Arizona Adopts the Revised Uniform Arbitration Act ("Text")
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"Because AZ-RUAA substantially mirrors the Revised Uniform Arbitration Act, we look to cases arising thereunder and to RUAA's commentary for guidance." *Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Props., Inc. v. Robson*, 294 P.3d 125, 129 (Ariz. Ct. App. 2012); *see River Housing Dev., Inc. v. Integrus Architecture, P.S.*, 272 P.3d 289 (Wash. Ct. App. 2012). Text at 482 & n.7.

KEY DEFINITIONS

There is no definition of "arbitration" in the RUAA or the AZ-RUAA. In *Rimov v. Schultz*, 253 P.3d 462, 465 (Wash. Ct. App. 2011), the court held that a nonbinding process (called Non-Binding Arbitration), a "the result of which is not binding upon the participants and not enforceable in a court of law, is by definition not an arbitration under" the Washington version of the RUAA. *See generally* Text at 484-85 & accompanying notes.

Although the terms of an arbitration agreement may only be changed by a writing, parties may change the notice provisions of an arbitration agreement under the normal rules that apply to contracts generally—parties to a written contract may modify a written contract by an oral agreement. *Createrra, Inc. v. Sundial, LC*, 304 P.3d 104, 108-110 (Utah Ct. App. 2013). Text at 485.

APPLICABILITY OF THE AZ-RUAA AND EXCLUSIONS

The Arizona Revised Uniform Arbitration Act applies to all arbitration agreements made after January 1, 2011. A.R.S. § 12-3003(A)(1). Because the parties signed the arbitration agreement in 2011, the court found that the Arizona Revised Uniform Arbitration Act applied to the dispute. *Duenas v. Life Care Centers of America, Inc.,* 336 P.3d 763 (Ariz. Ct. App. 2014). Text at 486.

Minnesota adopted its version of the RUAA effective August 1, 2011. It applies to an "action or proceedings commenced or right accrued" before the effective date. Because

the employee/plaintiff was discharged July 15, 2011, the court held that the prior version of Minnesota's arbitration law applied. *Davies v. Waterstone Capital Mgt.,L.P.,* 2014 WL 6724840 (Minn. Ct. App. Dec. 1, 2014). Text at 486.

Florida adopted the RUAA in 2013. Its application is prospective and applies to proceedings commenced after July 1, 2013. *FI-Evergreen Woods, LLC v. Robinson*, 2013 WL 5493462 (Fla. Ct. App. Oct. 4, 2013). Text at 486.

The District of Columbia adoption of the RUAA became effective July 1, 2009. In *Giron v. Dodds*, 35 A.3d 433 (D.C. Ct. App. 2012), the court held that the law applied to an arbitration agreement entered into in 2007 because the statute applies to an arbitration agreement whenever made. Text at 486.

NONWAIVABLE PROVISIONS

Under the Arizona Revised Uniform Arbitration Act, like the RUAA, certain provisions of the Act may be waived in a predispute arbitration provision. A.R.S. § 12-3004. One of those provisions is A.R.S. § 12-3006(B) which provides that a court must determine whether an agreement to arbitrate exists or whether a controversy is subject to arbitration. The court of appeals reversed the trial court's submission of a dispute to arbitration concluding that the parties' agreement providing for arbitration of disputes over the scope of the arbitration clause or the arbitrability of a particular claim or dispute, did not provide delegate to the arbitrator "the duty to determine whether an agreement [to arbitrate] existed." *Duenas v. Life Care Centers of America, Inc.,* 336 P.3d 763, 773 (Ariz. Ct. App. 2014). Text at 487-90.

ARBITRABILITY OF DISPUTES

In *State of Hawaii v. Nakanelua*, 323 P.3d 136 (Hawaii Ct. App. 2014) the court explained there is a difference between voluntary arbitration based on an agreement to arbitrate and compulsory arbitration required by statute. Describing the arbitration procedure required by statute under Hawaii's labor laws as interest arbitration, the court suggested, but did not decide, that Hawaii's Revised Uniform Arbitration Act did not apply to compulsory or interest arbitration. Assuming hypothetically that interest arbitration fell within the Act, the court concluded that the state's Labor Relations Board had exclusive jurisdiction of such disputes as the statute establishing the Board's jurisdiction provided that its provisions take precedence over any conflicting law. *See* Text at 491.

In *Estate of Cortez v. Avalon Care Center Tucson, L.L.C.*, 245 P.3d 892 (Ariz. Ct. App. 2010), the court considered the doctrine of waiver in a situation where it found that a party had unreasonably delayed in asserting the right to arbitrate. In that case, the party seeking to compel arbitration failed to request arbitration in its answer and waited another year to demand arbitration. The court found that by failing to request arbitration in its answer and participating substantially in the litigation, the party exhibited conduct inconsistent with enforcing its arbitration agreement. The court further held it was not necessary to show that the party actually knew of its right to arbitrate (the nursing home contended it had lost the patient file) but that constructive knowledge of the right to arbitrate was sufficient. Finally, the court rejected the contention that the party opposing arbitration must show prejudice. The court held that prejudice must be shown only where a party is attempting to prove waiver on the ground of unreasonable delay. There is no requirement to prove prejudice in addition to showing conduct inconsistent with an intent to arbitrate. *See* Text at 496 n.81.

It is for a court, not an arbitrator, to decide whether a nonsignatory to an arbitration agreement can nevertheless be required to arbitrate. *Smith v. Pinnamaneni*, 254 P.3d 409 (Ariz. Ct. App. 2011). *See* Text 491-92.

Depending whether the contract containing an arbitration provision is challenged or whether the arbitration agreement is challenged, the issue will be decided by either an arbitrator or a judge. In *WB, The Building Co., LLC v. El Destino LP*, 257 P.3d 1182 (Ariz. Ct. App. 2011), the court held that a party does not have to challenge an arbitration agreement on grounds distinct from its challenge to the contract and may challenge both the arbitration agreement and the contract on similar grounds. So long as the arbitration agreement itself is separate and distinctly challenged, the resolution of the issue is determined by the court. In this case the court also upheld the trial court's ruling that an arbitration agreement was unenforceable because the contractor had not complied with the applicable licensing statutes and therefore could not enter into an enforceable agreement. *See* Text 491-93.

Citing to Comment to § 6 of the RUAA, the Hawaii Intermediate Court of Appeals held that a court should find a waiver of the right to arbitrate only where the party claiming waiver meets the burden of proving that waiver has caused prejudice. *County of Hawaii v. Unidev, LLC,* 289 P.3d 1014, 1040 (Hawaii Ct. App. 2012). In this case, the claim of

waiver involved litigation conduct, not unreasonable delay in asserting the right to arbitrate. Thus, the Hawaii court's reasoning is consistent with the holding in *Estate of Cortez v. Avalon Care Center Tucson, L.L.C.* *See* Text 491-93.

Litigation-conduct waiver is decided by a court, not an arbitrator. *River Housing Dev., Inc. v. Integrus Architecture, P.S.*, 272 P.3d 289 (Wash. Ct. App. 2012). RUAA § 6, comment 5. *See* Text 491-93.

NONWAIVABLE PROVISIONS

In *Optimer Int'l, Inc. v. RP Bellevue, LLC,* 214 P.3d 954 (Wash. Ct. App. 2009), the court of appeals held that under Washington's adoption of the RUAA, parties could not by agreement waive the right to seek judicial review of an arbitration award. The Supreme Court of Washington affirmed the decision but chose to do so based on the prior version of Washington's arbitration act. In a footnote, however, the court observed that the RUAA makes the "prohibition on waiver or variation of judicial review explicit." *Optimer Int'l, Inc. v. RP Bellevue, LLC,* 246 P.3d 785, 787 n.1 (Wash. 2011). Text at 487-90.

MOTIONS TO COMPEL OR STAY ARBITRATION

When presented with a motion to compel arbitration, a court is limited to two questions: whether an arbitration agreement exists between the parties and, if so, whether the subject matter of the dispute is arbitrable under the agreement. *Safeway, Inc. v. Nordic PCL Constr., Inc.*, 2013 WL 5823693 (Hawaii Ct. App. Oct. 30, 2013). Text 493-94. Although the RUAA provides that a court should "summarily" determine whether a dispute is subject to arbitration, a court may still order an evidentiary hearing where there are genuine issues of material fact as to the existence of an arbitration agreement. *Id.*

Because the District of Columbia Comprehensive Merit Personnel Act contains no provision comparable to the District's arbitration law permitting a stay of arbitration, the Act did not preempt the stay provision of the District's adoption of the RUAA. *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. District of Columbia Public Schools,* 77 A.3d 441 (D.C. Ct. App. 2013). Text 493-94.

In *Mariposa Exp., Inc. v. United Shipping Solutions, LLC,* 295 P.3d 1173, 1178 (Utah Ct. App. 2013), the trial court compelled arbitration but dismissed the underlying lawsuit. The appellate court reversed citing the provision in Utah's adoption of the RUAA which

provides that "if a court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to arbitration." Text 493-94.

INTERIM REMEDIES

Under the broad power granted in the AZ-RUAA for an arbitrator to grant interim and provisional remedies, the Arizona Court of Appeals held that an arbitrator has the power to appoint a receiver. *Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Props., Inc. v. Robson*, 294 P.3d 125, 132 (Ariz. Ct. App. 2012). Text at 494-96.

INITIATION OF ARBITRATION

The Colorado Revised Uniform Arbitration Act, like the RUAA, provides that a party may contest an arbitration award on the grounds there was no agreement to arbitrate unless the party participates in the proceeding without raising an objection not later than the beginning of the arbitration hearing. The Colorado Court of Appeals held that when a party "does not seek judicial resolution of the question of whether a contract exists before participating in an arbitration regarding the existence of the contract and the contract's arbitration clause, he waives any arguments about the existence of the underlying contract on appeal." *Harper Hofer & Assocs., LLC v. Northwest Direct Marketing, Inc.,* 2014 WL 5840498 at * 4 (Colo. Ct. App. Nov. 6, 2014). Although one party disputed the existence of the contract which contained an arbitration clause, they proceeded with the arbitration and asked the arbitrator to determine whether the parties had an enforceable contract. The party explained that they had raised their objection to the arbitration "for the purposes of appeal." The appellate court reasoned that the party could have obtained a speedy judicial remedy under the arbitration act, but did not do so. Thus, the court concluded that the party waived the right to challenge the arbitration award which found that a valid contract existed between the parties. Text at 515 n. 188 & text 496-97.

CONSOLIDATION

A ruling by a trial court consolidating two arbitrations was upheld in *Cummings v. Budget Tank Removal & Envtl. Servs., LLC*. 260 P.3d 220 (Wash. Ct. App. 2011). The court held that because the arbitration statute makes consolidation discretionary, the decision to consolidate arbitrations is reviewed for an abuse of discretion. In applying Washington's arbitration law to the facts of the case, the court made several observations. The requirement that the separate arbitrations arise from related

transactions "ensures that the claims involved in the proceedings are sufficiently similar that consolidation will lead to an efficient resolution." *Id.* at 225. The requirement that there be common questions of law or fact does not mean that "identical facts" may possibly be decided differently. The court described this as to "narrow [a] reading" of the statute. *Id.* at 226. Text at 497-98.

Consolidation of a very large number of arbitrations involving construction defect claims by homeowners against their home builder was upheld in *Lyndoe v. D.R. Horton, Inc.*, 287 P.3d 357 (N.M. Ct. App. 2012). Text at 497-98.

APPOINTMENT, NEUTRAL ARBITRATORS AND DISCLOSURE

The Oklahoma Revised Uniform Arbitration Act permit a court to appoint an alternative arbitrator where the arbitrator or administering organization is no longer available and where the court finds that the selection of an arbitrator is an "ancillary logistical matter." If the appointment of the arbitrator is "integral" to the agreement, then the arbitration clause fails. *Bennett v. Eskridge Auto Group,* 326 P.3d 544, 547 (Ok. 2014). Text at 498.

THE ARBITRATION PROCESS

In *Colorado Mills, LLC v. SunOpta Grains & Foods Inc.*, 269 P.3d 731 (Colo. 2012), the supreme court held that a Colorado court does not have the authority to enforce a civil subpoena issued by an arbitrator to an out-of-state nonparty. The court observed that the Colorado version of the RUAA does not expressly address the issue of enforcing subpoenas against out-of-state nonparties. The court pointed out that the Colorado statute, like the Arizona statute, permits subpoenas to be enforced by a court in the same manner as a civil action. A.R.S. § 12-3017(A); see Text at 507. Because Colorado courts in civil proceedings may not enforce subpoenas against out-of-state nonparties, the Colorado Supreme Court held the same rule must apply in arbitration.

CONFIRMATION, VACATUR AND MODIFICATION OF THE AWARD

An arbitration award may not be vacated on the ground that an arbitrator "exceeded the arbitrator's powers" even though the arbitrator granted relief on a theory not raised by the prevailing party. *Johnson v. Aleut Corp.*, 307 P.3d 942 (Ak. 2013). Text at 515 and n. 187.

Where an unlicensed contractor brought a claim in arbitration the owner waived the defense of lack of licensure by not participating in the arbitration. *Smith v. Pinnamaneni*, 254 P.3d 409 (Ariz. Ct. App. 2011).

One of the grounds upon which to vacate an award is if it is obtained by "undue means." The Supreme Court of Nevada, citing federal authorities interpreting the same term in the Federal Arbitrational Act ("FAA"), held the term means "something like fraud or corruption." To prove that an award was obtained by undue means requires proof by clear and convincing evidence that the fraud was not discoverable upon the exercise of due diligence prior to the arbitration and was materially related to an issue in the arbitration. *Sylver v. Regents Bank, N.A.*, 300 P.2d 718, 722 (Nev. 2013); *see MBNA Am. Bank v. Hart,* 710 N.W.2d 125, 129 (N.D. 2006). Text at 514.

The Alaska Supreme Court adopted the standard under the Federal Arbitration Act for determining whether an arbitration award was procured by fraud. A party seeking to vacate an award based on fraud must show by clear and convincing evidence that the fraud was not discoverable upon the exercise of due diligence prior to the arbitration and materially related to an issue in the arbitration. Further, a court will not independently review an award for fraud where the arbitrator already considered and resolved the fraud claim. *McAlpine v. Priddle*, 321 P.3d 345 (Alaska 2014). Text at 514.

In *Low v. Minichino*, 267 P.3d 683, 691 (Hawaii. Ct. App. 2011), the court set forth a three-part test to determine when an arbitration award must be vacated where it is procured by fraud. "First, the movant must establish fraud by clear and convincing evidence. Second, the fraud must not have been discoverable, upon the exercise of due diligence, prior to or during the arbitration. Third, the movant must demonstrate that the fraud had a material effect on a dispositive issue in the arbitration." Text at 512-17.

Fraud in the context of obtaining an arbitration award means obtaining an award by perjured testimony. To demonstrate fraud, the complaining party must establish, with clear and convincing evidence, that (1) the fraud was not discoverable upon the exercise of due diligence prior to the arbitration, and (2) the fraud materially relates to an issue in the arbitration. *Fleming v. Simper,* 158 P.3d 1110, 1112-13 (Utah Ct. App. 2007). Text at 514.

In *Ruiz v. City of North Las Vegas*, 255 P.3d 216 (Nev. 2011), the court held that in an arbitration between a union and the city, a member of the union was not "party" who was permitted to make a motion to vacate an arbitration award. *See* Text 512-17.

In *James Valley Grain, LLC v. David,* 802 N.W.2d 158 (N.D. 2011), the court held that the filing of a motion to confirm an award does not extend the 90-day deadline in which to challenge an arbitration award. Text at 513.

In a case where an arbitration award was entered in 1998 and an application to confirm the award not filed until 2010, the Colorado Court of Appeals reversed the trial court's ruling dismissing the application to confirm the award. *Estate of Guido v. Exempla, Inc.*, 292 P.3d 996 (Colo. Ct. App. 2012). The appellate court held that an application to confirm the award is not a civil action to recover a liquidated debt and therefore the state's six-year statute of limitations applicable to such actions did not apply. The court noted that like the AZ-RUAA, there is no deadline in the Colorado arbitration law for filing an application to confirm an award. The court stated that "assuming" a time limit applied, citing to the RUAA, § 22, cmt. 2, that time period would be the state's general statute for filing and executing on a judgment which in Colorado is 20 years. In Arizona, there is a five-year statute of limitations for actions brought to execute on a judge. A.R.S. § 12-1551. Text at 512 & notes 176-77.

An arbitration award does not constitute a court order unless and until a party makes a motion to the court for an order confirming the award and the court issues an order confirming the award. *Leverett v. Leverett,* 2012 WL 1435938 (Colo. Ct. App. Apr. 26, 2012). *See* Text at 512.

In *Casey v. Wells Fargo Bank, N.A.*, 290 P.3d 265 (Nev. 2012), the trial court granted a motion to confirm an award without waiting for the 90-day period which the losing party has to move to vacate the award after receiving notice of it. The Nevada Supreme Court reversed because the trial court did not give the losing party the opportunity to file a motion to vacate, modify, or correct the award, as the 90-day period had not elapsed. The court went on to state that the trial court could have entered an order confirming the award had it reviewed the arbitration record and determined the propriety of doing so. Such an approach does not appear to be permitted under the explicit wording of the RUAA. *See* Text at 513. An alternative in a case where the timing to confirm an award is important might be to invoke the provision of the AZ-RUAA permitting interim or provisional remedies. *See* Text 494-96.

An arbitrator exceeds his power under New Mexico's adoption of the RUAA when the arbitrator rules on a matter that is beyond the scope of the arbitration agreement, inconsistent with the arbitration agreement, or removed from the arbitrator's consideration by statute or by case law. *State of New Mexico v. American Fed'n of State, Cnty, & Mun. Employees Council 18*, 291 P.3d 600 (N.M. 2012), *aff'd*, 2013 WL 2359657 (N.M. May 30, 2013). Text at 515 & n.187.

In *Westgate Resorts, LTD. v. Consumer Protection Group, LLC*, 289 P.3d 420 (Utah 2012), the Supreme Court of Utah considered whether the failure of a party-appointed arbitrator, Burbridge, to disclose he was the first cousin of a lawyer in the firm representing one of the parties to the arbitration, warranted vacatur of the award. Although the two party-appointed arbitrators, including Burbridge, designated themselves as neutral before the arbitration began, the court reasoned that Burbridge should not be considered a neutral arbitrator because, according to the court, the determination of neutrality occurs at the time of appointment. This ruling is highly questionable. First, since the Code of Ethics for Arbitrators in Commercial Disputes was amended in 2004, all arbitrators, including party-appointed arbitrators, are presumed to be neutral. Canon IX(A). Second, party-appointed arbitrators are obligated to advise the parties at the earliest practicable time whether they will serve as neutral arbitrators, which Burbridge did. Because Burbridge was presumed to be a neutral arbitrator and, indeed, confirmed this to the parties, the court's conclusion that he was not neutral because he was party-appointed is incorrect. Text at 498-501.

Although the court referred to Burbridge as a party-appointed arbitrator, the RUAA makes no reference to that term. The court correctly held that all arbitrators, whether they are neutral or nonneutral, are required to make the same disclosures. The comparable statute under the AZ-RUAA is A.R.S. § 12-3012. The distinction between neutral arbitrators and nonneutral arbitrators arises in connection with the rules governing vacatur of awards. If a neutral arbitrator 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," the neutral arbitrator is presumed to act with evident partiality. A.R.S. § 12-3012(E). If an arbitrator, whether neutral or not, fails to disclose a "financial or personal interest in the outcome of the arbitration" or an "existing or past relationship with any of the parties" or "their counsel or representatives, a witness or another arbitrator" then a court "may" vacate an award upon determining there was evident partiality by a neutral arbitrator, corruption by an

arbitrator, or misconduct by an arbitrator prejudicing the rights of a party. A.R.S. § 12-3012(D). *See* Text at 498-501. Because the court concluded that Burbridge was not a neutral arbitrator, it did not consider whether "evident partiality" existed because his first cousin was lawyer in the firm representing one of the parties to the arbitration.

Finally, the court did not consider whether the award should be vacated because of misconduct by the arbitrator, because there must be a showing that misconduct by the arbitrator actually prejudiced the rights of a party, and no such showing had been made. Text 514 and A.R.S. § 12-3023(A).

REMEDIES, FEES AND EXPENSES OF ARBITRATION

Interpreting the AZ-UAA, the court in *WB, The Building Co., LLC v. El Destino LP*, 257 P.3d 1182 (Ariz. Ct. App. 2011), held that because an arbitration is not an "action" under A.R.S. § 12-341.01, fees may not be awarded for services performed in an arbitration under that statute. Citing *City of Cottonwood v. James I. Fann Contracting, Inc.,* 877 P.2d 284 (Ariz. Ct. App. 1994), the court held attorneys' fees incurred in an arbitration may be awarded when the fees are intertwined with other fees that may be recovered pursuant to A.R.S. § 12-341.01. This holding is no longer good law as the AZ-RUAA makes A.R.S. § 12-341.01(A) applicable in arbitration on the same terms it would be applicable in a civil proceeding. A.R.S. § 12-3021(B). Text 510-11.

APPEALS FROM ARBITRATION AWARDS

In *Biotechpharma, LLC v. Ludwig & Robinson, PLLC,* 98 A.3d 986 (D.C. 2014), a law firm sued to collect unpaid legal fees. The client moved to stay the litigation and compel arbitration under a District of Columbia rule of court that requires fee arbitration. After the trial court denied the motion, the client appealed. The law firm claimed the appellate court lacked jurisdiction, but the court disagreed pointing out that the District of Columbia Revised Uniform Arbitration Act permitted interlocutory appeals from orders denying motions to compel arbitration and granting motions to stay an arbitration. Text at 520.

In *County of Hawaii v. UniDev LLC*, 301 P.3d 588 (Hawaii 2013), the court held that the enumerated grounds for appeal in cases involving arbitration orders are not exclusive and that appeals may be taken from orders compelling arbitration. *See Triple Crown at Observatory Village Ass'n, Inc. v. Village Homes of Colorado*, 2013 WL 5761028 (Colo. Ct. App. Oct. 24, 2013).

Court orders that deny confirmation of an award and also vacate the award while directing rehearing are not appealable. *Westgate Resorts, LTD. v. Consumer Protection Group, LLC*, 289 P.3d 420 (Utah 2012). The court relied, among other reasons, on the terms of the RUAA which provide that an order vacating an award without directing a rehearing is appealable. Text 521 & n.220.

In the very unique case, the Arizona Court of Appeals decline to decide whether the AZ-RUAA permits parties to expand contractually the scope of judicial review of an arbitration award. *Chang v. Siu*, 323 P.3d 725 (Ariz. Ct. App. 2014). In the case, the parties had an agreement to present their domestic relations dispute in a private arbitration proceeding. The agreement provided, among other things, that the parties preserved their right to "appeal a final arbitration award to the Arizona Court of Appeals, and that appeals shall not be taken to the Superior Court of Arizona." The arbitration award found that the parties' significant assets in a brokerage account were community property and ordered them divided equally. The superior court granted wife's application to confirm the award. The husband argued that the parties' agreement to permit an appeal to the Arizona Court of Appeals constituted an agreement to permit the appellate court to review the merits of the arbitration award. The court of appeals declined to decide whether Arizona law permitted parties to expand the scope of judicial review of arbitration awards, concluding the appellate court's jurisdiction was based on its review of the superior court judgment and that under normal appellate review, the superior court judgment should be affirmed. Surprisingly, the court did not comment on the propriety of the parties' arbitration agreement bypassing initial judicial review by the superior court. Text at 516.