FROM 2010 TO 2020, THE LAUNCH OF A NEW ARBITRATION ACT IN ARIZONA!

This is the "script" from an October 2020 presentation on the important case law developments in Arizona in the last decade. The presentation was to construction law lawyers.

1. In the Arizona Legislative Session of 2010, after a nine (9) year campaign, the enactment of the REVISED UNIFORM ACT was finally achieved by the ADR Section of the State Bar. In order to get the RUAA "birthed", a strange compromise had to be enacted. The old Uniform Arbitration Act (from 1962) would have to remain in force.

Per the compromise, the RUAA, effective January 1, 2011, would contain four (4) exclusions of certain matters in dispute (securities cases, employment law cases, banking cases, insurance cases), (A.R.S. § 12-3003), the old act still applies to any such cases, EXCEPT the old UAA says labor / employment cases are excluded from the UAA. (A.R.S. § 12-1517) Those cases are handled by the NLRB or some such platform.

None of this means much for us, as we daily deal in construction contracts, materials supplier contracts, liens, negligence, all easily within the purview of the RUAA.

2. What is vitally important, however, is that a U.S. Supreme Court case from 1995 can cause great mischief, now that we have adopted our bright and shiny new RUAA. Under *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 115, S. Ct 834, 130 L. Ed 2d 753 (1995), the Federal Arbitration Act will govern the arbitration proceedings on all disputes that have any connection, however small, to interstate commerce. The FAA preempts all State laws, to the extent incompatible with them, UNLESS the contract between the parties in the arbitration calls for the RUAA (or the old UAA) to be applicable to the dispute.

So, one of the big takeaways from this recap of Arizona cases since the January 1, 2011 effectiveness of the RUAA is that, if you want to get clear of the 100 year old "bare bones" FAA, you should (a) cover that issue in your arbitration clause, or (b) after a dispute arises, cover that issue by stipulating to a "Submission Agreement" saying that the parties agree they will proceed under the RUAA.

3. To illustrate how important this can be, unlike our new RUAA, the 100 year old FAA (and the 65+ year old UAA):

a) do not provide for attorneys' fee awards, or punitive damages;

b) do not provide for depositions in advance of an evidentiary hearing;

c) do not provide for Motion Practice, like Motions for Summary Judgment;

d) do not allow for Subpoenas which can be enforced in some 25 other States (the ones which have adopted the RUAA); and

e) do not provide for interim relief or rulings, like receiverships or sequestrations or injunctions.

All of these features exist under the RUAA!

4. Before I leave the RUAA, I need to return to my favorite sport of "trashing" our transactional-brother-lawyers who write arbitration clauses into those contracts under which you and I have to resolve disputes.

I have already faulted our transaction-brother-lawyers who are ignorant of the "crying need" to choose the RUAA and to state that it will apply in place of the FAA to govern the proceedings.

I am going to discuss in a moment the hubris with which our transactional-brother- lawyers try to "stack the deck" and "slant the playing field" and how they thereby draft arbitration clauses which are substantively unconsionable and will be voided - or "blue penciled" as partially void.

Before we leave the RUAA, which is the "arch stone" of the last decade of cases on arbitration, I want to call to your attention one of its provisions about drafting clauses. RUAA Section 12-3004(B) simply and clearly states, in effect, DRAFTERS BEWARE. There are a handful of things which the RUAA expressly says you cannot "take out" of, or strike out of, an arbitration clause. For example, among the non-waivable matters:

- the right to notice of the start of arbitration;
- the right to reasonable discovery;
- the right to subpoenas,
- the right to review of an award by a court;
- the right to representation by a lawyer in the arbitration.

Mark Lassiter has given me permission to reproduce as Exhibit A hereto his color coded copy of the RUAA as it exists today. Red text means BEWARE, as you cannot waive, alter, or negate anything in red at any time. Yellow text is stuff that can be waiver or altered after a dispute has been commenced.

All of us should look at that handy document and, whenever we are arbitrating, make sure that the clause does not "run afoul" of these statutory NO-NO's. If the clause you are stuck with presents a problem, you can solve that by a Submission Agreement

5. With this prelude, let's turn to the lucky thirteen (13) important court decisions on arbitration since January 1, 2011, the start of this decade under the RUAA. They are all Court of Appeals decisions.

I am going to ignore the many non-published opinions and group the published thirteen (13) important decisions in five (5) "silos."

6. UNCONSCIONABILITY:

Let's start with the most recent Arizona case on arbitration, *Rizzio v. Surpass Senior Living LLC,* Ariz. ___, ____ P.3d (App. 1/30/2020). Only months ago our Appeals Court considered another one of the half-dozen "Retirement Center" cases decided during the last decade. A caregiver had signed her mom into a senior living facility. The contract for services from the Center stated that the patient in the event of a claim would arbitrate and would be responsible for all costs of the proceeding, whether she won or she lost. That would be all:

> "[c]osts of arbitration, including [defense]'s legal costs and attorneys' fees, arbitration fees, and similar costs."

The trial court voided the entire arbitration clause saying it was procedurally and substantively unconscionable, and that the patient, *Rizzio,* would be unable to vindicate her claims due to this unfair cost shifting clause.

The Appeals Court in the first headnote reviewed the 1995 *Allied-Bruce Terminix Companies* decision and declared that the process of arbitrating was subject to the FAA, not the RUAA, because no one had rejected the FAA and selected our RUAA and interstate commerce was somewhat involved in this matter.

The second point in *Rizzio* is that under an earlier-in the-decade (2014) Arizona case, *Dueñas*, which I'll discuss in a moment, the Appeals Court reiterated the important proposition that, unlike California, in Arizona, you do not have to prove both procedural and substantive unconscionability to void an arbitration clause. The Appeals Court explained that procedural unconscionability has to do with fine print clauses, unfair surprise, ignorance of important facts so that the process of bargaining for the terms of the arbitration clause did not proceed as it should, citing *Dueñas*. The court said adhesion contracts are not per se unsconscionable and that "nothing in applicable Arizona law requires a drafter to explain the provisions of standardized contracts…" to someone signing the contract. (Emphasis added).

But the Appeals Court found that this cost shifting clause was substantively unconscionable, "so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain…" Citing *Clark v. Renaissance West* and *Harrington v. Pulte*, two (2) other important mid-decade cases, the Appeals Court said if the fees and costs provision is so excessive as to deny a litigant the opportunity to litigate his claim, then you have substantive unconscionability. DRAFTER BEWARE!

However, the court pounced on a "severability clause" in the underlying contract, severed the cost shifting provision, and voided it, noting that *Rizzio* had a contingent fee agreement with her counsel who was advancing all costs and fees. The court found the remainder of the arbitration clause enforceable.

The Appeals Court remanded the matter for action under the "blue-penciled" (now enforceable) arbitration clause. It is also noteworthy that the court said it was appropriate to "blue pencil" the clause in view of the statutory bias of our courts in favor of enforcing arbitration clauses.

This very recent and ample *Rizzio* decision cites three (3) very important cases of the last decade regarding arbitration:

(a) *Dueñas v. Life Care Centers of America, Inc.,* 236 Ariz. 130, 140, 336 P.3d 763 (App. 2014) is to the very same effect as *Rizzio*, but notes that in determining substantive unconscionability one needs to ascertain if the arbitration agreement or the applicable arbitration rules allow for a waiver or reduction of costs and fees based on economic hardship (like the AAA Rules provided). *Dueñas* also established that, by using clear language, the parties may remove from the courts, the task of determining an arbitration's existence or scope and give that task to the arbitrator, as AAA Rule 7 does. Thus, by contract, RUAA § 12-3006 which gives that decision to the courts, can be "nullified" so that arbitrator makes the decision on arbitrability.

(b) *Harrington v. Pulte Home Corp.,* 211 Ariz. 241, 247, 119 P.3d 1044 (App. 2006), is to the same effect as *Rizzio*, but notes that the "reasonable expectations" (*Darner Motor Sales*) doctrine in Arizona provides a third basis, besides procedural or substantive unconscionability, to invalidate an arbitration clause. This doctrine hinges on one of the two parties signing the agreement knowing that the other party would not have accepted the clause if he had realized that the contract contained that set of terms. The court carefully lists six (6) key facts regarding a reasonable expectations review and said it should have been apparent to the signing homeowner that the agreeing to arbitration meant the loss of the right to a jury trial would occur. This court found that the adoption of AAA Rules (which provided for reduction of fees and costs in the event of economic hardship) was important in a finding of no substantive unconscionability in the clause which made the homeowner go to arbitration instead of courthouse litigation. .

(c) *Clark v. Renaissance West, L.L.C.*, 232 Ariz. 510, 512, 307 P.3d 77 (App. 2013) like *Rizzio*, but here the costs of arbitration and the absence of any rule like the AAA's providing for an economic hardship avoidance of fees and costs led to a finding of substantive unconscionability as regards the clause.

7. There is one more case on unconscionability in this decade worth noting. *Gullett v. Kindred Nursing Centers West*, 241 Ariz. 532, 390 P.3d 378 (App. 2017) is like *Rizzio*, but it dealt with a clause's limiting discovery in arbitration. It is not worth reciting exactly what the limits on interrogatories and requests for admission and requests for documents were. The court found the limits in this clause we not so strict as to be unconscionable. The *Gullett* reviews unconscionability for restrictions on the choice of arbitrator as well and contains a very thorough review of many bases for unconscionability.

The *Gullett* opinion cites to the California case which is the grand-daddy of all cases about unconscionability, the 70 page opinion in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 99 Cal. Reptr. 2d 745, 6 P.3d 669, 684 (Cal App. 2000)

8. The take away from these five (5) blockbuster unsconscionability Arizona cases in the last decade (and the eight (8) or so other unpublished decisions on this subject) this decade is as follows. When crafting your arbitration clause, do not conceal, obfuscate, or use cost-shifting measures, all of which "make the playing field not level." Do not violate RUAA § 12-3004(B)

about waiving or altering things that cannot be tampered with. If you do, your clause may get voided, or "blue-penciled." DRAFTER BEWARE!

9. AFFIRMING AWARDS AND HALL STREET ASSOCIATES:

It was no surprise, but *RS Industries v. Candrian,* 240 Ariz. 132, 135, 377 P.3d 329 (App. 2016) stated that an arbitrator's decision on the facts and the law are final and "not to be disturbed" unless the arbitrator has purported to decide a matter beyond the scope of the issues submitted for arbitration. A Superior Court confirmation of an arbitration award is reviewed in the light most favorable to upholding the decision and will be affirmed unless the trial court has abused its discretion. Incidentally, the *RS Industries* decision says that when an arbitration agreement or rules provide for the arbitrator to award the "costs and expenses" of arbitration, that is broader than Superior Court "costs" under A.R.S. § 12-332. The *RS Industries* court went on to say that § 12-3025 of the RUAA allows a Superior Court ruling on an attack on an award to allow costs beyond the usual taxable costs in litigation so as to "discourage" unfounded appeals of arbitration awards. In this case, Judge Diane M. Johnson's opinion featured two (2) points which have surfaced in other opinions this decade. First, public policy in Arizona favors arbitration as a speedy and affordable means of resolving disputes. Second, the judicial review of arbitrators' rulings is "substantially limited by Statute." These latter words echo in another blockbuster appellate decision of this decade by Judge Johnson, the *Chang v. Siu* decision.

In a very short 2014 opinion authored by Judge Johnson some two years before *RS Industries*, Judge Johnson dealt with a nationwide controversy. Under UAA A.R.S. § 15-1512 and RUAA A.R.S. § 12-3023, and FAA 9 USC 1, the Statutes say you can only challenge an award on six very limited grounds, as listed:

(i) fraud or corruption or use of "undue means" in the proceedings;

(ii) evident partiality of the arbitrator;

(iii) misconduct of the arbitrator prejudicing the rights of a party to a hearing;

(iv) refusal to postpone a hearing to prepare a claim or defense;

(v) refusal to consider evidence material to the controversy;

(vi) exceeding the arbitrator's powers, for example dealing with issues not agreed to be arbitrated.

In *Chang v. Siu*, 234 Ariz. 442, 336, 323 P.3d 725 (App. 2014), Judge Johnson dealt with an arbitration clause regarding a divorce which stated that the Appeals Court would review any fact or law aspect of the arbitrator's award – and that the Superior Court would not hear any appeal of an award. Judge Johnson cited to the U.S.S.Ct. decision in *Hall Street Associates LLC v. Mattel, Inc.,* 552 U.S. 576, 1285. Ct. 1396, 170 L.Ed. 2d 254 (2008) where the Supreme Court of the U.S. held that, under the FAA (9 U.S.C. § 1), parties cannot by contract expand the scope of judicial review of an award beyond the six (6) bases listed above in the FAA. *Hall Street* left open the question of whether parties subject to State laws on arbitration can somehow agree to a different or more extensive judicial review. Judge Johnson carefully sidestepped ruling that *Hall Street*

prevented contracting for judicial review, but said that this particular clause in this case did not show an intent to amplify the judicial review of the award. Judge Johnson in dicta wrote "parties may not by agreement create appellate jurisdiction where it otherwise would not exist."

Though it is dicta, and stated in a short opinion[1], this seems to put Arizona in the group of States which endorse the *Hall Street* decision and do not permit parties to by contract alter the RUAA to provide for a court review of an award. We will only overturn an award, if it violates the six (6) statutory precepts I have outlined above.

Atreus Communities Group of Arizona v. Stardust Development Inc., 229 Ariz. 503, 506, 277 P.3d 208 (App. 2012) is another case very much like *RS Industries* and *Chang v. Siu*, but coming as it did, early in the decade, it was under the old UAA, not the RUAA. The argument was that, under the old UAA, which unlike the RUAA fails to provide for a summary judgment practice, the arbitrator "exceeded his power" because he allowed a summary judgment. Here the appellant raised the claim on appeal that the arbitrator had acted in "a manifest disregard of the law." Judge Kessler wrote that the AAA Rules of that time (which were applicable) impliedly allowed summary judgment, even if the UAA did not expressly provide for it. Judge Kessler also ruled that "manifest disregard" did not exist as a basis for an attack on the award, saying the six (6) statutory bases for attack are all that is available in Arizona.

"Manifest disregard" these days is argued nationwide as a as a separate (not listed in the Statutes) basis for appeal. This *Atreus* case and the *RS Industries* and *Chang v. Sui* decisions seem to put Arizona well into the column of the States hostile to recognizing "manifest disregard" as a proper basis for attacking an award.

10. WAIVER IN ARBITRATION:

One of the improvements made n the RUAA over the UAA (and the FAA) is the strong requirement that possible hidden biases of the arbitrator must be exposed by extensive disclosure of relationships, ties, and experience. RUAA § 12-3012 mandates that an appointed or prospective arbitrator must expose to the parties (and any other arbitrators) "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator…including: (1) a financial or personal interest in the outcome… and (2) …relationship with any of the parties…their counsel or representatives, a witness or another arbitrator…". Just as important, the arbitrator has a continuing obligation throughout the proceedings to disclose to the parties and other arbitrators any facts or relationships that come to light as the proceedings unfold.

This is serious business. An arbitrator is the "guardian of the process" and she cannot fail to take action to protect her award from an attack. AAA has an extensive questionnaire designed to surface any potentially objectionable connections and most arbitrators spend time on checking for "conflicts" and any relationships, including checking witness lists, property locations, repeated customer disclosures, etc. This is done at the start of the proceedings and thereafter, as witness lists come in. In California, there is a "cottage industry" built around finding undisclosed material facts which can be seized upon to try to overturn an arbitration award on behalf of a disappointed

[1] There is an interesting non-published opinion where Defendant – Appellant *Siu* (the husband) sued his lawyers for having created a bad clause, and for other alleged legal malpractice. *Siu v. The Cavanagh Law Firm* (2018 W.L. 4763886). *Siu* was not successful.

litigant. There are cases galore about what might/ought to have been disclosed and, since it was not, what justifies overturning an award.

We have had one reported decision on this critical matter. In *Fisher v. USAA Casualty Insurance Company,* 245 Ariz. 270, 276, 427 (p.3d 791 (App. 2018), the Appeals Court made three (3) key points about attacks on awards based on non-disclosure, i.e. evident partiality:

(1) a party is not entitled to a presumption of partiality against an arbitrator simply because a disclosure is not complete;

(2) an arbitrator who does not disclose trivial or casual contacts with a party or counsel is not going to have his award automatically overturned;

(3) when a party learns of a disclosable conflict or relationship, but proceeds without raising it, she cannot then later challenge the award on that basis. The challenge has been waived if no action has been taken upon learning of the disclosable information.

This *Fisher* case involved a friend of mine, Alan Goldman, Esq., a well-known personal injury arbitrator. Though the plaintiffs had learned, before the hearing, that Goldman had arbitrated a few cases involving the defense law firm, the plaintiffs never raised it until they were unhappy with the final award. The Appeals Court said that constituted a WAIVER of the right to claim partiality. The Appeals Court cited Circuit Court authority to the effect that, even if a party has "constructive knowledge" of a potential disclosable fact, if she takes no action to raise it in a "reasonable timely manner," that potential basis for attacking the award is waived and lost. If you "knew or should have known" of a disclosable fact and you take no action, you will have waived your basis to attack an award on an impartiality basis. While the arbitrator has an obligation to disclose, the party can waive and lose its basis for an impartiality attack on the award.

Of somewhat similar effect is *In re Estate of Cortez*, 226 Ariz. 207, 210, 245 P.3d 892 (App. 2010), involving a different kind of waiver. There the Retirement Center began litigating in the courthouse with the survivors of a resident patient in a wrongful death case. A year into the litigation, the Center suddenly produced an arbitration agreement and moved to stay the litigation and go to arbitration. The Appeals Court said, not so fast! Even where a dispute is by contract subject to arbitration, that right may be waived by a party who participates substantially in litigation without promptly seeking an Order from the court compelling litigation. Even if a party preserves in its answer the defense that the issue is or may be arbitratable, the party "may waive that defense by its subsequent conduct in the litigation."

11. NON-SIGNATORS/RECEIVERS:

The Hon. Bruce Meyerson (Ret.) has a paper which he wrote some time in 2014 entitled "But I didn't SIGN an Arbitration Agreement!" The head topic sentence states: "there is a well-established body of law which authorizes a court [or arbitrator] to make arbitration provisions binding even on parties who never signed an arbitration agreement and also allow these non-signatories to compel arbitration with those who have signed an arbitration agreement." Bruce Meyerson cited seven (7) full pages of cases from around the country showing non-signatories can be and are being held to arbitration clauses on contracts that they did not sign.

Early in this decade, shortly before Bruce's paper, the Court of Appeals decided *Sun Valley Ranch 308 Limited Partnership v. Robson,* 231 Ariz. 287, 294 P.3d 124 (App. 2012). The holding in *Sun Valley* says:

> "In determining whether to compel arbitration of a dispute arising under an agreement lacking an arbitration clause when a related contract containing a broad arbitration clause that encompasses all matters in dispute, courts consider…(1) whether the agreements incorporate or reference each other; (2) whether the agreement are dependent on each other or relate to the same subject matter; (3) whether the arbitration clause specifically excludes certain claims; (4) whether the agreements are executed closely in time and by the same parties."

Here in *Sun Valley*, there was a limited partnership agreement with a broad arbitration clause and a concurrent construction contract (signed by several of the signators of the partnership agreement), which construction contract had no arbitration provision. This case held the non-signators of the related partnership agreement bound by the arbitration clause.

Even more important, the *Sun* Valley Court declined to appoint a receiver and order an account noting that such was in the power of the arbitrator under RUAA § 12-3008(B)(1), the section that grants power to an arbitrator:

> "issue such orders for interim remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding…as if the controversy were the subject of a civil action."

The court endorses sequestration of property, receivership, etc., but expressly reserved the question of garnishments.

So, *Sun Valley* was a large step forward and Appeals Court Judge Margaret Downie's long opinion puts Arizona in the position of being a State where it is not difficult to (a) empower non-signatories to demand arbitration, or (b) to force non-signatories to submit to arbitration, in other words, "a two-way street."

12. MISCELLANEOUS:

Now to end up where we began. In *Smith v. Pinnamaneni*, 227 Ariz. 170, 254 P.3d 403 (App. 2011) the court considered an AIA Construction Contract which incorporated the AAA Construction Arbitration Rules. This case endorsed the principle that an attack on a contract (with an arbitration provision) will be handled by an arbitrator. The attack on the contract as a whole does not "moot" the arbitration cause – which is separable. Here *Pinnamaneni* had failed to appear in the arbitration and, therefore, could not raise in a Superior Court challenge to the award matters involved in the arbitration. This case also said that non-signator *Pinnamaneni* was liable on the contract on an alter ego theory. The court made a point of saying under the AAA Rules the parties can and do agree that an arbitrator will decide (instead of the courts as under the FAA and RUAA) whether there is a contract and an arbitration clause and whether the dispute is arbitratable.

Our last important case of the decade is *Hamblen v. Hatch*, 242 Ariz. 483, 398 P.3d 99 (App. 2017). It is very much like the *Smith* case, discussing the FAA, the courts deciding or arbitratability (instead of an arbitrator), and the separability doctrine in *Smith.* It notes that the FAA will govern all contracts touching in any way upon interstate commerce.

Thus, we end where we started. GET YOUR DISPUTE UNDER THE RUAA unless there is some good reason why you don't want the advantages of modern arbitration procedures.

EXHIBIT A

(Reprinted by permission of Mark Lassiter, Esq.)

(Red text cannot be waived in creating an arbitration clause or at any time)

(Yellow shows items which can be tinkered with and altered <u>after</u> a dispute is in process)

ARIZONA'S REVISED UNIFORM ARBITRATION ACT
A.R.S. §12-3001, et. seq.

12-3001. Definitions[1]

In this chapter, unless the context otherwise requires:

1. "**Arbitration organization**" means an association, agency, board, commission or other entity that is neutral and that initiates, sponsors or administers an arbitration proceeding or is involved in the appointment of an **arbitrator**.

2. "**Arbitrator**" means an individual who is appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

3. "**Court**" means a **court** of competent jurisdiction in this state.

4. "**Knowledge**" means actual **knowledge**.

5. "**Person**" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency or instrumentality or public corporation or any other legal or commercial entity.

6. "**Record**" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and that is retrievable in perceivable form.

12-3002. Notice

A. Except as otherwise provided in this chapter, a **person** gives notice to another **person** by taking action that is reasonably necessary to inform the other **person** in ordinary course, whether or not the other **person** acquires **knowledge** of the notice.

B. A **person** has notice if the **person** has **knowledge** of the notice or has received notice.

C. A **person** receives notice when it comes to the **person's** attention or the notice is delivered at the **person's** place of residence or place of business or at another location held out by the **person** as a place of delivery of such communications.

12-3003. Applicability

A. Except as provided in subsection B:

1. This chapter governs an agreement to arbitrate made on or after January 1, 2011.

2. This chapter governs an agreement to arbitrate made before January 1, 2011 if all the parties to the agreement or to the arbitration proceeding so agree in a **record**.

3. On or after January 1, 2011, this chapter governs an agreement to arbitrate whenever made.

B. Beginning January 1, 2011 this chapter shall not apply to an agreement to arbitrate any existing or subsequent controversy:

1. Between an employer and employee or their respective representatives.

2. Contained in a contract of insurance.

3. Between a national banking association or a federal savings association or its affiliate, subsidiary or holding company and any customer.

[1] Defined terms are in **bold** in this text.

4. If the arbitration is conducted or administered by a self-regulatory organization as defined in the securities exchange act of 1934 (15 United States Code section 78c), the commodity exchange act (7 United States Code chapter 1) or regulations adopted under those acts.

C. An agreement to arbitrate that is described in subsection B, paragraphs 2, 3 and 4 shall be governed by chapter 9, article 1 of this title.

12-3004. Effect of agreement to arbitrate; nonwaivable provisions[2]

A. Except as otherwise provided in subsections B and C of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this chapter to the extent permitted by law.

B. Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

1. Waive or agree to vary the effect of the requirements prescribed in section 12-2101.01 [regarding '*Appeals from arbitration awards*'], section 12-3005, subsection A [regarding '*Application for judicial relief*'], section 12-3006, subsection A [regarding '*Validity of agreement to arbitrate*'], or section 12-3008 [regarding '*Interim remedies*'], section 12-3017, subsection A or B [regarding '*Witnesses; subpoenas; depositions*'] or section 12-3026 [regarding an Arizona court's '*Jurisdiction*' to enforce an agreement to arbitrate or enter a judgment on an arbitration award].

2. Agree to unreasonably restrict the right under section 12-3009 [regarding '*Initiation of arbitration; notice*'] to notice of the initiation of an arbitration proceeding.

3. Agree to unreasonably restrict the right under section 12-3012 [regarding '*Disclosure by arbitrator*'] to disclosure of any facts by a neutral arbitrator.

4. Waive the right under section 12-3016 [regarding '*Representation by lawyer*'] of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this chapter, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

C. A party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of this section, section 12-2101.01 [regarding '*Appeals from arbitration awards*'], section 12-3003, subsection A, paragraph 1 or 3 [regarding the RUAA's '*Applicability*' to an agreement to arbitrate or dispute subject to the RUAA '*on or after January 1, 2011*'], section 12-3007 [regarding a '*Motion to compel or stay arbitration*'], 12-3014 [regarding "*Immunity of arbitrator; competency to testify; attorney fees and litigation expenses*"] or 12-3018 [regarding '*Judicial enforcement of preaward ruling by arbitrator*'], section 12-3020, subsection D or E [regarding '*Change of award by arbitrator*'], section 12-3022 [regarding '*Confirmation of award*'], 12-3023 [regarding '*Vacating award*'] or 12-3024 [regarding '*Modification or correction of award*'], section 12-3025, subsection A or B [regarding '*Judgment on award; attorney fees and litigation expenses*'] or section 12-3028 [regarding

[2] Includes SB 1504 corrective changes to the RUAA passed in 2011 during the Fiftieth Legislature's First Regular Session to correct scrivener's error to original §12-3004(B)(1), which erroneously left out "subsection A" in the following phrase: "*... section 12-3005, **subsection A**, section 12-3006, **subsection A**...*"

'*Uniformity of application and construction*'], 12-3029 [regarding '*Relationship to electronic signatures in global and national commerce act*'] or 41-2615 [regarding the '*Exclusive remedy*' for procedure for asserting a claim against Arizona state or any agency of it arising to any procurement under Chapter 23 of Title 41].

12-3005. Application for judicial relief

A. An application for judicial relief under this chapter must be made by motion to the **court** and heard in the manner provided by law or **court** rule for making and hearing motions.

B. Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the **court** under this chapter must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion must be given in the manner provided by law or **court** rule for serving motions in pending cases.

12-3006. Validity of agreement to arbitrate

A. An agreement contained in a **record** to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.

B. The **court** shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

C. An **arbitrator** shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

D. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the **court**, unless the **court** otherwise orders.

12-3007. Motion to compel or stay arbitration

A. On motion of a **person** showing an agreement to arbitrate and alleging another **person's** refusal to arbitrate pursuant to the agreement:

1. If the refusing party does not appear or does not oppose the motion, the **court** shall order the parties to arbitrate.

2. If the refusing party opposes the motion, the **court** shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

B. On motion of a **person** alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the **court** shall proceed summarily to decide the issue. If the **court** finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

C. If the **court** finds that there is no enforceable agreement, it may not order the parties to arbitrate pursuant to subsection A or B of this section.

D. The **court** may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

E. If a proceeding involving a claim referable to arbitration under an alleged agreement to

arbitrate is pending in **court**, a motion under this section must be made in that **court**. Otherwise, a motion under this section may be made in any **court** as provided in section 12-3027.

F. If a party makes a motion to the **court** to order arbitration, the **court** on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the **court** renders a final decision under this section.

G. If the **court** orders arbitration, the **court** on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the **court** may limit the stay to that claim.

12-3008. Interim remedies

A. Before an **arbitrator** is appointed and is authorized and able to act, the **court**, on motion of a party to an arbitration proceeding and for good cause shown, may enter an order for interim remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

B. After an **arbitrator** is appointed and is authorized and able to act:

1. The **arbitrator** may issue such orders for interim remedies, including interim awards, as the **arbitrator** finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action.

2. A party to an arbitration proceeding may move the **court** for an interim remedy only if the matter is urgent and the **arbitrator** is not able to act timely or the **arbitrator** cannot provide an adequate remedy.

C. A party does not waive a right of arbitration by making a motion under subsection A or B.

12-3009. Initiation of arbitration: notice

A. A **person** initiates an arbitration proceeding by giving notice in a **record** to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of an agreement, by certified mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

B. Unless a **person** objects for lack or insufficiency of notice under section 12-3015, subsection C not later than the beginning of the arbitration hearing, the **person** by appearing at the hearing waives any objection to lack or insufficiency of notice.

12-3010. Consolidation of separate arbitration proceedings

A. Except as otherwise provided in subsection C, on motion of a party to an agreement to arbitrate or to an arbitration proceeding, the **court** may order consolidation of separate arbitration proceedings as to all or some of the claims if all of the following apply:

1. There are separate agreements to arbitrate or separate arbitration proceedings between the same **persons** or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third **person**.

2. The claims subject to the agreements to arbitrate arise in substantial part from the

same transaction or series of related transactions.

3. The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings.

4. Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

B. The **court** may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

C. The **court** may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

12-3011. Appointment of **arbitrator**; service as a neutral **arbitrator**

A. If the parties to an agreement to arbitrate agree on a method for appointing an **arbitrator**, that method must be followed unless the method fails. If the parties have not agreed on a method, the agreed method fails or an **arbitrator** appointed fails or is unable to act and a successor has not been appointed, the **court**, on motion of a party to the arbitration proceeding, shall appoint the **arbitrator**. An **arbitrator** so appointed has all the powers of an **arbitrator** designated in the agreement to arbitrate or appointed pursuant to the agreed method.

B. An individual who has a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party may not serve as an **arbitrator** required by an agreement to be neutral.

12-3012. Disclosure by **arbitrator**

A. Before accepting appointment, an individual who is requested to serve as an **arbitrator**, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate, to the arbitration proceeding and to any other **arbitrators** any known facts that a reasonable **person** would consider likely to affect the impartiality of the **arbitrator** in the arbitration proceeding, including both:

1. A financial or **personal** interest in the outcome of the arbitration proceeding.

2. An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness or another **arbitrator**.

B. An **arbitrator** has a continuing obligation to disclose to all parties to the agreement to arbitrate, to the arbitration proceeding and to any other **arbitrators** any facts that the **arbitrator** learns after accepting appointment that a reasonable **person** would consider likely to affect the impartiality of the **arbitrator**.

C. If an **arbitrator** discloses a fact required by subsection A or B of this section to be disclosed and a party timely objects to the appointment or continued service of the **arbitrator** based on the fact disclosed, the objection may be a ground under section 12-3023, subsection A, paragraph 2 for vacating an award made by the **arbitrator**.

D. If the **arbitrator** did not disclose a fact as required by subsection A or B of this section, on timely objection by a party, the **court** under section 12-3023, subsection A, paragraph 2 may

vacate an award made by the **arbitrator**.

E. An **arbitrator** appointed as a neutral **arbitrator** who does not disclose a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party is presumed to act with evident partiality under section 12-3023, subsection A, paragraph 2.

F. If the parties to an arbitration proceeding agree to the procedures of an **arbitration organization** or any other procedures for challenges to **arbitrators** before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under section 12-3023, subsection A, paragraph 2.

12-3013. Action by majority

If there is more than one **arbitrator**, the powers of an **arbitrator** must be exercised by a majority of the **arbitrators**, but all of them shall conduct the hearing under section 12-3015, subsection C.

12-3014. Immunity of arbitrator; competency to testify; attorney fees and litigation expenses

A. An **arbitrator** or an **arbitration organization** acting in that capacity is immune from civil liability to the same extent as a judge of a **court** of this state acting in a judicial capacity.

B. The immunity afforded by this section supplements any immunity under other law.

C. The failure of an **arbitrator** to make a disclosure required by section 12-3012 does not cause any loss of immunity under this section.

D. In a judicial, administrative or similar proceeding, an **arbitrator** or representative of an **arbitration organization** is not competent to testify, and may not be required to produce **records** as to any statement, conduct, decision or ruling occurring during the arbitration proceeding, to the same extent as a judge of a **court** of this state acting in a judicial capacity. This subsection does not apply:

1. To the extent necessary to determine the claim of an **arbitrator**, **arbitration organization** or representative of the **arbitration organization** against a party to the arbitration proceeding.

2. To a hearing on a motion to vacate an award under section 12-3023, subsection A, paragraph 1 or 2 if the movant establishes prima facie that a ground for vacating the award exists.

E. If a **person** commences a civil action against an **arbitrator**, **arbitration organization** or representative of an **arbitration organization** arising from the services of the **arbitrator**, organization or representative or if a **person** seeks to compel an **arbitrator** or a representative of an **arbitration organization** to testify or produce **records** in violation of subsection D of this section, and the **court** decides that the **arbitrator**, **arbitration organization** or representative of an **arbitration organization** is immune from civil liability or that the **arbitrator** or representative of the organization is not competent to testify, the **court** shall award to the **arbitrator**, organization or representative reasonable attorney fees and other reasonable expenses of litigation.

ARIZONA'S REVISED UNIFORM ARBITRATION ACT
A.R.S. §12-3001, et. seq.

12-3015. Arbitration process

A. An **arbitrator** may conduct an arbitration in such manner as the **arbitrator** considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred on the **arbitrator** includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, to determine the admissibility, relevance, materiality and weight of any evidence.

B. An **arbitrator** may decide a request for summary disposition of a claim or particular issue either:

1. If all interested parties agree.

2. On request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

C. If an **arbitrator** orders a hearing, the **arbitrator** shall set a time and place and give notice of the hearing at least five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. On request of a party to the arbitration proceeding and for good cause shown, or on the **arbitrator**'s own initiative, the **arbitrator** may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The **arbitrator** may hear and decide the controversy on the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The **court**, on request, may direct the **arbitrator** to conduct the hearing promptly and render a timely decision.

D. At a hearing under subsection C of this section, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

E. If an **arbitrator** ceases or is unable to act during the arbitration proceeding, a replacement **arbitrator** must be appointed in accordance with section 12-3011 to continue the proceeding and to resolve the controversy.

12-3016. Representation by lawyer

A party to an arbitration proceeding may be represented by a lawyer.

12-3017. Witnesses: subpoenas; depositions; discovery

A. An **arbitrator** may issue a subpoena for the attendance of a witness and for the production of **records** and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, on motion to the **court** by a party to the arbitration proceeding or the **arbitrator**, enforced in the manner for enforcement of subpoenas in a civil action.

B. In order to make the proceedings fair, expeditious and cost effective, on request of a party to or a witness in an arbitration proceeding, an **arbitrator** may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for

or is unable to attend a hearing. The **arbitrator** shall determine the conditions under which the deposition is taken.

C. An **arbitrator** may permit such discovery as the **arbitrator** decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected **persons** and the desirability of making the proceeding fair, expeditious and cost effective.

D. If an **arbitrator** permits discovery under subsection C, the **arbitrator** may order a party to the arbitration proceeding to comply with the **arbitrator**'s discovery related orders, issue subpoenas for the attendance of a witness and for the production of **records** and other evidence at a discovery proceeding and take action against a noncomplying party to the extent a **court** could if the controversy were the subject of a civil action in this state.

E. An **arbitrator** may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets and other information protected from disclosure to the extent a **court** could if the controversy were the subject of a civil action in this state.

F. All laws compelling a **person** under subpoena to testify and all fees for attending a judicial proceeding, a deposition or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this state.

G. The **court** may enforce a subpoena or discovery related order for the attendance of a witness within this state and for the production of **records** and other evidence issued by an **arbitrator** in connection with an arbitration proceeding in another state on conditions determined by the **court** so as to make the arbitration proceeding fair, expeditious and cost effective. A subpoena or discovery related order issued by an **arbitrator** in another state must be served in the manner provided by law for service of subpoenas in a civil action in this state and, on motion to the **court** by a party to the arbitration proceeding or the **arbitrator**, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this state.

12-3018. Judicial enforcement of preaward ruling by **arbitrator**

If an **arbitrator** makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the **arbitrator** to incorporate the ruling into an award under section 12-3019. A prevailing party may make a motion to the **court** for an expedited order to confirm the award under section 12-3022, in which case the **court** shall summarily decide the motion. The **court** shall issue an order to confirm the award unless the **court** vacates, modifies or corrects the award under section 12-3023 or 12-3024.

12-3019. Award

A. An **arbitrator** shall make a **record** of an award. The **record** must be signed or otherwise authenticated by any **arbitrator** who concurs with the award. The **arbitrator** or the **arbitration organization** shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

B. An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the **court**. The **court** may extend or the parties to the arbitration proceeding may agree in a **record** to extend the time. The **court** or the parties

may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the **arbitrator** before receiving notice of the award.

12-3020. Change of award by **arbitrator**

A. On motion to an **arbitrator** by a party to an arbitration proceeding, the **arbitrator** may modify or correct an award either:

1. On a ground stated in section 12-3024, subsection A, paragraph 1 or 3.
2. Because the **arbitrator** has not made a final and definite award on a claim submitted by the parties to the arbitration proceeding.
3. To clarify the award.

B. A motion under subsection A of this section must be made and notice given to all parties within twenty days after the movant receives notice of the award.

C. A party to the arbitration proceeding must give notice of any objection to the motion within ten days after receipt of the notice.

D. If a motion to the **court** is pending under section 12-3022, 12-3023 or 12-3024, the **court** may submit the claim to the **arbitrator** to consider whether to modify or correct the award either:

1. On a ground stated in section 12-3024, subsection A, paragraph 1 or 3.
2. Because the **arbitrator** has not made a final and definite award on a claim submitted by the parties to the arbitration proceeding.
3. To clarify the award.

E. An award modified or corrected pursuant to this section is subject to section 12-3019, subsection A and sections 12-3022, 12-3023 and 12-3024.

12-3021. Remedies: fees and expenses of arbitration proceeding

A. An **arbitrator** may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

B. An **arbitrator** may award reasonable attorney fees and other reasonable expenses of arbitration only if that award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

C. As to all remedies other than those authorized by subsections A and B of this section, an **arbitrator** may order such remedies as the **arbitrator** considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the **court** is not a ground for refusing to confirm an award under section 12-3022 or for vacating an award under section 12-3023.

D. An **arbitrator**'s expenses and fees, together with other expenses, must be paid as provided in the award.

E. If an **arbitrator** awards punitive damages or other exemplary relief under subsection A of

this section, the **arbitrator** shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

12-3022. Confirmation of award

After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the **court** for an order confirming the award at which time the **court** shall issue a confirming order unless the award is modified or corrected pursuant to section 12-3020 or 12-3024 or is vacated pursuant to section 12-3023.

12-3023. Vacating award

A. On motion to the **court** by a party to an arbitration proceeding, the **court** shall vacate an award made in the arbitration proceeding if any of the following applies:

1. The award was procured by corruption, fraud or other undue means.

2. There was either:

(a) Evident partiality by an **arbitrator** appointed as a neutral **arbitrator**.

(b) Corruption by an **arbitrator**.

(c) Misconduct by an **arbitrator** prejudicing the rights of a party to the arbitration proceeding.

3. An **arbitrator** refused to postpone the hearing on showing of sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise conducted the hearing contrary to section 12-3015, so as to prejudice substantially the rights of a party to the arbitration proceeding.

4. An **arbitrator** exceeded the **arbitrator**'s powers.

5. There was no agreement to arbitrate, unless the **person** participated in the arbitration proceeding without raising the objection under section 12-3015, subsection C not later than the beginning of the arbitration hearing.

6. The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 12-3009 so as to prejudice substantially the rights of a party to the arbitration proceeding.

B. A motion under this section must be filed within ninety days after the movant receives notice of the award pursuant to section 12-3019 or within ninety days after the movant receives notice of a modified or corrected award pursuant to section 12-3020, unless the movant alleges that the award was procured by corruption, fraud or other undue means, in which case the motion must be made within ninety days after the ground is known or by the exercise of reasonable care would have been known by the movant.

C. If the **court** vacates an award on a ground other than that set forth in subsection A, paragraph 5 of this section, it may order a rehearing. If the award is vacated on a ground stated in subsection A, paragraph 1 or 2 of this section, the rehearing must be before a new **arbitrator**. If the award is vacated on a ground stated in subsection A, paragraph 3, 4 or 6 of this section, the rehearing may be before the **arbitrator** who made the award or the **arbitrator**'s successor. The

arbitrator must render the decision in the rehearing within the same time as that provided in section 12-3019, subsection B for an award.

D. If the **court** denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

12-3024. Modification or correction of award

A. On motion made within ninety days after the movant receives notice of the award pursuant to section 12-3019 or within ninety days after the movant receives notice of a modified or corrected award pursuant to section 12-3020, the **court** shall modify or correct the award if either:

1. There was an evident mathematical miscalculation or an evident mistake in the description of a **person** or thing or property referred to in the award.

2. The **arbitrator** made an award on a claim not submitted to the **arbitrator** and the award may be corrected without affecting the merits of the decision on the claims submitted.

3. The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

B. If a motion made under subsection A of this section is granted, the **court** shall modify or correct and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the **court** shall confirm the award.

C. A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

12-3025. Judgment on award; attorney fees and litigation expenses

A. On granting an order vacating an award without directing a rehearing or confirming, modifying or correcting an award, the **court** shall enter a judgment in conformity with the order. The judgment may be recorded, docketed and enforced as any other judgment in a civil action.

B. A **court** may allow reasonable costs of the motion and subsequent judicial proceedings.

C. On application of a prevailing party to a contested judicial proceeding under section 12-3022, 12-3023 or 12-3024, the **court** may add reasonable attorney fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment vacating an award without directing a rehearing or confirming, modifying or correcting an award.

12-3026. Jurisdiction

A. A **court** of this state having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

B. An agreement to arbitrate providing for arbitration in this state confers exclusive jurisdiction on the **court** to enter judgment on an award under this chapter.

12-3027. Venue

A motion pursuant to section 12-3005 must be made in the **court** of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the **court** of the county in which it was held. Otherwise, the motion may be made in the

court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this state, in the **court** of any county in this state. All subsequent motions must be made in the **court** hearing the initial motion unless the **court** otherwise directs.

12-3028. Uniformity of application and construction

In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

12-3029. Relationship to electronic signatures in global and national commerce act

The provisions of this chapter governing the legal effect, validity and enforceability of electronic **records** or electronic signatures and of contracts performed with the use of such **records** or signatures conform to the requirements of section 102 of the electronic signatures in global and national commerce act (P.L. 106-229; 114 Stat. 463; 15 United States Code sections 7001 and 7002).