No. 87062-4

MADSEN, C.J. (concurring)—The majority issues an edict that if a party does not ask for discretionary review of an order compelling arbitration, a prejudice standard must be applied on judicial review. The edict is antiarbitration and contrary to the modern trend favoring arbitration. Indeed, most courts conclude that interlocutory review of orders to compel should rarely be granted. *See, e.g.*, *Phillips v. Sprint PCS*, 209 Cal. App. 4th 758, 766, 147 Cal. Rptr. 3d 274 (2012) ("[o]rdinarily, no immediate appeal lies from an order compelling arbitration and review of the order must await appeal from a final judgment entered after arbitration"). Permitting interlocutory review is disfavored because it can cause unnecessary delay of the arbitral process. *E.g.*, *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002) ("[u]nnecessary delay of the arbitral process through appellate review is disfavored" (citation omitted)). Indeed, in many states an order compelling arbitration is not appealable. *See, e.g.*, *Dennis v. Jack Dennis Sports, Inc.*, 253 P.3d 495 (Wyo. 2011) (holding that order compelling arbitration was not appealable, and citing cases to the same effect from other states).

The majority's new prejudice standard encourages motions for interlocutory discretionary review. In turn, this encourages the delay that courts disfavor and contravenes goals of arbitration as an efficient, swift form of dispute resolution. It should be rare to permit discretionary review of such orders and we should not penalize parties for failing to seek review that in general should not and will not be granted.

Our established procedure is to engage in de novo review of the order compelling arbitration, after a final judgment. *Otis Hous. Ass'n v. Ha*, 165 Wn.2d 582, 586-87, 201 P.3d 309 (2009); *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007); *Zuver v. Airtouch Comm'cs, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). This is the established procedure in other jurisdictions as well. *E.g.*, *Gove v. Career Sys. Dev. Corp*., 689 F.3d 1, 4 (1st Cir. 2012); *Pendergast v. Sprint Nextel Corp*., 691 F.3d 1224, 1230 n.5 (11th Cir. 2012); *Baldwin v. Regions Fin. Corp.*, 98 So. 3d 1210, 1212 n.4 (Fla. Dist. Ct. App. 2012); *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d 770, 774-75 (Ind. App. 2011). The majority's prejudice standard is utterly contrary to our cases holding that de novo review is appropriate.[1]

Here, our review occurs after arbitration has occurred. I would conclude that while the trial court entering the order to compel arbitration did not direct that it occur in Connecticut, the order should not be overturned. The trial court in fact granted an order to compel arbitration and carried out the parties' agreement to arbitrate. I do not believe

[1] I do not agree that the majority has established that there is a "trend" in courts that requires parties who challenge an order to compel arbitration to establish prejudice from the arbitration award. The cases cited on pages 13-14 of the majority opinion do not support that conclusion.

under the facts here that the arbitration that ensued was defective solely because of location. Nothing would be gained in terms of the policies underscoring arbitration. Doctor's Associates, Inc.'s (DAI) concedes that Washington's Franchise Investment Protection Act, chapter 19.100 RCW applies. Arbitration was conducted under the same American Arbitration Association rules that would have applied had the arbitration been held in Connecticut. In these circumstances, DIA can point to nothing that demonstrates that arbitration in Connecticut would have carried out the parties' agreement to arbitration to any significantly greater degree than actually occurred through arbitration in Washington.

Because the majority offers a standard of review that encourages parties to seek interlocutory review, when such review can cause delay contrary to policy favoring arbitration, and that places a burden on one party that does not accord with the usual standard courts use providing for de novo review of orders to compel arbitration, I do not agree with its analysis. I concur in the result.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: