes
  - b) Construction disputes
  - c) Contract disputes
  - d) Employment
  - e) International trade disputes
  - f) Buy-sell disputes
  - g) Non-competitions
  - h) Healthcare and medical malpractice
  - i) Real estate purchases
  - j) Domestic post-separation agreements
  - k) Software installation contracts
  - l) Medical service delivery disputes
  - m) Patent and copyright disputes
  - n) “Goods” cases under the Uniform Commercial Code
  - o) Malpractice
  - p) Technology disputes
  - q) Accounting
  - r) Personal injury
2. Liability insurance disputes a’la Nationwide and Allstate
    - a) Uninsured motorist
    - b) Underinsured motorist
    - c) Fire insurance umpire proceedings

3. N.C. Department of Public Instruction G.S. 115C-325
  - a) Teacher disciplinary proceedings and the use of Arbitrators called “case managers” is explained here [www.dpi.state.nc.us/legal/discipline.html](http://www.dpi.state.nc.us/legal/discipline.html)
4. National Association of Securities Dealers: [www.nasdaq.org](http://www.nasdaq.org)
  - a) Broker-dealer
  - b) Broker-customer
5. Employment/ Title VII Disputes post *Circuit City & Waffle House*
6. International trade: [www.internationaladr.com](http://www.internationaladr.com)
7. Pursuant to North Carolina state law
  - a) North Carolina Article 45A. Arbitration and Award in Section 1-567.1, the Uniform Arbitration Act, the text of which can be located online at this address: [www.ncga.state.nc.us](http://www.ncga.state.nc.us) .

The purpose of the act, in those instances where there is a written agreement, is to provide “parties with a means to bypass the morass of judicial litigation, while still maintaining the judicial doors ajar for recalcitrant disputes.”

That statute makes arbitration agreements enforceable and provides a procedure to be followed when such a covenant is present in sections 1.567.2 et. seq. Such procedures provide for (1) a stay of trial proceedings, (2) a mandatory order to arbitration, (3) a selection process, (3) discovery and hearing procedure, (3) a written award, (3) change of award, (3) fees and expenses, (4) modification or correction of patent errors, (4) judicial confirmation, (5) vacating based upon a review of limited factors having to do largely with procedure, (5) appeal, etc.

- b) Family Law Arbitration Act, General Statute 50-41, et. Seq. which provides for the arbitration of “all issues arising from a marital separation or divorce, except the divorce itself, while preserving a right of modification.....” [www.ncga.state.nc.us](http://www.ncga.state.nc.us).

Note, that arbitration awards are generally non-modifiable; however, there is a major exception. Provisions governing custody and child support remain reviewable and modifiable as the controlling jurisdiction over those matters lies with the courts, *Crutchley v Crutchley*, 306 N.C. 518, (1982)

- c) International Commercial Arbitration & Conciliation as per Article 45B, N.C.G.S. 1-567.30 – 1-567.87.

This statutory scheme provides enabling legislation for the arbitration in North Carolina of international commercial disputes subject to “any international agreement in force between the United States of America and any other nation or nations, or any federal statute”. It lays out the mechanics for this type of arbitration as well as a conciliation process..

## 6. Pursuant to North Carolina Rules of the Supreme Court

- a) Court-ordered arbitration: The N.C. Supreme Court has established rules which govern court-ordered arbitration in certain N.C. Counties. Check with the Clerk of Superior Court in your county to determine if such a procedure is required in the District Court in which you must do business. Someday the Rules of the N.C. Supreme Court will be freely found here: [www.nccourts.org](http://www.nccourts.org). The authority to make the Rules was granted in N.C.G.S. 7A-37.1, the text of which appears in [www.ncga.state.nc.us](http://www.ncga.state.nc.us) and can be located by typing in the word “arbitration”.

## (2) Procedural Law

Q. What procedural laws may apply?

A. Read the document and then go looking for the rules!

1. Federal Arbitration Act

Text: [www.cornell.edu/topics/adr.html](http://www.cornell.edu/topics/adr.html)

2. State arbitration acts

Text: [www.cornell.edu/topics/adr.html](http://www.cornell.edu/topics/adr.html)

## (3) Substantive Law

- Q. What substantive law may apply?  
A. That which is specified or that which applies by default.

#### **(4) Gotcha!**

- Q. How do you get into arbitration?  
A. Voluntarily under the “use it or lose it theory” or dragged kicking and screaming into it without a choice!
1. Upon your own initiative where there is an applicable provision
  2. Upon directive when demand is made by any named party

#### **(5) Avoidance**

- Q. Is there any way to avoid it?  
A. No! Not unless both parties waive it. And don't look for any help from the trial courts. If you were a trial judge facing a gazillion whiplash or impaired driving trials and someone showed you an arbitration provision, how would you rule?
1. Courts favor it
    - a) See the caselaw summary which appears herein
  2. Exceptions:
    - a) *Waffle House, infra*
    - b) consumer contracts with financial barriers to using arbitration violative of due process or adhesion in nature?

#### **(6) Getting Started**

- Q. How do you initiate an arbitration?  
A. It depends upon the subject matter and document language!
1. Under the rules of the American Arbitration Association  
See: [www.adr.org](http://www.adr.org)
  2. Read the liability insurance policy
  3. Read the applicable N.C. General Statutes  
See: [www.ncga.state.nc.us](http://www.ncga.state.nc.us)
  4. Under the rules of the National Association of Securities Dealers Regulation as confirmed in *Gilmer vs. IJL*, 500 U.S. 20 (1991) [www.supremecourtus.gov](http://www.supremecourtus.gov)  
See: [www.nasdadr.org](http://www.nasdadr.org)
  5. Read the employee manual for the guidelines

6. Follow the Court order
7. Follow the contract provisions and make a demand
8. Go to my **Bibliography** for additional information

## (7) What Comes Next Checklist

Q. What's next?

A. Checklisting! This check list features considerations attendant to any arbitration which you might become involved. Consider an arbitration to be a "designer trial" where you must affirmatively act to set the stage for your litigation. The governing admonition is "DO IT OR LOSE IT!"

1. Determine the procedural rules which apply to the process
  - a) How do you file a complaint or an answer?
    - I. Complaint requirements depend
      - a. If case initiated in arbitration
      - b. If case compelled to arbitration
      - c. Legal complaint form is sufficient
      - d. Size of claim may trigger a cost
  - b) What can you expect in response?
    - a. General Answer
    - b. No need for formality
    - c. Failure to respond may limit evidence
    - d. Size of answer may trigger a cost
  - c) What will it cost and can you afford it?
    - I. How will the arbitrators be paid?
      - e. As provided by rules
      - f. As provided by order
    - II. What do arbitrators cost?
      - a. Daily rates and hourly rates
    - III. How will you finance an arbitration?
      - a. Requirement of pre-payment of costs
      - b. No decision until payment
      - c. No contingency financing
    - IV. What are the administrative costs?
      - a. Arbitration groups have cost schedules
    - V. How can you cut costs?
      - a. By agreement
      - b. By limiting discovery
      - c. By using mediation
  - d) What are arbitrator selection criteria?
    - I. Is the process specified?
      - a. Look to the agreement
      - b. Look to the statute
      - c. Usually provisions are flexible

- d. Some judicial involvement
- II. If not, what process will you use?
- III. Who can you select to arbitrate the case?
- IV. Who should you select to arbitrate the case?
- V. Where can you find out about them?
  - a. Request a resume
  - b. AAA maintains a roster and resumes
  - c. Likewise the NASD
- VI. Conflicts of interest involved or resolved?
- VII. What can you do to remove an arbitrator?
- VIII. Are arbitrators trained?
  - a. Arbitrators are trained; the AAA has extensive training requirements
  - b. You can select experience
- IX. What is their scope of authority by contract?
  - a. The agreement governs their authority
  - b. The parties may agree upon it
  - c. The scope may be a consideration
- e) What state or federal procedural law will apply?
  - I. Look to the agreement
- f) What procedures exist to work out ongoing issues?
  - I. Read the applicable act
  - II. N.C. hearing rules G.S. 1-567.6 are loose and require you to actively determine the rules you will use; many choose the AAA rules. If you fail to set up a procedure, the arbitrators have free rein,
  - III. FAA hearing rules are provided by the AAA which are the default standard
  - IV. The importance of the Panel Chair
    - a. As scheduler
    - b. Teleconferencer
    - c. As panel procedure controller
  - V. The importance of the Case Manager
    - a. Central clearing house
    - b. Wall between panel and parties
    - c. Document and docket control
    - d. Scheduler
- g) What discovery process will govern
  - I. That which you agree upon
  - II. Example
    - a. Limit number of depositions, requests for production, interrogatories
    - b. Time to identify witnesses and experts
    - c. Time to complete depositions
    - d. Time to submit briefs and responses

- e. To exchange witness lists and exhibits
- h) What forms of evidence may be presented?
  - I. Your call if not specified
- i) Will subpoenas be used?
  - I. It depends upon the rules in place
- j) What rules of evidence will be used?
  - I. As you agree
  - III. Non-jury, “let-it-all-in-and-we’ll-sort-it-out” rule
  - III. Subject to the “don’t beat a dead horse” rule
- k) What motions practice will be permitted?
  - I. Is there a motions practice in arbitration?
  - II. What can you expect?
  - III. The importance of lawyer panelists
- l) What forum and location do I want?
  - I. Look to the agreement
  - II. Consent
- m) How long will the hearing last?
  - I. Arbitrators work longer hours
  - II. You have to have more witnesses
- n) Is a court reporter allowed?
  - I. If you want one, you pay for one
- o) What arguments will be permitted?
  - I. As you agree subject to panel control
- p) What is the best way to present evidence?
  - I. Notebooks, charts, spreadsheets, Bates
  - II. Remember you are moving faster
  - III. The panel can take it in faster
  - IV. Computer printers in the hearing room
- q) What form will the ruling take?
  - I. Whatever form you wish
- r) How long will it take to get a ruling?
  - I. Ordinarily rules provided the parameters
- s) Will the ruling vary from that of a trial court?
  - I. It depends upon the makeup of the panel
  - II. Lawyers and non-lawyers as panelists
  - III. Experience and inexperience
  - IV. “Babysplitting” versus “all or nothing”
  - V. Application of the “Goldilocks Rule”
- t) What about costs and attorneys fees?
  - I. N.C. requires express provision in agreement
  - II. FAA see the AAA rules or federal decisions
- u) What review is permitted?
  - I. See the statutes
- v) How is the ruling enforced?
  - I. See the statutes
- w) Can you have sidebar “high low” agreements?

- I. Of course, the proceeding is your own
- x) How long will the entire process take?
  - I. Fast tract arbitration processes exist
  - II. In contrast to routine processes
  - III. Six months versus one year thereabouts
- y) Is the process shorter or less complex than trial?
  - I. Shorter in presentation
  - II. Complexity depends upon subject matter
  - III. Computer, spreadsheet, and complex cases
- z) What is the role of mediation?
  - I. Use of mediation to define issues
  - II. Arbitrations can be really expensive

## **(8) Drafting Considerations**

- Q. What should you consider before inserting an arbitration clause?  
 A. All of the above!

- Q. What language should you use in your drafts?  
 A. Long enough to cover the subject but short enough so as to make it attractive! There are a multitude of locations where you can find a clause to fit your needs. I recommend you go to the search engine FINDLAW. Go to their LAWCRAWLER feature; type in the phrase "arbitration clauses" and reap a list of clauses. Of course, in the United States, the American Arbitration Association is the oldest institution with a corresponding lead in suggested language. An excellent article on drafting considerations by Gary Barnes is here: [www.hq.org/adr.html](http://www.hq.org/adr.html)

- i. Examples: American Arbitration Association

The standard arbitration clause suggested by the American Arbitration Association addresses those questions. It has proven highly effective in over a million disputes. The parties can provide for the arbitration of future disputes by inserting the following in their contracts:

STD1 Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its [applicable] rules and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

The arbitration of existing disputes may be accomplished by use of the following:

STD2 We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its

(applicable) rules the following controversy [cite briefly]. We further agree that we will faithfully observe this agreement and the rules, and that we will abide by and perform any award rendered by the arbitrator(s) and that a judgment of the court having jurisdiction may be entered upon the award.

The above clauses, which refer to the time-tested rules of the AAA, have consistently received judicial support. The standard clause is often the best to include in a contract. This language and the aforementioned comments appear in the text of an excellent discussion of forms and dispute resolution found at the website [www.lectriclaw.com/adr.htm](http://www.lectriclaw.com/adr.htm)

ii. Examples: Family Law Arbitration Act

**The parties agree that in the event the supporting spouse contends that supporting income as defined by the U.S. Internal Revenue Code has fallen below the level of \$\_\_\_\_\_ due to circumstances beyond the party's direct or indirect control, application may be made for arbitration of the "ability to pay" under the provisions of Chapter 50, Article 3. entitled the Family Law Arbitration Act, Sections 50-41, et. seq.**

Arbitration Language

**The parties agree that in the event the Husband contends that that his income as defined by the U.S. Internal Revenue Code including salary, wages, bonuses, options, cars, meals, benefits, allowances, etc. has fallen below the level of \$\_\_\_\_\_ due to circumstances beyond his direct or indirect control, application may be made for arbitration of the "ability to pay" as it relates**

**to alimony under the provisions of Chapter 50, Article 3. entitled the Family Law Arbitration Act, Sections 50-41, et. seq.**

**The parties agree to the provisions of that Act subject to these modifications:**

**(a) The parties agree to use one arbitrator appointed by a District Court Judge agreed upon by the parties;**

(b) That arbitrator shall be selected from a list of no more than four lawyers, two identified by each party unless the parties otherwise agree;

(c) Any prospective arbitrator shall be have practiced law for over ten years or been a District Court Judge unless the parties otherwise agree;

(d) Upon appointment of the arbitrator, the parties shall each deposit the costs of arbitration in the trust accounts of respective counsel.

(e) Arbitration discovery shall be conducted in accord with the Rules of the American Arbitration Association; however, the hearing shall be conducted under North Carolina rules of evidence, procedure, and applicable substantive law.

In the event Husband fails to secure a reduction in the level of support by more than 15%, said spouse shall reimburse the dependent spouse for the costs of arbitration and shall pay the attorneys' fees of the Wife.

This provision shall not relieve the Husband of the duty to pay the full, contractual sum provided in this Agreement and should relief be granted the Husband, any and all unpaid amounts shall constitute a judgment against the estate of the Husband which may be filed in the Office of the Clerk of Superior Court. This provision is only contemplated to provide temporary relief from the payment of alimony upon a showing of a substantial change of financial circumstances and actual hardship. It is not intended to permit a means for reducing the obligations set forth in this Agreement. At such time

**as the circumstances found by the arbitrator to support a change cease to exist, the Husband shall resume the contractual payment scheme and catch up on the arrearage. Said amounts shall constitute a credit against the judgment entered against the Husband.**

The Wife shall have the right to initiate an action against Husband under this provision in order to re-examine the financial circumstances of the Husband to determine whether or not his payments should resume at the contract amount.

The parties shall otherwise follow the provisions of North Carolina law, evidence, and procedure as provided in the Family Law Arbitration Act.

iii. Employment dispute arbitration drafting considerations:  
(summarized from an article in the *South Carolina Lawyer*, January 2002 by William Floyd and Phillip Kilgore of the Ogletree Lawfirm)

- (a) Evaluate the affect of the provision in the workplace on morale, recruitment, etc
- (b) Determine whether the employees are exempted from arbitration like railway workers under the FAA
- (c) Make sure there is consideration for the provision, e.g. a new pay period
- (d) Agreement cannot remove employee substantive rights to statutory remedies
- (e) Specify the law which will govern;
- (f) Designate the rules which will govern the process;
- (g) Do not make the costs of the procedure burdensome on the employee or you face due process problems;
- (h) Set forth time limits for filing claims;
- (i) Exclude claims not subject to arbitration, e.g. Comp and Unemployment;
- (j) Provide for a waiver of a right to a jury trial;
- (k) Provide for a written decision with findings and conclusions of law;
- (l) Make sure there is a savings clause.

Suggested language from the American Arbitration Association:

“We the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Employment Dispute Resolution Rules the following controversy: (cite briefly). We further agree that

the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide and perform any award rendered by the arbitrator(s), and that judgment of the court having jurisdiction may be entered on the award.”

#### iv. Intellectual Property Disputes

The World Intellectual Property Organization provides arbitration clause language recommendations at their site [www.wipo.org](http://www.wipo.org), for instance:

##### Recommended WIPO Arbitration Clause

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [three arbitrators][a sole arbitrator]. The place of arbitration shall be ... The language to be used in the arbitral proceedings shall be ... The dispute, controversy or claim shall be decided in accordance with the law of ..."

#### v. International Trade Disputes

The website, International ADR: International Arbitration Resources provides Model clauses of all sorts for its subject matter: [www.internationaladr.com](http://www.internationaladr.com) . It has a DIRECTORY OF MODEL CLAUSES for use in all manner of international subject matters from sports to commerce and including language suggested when dealing with foreign countries.

### **(9) Caselaw Summaries**

Q. Have the courts said anything about arbitration in 2000-2001  
A. You betcha! They spoke eleven times!

(1) North Carolina: [www.nccourts.org](http://www.nccourts.org)

Procedural wrangling: But Judge, I don't like arbitration!

Arbitrability of a case; determinative factors; scope and agreement; injunction barring arbitration

In the case of *Raspet v Buck*, COA00-957, 11/01 the court held, in the context of an operating agreement dispute involving two investment representatives with Met Life, that the document containing an arbitration clause, was inapplicable. An arbitration agreement must exist and the dispute in question must be within the scope of the agreement. Here, the agreement with the arbitration provision was an LLC operating agreement. The parties entered into it to handle business with joint clients. The court held that agreement was inapplicable in that the LLC never had joint accounts involving the parties, never did business, and did not cover the present dispute in which the defendant said the plaintiff owed him money as a part of an oral agreement to reimburse him when he took over the joint accounts. The court enjoined arbitration.

Policy favoring arbitration; even if late; no waiver even though pleadings were filed and a trial date was set before the demand for arbitration.

In the case of *Kay Smith v Young Moving*, see COA 99-1378, 12/00 an action was filed by the Plaintiff who allegedly lost property stored with the Defendant. The Defendant filed only a general denial. The case proceeded on a path toward trial; a scheduling order and mediation order were entered and the matter was set for trial. New defense counsel entered and made a demand for arbitration. The court held that the demand for arbitration was not a “dispositive motion” precluded by the scheduling order. It noted the policy in favor of arbitration and observed that there was no “undue prejudice” in that the delay in the demand would result at most in the “inconveniences and expenses consistent with normal trial preparation.”

Assignment of Benefits form with arbitration clause; numerous defenses asserted, remand

In the case of *James Milon, et. al. v. Duke*

*University, et. al, COA00-1246, 08/01*, Plaintiff's wife signed an "Assignment of Benefits" form which contained an arbitration clause. A medical malpractice case was filed and a demand for arbitration was asserted. This case raised issues of the apparent authority of the wife to sign the document on behalf of her husband, waiver of the right to arbitration to the prejudice of a party, and whether a valid arbitration agreement existed or was the result of mistake, lack of mutual assent, overreaching, unfair advantage, undue influence of constructive fraud. The case was remanded for a determination of those issues by the trial court.

Requirement of written arbitration agreement; third party beneficiary status covered by agreement

In the case of *LSB Financial Services, Inc. v. Brenda Harrison and J.C. Bradford, COA see 00-515, 07/01* a non-compete clause in a brokercontract with her employer contained the standard "U-4" NASD arbitration clause. The Court held that binding arbitration was required and that trial court proceedings should be stayed. Employment disputes are subject to arbitration when the parties agree to it in a contract. Here, while the plaintiff had not signed the U-4 clause, her employer did and she was a third party beneficiary of the contract which was required for her to sell securities. The FAA applies inasmuch as it governs contracts which "evidenced a transaction involving commerce". Thus, the matter was properly one where the motion to compel arbitration should be granted.

Arbitrability of physician employment contract; defenses of vagueness; assertion of unconscionable contract terms

In the case of *Tally Eddings, MD v Southern Orthopedic, et al, COA00-1197, 12/01*, the court held, subject to a dissent, that the

employment agreement of a physician which was signed in Tenn. governed the dispute which took place in N.C. and that the attack on unconscionability was not directed at the agreement, but rather at the terms of the contract. Therefore, the matter must go to arbitration.

Death abrogates securities arbitration agreement;  
State trial permitted

In the case of *Margaret Ragan, Executor v. Wheat First Securities, Inc.* COA 99-959, 06/00 the decedent opened a brokerage account which contained an arbitration clause. Action taken prior to her death resulted in the filing of a suit. The court properly denied the motion to compel arbitration because death terminated the power of Wheat to act as the agent of the decedent and thereby terminated the securities agreement with the arbitration clause. While the Executrix had also signed a brokerage agreement with an arbitration clause, it did not apply in cases where the cause of action was based on conversion and negligence in handling the account of the decedent prior to her death.

Arbitration clause and forum selection clause  
reconciled to permit arbitration

In the case of *Internet East, Inc. v. Duro Communications, Inc.* COA 1154, 10/01a license agreement to operate an internet service provider contained an arbitration clause and a trial division forum selection clause. The Trial Court held in favor of the forum clause. The Court of Appeals held that the trial court erred in treating a clearly stated arbitration provision as a "permissive" as opposed to a "mandatory" directive and sent the matter back for arbitration noting that North Carolina's Arbitration Act provides that where an arbitration agreement exists, the court still has jurisdiction to enforce the agreement and to enter judgment on the award. Inasmuch as this

is the case, the forum clause which provided for jurisdiction of disputes in the Superior Court did not keep the courts from staying proceedings and ordering the matter to arbitration. North Carolina has a strong public policy favoring dispute settlement by arbitration.

Umpire proceedings are analogous to arbitrations; errors of law re insufficient to set aside an award fairly and honestly made

In the case of *N.C. Farm Bureau v Harrell*, see COA01-152, 12/01 the court held that the decision of an umpire determining the valuation of farm equipment as noted in a written decision was subject to the same law as that of arbitrations and noted that “an arbitrator who errs as a matter of law, exceeding his powers is not subject to the vacating of his award because such an erroneous decision of a matter submitted to arbitration is insufficient to invalidate an award fairly and honestly made.” The same rule applies to umpire decisions.

Trial within a trial; interrelation of UIM carrier, victim, and tortfeasor explored in subsequent jury trial with victim and carrier become plaintiffs; identification of issues to be submitted to the jury

In the case of *Burger and Farm Bureau v. Doe*, COA00-259, 05 /01 the court held that an arbitration award in a UIM case had the same legal effect as a settlement agreement reached between the parties. In reviewing the case, the same inquiries of “fairness and reasonableness” as would be made regarding a settlement must be applied to the arbitration award. A UIM arbitration took place because the defendants in an auto personal injury case denied operation and Farm Bureau was put on notice. The arbitration was conducted and an award was entered in favor the victim. The victim plaintiff and carrier then sued the defendants to determine the issue of operation. At trial issues rose regarding the evidence of

the arbitration provision which the trial court excluded. The court held that the judge erred in failing to submit to the jury the issues of (1) whether the victim was injured by the negligence of the defendant; (2) whether the plaintiff's settlement with the victim was made "in good faith"; (3) whether it was "fair and reasonable"; and (4) what amount was the plaintiff entitled to recover. In order to do this the jury must determine whether the defendants were bound by results of the arbitration and in order to do that the jury was entitled to hear about the arbitration. If the jury answered the first three questions yes, the court must enter judgment against the defendant in the amount found in arbitration and the case is over.

Interlocutory award of sanctions found where the underlying, non-binding, court-ordered arbitration decision was on appeal to the trial court

In the case of *Andaloro v Sawyer*, COA00-735, 07 /01, an automobile personal injury case, the court dismissed an appeal by the defendant from an award of sanctions entered against the defendant under the N.C. Rules of Arbitration 3(p) and 3(l) which require that someone with authority to settle appear at the arbitration hearing. That appeal was entered after a previous appeal taken by the defendant from a decision in the court-ordered, G.S. 7A-37.1 non-binding arbitration. The first appeal had not been decided when the second appeal was taken. The court held that the second appeal was interlocutory. Note that the court did not decide how much one must participate in an arbitration as per the N.C. Rules of Arbitration 3(l) and 3(p).

Remand of confirmed arbitration award to trial court for remand to panel for findings In the case of an ambiguity

In the case of *General Accident Ins. Co. v. MSL Enterprises*, COA00-403, 05 /01 the

court held that a judicially-confirmed award was subject to a remand for the determination of an “ambiguous” term in the award. Here, the trial court , on remand interpreted a term in an arbitration award. The Appellate Court held that unless the ambiguity could be determined on the face of the record, the matter must be remanded to the arbitration panel.

(2) Federal: [www.supremecourtus.gov](http://www.supremecourtus.gov)

#### Employment agreements subject to arbitration

Employment disputes: March 21, 2001, the Supreme Court held that employers could require employees to arbitrate employment disputes in *Circuit City Stores, Inc. vs. Adams*, No. 99-1379, in accord with the rules of the FAA. What did this do to EEOC litigation? Did this limit or stop EEOC lawsuits?

#### Employment agreement to arbitrate cannot bar EEOC initiated lawsuits

EEOC powers remain. January 15, 2001 the Supreme Court held that a clause which required an employee to arbitrate employment disputes did not bar the EEOC from pursuing victim-specific judicial relief such as back pay, reinstatement, and damages alleging a violation of the ADA, 41 U.S.C. 12101 under their jurisdictional grant to enforce Title VII of the Civil Rights Act of 1964 in *EEOC vs. Waffle House*, No. 99-1823. The right of the EEOC is separate from that of the employee and is not derivative; however, if the employee failed to mitigate damages or accepted a monetary settlement, the relief sought by the EEOC would be limited. Accordingly, the employer did not prevail in his efforts to enjoin the EEOC under the FAA.

#### Finance Agreements with arbitration clauses enforced

*Green Tree Financial Corp. vs Randolph* , the

U.S. Supreme court (99-1235) decided in 2000 is interesting because it affirmed the validity of an arbitration clause requiring binding arbitration to resolve a mobile home finance agreement in the face of arguments that the Equal Credit Opportunity Act was violated by requiring her to arbitrate. The Court upheld the arbitration clause and the matter was sent back for arbitration. Left open for another visit to the Court was the argument that the costs of the process to the mobile home owner rendered the agreement to arbitrate “unenforceable”.

## **Bibliography**

### Arbitration Link Sites

- a. Best university site: [www.cornell.edu/topics/adr.html](http://www.cornell.edu/topics/adr.html)  
Features: U.S. Codes, Federal decisions, State statutes, The Uniform Arbitration Act, Appellate decisions from some states, International law rules including NAFTA, and topical links
- b. Best site for practicing lawyers (Hieros Gamos): [www.hg.org/adr.html](http://www.hg.org/adr.html)

Features: links to all major government and legal resources with a current focus

- c. Best legal search engine (Findlaw Lawcrawler): [www.findlaw.com](http://www.findlaw.com)  
Features: the Lawcrawler feature allows you to search for specific information with a high probability of success
- d. Simple quick links to North Carolina sites: [www.ncatl.org](http://www.ncatl.org)

## Resource Sites

- a. American Arbitration Association: [www.adr.org](http://www.adr.org)
- b. Bibliography of State arbitration laws: [www.cornell.edu/topics/adr.html](http://www.cornell.edu/topics/adr.html)
- c. Drafting an arbitration clause: A Checklist: [www.hg.org/adr.html](http://www.hg.org/adr.html)
- d. Equal Employment Opportunity Commission: [www.eeoc.gov](http://www.eeoc.gov)
- e. Forms: The "Lectric Law Library": [www.lectriclaw.com/tadr.htm](http://www.lectriclaw.com/tadr.htm)
- f. International trade forms, etc: [www.internationaladr.com](http://www.internationaladr.com)
- g. International trade disputes: [www.ita.gov](http://www.ita.gov)
- h. NAFTA: [www.itaiep.doc.gov/nafta/nafta2.htm](http://www.itaiep.doc.gov/nafta/nafta2.htm)
- i. N.C. court-ordered arbitration rules: [www.ncga.state.nc.us](http://www.ncga.state.nc.us)
- j. N.C. General Statutes: [www.ncga.state.us](http://www.ncga.state.us)
- k. N.C. opinions of the Supreme & Appellate Courts: [www.nccourts.org](http://www.nccourts.org)
- l. N.C. teachers: [www.dpi.state.nc.us/legal/discipline.html](http://www.dpi.state.nc.us/legal/discipline.html)
- m. N.C. quick links: [www.meckbar.org](http://www.meckbar.org)
- n. Securities disputes: [www.nasdr.com](http://www.nasdr.com)
- o. SICA (securities industry assoc.) [www.lectriclaw.com/files/adr01.htm](http://www.lectriclaw.com/files/adr01.htm)
- p. Summary of U.S. Arbitration Law: [www.ita.doc.gov](http://www.ita.doc.gov)
- q. Teacher disciplinary process: [www.dpi.state.nc.us/legal/discipline.html](http://www.dpi.state.nc.us/legal/discipline.html)
- r. Uniform Arbitration Act: [www.lectriclaw.com/tadr.htm](http://www.lectriclaw.com/tadr.htm)
- s. UNC Law School: [www.library.law.unc.edu](http://www.library.law.unc.edu)
- t. U.S. Department of Commerce (trade disputes): [www.home.doc.gov](http://www.home.doc.gov)
- u. U.S. Supreme Court [www.supremecourtus.gov](http://www.supremecourtus.gov)
- v. World Intellectual Property Organization: [www.wipo.org](http://www.wipo.org)

## Appendix

- a. First pages of sites noted herein
- b. First page of [www.chasesaunders.com](http://www.chasesaunders.com) where the content appears