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## Alternative Dispute Resolution

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# Alternative Dispute Resolution: 1994 Survey of Florida Law

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I. INTRODUCTION

The use of alternative dispute resolution to settle disputes outside the confines of the formal legal system is gaining increasing popularity. Although there are several forms of alternative dispute resolution now available in Florida, this article will focus on two of the more common means of dispute resolution: arbitration and mediation. In particular, this article will address recent developments in the area of commercial arbitration, which is governed by chapter 682 of the *Florida Statutes*, better known as the Florida Arbitration Code. Additionally, this article will address court-annexed dispute resolution in the Florida state court system which includes mediation as well as binding and nonbinding arbitration.

Unlike other procedural and substantive areas of the law, there are relatively few reported decisions addressing alternative dispute resolution mechanisms. This is a laudable result, however, since one of the principle objectives of alternative dispute resolution is the minimization of judicial intervention. If parties to arbitration or mediation were concerned that the alternative dispute resolution they had chosen (be it in the form of arbitration or mediation) was subject to unbridled judicial review, it would nullify many of the incentives which prompted them to steer away from the traditional court system in the first instance. Finally, this article will highlight significant cases in the area of alternative dispute resolution which, albeit not all occurring within the past year, nonetheless serve as the most meaningful and significant pronouncements in this area of the law.

II. COMMENCEMENT OF ARBITRATION

The Florida Arbitration Code (“FAC”) is codified at chapter 682 of the *Florida Statutes*.<sup>1</sup> The FAC applies to written agreements to arbitrate that are controlled by Florida law, unless the agreements specifically provide otherwise. Arbitration proceedings begin with a demand for arbitration. This demand serves as notice to the other party of the claimant’s intent to arbitrate and a statement of the claim. Because the FAC contains no specific provisions concerning the commencement of arbitration, contract

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1. See generally FLA. STAT. §§ 682.01-.22 (1993).

provisions for arbitration typically incorporate by reference a set of rules to govern the procedure. The most common reference is to the Commercial Arbitration Rules of the American Arbitration Association.<sup>2</sup> Under rule 6 of the Commercial Arbitration Rules, the demand must contain a statement setting forth: 1) the nature of the dispute; 2) the amount involved, if any; 3) the remedy sought; and 4) the hearing locale.<sup>3</sup> Three copies of the notice are filed with the American Arbitration Association's ("AAA") regional office, along with copies of the arbitration provisions of the contract, and the appropriate administrative fee charged by the AAA.<sup>4</sup> The respondent may file an answer within ten days after notice from the AAA of the initial demand.<sup>5</sup>

The demand does not have to comply with the Florida Rules of Civil Procedure. There is no provision, for instance, for a motion to dismiss or any other preliminary challenge to the legal sufficiency of the claim. The arbitrator has the right, however, to require a party to state a claim more precisely.<sup>6</sup> The degree of detail set forth is a matter of judgment by the claimant or the claimant's attorney. If the dispute is simple, very little detail is needed. Because there are few or no pretrial proceedings, the arbitrator usually comes to the hearing with little advance information about the nature of the claim except for having reviewed the demand.

#### A. *Determination of Right to Arbitration*

The threshold issue of whether there is a right to arbitration usually arises in one of two situations: 1) when one of the parties has refused to participate and denies the right to arbitration; or 2) when a party has initiated litigation concerning a dispute which the defending party believes is subject to an enforceable arbitration agreement. This issue is governed by section 682.03 of the *Florida Statutes*, which provides that if a party to an agreement refuses arbitration, application may be made to the court for an order directing the party to proceed with arbitration.<sup>7</sup> The question to be decided by the court is whether any substantial issue exists regarding the making of the arbitration agreement. If the court finds there is no issue involved in the making of the agreement, it will compel arbitration. If,

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2. AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES (1993) (effective Nov. 1, 1993) [hereinafter COMMERCIAL ARBITRATION RULES].

3. *See id.* r. 6.

4. *Id.*

5. *See id.*

6. *See id.* r. 29.

7. FLA. STAT. § 682.03(1) (1993).

however, the court finds there is a substantial issue concerning the parties' agreement to arbitrate, "it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application."<sup>8</sup> Courts will generally "resolve all doubts about the scope of an arbitration agreement as well as any questions about waivers thereof in favor of arbitration, rather than against it."<sup>9</sup>

When an arbitration proceeding has started or is about to start, the party challenging the right to arbitrate may obtain a stay by applying to the court as provided by section 682.03(4).<sup>10</sup> If the arbitrators find there is a valid agreement to arbitrate, the challenging party may appeal to the circuit court, after the arbitration, to challenge the arbitration award. This procedure is not available, however, if the court has already determined the issue under section 682.03.<sup>11</sup>

If the application to compel arbitration is denied, an appeal may be taken by petition for writ of certiorari.<sup>12</sup> An order that grants an application to stay arbitration may also be appealed.<sup>13</sup> An order that grants a motion to compel arbitration, however, is non-appealable.<sup>14</sup> Thus, if the court compels arbitration of the dispute, the arbitration process must be completed. If it is later determined that the court erred and the matter was not properly the subject of an arbitration agreement, then the award is subject to being vacated under section 682.13(1)(c), which provides that "[u]pon application of a party, the court shall vacate an award when . . . [t]he arbitrators or the umpire in the course of his jurisdiction exceeded their powers."<sup>15</sup> The reason for only allowing an appeal of orders denying arbitration is that the arbitrators should have the first opportunity to determine the scope of the agreement. The court should step in only if the arbitrators have exceeded that power. To hold otherwise would present the parties with the right to appeal every order compelling arbitration, thereby clearly frustrating the purpose of arbitration.

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8. *Id.*

9. *Ronbeck Constr. Co. v. Savanna Club Corp.*, 592 So. 2d 344, 346 (Fla. 4th Dist. Ct. App. 1992).

10. FLA. STAT. § 682.03(4) (1993).

11. *Koch v. Waller & Co.*, 439 So. 2d 1041, 1043 (Fla. 4th Dist. Ct. App. 1983).

12. *See* FLA. STAT. § 682.20(1)(a) (1993); *see also* FLA. R. APP. P. 9.100; *Manalili v. Commercial Mowing & Grading*, 442 So. 2d 411, 413 (Fla. 2d Dist. Ct. App. 1983).

13. *See* FLA. STAT. § 682.20(1)(b) (1993).

14. *Harris v. State Farm Mut. Auto. Ins. Co.*, 283 So. 2d 147, 148 (Fla. 2d Dist. Ct. App. 1973).

15. FLA. STAT. § 682.13(1)(c) (1993).

The right to arbitration provided in an agreement may be waived by taking actions inconsistent with the arbitration provision. In *Breckenridge v. Farber*,<sup>16</sup> the Fourth District Court of Appeal enunciated a two-prong test for determining when a party has waived its right to arbitration: 1) the party must have knowledge of an existing right to arbitrate; and 2) there must be active participation in litigation or other acts inconsistent with the right to arbitrate.<sup>17</sup> Thus, a party who files an action in court for relief that would be the subject matter of an arbitration agreement waives the right to subsequent arbitration of that claim or related claims. Similarly, when a defendant answers a complaint without demanding arbitration, that party waives the right to arbitration even if the failure to arbitrate is asserted as an affirmative defense.<sup>18</sup> The same applies to a defendant who files a counterclaim with the court that raises an issue that would be the subject of an arbitration agreement.<sup>19</sup> A party who desires arbitration should demand it before seeking relief in court. Upon being made a defendant to a proceeding, a party wishing to enforce an arbitration clause should file a motion to compel arbitration before seeking any affirmative relief. Otherwise, that party runs the risk of having waived the right to arbitration.

#### B. *Determination of Validity and Scope of Arbitration Agreement*

As soon as a demand for arbitration is filed or a court action is commenced, arising out of a contract containing an arbitration provision, the threshold question becomes whether the arbitration agreement is valid and, if so, whether the particular dispute falls within the scope of the provision. Generally speaking, the issue of whether an arbitration agreement is valid is a matter for the court to decide. For instance, in *Thomas W. Ward & Associates, Inc. v. Spinks*,<sup>20</sup> the Fourth District Court of Appeal held that the trial court erred by compelling arbitration prior to making a determination that the parties intended to be bound by the arbitration clause in their

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16. 640 So. 2d 208 (Fla. 4th Dist. Ct. App. 1994).

17. *Id.* at 211.

18. *Hansen v. Dean Witter Reynolds, Inc.*, 408 So. 2d 658, 659 (Fla. 3d Dist. Ct. App. 1981), *review denied*, 417 So. 2d 328 (Fla. 1982). *But see Breckenridge*, 640 So. 2d at 212 (implying that raising failure to arbitrate as an affirmative defense may be sufficient to prevent waiver).

19. *Ojus Indus., Inc. v. Mann*, 221 So. 2d 780, 782 (Fla. 3d Dist. Ct. App. 1969).

20. 574 So. 2d 169 (Fla. 4th Dist. Ct. App. 1990), *review denied*, 583 So. 2d 1037 (Fla. 1991).

written contract after the contract had expired.<sup>21</sup> The court emphatically stated that “[w]hether or not a dispute should be submitted to arbitration is a question for the court to determine from the contract of the parties.”<sup>22</sup>

Even assuming arguendo that there is a valid and binding agreement to arbitrate, the court must also decide whether the particular dispute at issue is properly the subject of arbitration. The parties may agree to arbitrate all disputes arising out of their contractual relationship or, alternatively, they may specify only particular disputes which may be arbitrated. In *Painewebber, Inc. v. Hess*,<sup>23</sup> the Third District Court of Appeal refused to disturb the trial court’s denial of a motion to compel arbitration on a particular issue because of the policy of not forcing a party to submit to arbitration on a question outside the scope of the arbitration agreement.<sup>24</sup> More recently, in *Katzin v. Mansdorf*,<sup>25</sup> the court reversed a trial court’s order compelling arbitration of a dispute involving a promissory note where the promissory note sued upon “contain[ed] no express terms requiring the parties to arbitrate any dispute arising from the notes . . . .”<sup>26</sup>

### III. PRACTICAL CONSIDERATIONS

The hallmark of the arbitration hearing is its informality. The FAC provides no specific direction as to the conduct of the hearing other than that “[t]he parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.”<sup>27</sup> The Commercial Arbitration Rules provide in rule 29 that the complaining party must first “present evidence to support its claim” and that “[w]itnesses for each party shall submit to questions or other examination.”<sup>28</sup> The defending party then does likewise. Rule 29 specifically provides that the “arbitrator has the discretion to vary this procedure but shall afford full and equal opportunity to all parties for the presentation of any material and relevant evidence.”<sup>29</sup>

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21. *Id.* at 169.

22. *Id.* at 170; *see also* Eugene W. Kelsey & Son, Inc. v. Architectural Openings, Inc., 484 So. 2d 610, 611 (Fla. 5th Dist. Ct. App.), *review denied*, 492 So. 2d 1330 (Fla. 1986).

23. 497 So. 2d 1323 (Fla. 3d Dist. Ct. App. 1986).

24. *Id.* at 1323.

25. 624 So. 2d 810 (Fla. 3d Dist. Ct. App. 1993).

26. *Id.* at 811.

27. *See* FLA. STAT. § 682.06(2) (1993).

28. *See* COMMERCIAL ARBITRATION RULES, *supra* note 2, r. 29.

29. *Id.*

Consistent with the notion that arbitration is to be less formal than a judicial proceeding, the rules of evidence applicable to court proceedings do not apply to arbitration hearings. Therefore, hearsay evidence is admissible, leading questions may be asked, documents may be admitted without the testimony of a records custodian, and skilled witnesses may testify without being qualified as experts.<sup>30</sup> The reasoning is twofold. First, the arbitrators may not be lawyers trained in the rules of evidence. Second, because arbitrators presumably have some special skill or background in the subject matter, they are capable of determining how much weight to give the evidence. The situation is not unlike that encountered in nonjury court proceedings. Rule 31 of the Commercial Arbitration Rules provides in part that the arbitrator “shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary.”<sup>31</sup> The FAC contains no corresponding provision.

Evidentiary rulings by arbitrators generally are not subject to court review. Courts have expressed little empathy for parties who have agreed to submit a dispute to arbitration, only to later complain that the arbitrator disregarded evidentiary considerations. In reinstating an arbitration award that had been vacated by the trial court, the First District Court of Appeal stated:

The court may well have been correct in concluding that in a court of law the evidence presented to the arbitrator would have been insufficient to support the award. The point is that the parties were not in a court of law. When the parties agreed to arbitration, they gave up some of the safeguards which are traditionally afforded to those who go to court. One of these safeguards is the right to have the evidence weighed in accordance with legal principles.<sup>32</sup>

The FAC also contains no provisions relating to the weight to be given evidence nor does it provide any grounds for review of an arbitration decision based on issues relating to the admissibility of evidence. The arbitrator in Florida has been said to be the “sole and final judge of the evidence and the weight to be given to it.”<sup>33</sup>

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30. *Id.* r. 31.

31. *Id.*

32. *Affiliated Mktg., Inc. v. Dyco Chems. & Coatings, Inc.*, 340 So. 2d 1240, 1243 (Fla. 2d Dist. Ct. App. 1976), *cert. denied*, 353 So. 2d 675 (Fla. 1977).

33. *Id.* at 1242.



## IV. AWARD AND SCOPE OF RELIEF

A. *Form of Award*

The FAC provides that the award must be in writing and signed by the arbitrators joining in the award.<sup>34</sup> Although an award is not required to take any particular form, it should resolve and determine all matters that have been submitted.<sup>35</sup> Otherwise, the award will generally be considered invalid, and not eligible for confirmation.<sup>36</sup> An exception to this rule exists “where the omitted matters are found to be severable and are sufficiently independent of the matters determined in the order [under review] . . . .”<sup>37</sup> If the arbitration award is incomplete in the relief afforded, at a minimum, the award should contain an “objective formula” for adequately disposing of any unresolved issues.<sup>38</sup>

In keeping with the informal nature of arbitration, there is no requirement that the arbitrator’s decision be supported by written findings of fact. In *Affiliated Marketing*, the court noted that “[t]he proceedings before an arbitrator are not generally to be examined by the court for the purpose of determining how the arbitrator arrived at his award.”<sup>39</sup> From a policy perspective, at least two considerations may be advanced for the court’s rationale in *Affiliated Marketing*. First, although detailed findings may prove useful for future business relationships, detailed written findings may expose the award to a myriad of court challenges, thereby jeopardizing both the speed and finality of the arbitration process. Second, and more pragmatic, arbitrators, who often serve for limited pay, may be reluctant to serve as arbitrators if they are required to prepare detailed findings underlying the reasons for their decisions.

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34. See FLA. STAT. § 682.09(1) (1993).

35. *Air Conditioning Equip., Inc. v. Rogers*, 551 So. 2d 554, 556 (Fla. 4th Dist. Ct. App. 1989).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Affiliated Mktg.*, 340 So. 2d at 1242; see also *Schmidt v. Finberg*, 942 F.2d 1571, 1575 (11th Cir. 1991) (citation omitted); *In re Arbitration Between Prudential-Bache Securities, Inc. & Depew*, 814 F. Supp. 1081, 1082 (M.D. Fla. 1993); Annotation, *Necessity that Arbitrators, in Making Award, Make Specific or Detailed Findings of Fact or Conclusions of Law*, 82 A.L.R.2d 969, 971 (1962).

## B. *Types of Relief*

The parties may contractually provide for the types of relief that the arbitrator may grant. Thus, the parties may specify that: 1) specific performance will be available; 2) the arbitrator may conduct an accounting; or 3) the arbitrator may grant any relief the parties deem appropriate under the circumstances. To the extent that the arbitration award compels affirmative action on the part of a party, the right to this relief should be spelled out in the agreement. Although the parties will be bound by their agreement, they are not bound by arbitration awards in which the arbitrators exceed the powers expressly conferred on them.

### 1. Specific Performance

Unless it is expressly provided for in the agreement, generally speaking, specific performance is not available as a remedy in arbitration.<sup>40</sup> Notwithstanding this general prohibition, the Commercial Arbitration Rules do provide that an arbitrator may grant specific performance of a contract.<sup>41</sup> This being the case, a party's incorporation by reference of the Commercial Arbitration Rules will provide the arbitrator with the authority to grant specific performance even in situations where that remedy would not necessarily have been available had the matter been litigated in court. In arbitration, therefore, the parties may provide for remedies that would extend beyond those normally available in a court proceeding.

### 2. Punitive Damages

In *Richardson Greenshields Securities, Inc. v. McFadden*,<sup>42</sup> the Second District Court of Appeal, relying upon *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Melamed*,<sup>43</sup> implicitly held that punitive damages are available as a remedy in arbitration. Lacking in-depth analysis, the court seemed to rest its decision on the simple premise that because "[a]ctions sounding in tort are proper subjects for arbitration," punitive damages were likewise an appropriate remedy in arbitration.<sup>44</sup> In *Complete Interiors, Inc.*

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40. See MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 30.01, at 441 (Wilner ed., rev. ed. 1993).

41. COMMERCIAL ARBITRATION RULES, *supra* note 2, r. 43.

42. 509 So. 2d 1212 (Fla. 2d Dist. Ct. App. 1987).

43. 453 So. 2d 858 (Fla. 4th Dist. Ct. App. 1984).

44. *McFadden*, 509 So. 2d at 1213.

*v. Behan*,<sup>45</sup> however, the Fifth District Court of Appeal held that “punitive damages may not be awarded by an arbitrator absent an *express* provision authorizing such relief in the arbitration agreement or pursuant to a stipulated submission.”<sup>46</sup>

### 3. Interest

Interest may be awarded by an arbitration panel in the absence of a provision to the contrary.<sup>47</sup> Florida courts generally have no authority to award prejudgment interest predating an arbitration award where the arbitration award itself does not include pre-award interest, particularly where the award states it is in “full settlement of ‘all claims.’”<sup>48</sup> Under such circumstances, the Fourth District Court held that “[a]ny claim . . . to interest predating the award [is] extinguished by the award.”<sup>49</sup> Courts generally have the authority to add interest from the date of the award.<sup>50</sup>

### 4. Attorney’s Fees, Costs, and Expenses

Section 682.11 provides that “[u]nless otherwise provided in the agreement or provision for arbitration, the arbitrators’ and umpire’s expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.”<sup>51</sup> In *Insurance Co. of North America v. Acousti Engineering Co. of Florida*,<sup>52</sup> the Florida Supreme Court held that section 682.11 does not prescribe an award of attorney’s fees with arbitration; rather, it merely prohibits arbitrators from awarding such fees.<sup>53</sup> Such fees may only be awarded by

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45. 558 So. 2d 48 (Fla. 5th Dist. Ct. App.), *review denied*, 570 So. 2d 1303 (Fla. 1990).

46. *Id.* at 51. For a related discussion, see Karen Ruga, Note, *An Argument Against the Availability of Punitive Damages in Commercial Arbitration*, 62 ST. JOHN’S L. REV. 270 (1988).

47. See *Complete Interiors*, 558 So. 2d at 49 n.2; see also DOMKE, *supra* note 40, § 30.03, at 447-48.

48. See *Pharmacy Management Servs., Inc. v. Perschon*, 622 So. 2d 75, 76 (Fla. 2d Dist. Ct. App. 1993).

49. *Id.*; see also *McDaniel v. Berhalter*, 405 So. 2d 1027, 1030 (Fla. 4th Dist. Ct. App. 1981).

50. DOMKE, *supra* note 40, § 30.03, at 447-48.

51. FLA. STAT. § 682.11 (1993).

52. 579 So. 2d 77 (Fla. 1991).

53. *Id.* at 79-80.

the trial court upon confirmation of the award.<sup>54</sup> An exception to this rule was carved out in *Pierce v. J.W. Charles-Bush Securities, Inc.*,<sup>55</sup> wherein the Fourth District Court of Appeal held that an arbitrator may award attorney's fees where the parties have mutually agreed to "confer jurisdiction on the arbitration panel to decide entitlement to attorney's fees and assess the agreed fee."<sup>56</sup> In so holding, the court stated:

The essential reason for preferring arbitration over litigation in a court is that arbitration is faster and cheaper. Limiting the determination of attorney's fees for arbitration to a judicial forum, however, simply adds time and expense to the chosen remedy. If the parties have expressly decided for themselves to have arbitrators determine entitlement and the amount of such fees, they have thereby manifested an intention in the clearest way possible that they desire to avoid that very additional time and expense. To deny them that savings, especially because of some now discredited notion about the inviolability of judicial turf, is—well, certainly not unambiguously required by anything in the arbitration law.<sup>57</sup>

Finally, practitioners should be aware that where an arbitrator is presented with one or more legal theories, one or more of which would permit an award of attorney's fees, the arbitrator should specify whether his award was based on a theory which would support an award of attorney's fees.<sup>58</sup> Otherwise, the trial judge has no authority upon which to award attorney's fees.<sup>59</sup>

By comparison, rule 49 of the Commercial Arbitration Rules provides that the expenses of witnesses must be borne by the party producing them.<sup>60</sup> Rule 49 further provides that:

All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless

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54. *See id.* As in litigation, "[a]ttorney's fees for services performed in arbitration proceedings are recoverable only when authorized by statute or by specific agreement." *Par Four, Inc. v. Gottlieb*, 602 So. 2d 689, 690 (Fla. 4th Dist. Ct. App. 1992).

55. 603 So. 2d 625 (Fla. 4th Dist. Ct. App. 1992).

56. *Id.* at 631.

57. *Id.* at 630.

58. *Perschon*, 622 So. 2d at 76.

59. *Id.*

60. *See* COMMERCIAL ARBITRATION RULES, *supra* note 2, r. 49.

the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.<sup>61</sup>

The arbitrator, therefore, can allocate the expenses of the arbitration among the various parties. Fees for the parties' attorneys generally are not considered expenses under rule 49 of the Commercial Arbitration Rules.

## V. CONFIRMATION AND REVIEW OF ARBITRATION AWARDS

### A. *In General*

One of the distinguishing features of the arbitration process is the limited review of the arbitrators' actions. Unlike formal court proceedings where there is a right to broad appellate review of the trial court's actions—measured against the standards of statutory and case law—in arbitration, the grounds on which an award can be challenged are much more narrowly circumscribed. Generally, absent misconduct by the arbitrator or an award outside the jurisdictional powers conferred on the arbitrator, there is little opportunity to challenge the arbitrator's award. The FAC provides mechanisms for modification of an arbitration award by the arbitrator or the court. Additionally, the FAC contains provisions for vacating an arbitration award.<sup>62</sup>

### B. *Change of Award by Arbitrator*

Following the rendition of an arbitration award, section 682.10 of the *Florida Statutes* provides that the parties may petition the arbitrators to modify the award for the purpose of clarification.<sup>63</sup> Alternatively, the parties may also petition the court to modify an award under certain circumstances.<sup>64</sup>

The application for modification to the arbitrators must be made within twenty days after delivery of the award to the applicant.<sup>65</sup> The applicant must give written notice of his application for modification to the other party to the arbitration.<sup>66</sup> This notice shall state that the other party has ten

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61. *Id.*

62. *See* FLA. STAT. § 682.13 (1993).

63. *Id.* § 682.10.

64. *See infra* note 79 and accompanying text.

65. FLA. STAT. § 682.10 (1993).

66. *Id.*

days within which to serve any objections.<sup>67</sup> There is no provision under section 682.10 for the substance of the award itself to be altered based on the merits of the controversy.

### C. *Court Challenge to Award*

#### 1. Vacation of Award

After an arbitration award has been rendered, the parties have ninety days in which to move the court to vacate the award.<sup>68</sup> Each of the grounds upon which an award may be vacated relates either to a fundamental unfairness in the conduct of the proceedings or conduct taken by the arbitrator outside the authority granted to him.<sup>69</sup> “[T]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.”<sup>70</sup> The high degree of conclusiveness attached to arbitration awards is consistent with the notion that the parties chose “to utilize arbitration in order to avoid

67. *Id.*

68. *Id.* § 682.13. The grounds upon which an arbitration award may be vacated are as follows:

- (a) The award was procured by corruption, fraud or other undue means.
- (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.
- (c) The arbitrators or the umpire in the course of his jurisdiction exceeded their powers.
- (d) The arbitrators or the umpire in the course of his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of s. 682.06, as to prejudice substantially the rights of a party.
- (e) There was no agreement or provision for arbitration subject to this law, unless the matter was determined in proceedings under s. 682.03 and unless the party participated in the arbitration hearing without raising the objection.

*Id.* § 682.13(1)(a)-(e). An exception to the 90-day requirement exists if the application is based upon fraud, corruption, or other undue means, in which case it “shall be made within 90 days after such grounds are known or should have been known.” FLA. STAT. § 682.13(2) (1993).

69. *See id.* § 682.13(1).

70. *Id.*; *see also* *City of Miami Beach v. Turchin/CRS*, 641 So. 2d 471 (Fla. 3d Dist. Ct. App. 1994); *Applewhite v. Sheen Fin. Resources, Inc.*, 608 So. 2d 80, 83 (Fla. 4th Dist. Ct. App. 1992).

the expense and delay of litigation.”<sup>71</sup> In *Fridman v. Citicorp Real Estate, Inc.*,<sup>72</sup> the court held that “[i]t [was] error for a circuit court to enter an order vacating an arbitration award without directing a rehearing.”<sup>73</sup>

Although there are several grounds upon which an arbitration award may be vacated, recent Florida cases have focused on the propriety of vacating an arbitration award where the arbitrator has exceeded his authority. It has been held that “[a]n arbitrator exceeds his or her power under section 682.13(1)(c) when he or she goes beyond the authority granted by the parties or the operative documents and decides an issue not pertinent to the resolution of the issue submitted to arbitration.”<sup>74</sup> Thus, in *Applewhite*, the Fourth District Court of Appeal held that an arbitrator did not exceed the authority granted him in an employment agreement by enjoining former employees from conducting business with their employer’s clients where a noncompete provision in their employment agreements provided that leads and clients remained the property of the employer regardless of the reason for termination of future employment.<sup>75</sup> Conversely, in *Hymowitz v. Drath*,<sup>76</sup> the court held that the arbitrators exceeded the scope of their authority in a dispute over a stock purchase agreement where they treated the purchaser as a full stockholder but canceled her stock purchase obligation, thereby extinguishing the stockholder’s agreement which contained the arbitration clause.<sup>77</sup> The court reasoned that “where the parties arbitrate, the arbitrators exceed their powers if their award rescinds the very obligation which is the foundation of the contract from which they derive their authority.”<sup>78</sup>

## 2. Modification or Correction of Award

According to section 682.14 of the *Florida Statutes*, upon application made within ninety days after delivery of the arbitrator’s award, a party may also move to correct or modify the award when:

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71. *Applewhite*, 608 So. 2d at 83 (citation omitted).

72. 596 So. 2d 1128 (Fla. 2d Dist. Ct. App. 1992).

73. *Id.* at 1129 (citation omitted).

74. *Applewhite*, 608 So. 2d at 83 (citing *Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327, 1329 (Fla. 1989)).

75. *Id.*

76. 567 So. 2d 540 (Fla. 4th Dist. Ct. App. 1990).

77. *Id.* at 542.

78. *Id.*

- (a) There is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award.
- (b) The arbitrators or umpire have awarded upon a matter not submitted to them or him and the award may be corrected without affecting the merits of the decision upon the issues submitted.
- (c) The award is imperfect as a matter of form, not affecting the merits of the controversy.<sup>79</sup>

Florida courts have narrowly construed this provision. In *Glen Johnson, Inc. v. Ruzicka*,<sup>80</sup> the Second District Court of Appeal held that the trial court properly confirmed the arbitrator's award where the motion to modify or vacate the award "did not involve an alleged evident miscalculation of figures and was actually based upon the contention that the arbitrator's mathematics had been improperly affected by the consideration of certain evidence."<sup>81</sup>

#### D. Procedure for Confirmation

In most cases, because the parties voluntarily comply with the arbitrator's decision, there is no need for the circuit court to confirm the award. However, if the award is not complied with, or if one or both of the parties deem it advisable to reduce the award to the form of a judgment, section 682.12 states that "[u]pon application of a party to the arbitration, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in ss. 682.13 and 682.14."<sup>82</sup> If the arbitration arose out of an application to the court to compel arbitration or out of a motion to stay legal proceedings and compel arbitration, confirmation should be applied for in the court that previously dealt with the dispute.<sup>83</sup> When there has been no pending litigation

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79. FLA. STAT. § 682.14(1)(a)-(c) (1993). Section 682.14(3) of the *Florida Statutes* provides that "[a]n application to modify or correct an award may be joined in the alternative with an application to vacate the award." *Id.* § 682.14(3).

80. 517 So. 2d 762 (Fla. 2d Dist. Ct. App. 1987).

81. *Id.* at 763; *see also Applewhite*, 608 So. 2d at 83 ("Remand from this court for justification of the arbitrators' calculations when no miscalculation is evident would serve only to defeat the high degree of conclusiveness that accompanies review of an arbitration award.").

82. FLA. STAT. § 682.12 (1993).

83. *Id.* § 682.19.



concerning the dispute or the arbitration, a separate civil action for confirmation of the award should be filed in the circuit court.

Once an order has been entered confirming, modifying, or correcting an award, the judgment must be entered by the court in conformity with the order and may be enforced as any other judgment.<sup>84</sup> Section 682.16 of the *Florida Statutes* sets forth the method to be used by the clerk in preparing the judgment roll.<sup>85</sup> The clerk must include the agreement or provision for arbitration, the award, a copy of the order confirming, modifying, or correcting the award, and a copy of the judgment.<sup>86</sup> The judgment may then be docketed as if rendered in a civil action.<sup>87</sup> Once the judgment has been entered, it is enforceable regardless of the time when the arbitration award was made.<sup>88</sup>

### E. Appellate Review

In keeping with the policy of minimizing judicial intervention in the arbitration process, appellate review under the FAC is accordingly limited. An appeal may be taken from the following:

- (a) An order denying an application to compel arbitration made under s. 682.03.
- (b) An order granting an application to stay arbitration made under s. 682.03(2)-(4).
- (c) An order confirming or denying confirmation of an award.
- (d) An order modifying or correcting an award.
- (e) An order vacating an award without directing a rehearing.
- (f) A judgment or decree entered pursuant to the provisions of this law.<sup>89</sup>

Furthermore, “[t]he appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.”<sup>90</sup> There are no provisions under the FAC for interlocutory review during the arbitration process itself.

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84. *Id.* § 682.15.

85. *Id.* § 682.16(2).

86. *Id.* § 682.16.

87. FLA. STAT. § 682.16(2) (1993).

88. *Id.* § 682.18(2).

89. *Id.* § 682.20(1)(a)-(f).

90. *Id.* § 682.20(2).

## VI. COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION

In 1987, the Florida Legislature passed legislation entitled "Mediation Alternatives to Judicial Action," which was codified as sections 44.301-44.306 of the *Florida Statutes*, effective January 1, 1988.<sup>91</sup> These sections were subsequently amended by the legislature in 1990 and renumbered as sections 44.1011-44.108.<sup>92</sup> Among the procedures covered by this legislation are court-ordered mediation, court-ordered nonbinding arbitration, and voluntary binding arbitration.

### A. Court-Ordered Mediation

Section 44.102 of the *Florida Statutes* provides for court-ordered mediation and allows a court to refer to mediation all or any part of a contested civil action filed in circuit or county court.<sup>93</sup> Mediation is defined as "a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties."<sup>94</sup> Any communications made during the course of mediation are deemed privileged.<sup>95</sup> Specifically, section 44.102(3) provides that:

Each party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding. Notwithstanding the provisions of s. 119.14 [The Public Records Act], all oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119 and shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise.<sup>96</sup>

The Florida Supreme Court has likewise underscored the confidentiality of mediation proceedings by mandating that "[i]f the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court without comment or recommen-

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91. Act of June 30, 1987, ch. 87-173, §§ 1-7, 1987 Fla. Laws 1202, 1202-05 (originally codified at FLA. STAT. §§ 44.301-306 (1989)).

92. Act of June 25, 1990, ch. 90-188, §§ 1-11, 1990 Fla. Laws 850, 850-56 (codified at FLA. STAT. §§ 44.1011-.108 (Supp. 1990)).

93. FLA. STAT. § 44.102(2)(a) (1993).

94. *Id.* § 44.1011(2).

95. *See id.* § 44.102(3).

96. *Id.*

ation.”<sup>97</sup> The Florida Rules of Civil Procedure also provide that “[i]f an agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any.”<sup>98</sup> In *Gordon v. Royal Caribbean Cruises, Ltd.*, the Third District Court of Appeal held that “an attorney’s signature alone, albeit in the presence of the client, is wholly insufficient under [rule 1.730(b)].”<sup>99</sup>

Indisputably, the aspect of mediation most zealously guarded by the courts has been the privilege of confidentiality which attaches to mediation proceedings. For instance, in *Hudson v. Hudson*,<sup>100</sup> involving a dissolution of marriage proceeding, the Fourth District Court of Appeal held that the wife’s presentation at trial of negotiations which occurred during mediation violated section 44.102(3) of the *Florida Statutes*.<sup>101</sup> In that case, the trial court allowed the wife to testify concerning an agreement allegedly reached by her and her husband during mediation. Reasoning that this testimonial evidence violated “the spirit and letter of the mediation statute,” the court held that “the well was poisoned by the admission of the . . . evidence of the ‘agreement’ and so infected the judgment reached that it should be vacated and the matter tried anew.”<sup>102</sup>

Likewise, in *Royal Caribbean Corp. v. Modesto*,<sup>103</sup> the Third District Court of Appeal addressed a similar issue. At issue in *Modesto* was whether the confidentiality provisions of section 44.302(2) were preempted by the Jones Act.<sup>104</sup> In *Modesto*, the plaintiff sued Royal Caribbean and other defendants for personal injuries he sustained at sea. Although the parties’ attempt at mediation resulted in an impasse, the defendants moved to enforce an oral agreement which was allegedly reached during mediation, and subpoenaed the mediator to testify at a hearing on the motion.<sup>105</sup> The mediator moved to quash the subpoena, invoking the confidentiality provisions codified in section 44.302 of the *Florida Statutes*. The trial court granted the mediator’s motion to quash the subpoena, and did not permit the defendants to present any testimony regarding the agreement allegedly

97. FLA. R. CIV. P. 1.730(a).

98. *Id.* at 1.730(b).

99. 641 So. 2d 515 (Fla. 3d Dist. Ct. App. 1994).

100. 600 So. 2d 7 (Fla. 4th Dist. Ct. App. 1992).

101. *Id.* at 8-9.

102. *Id.* at 9.

103. 614 So. 2d 517 (Fla. 3d Dist. Ct. App. 1992), *review denied*, 626 So. 2d 207 (Fla. 1993).

104. 46 U.S.C. § 688 (1988).

105. *Modesto*, 614 So. 2d at 518.

reached during mediation.<sup>106</sup> Judgment was later entered in favor of the plaintiff.

In addressing the trial court's decision to quash the subpoena, the Third District reasoned that states are free to "apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law."<sup>107</sup> Florida's privilege afforded to parties in mediation proceedings, the court concluded, "contravenes no federal rule of substance or procedure and plays a central role in Florida's mediation scheme by preserving the neutrality of the mediator."<sup>108</sup> Thus, the court held that the trial court properly quashed the subpoena directed at the mediator, and declined to take any testimony arising out of the mediation proceedings.<sup>109</sup>

### B. Court-Ordered Nonbinding Arbitration

A second method of alternative dispute resolution provided in chapter 44 of the *Florida Statutes* is court-ordered "nonbinding" arbitration. Arbitration is defined as "a process whereby a neutral third person or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding . . . ."<sup>110</sup> Pursuant to rules of procedure adopted by the Florida Supreme Court, certain types of matters may not be referred to arbitration, except upon petition of all parties, including bond validation actions, condemnation actions, mortgage foreclosures, and declaratory judgment actions, to name a few.<sup>111</sup> A court, pursuant to rules adopted by the supreme court, may refer any contested civil action in circuit or county court to nonbinding arbitration. Arbitrators have the power to administer oaths, issue subpoenas, and compel attendance by witnesses. The procedural rules adopted by the supreme court clearly contemplate that the arbitration hearing be conducted informally, with the presentation of testimony kept to a minimum.

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106. *Id.*

107. *Id.* at 519 (quoting *Howlett v. Rose*, 496 U.S. 356, 372 (1990)).

108. *Id.* (citations omitted).

109. *Id.*; *see also* *Fabber v. Wessel*, 604 So. 2d 533, 554 (Fla. 4th Dist. Ct. App. 1992), *review denied*, 617 So. 2d 322 (Fla. 1993); *Chabad House-Lubavitch of Palm Beach County, Inc. v. Banks*, 602 So. 2d 670, 672 (Fla. 4th Dist. Ct. App. 1992) (holding that the trial court erred by admitting a site plan into evidence "because it was a direct product of mediation between the parties, and appellant objected to its introduction").

110. FLA. STAT. § 44.1011(1) (1993).

111. *See* FLA. R. CIV. P. 1.800.

The only reported decision under section 44.103 pertains to the time within which a party must request a trial de novo if it is dissatisfied with the arbitrator's decision. Pursuant to rule 1.820(h), any party may file a request for a trial de novo within twenty days of the arbitrator's service of his decision on the parties.<sup>112</sup> In *Klein v. J.L. Howard, Inc.*,<sup>113</sup> the Fourth District Court of Appeal held that upon a party's failure to timely request a trial de novo, the trial court is required to enforce the arbitration award and lacks the discretion to do otherwise.<sup>114</sup> In so holding, the court reasoned that "[i]t does not matter that the award itself was untimely rendered beyond the period provided by rule 1.820(g)(3), Florida Rules of Civil Procedure, because, in contrast to section 44.303(4) and rule 1.820(h), this clause is merely directory."<sup>115</sup>

### C. Voluntary Binding Arbitration

Section 44.104 of the *Florida Statutes* provides for voluntary binding arbitration and recognizes that two or more parties involved in a civil dispute may voluntarily agree in writing to submit the dispute to binding arbitration, either before or after a lawsuit has been filed, if there are no constitutional issues involved in the controversy.<sup>116</sup> Unlike court-ordered nonbinding arbitration where the rules of evidence are relaxed, the Florida Evidence Code applies in voluntary binding arbitration.<sup>117</sup> A decision rendered after voluntary arbitration may be appealed within thirty days after service of the arbitrators' decision on the parties and is limited to the following grounds:

- (a) Any alleged failure of the arbitrators to comply with the applicable rules of procedure or evidence.
- (b) Any alleged partiality or misconduct by an arbitrator prejudicing the rights of any party.

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112. *Id.* at 1.820(h). This rule provides, in its entirety, as follows:

Any party may file a motion for trial de novo. If a motion for a trial de novo is not made within 20 days of service on the parties of the decision, the decision shall be referred to the presiding judge, who shall enter such orders and judgments as may be required to carry out the terms of the decision as provided by section 44.303(4), Florida Statutes (1987).

*Id.*

113. 600 So. 2d 511 (Fla. 4th Dist. Ct. App. 1992).

114. *Id.* at 512.

115. *Id.* (citations omitted).

116. See FLA. STAT. § 44.104(1) (1993).

117. See *id.* § 44.104(9).

- (c) Whether the decision reaches a result contrary to the Constitution of the United States or of the State of Florida.<sup>118</sup>

Appellate review is limited to the circuit court unless a constitutional issue is involved.<sup>119</sup> If no appeal is taken within the prescribed period, the arbitration decision shall then be “referred to the presiding judge in the case . . . who shall enter such orders and judgments as are required to carry out the terms of the decision . . .” as provided under section 44.104(11) of the *Florida Statutes*.<sup>120</sup> Thus far, there have been no reported decisions construing Florida’s court-ordered binding arbitration provisions.

## VII. CONCLUSION

Although its roots are of ancient lineage, alternative dispute resolution has only recently become a favored means of dispute resolution. These alternative methods of resolving conflicts offer parties a quick means of settling differences where often times they can define their own rules, procedures, and even delineate the available remedies. Alternative dispute resolution offers all of the advantages of the formal judicial process without the attendant drawbacks.

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118. *Id.* § 44.104(10); *see also* FLA. R. CIV. P. 1.830(3).

119. *See* FLA. STAT. § 44.104(10) (1993).

120. *Id.* § 44.104(11).