

THE REVISED UNIFORM ARBITRATION ACT: 15 YEARS LATER

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In 2000, after six years of study, the National Conference of Commissioners on Uniform State Laws (NCCUSL), commonly known as the Uniform Law Commission, promulgated the Revised Uniform Arbitration Act (RUAA).¹ Fifteen years later, eighteen states and the District of Columbia have adopted the RUAA or substantial versions of it.² Significant changes in the law of arbitration have

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¹ UNIF. ARBITRATION ACT, 7 Pt. IA U.L.A. 1-98 (2009 & Supp. 2015) [hereinafter RUAA]. See www.uniformlaws.org/shared/docs/arbitration_final_00.pdf for the text of the RUAA. Reference to a state's adoption of the RUAA will precede the RUAA with the state's abbreviation. For example, Arizona's version of the RUAA will be "AZ-RUAA."

² ALASKA STAT. ANN. §§ 09.43.300 to -.595 (West, Westlaw through 2015 1st Reg. Sess. & 2015 29th Spec. Sess.); ARIZ. REV. STAT. ANN. §§ 12-3001 to -29 (West, Westlaw through 2015 1st Reg. Sess.); ARK. CODE ANN. §§ 16-108-201 to -230 (West, Westlaw through 2015 Reg. Sess. & 2015 1st Ex. Sess.); COLO. REV. STAT. ANN. §§ 13-22-201 to -230 (West, Westlaw through 2015 1st Reg. Sess.); D.C. CODE §§ 16-4401 to -4430 (West, Westlaw through Oct. 1, 2015); FLA. STAT. ANN. §§ 682.01 to -.25 (West, Westlaw through 2015 1st Reg. Sess. & 2015 Spec. Sess A); HAW. REV. STAT. ANN. §§ 658A-1 to -29 (West, Westlaw through 2015 Reg. Sess.); MICH. COMP. LAWS §§ 691.1681 to -1713 (West, Westlaw through 2015 Reg. Sess.); MINN. STAT. §§ 572B.01 to -.31 (West, Westlaw through 2015 1st Spec. Sess.); NEV. REV. STAT. ANN. §§ 38.206 to -.248 (West, Westlaw through June 30, 2015); N.J. STAT. ANN. §§ 2A:23B-1 to -32 (Westlaw through Oct. 22, 2015); N.M. STAT. ANN. §§ 44-7A-1 to -32 (West, Westlaw through 2015 1st Spec. Sess.); N.C. GEN. STAT. §§ 1-569.1 to -.31 (West, Westlaw through 2015 Reg. Sess.); N.D. CENT. CODE §§ 32-29.3-01 to -29 (West, Westlaw through 2015 Reg. Sess.); OKLA. STAT. ANN. tit. 12 §§ 1851 to -1881 (West, Westlaw through 2015 1st Sess.); OR. REV. STAT. §§ 36.600 to -.740 (West, Westlaw through 2015 Reg. Sess.); UTAH CODE ANN. §§ 78B-11-101 to -131 (West, Westlaw through 2015 1st Spec. Sess.); WASH. REV. CODE ANN. §§ 7.04A.010 to -.903 (West, Westlaw through 2015 1st Reg. Sess. and 3d Spec. Sess.); W.VA. CODE §§ 55-10-1 to -33 (West, Westlaw through 2015 Reg. Sess.); See generally Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. Rev. 1189 (2011); Mary A. Bedikian, *What Michigan Attorneys and Arbitrators Must Know About the New Revised Uniform Arbitration Act*, 92 MICH. B. J. 42 (May 2013); Matthew E. Braun, *The Revised Uniform Arbitration Act*, 18 OHIO ST. J. DISP. RESOL. 237 (2002); Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1 (2001) (Timothy Heinsz, the

occurred during the past fifteen years making it timely to review how the law has been interpreted. In addition, this article will mention where appropriate key developments under the Federal Arbitration Act (FAA), comparisons between the RUAA and the Uniform Arbitration Act and the relationship of the RUAA to the rules of a leading provider organization, the American Arbitration Association.

The original Uniform Arbitration Act (UAA) was promulgated by NCCUSL in 1955.³ NCCUSL appointed a Study Committee in 1994 to determine whether the UAA should be revised. By 1996 the Study Committee concluded changes were needed and a Drafting Committee was appointed that year, holding its first meeting in May 1997.⁴ The decision to revise the UAA was based on “the increasing use of arbitration, the greater complexity of many disputes resolved by arbitration, and the developments” in arbitration law.⁵

Like other uniform laws, one of the goals of the RUAA is to promote uniformity of arbitration law among the states that enact it.⁶ Thus, states that have adopted the RUAA look to other state interpretations of the RUAA for guidance.⁷

former Dean of the University of Missouri School of Law, was the Reporter to the Drafting Committee of the RUAA.); Laura A. Kaster, *The Revised Uniform Arbitration Act at 15: The New Jersey Story*, 22 DISP. RES. MAG. 38 (Winter 2016); Bruce E. Meyerson, *Arizona Adopts the Revised Uniform Arbitration Act*, 43 ARIZ. ST. L. J. 481 (Summer 2011); Francis J. Pavetti, *Why the States Should Enact the Uniform Arbitration Act*, 3 PEPP. DISP. RESO. L. J. 443 (2003).

³ Thirty-five states have adopted the UAA and 14 have adopted substantially similar legislation. RUAA, Prefatory Note.

⁴ Heinsz, *supra* note 2, at 2.

⁵ RUAA, Prefatory Note. A comparison between the RUAA and the UAA easily shows the greater detail and formality embraced in the RUAA. Some have commented on this questioning whether the increased formality has been good for the practice of labor arbitration. Lou Chang, *The Revised Uniform Arbitration Act and its Impact Upon the Collective Bargaining Arbitration Process*, 18 HAW. B. J. 4 (June 2014); Christine E. Ver Ploeg, *Minnesota’s Revised Uniform Arbitration Act: Unintended Consequences for Minnesota Labor Relations*, 69 BENCH & BAR MINN. 16 (2012).

⁶ RUAA § 29.

⁷ Sun Valley Ranch 308 Ltd. P’ship, Inc. v. Robson, 294 P.3d 125, 129 (Ariz. Ct. App. 2012); River Housing Dev. Inc. v. Integrus Arch., P.S., 272 P.3d 289, 295-96 (Wash. Ct. App. 2012). The UAA provides it “shall be so construed as to effectuate its general purpose to make uniform the law of the states which enact it.” UAA § 21.

I. RELATIONSHIP OF STATE ARBITRATION LAWS TO THE FEDERAL ARBITRATION ACT

Before describing how the RUAA has been adopted thus far, and the court rulings that have discussed each state's act, it is important to understand the relationship between state arbitration laws such as the RUAA, and the FAA.⁸ In enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration."⁹ According to the Supreme Court, there are only two limitations on the enforceability of arbitration provisions governed by the FAA: "they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'"¹⁰

The Supreme Court has interpreted the term "involving commerce" in the FAA as indicating the broadest permissible exercise of Congress's Commerce Clause power.¹¹ The Supreme Court also has clarified Congress's Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control.¹² Thus, the FAA's reach is quite broad.

Where an agreement falls within the coverage of the FAA,¹³ there is a strong presumption the FAA, not state arbitration law, provides

⁸ See generally Robert E. Benson, *Application of the Federal Arbitration Act in State Court Proceedings*, 43 COLO. LAW. 33 (Dec. 2014) (discussing the extent to which the FAA preempts the CO-RUAA in state court proceedings).

⁹ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); see *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012) (West Virginia's public policy requiring judicial determination of wrongful death and personal injury claims against nursing homes preempted by the FAA); *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (California's rule regarding the unconscionability of class action waivers in consumer contracts preempted by the FAA); *Preston v. Ferrer*, 552 U.S. 346 (2008) (California law requiring certain employment disputes to be heard by state administrative agency preempted by the FAA).

¹⁰ *Southland Corp.*, 465 U.S. at 11; see 9 U.S.C. § 2 (Westlaw through P.L. 112-3 (excluding P.L. 111-296, 111-314, 111-320, 111-350, 111-377, and 111-383)).

¹¹ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995).

¹² *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003).

¹³ Until 2001 there was some doubt about the extent to which the FAA applied to employment disputes. In *Circuit City Stores, Inc. v. Adams*, 523 U.S. 105 (2001), the Supreme Court held the exclusion in Section 1 of the FAA for "contracts of employment

the rules for the arbitration.¹⁴ Importantly, however, even if an arbitration agreement falls under the FAA, parties are free to conduct their arbitration under state arbitration laws so long as they manifest a “clear intent” to do so.¹⁵ A general choice of law provision in a contract is not sufficient to remove a case from the FAA’s default provisions.¹⁶ However, where parties agree to conduct their arbitration according to the arbitration law of a particular state, this constitutes sufficient manifestation of their intent so that the arbitration laws of that state will apply to their arbitration.¹⁷

By incorporating state arbitration laws, such as the RUAA, into an arbitration agreement, parties can utilize a complete set of procedural rules missing from the FAA, adopted ninety years ago. The RUAA provides a comprehensive set of procedural rules that answer many questions left open by the FAA. Thus, the RUAA “provides state legislatures with a more up-to-date statute to resolve disputes through arbitration.”¹⁸

II. KEY DEFINITIONS

The RUAA contains a number of definitions that make significant changes in arbitration practice¹⁹ although the RUAA does not define

of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce” did not apply to all employment contracts but only contracts for employment of transportation workers.

¹⁴ *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002).

¹⁵ *Fid. Fed. Bank v. Durga Ma Corp.*, 386 F.3d 1306, 1311 (9th Cir. 2004) (citation omitted).

¹⁶ *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

¹⁷ *See Johnson v. Gruma Corp.*, 614 F.3d 1062, 1066–67 (9th Cir. 2010). The reference to state arbitration law must not be ambiguous. For example, in *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015), the arbitration agreement contained provisions regarding the use of California procedural and substantive law. Specifically, the agreement provided “the parties shall retain the rights of all discovery provided pursuant to the California Code of Civil Procedure” and “[a]ll rights, causes of action, remedies and defenses available under California law and equity.” *Id.* at 1129. However, the agreement was silent with respect to questions of arbitrability. The court held the silence in the agreement gave rise to an ambiguity, and therefore “federal arbitrability law applies in the present case.” *Id.*

¹⁸ RUAA, Prefatory Note. As an alternative to, or in addition to, adopting a state’s arbitration law, parties may choose, and customarily do choose, to incorporate into their agreement the procedural rules of an arbitration organization such as the American Arbitration Association.

¹⁹ A “court” is a court of competent jurisdiction in the applicable state. RUAA § 1(3); UAA § 17. Other definitions in the RUAA include the following. An “arbitration

arbitration.²⁰ First, an arbitration agreement must be contained in a “record,” which is defined as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium . . . that is retrievable in perceivable form.”²¹ Similarly, the arbitration award, which must be in a record, may also be in electronic format, although a “copy” of the award must be provided to each party to the arbitration proceeding.²² The definition of record should be read in conjunction with a later provision of the RUAA which provides that the law is intended to conform to the Electronic Signatures in Global and National Commerce Act (Electronic Signatures Act).²³

The definition of “knowledge”²⁴—actual knowledge—should be read together with the meaning of “notice.”²⁵ The concept of notice

organization” is defined as 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.” *Id.* § 1(2). An “arbitrator” is an “individual who is appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.” *Id.* § 1(2). A “person” is defined as 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.” *Id.* § 1(5).

²⁰ In *Rimov v. Schultz*, 253 P.3d 462, 465 (Wash. Ct. App. 2011), the appellate court held a “Non-Binding Arbitration,” 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 WA-RUAA. In *State of Hawaii v. Nakanelua*, 345 P.3d 155 (Haw. 2015), the court described the difference between voluntary arbitration based on an agreement to arbitrate, and compulsory arbitration required by a statute. The former is subject to the HI-RUAA, the latter is not. In *Montview Blvd. Presbyterian Church v. Church Mut. Ins. Co.*, 2016 WL 233380 (D. Colo. Jan. 20, 2016), the court held an appraisal process in an insurance policy was not an arbitration under the CO-RUAA.

²¹ RUAA §§ 1, 6. The purpose of this definition is to “accommodate the use of electronic evidence in business and governmental transactions.” RUAA § 1 cmt. 5.

²² *Id.* § 19(a).

²³ RUAA § 30; 15 U.S.C. §§ 7001, 7002 (Westlaw through P.L. 112-3 (excluding P.L. 111-296, 111-314, 111-320, 111-350, 111-377, and 111-383)). The Electronic Signatures Act provides that in transactions affecting interstate or foreign commerce, a “contract or other record relating to the transaction shall not be denied legal effect merely because it is in electronic form.” *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 295 (7th Cir. 2002).

²⁴ RUAA § 1(4). Actual knowledge “is not intended to include imputed knowledge or constructive knowledge.” *Id.* § 1 cmt. 4.

²⁵ *Id.* § 2. The notice provisions of the RUAA may be changed in a predispute arbitration agreement. *See id.* § 4. Thus, when an arbitration agreement incorporates the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures (the AAA Commercial Rules) the notice provisions of those rules apply. The notice provisions of the AAA Commercial Rules are set forth in R-43. These rules may be found on the American Arbitration Association website: www.adr.org. Another commonly used set of arbitration rules are the JAMS Comprehensive Arbitration Rules &

applies throughout the RUAA. For example, an arbitration is initiated by giving “notice in a record” to the other parties to the arbitration agreement.²⁶ Upon making an award, an arbitrator must give notice of the award to each party.²⁷

Except where otherwise specified in the RUAA,²⁸ notice is given to another “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.”²⁹ For example, mailing notice to the last known address of a party has been held to be sufficient notice of the date and time of a hearing.³⁰ A person is considered to have notice if the person has actual knowledge of the notice, or if the person has received notice.³¹ A person is considered to receive 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.”³²

Procedures: www.jamsadr.com. The International Institute for Conflict Prevention & Resolution has developed rules for a nonadministered arbitration” www.cpradr.org.

²⁶ *Id.* § 9(a). Although the terms of an arbitration agreement may only be changed by a writing, the notice provisions of an arbitration agreement may be changed according to rules that apply to contracts generally. For example, under the law of certain states, parties to a written contract may modify a written contract by an oral agreement. *E.g.*, *Createrria, Inc. v. Sundial, LC*, 304 P.3d 104, 108-110 (Utah Ct. App. 2013).

²⁷ RUAA § 19(a).

²⁸ The manner of notice with respect to the initiation of an arbitration is specific, and takes precedence over the notice provisions in this section. *See infra* note 84 and accompanying text.

²⁹ RUAA § 2(a). The definition of notice “spells out standards for when notice is given and received rather than requiring any particular means of notice. This allows parties to use systems of notice that become technologically feasible and acceptable, such as fax or electronic mail.” RUAA § 2 cmt. 1.

³⁰ *Linsenmayer v. Omni Homes, Inc.*, 668 S.E.2d 388, 391–92 (N.C. Ct. App. 2008). In that case the defendants did not appear at the arbitration hearing and an award was entered ordering the defendants to pay over \$300,000 in damages and attorneys’ fees. The arbitrator sent the hearing notice to the address on file of the defendants’ representative. The defendants changed their address but did not inform the arbitrator. The court held it was sufficient to send the notice to the representative’s place of business. The court observed the arbitrator also sent notice to the defendants’ first attorney as well as to the attorney who took over representation of the defendants. Citing the comparable provisions of NC-RUAA, the court held “[a]ctual receipt is not required by the statute.” *Id.*

³¹ RUAA § 2(a).

³² *Id.* § 2(c).

III. APPLICABILITY OF THE RUAA

The RUAA is applicable to any agreement to arbitrate made after the effective date of a state’s adoption of the Act, or before, if all parties agree.³³ The RUAA provides a state legislature may set a so-called “delayed date” by when the RUAA applies, regardless of when an arbitration agreement was approved.³⁴ Arizona and Alaska, upon adopting the RUAA, did not replace their existing arbitration law.³⁵

³³ *Id.* § 3(a), (b). In *Snider v. Prod. Chem. Mfr., Inc.*, 230 P.3d 1, 4 (Or. 2010), the court held the OR-RUAA applied to the dispute rather than Oregon’s former arbitration law because no proceeding was commenced and no right accrued before January 1, 2004, the effective date of the OR-RUAA. The Hawaii Supreme Court, considering a similar provision under the HI-RUAA, held that because the legislature “would not have intended the absurd result of having parties to an arbitration be subjected to a change of rules while in the midst of an ongoing arbitration proceeding,” this provision applies where “arbitration proceedings” are commenced after the operative date in the statute. *United Pub. Workers, AFSCME Local 646 v. Dawson Int’l, Inc.*, 149 P.3d 495, 512 (Haw. 2006); *see Rock Work, Inc. v. Pulaski Constr. Co.*, 933 A.2d 988, 988 (N.J. Super. Ct. App. Div. 2007) (because the arbitration was commenced after the effective date of the NJ-RUAA, that act applied to the dispute). The District of Columbia interpreted the DC-RUAA in a way that distinguished between the proceeding in the trial court and the proceeding on appeal. In *Menna v. Plymouth Rock Assurance Corp.*, 987 A.2d 458 (D.C. 2010), a motion to compel arbitration was filed in 2007, the year before the adoption of the DC-RUAA. The appellate court considered the appeal in 2010. Because the District of Columbia statute provided that after July 1, 2009, the DC-RUAA would govern arbitration agreements whenever made, the court held the DC-RUAA would apply to the appeal.

The AZ-RUAA became effective January 1, 2011. Because parties to a dispute executed their arbitration agreement in 2011, the court held the AZ-RUAA applied to the arbitration. *Duenas v. Life Care Centers of America, Inc.*, 304 P.3d 763 (Ariz. Ct. App. 2014); *see Fi-Evergreen Woods, LLC v. Robinson*, 135 So.3d 331 (Fla. Dist. Ct. App. 2013) (the FL-RUAA applies to proceedings commenced after July 1, 2013). The MN-RUAA contains a savings clause providing the act does not apply to an “action or proceedings or right accrued” before the effective date of the statute which was August 1, 2011. Because an employee was discharged on July 15, 2011, the arbitration of his claim was conducted under the MN-UAA. *Davies v. Waterstone Capital Mgmt., L.P.*, 856 N.W.2d 711, 716 (Minn. Ct. App. 2014).

The UAA applies only to “agreements made subsequent to the taking effect” of the UAA in any state where it is adopted. UAA § 20.

³⁴ RUAA. § 3(c). Although the DC-RUAA became effective July 1, 2009, it applied to a dispute involving an arbitration agreement executed in 2007 because the statute applies to an arbitration agreement whenever made. *Giron v. Dodds*, 35 A.3d 433 (D.C. Ct. App. 2012).

³⁵ See *supra* note 2. Four categories of disputes are excluded from the AZ-RUAA, ARIZ. REV. STAT. ANN. § 12-3003(B) (West, Westlaw through 2015 1st Reg. Sess.), three of which are not excluded from the AZ-UAA which was not replaced by the Arizona Legislature. Like the AZ-UAA, *id.* § 12-1517, disputes between an employer and employee or their respective representatives, are excluded from the AZ-RUAA. *Id.* § 12-3003(B)(1). In addition, the following categories of disputes are excluded: disputes

A number of jurisdictions, in adopting the RUAA, added special provisions applicable to arbitration agreements involving consumers and similar parties.³⁶

arising from a contract of insurance, disputes between a national banking association or federal savings association (or its affiliate, subsidiary or holding company) and a customer, and disputes involving a self-regulatory organization defined in the Securities Exchange Act of 1933, the Commodity Exchange Act or regulations adopted under these acts. The exclusion under the AZ-UAA for employer/employee disputes has been held to exempt employment arbitration agreements from the AZ-UAA. *N. Valley Emergency Specialists, LLC v. Santana*, 93 P.3d 501, 502 (Ariz. 2004). The AZ-UAA and AZ-RUAA differ from the UAA which does apply to “arbitration agreements between employers and employees or between their respective representatives unless other provided in the agreement.” UAA § 1.

The AR-RUAA also exempts certain disputes: personal injury or tort matters, employer-employee disputes, and disputes involving an insured or beneficiary under any insurance policy or annuity contract. ARK. CODE ANN. § 16-108-230 (West, Westlaw through 2015 Reg. Sess. & 2015 1st Ex. Sess). The FL-RUAA “does not apply to any dispute involving child custody, visitation, or child support.” FLA. STAT. ANN. § 682.25 (West, Westlaw through 2015 1st Reg. Sess. & 2015 Spec. Sess A).

Importantly, however, such exclusions are preempted by the FAA to the extent the arbitration agreement involves commerce—an agreement that would fall within the scope of Congress’s Commerce Clause power. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995). Because the FAA prohibits the states from making special rules which interfere with the ability of parties to agree to arbitrate their disputes, the exclusion of disputes from state arbitration laws will be preempted so long as the agreement to arbitrate the dispute falls within the scope of the FAA. *See Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). *See generally* Bruce E. Meyerson, *Arbitration*, in 1 ARIZONA EMPLOYMENT LAW HANDBOOK, art. 1.8 (2010 ed.); *see also* Katharine B. Church, *Arkansas and Mandatory Arbitration: Is the Feeling Really Mutual?*, 65 ARK. L. REV. 343 (2012) (discussing Arkansas cases “narrow interpretation” of “involving commerce” and the AR-RUAA). Not only must states not make rules which prohibit parties from agreeing to arbitrate, preemption will apply when states do not place arbitration contracts on “equal footing with all other contracts.” *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 471 (2015) (citation omitted).

³⁶ The DC-RUAA provides that arbitration organizations that administer 50 or more consumer arbitrations a year must collect and publish in a searchable data base a variety of information about those arbitrations. D.C. CODE § 16-4430 (West, Westlaw through Oct. 1, 2015). In addition, a “consumer arbitration agreement” must disclose certain information regarding the costs associated with the arbitration. *Id.* § 16-4431. This section avoids issues of preemption as it does not make the arbitration agreement unenforceable but grants authority to the Attorney General of the District of Columbia to “enjoin the drafting party from violating this section as to agreements it enters into in the future.” Further, the statute provides that a violation “may” constitute an unfair trade practice. The NM-RUAA prohibits the enforceability of a “disabling civil dispute clause” in an arbitration agreement involving a consumer, borrower, tenant or employee. N.M. STAT. ANN. § 44-7A-5 (West, Westlaw through 2015 1st Spec. Sess.). Such a clause would be one modifying or limiting procedural rights “necessary or useful” to a consumer, borrower, tenant or employee. *Id.* § 44-7A-1 The statute provides seven examples of such clauses.

IV. NONWAIVABLE PROVISIONS

Although arbitration is a matter of contract, the RUAA provides that certain aspects of the arbitral process cannot be changed regardless of the parties' agreement. Certain provisions of the RUAA can only be changed after a dispute arises, others cannot be changed at any time. The provisions in Section 4(b) may be changed by the parties but only after a dispute arises.³⁷ Of course, any changes are "to the extent permitted by law."³⁸ Any provision of the RUAA not covered by section 4(b) or (c) may be changed in a predispute arbitration agreement, or at any time prior to when the dispute arises, "to the extent permitted by law."³⁹

The following provisions may be changed by the parties to an arbitration agreement, but only after a dispute arises.⁴⁰ These are:

- the manner of applying for judicial relief;⁴¹
- the requirement that an arbitration agreement be contained in a record;⁴²
- the procedures regarding provisional remedies;⁴³
- the provisions granting an arbitrator authority to issue subpoenas and order depositions;⁴⁴

³⁷ Although an arbitration agreement must be in a "record," except for provisions of the RUAA that may not be changed, parties "subsequently may vary [the arbitration] agreement orally, for instance, during the arbitration proceeding." RUAA § 4 cmt. 2.

³⁸ The language "to the extent permitted by law" was included by the Drafting Committee "to incorporate . . . theories of adhesion and unconscionability into the arbitration process under the RUAA." Heinsz, *supra* note 2, at 25–26. The purpose of this limitation is "to inform the parties that they cannot vary the terms of an arbitration agreement from the RUAA if the result would violate applicable law." RUAA § 4 cmt. 3. The most common legal doctrine that places restrictions on agreements in adhesion contracts is unconscionability.

³⁹ *Id.* § 4(a). Arbitration organizations such as the American Arbitration Association offer to parties comprehensive rules to govern their arbitration. These rules are typically incorporated into a predispute arbitration agreement. Unless aspects of such rules fall within the subject matter for which waiver is prohibited, the rules of the arbitration organization will govern the parties' arbitration even where inconsistent with the RUAA.

⁴⁰ Parties are able to vary these procedures after a dispute arises because after "a dispute . . . arises, the parties should have more autonomy to agree to provisions different than those required under the RUAA." RUAA § 4 cmt. 4.

⁴¹ *Id.* § 5(a).

⁴² *Id.* § 6(a).

⁴³ *Id.* § 8.

- the provision regarding court jurisdiction to enforce an arbitration award;⁴⁵
- the rules regarding the appealability of arbitration orders and awards;⁴⁶
- the prohibition against unreasonably restricting the right to notice of the initiation of an arbitration proceeding;⁴⁷
- the prohibition against unreasonable restrictions regarding the disclosure by a neutral arbitrator;⁴⁸ and
- waiver of the right to be represented by counsel.⁴⁹

Section 4(c) sets forth those provisions that may not be changed either before or after a dispute arises:

- provisions regarding the applicability of the RUAA under section 3(a) or (c);
- the provisions regarding motions to compel and motions to stay arbitration under section 7;
- provisions regarding arbitral immunity under section 14;
- provisions regarding judicial enforcement of preaward rulings under section 18;
- provisions regarding the modification or correction of an award by a court under section 20(d) or (e);
- the provision regarding the confirmation of an award under section 22;
- the provisions regarding judicial review of arbitration awards under section 23;

⁴⁴ *Id.* § 17(a), (b).

⁴⁵ *Id.* § 26.

⁴⁶ *Id.* § 28. After a dispute arises, parties may choose “to limit the jurisdictional provisions” of a reviewing court . . . or the provisions regarding appeals . . . to decide that there will be no appeal from lower court rulings.” RUAA § 4 cmt. 4(d). *But see infra* note 183.

⁴⁷ *Id.* § 9.

⁴⁸ *Id.* § 12. There is no restriction on the ability of the parties to change the requirements regarding disclosure by a non-neutral arbitrator. RUAA § 4 cmt. 4(b).

⁴⁹ *Id.* § 16. An “employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.” *Id.* § 4(b)(4).

- provisions regarding judicial modification or correction of an award under section 24;
- provisions regarding the entry of judgment following the vacatur of an award and court authorization of reasonable costs with respect to a motion to vacate under section 25(a) or (b);
- the provision regarding the directive that each state’s legislature is to apply and construe its adoption of the RUAA with the objective of promoting “uniformity of the law with respect to its subject matter among States that enact it” under section 29;
- the provision in section 30 stating that references in the RUAA regarding electronic records and electronic signatures are in compliance with the Electronic Signatures Act; and
- the provision in section 31 providing that the effective date of the adoption of the RUAA by a state should be read in conjunction with Section 3; and
- the provision in section 32 providing the adoption of the RUAA should also provide for the repeal of the UAA.

V. APPLICATIONS FOR JUDICIAL RELIEF

Applications for judicial relief are made by motions to the court, to be heard “in the manner provided by law or court rule for making and hearing motions.”⁵⁰ However, if a civil action involving the agreement to arbitrate is not pending, notice of an initial motion must be served “in the manner provided by law for the service of a summons in a civil action.”⁵¹ Otherwise, notice of the motion must be given in the manner provided “by law or court rule for serving motions in pending cases.”⁵²

VI. ARBITRABILITY OF DISPUTES

The RUAA’s definition of disputes subject to arbitration is substantially similar to the comparable definition in the FAA, with one important difference:

⁵⁰ RUAA § 7(a); UAA § 16. The provisions of section 7 may not be waived before or after a dispute arises.

⁵¹ *Id.* § 7(b).

⁵² *Id.* Although not apparent from the actual language of this section, the Comments to the RUAA indicate the intent of this section is to permit the parties to agree to another method of providing initial notice of a motion filed in court. *Id.* § 5 cmt. 1.

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.⁵³

The FAA requires a “written agreement” to arbitrate.⁵⁴ The use of the word “record” in the RUAA, however, means an agreement to arbitrate may be in a written agreement or in any “electronic or other medium . . . that is retrievable in perceivable form.”⁵⁵

This same section of the RUAA also addresses another aspect of arbitrability—who decides whether a dispute is arbitrable. The RUAA adopts the rule applied by federal courts under the FAA that a “court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.”⁵⁶

Under the FAA, parties can agree that an arbitrator, instead of a court, may decide if a dispute is arbitrable where they “clear[ly] and

⁵³ This section “is intended to include arbitration provisions contained in the bylaws of corporate or other associations as valid and enforceable arbitration agreements.” RUAA § 6 cmt. 1. For example, in *Marcus & Millichap Real Estate Invest. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 2016 WL 394007 (Wash. Ct. App. Feb. 1, 2016), the court held that members of a voluntary professional association were bound to the terms of an arbitration agreement contained in the organization’s by-laws. “The language in [this section] as to the validity of arbitration agreements is the same as [the] UAA . . . and almost the same as the language of [the] FAA . . .” *Id.* § 6 cmt 1.

⁵⁴ 9 U.S.C. § 2. Although an arbitration agreement must be in writing under the FAA, it does not need to be signed by the parties. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1369 (11th Cir. 2005).

⁵⁵ RUAA. § 1(6).

⁵⁶ *Id.* § 6(B). Citing the comparable provision in the WA-RUAA, a Washington appellate court held the “trial court, not an arbitrator, generally determines the arbitrability of a dispute.” *Davis v. Gen. Dynamics Land Sys.*, 217 P.3d 1191, 1193 (Wash. Ct. App. 2009). Another Washington appellate court summed up the relationship between the provisions in this section this way:

[I]f a party makes a discrete challenge to the enforceability of the arbitration clause, a court must determine the validity of the clause. If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration. If the court finds as a matter of law that the arbitration clause is not enforceable, all issues remain with the court for resolution, not with an arbitrator. Alternatively, if a party challenges only the validity of the contract as a whole, the arbitrator has the authority . . . to determine the validity of the contract.

Townsend v. Quadrant Corp., 224 P.3d 818, 825 (Wash. Ct. App. 2009) (citations omitted). Neither of the Washington decisions discussed the situation where the parties agree the arbitrator is permitted to decide issues of arbitrability.

unmistakabl[y] [agreed to do] so.”⁵⁷ The AAA Commercial Arbitration Rules, for example, includes a provision allowing an arbitrator to “rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”⁵⁸ This language has been held sufficient to clearly and unmistakably grant to an arbitrator the power to determine the arbitrability of a dispute.⁵⁹ Because the RUAA permits parties in a predispute arbitration agreement to waive Section 6(b),⁶⁰ by adopting the RUAA and incorporating the AAA Commercial Rules in an arbitration agreement, parties have agreed that arbitrability issues will be decided by the arbitrator.

The RUAA also provides that “[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.”⁶¹ The authority granted to arbitrators to determine conditions precedent to arbitration is consistent with cases under the FAA which hold arbitrators are empowered to determine procedural issues that arise out of the parties’ dispute.⁶² The power granted to arbitrators to

⁵⁷ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 939 (1995).

⁵⁸ AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R-7(a) (2013) [hereinafter AAA COMMERCIAL RULES].

⁵⁹ *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006). However, the AAA Commercial Rules and the AAA Supplementary Rules for Class Arbitration are “not enough for [a court] to conclude that [an arbitration agreement] clearly and unmistakably delegate[s] the question of class arbitrability to the arbitrators.” *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 2016 WL 53806, at *14 (3d Cir. Jan. 5, 2016).

⁶⁰ See RUAA § 4; *Duenas v. Life Care Centers of America, Inc.*, 336 P.3d 763, 773 (Ariz. Ct. App. 2014) (noting that RUAA section 6(b) may be changed by the parties before a dispute arises).

⁶¹ RUAA § 6(c). Waiver of the right to arbitrate by conduct occurring in litigation is decided by a court, not an arbitrator. *Cassedy v. Hofmann*, 153 So.3d 938 (Fla. Dist. Ct. App. 2014); *River Housing Dev., Inc. v. Integrus Architecture, P.S.*, 272 P.3d 289 (Wash. Ct. App. 2012). Citing to comment 5 of section 6 of the RUAA, the Hawaii Intermediate Court of Appeals held that a court should find waiver of the right to arbitrate only where the party claiming waiver meets the burden of proving prejudice from the delay in asserting the right to arbitrate. *County of Hawaii v. Unidev*, 289 P.3d 1014, 1039-40 (Haw. Ct. App. 2012).

⁶² *BG Group PLC v. Republic of Argentina*, 134 S.Ct. 1198 (2014) (a dispute over a provision in an investment treaty describing when an arbitration is to begin is a procedural question to be decided by the arbitration panel); *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003) (the “preliminary question” of whether an arbitration agreement permits an award of statutory punitive damages is “not a question of arbitrability” and should be resolved by the arbitrator); *Howsam v. Dean Witter*

determine the enforceability of a contract containing an arbitration provision is derived from the so-called “separability doctrine” which views the arbitration clause as a separate agreement within a contract.⁶³ Finally, if a party to a court proceeding challenges the existence of an arbitration agreement or contends a dispute does not fall within the scope of an arbitration agreement, the arbitration may proceed pending a ruling by the court to stay the arbitration.⁶⁴

VII. MOTIONS TO COMPEL OR STAY ARBITRATION⁶⁵

In a motion to compel arbitration, the court shall order the parties to arbitrate if the “refusing party does not appear or does not oppose” the motion.”⁶⁶ If the refusing party opposes the motion, the court “shall proceed summarily to decide the issue and order the parties to

Reynolds, Inc., 537 U.S. 79, 86 (2002) (procedural questions which grow out of a dispute and bear upon its final disposition are presumptively not for a judge but for an arbitrator to decide). Citing the Comment to the applicable section of the OR-RUAA, an Oregon court held issues of estoppel and waiver are conditions precedent and therefore issues to be resolved by an arbitrator. *Livingston v. Metro. Pediatrics, LLC*, 227 P.3d 796, 802 (Or. Ct. App. 2010). Conditions precedent to arbitrability embrace “procedural defenses . . . that do not go to the validity” of the arbitration agreement such as “waiver, the statute of limitations and laches.” *Menna v. Plymouth Rock Assurance Corp.*, 987 A.2d 458, 465 (D.C. 2010).

In 2003 a plurality of the Supreme Court held it was for arbitrators to decide if an arbitration agreement permitted a class arbitration. *Green Tree Finan. Corp. v. Bazzle*, 539 U.S. 444 (2003). That decision is no longer good law because the Court subsequently held that class arbitration was incompatible with the FAA. *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1750-53 (2011); *see Am. Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013) (nothing in the federal antitrust laws or the doctrine of effective vindication of statutory rights requires that a class action waiver be held unenforceable). Class arbitration has been upheld, however, where class procedures have been authorized by the parties. *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013).

⁶³ Arbitration agreements are considered an agreement independent and separate from the principal contract. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 409 (1967); *see Nitro-Lift Techs., L.L.C. v. Howard*, 133 S.Ct. 500 (2012); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006).

⁶⁴ RUAA § 6(d). This section “follows the practice of the American Arbitration Association and most other arbitration organizations that if a party challenges the arbitrability of a dispute in a court proceeding, the arbitration organization or arbitrators in their discretion may continue with the arbitration unless a court issues an order to stay the arbitration or makes a final determination that the matter is not arbitrable.” RUAA § 6(d) cmt. 6.

⁶⁵ “Proceedings to Compel or Stay Arbitration” are covered under Section 2 of the UAA.

⁶⁶ RUAA § 7(a)(1). Citing the comparable provision in the HI-RUAA, the Hawaii Supreme Court held a motion to compel arbitration cannot be filed until a party has first attempted to initiate an arbitration. *Ueoka v. Szymanski*, 114 P.3d 892, 901 (Haw. 2005).

arbitrate unless it finds that there is no enforceable agreement to arbitrate.”⁶⁷ When a motion is made to compel arbitration, the court must stay the pending judicial proceeding, if any, until a ruling is made on the motion.⁶⁸ If the court orders arbitration, it “shall” stay the judicial proceeding; if the claim subject to arbitration is severable from the remainder of the action, the stay may be limited to that claim.⁶⁹

If a party moves in court alleging an arbitration has been “initiated or threatened” but there is no arbitration agreement, the court shall “summarily” decide whether or not to order the parties to arbitrate.⁷⁰ The term “summarily” means a “trial court should act expeditiously and without a jury trial to determine whether a valid arbitration agreement exists.”⁷¹

A motion to compel or stay arbitration must be made in the court where a claim involving a dispute referable to arbitration is pending, or in any court pursuant to the venue provisions of the RUAA.⁷² Of course, it goes without saying that a court “may not refuse to order arbitration because the claim . . . lacks merit or grounds for the claim have not been established.”⁷³

⁶⁷ RUAA § 7(a)(2). The word “summarily” in the OR-RUAA was held to mean “expeditiously and without a jury.” *Greene v. Salomon Smith Barney, Inc.*, 209 P.3d 333, 336 (Or. Ct. App. 2009); *see also* *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126, 130 (Colo. 2007) (if material facts are undisputed, the trial court should resolve the dispute on the record before it; if material facts are in dispute, the court should “proceed expeditiously” to hold a hearing).

⁶⁸ RUAA § 7(f).

⁶⁹ *Id.* § 7(g); *see* *Mariposa Exp., Inc. v. United Shipping Solutions, LLC*, 295 P.3d 1173, 1178 (Utah Ct. App. 2013)

⁷⁰ RUAA § 7(b).

⁷¹ *Id.* § 7 cmt. The requirement under the HI-RUAA that a court proceed “summarily” does not prohibit a court from holding an evidentiary hearing where there are genuine issues of material fact as to the existence of an arbitration agreement. *Safeway, Inc. v. Nordic PCL Constr., Inc.*, 312 P.3d 1224, 1237-39 (Haw. Ct. App. 2013). According to the court, to “proceed summarily” means: “First, a court should determine whether, on the basis of the parties’ submissions, it can decide the issue (of the existence or enforceability of an arbitration agreement) as a matter of law. Second, if the court cannot do so because there are disputed issues of material fact, it should hold an evidentiary hearing to resolve those factual issues.” *Id.* at 1238.

⁷² RUAA § 7(e).

⁷³ *Id.* § 7(d).

VIII. INTERIM REMEDIES

The RUAA includes an important new section, not found in the UAA,⁷⁴ clarifying an arbitrator's power to grant preliminary relief including provisional remedies, and providing that a court may grant such remedies before an arbitration is initiated and even after an arbitration has begun.⁷⁵ The RUAA also clarifies that obtaining such relief does not constitute a waiver of the right to arbitrate.

The RUAA makes clear that an arbitrator has broad power to grant interim relief:

[T]he arbitrator may issue such orders for provisional 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.⁷⁶

This section is intended to give arbitrators very broad authority. As the Comments to the RUAA point out, the

case law, commentators, rules of arbitration organizations, and some state statutes are very clear that arbitrators have broad authority to order provisional remedies and interim relief This authority has included the issuance of measures equivalent to civil remedies of attachment, replevin, and sequestration to preserve assets or to make preliminary rulings ordering parties to undertake certain acts that affect the subject matter of the arbitration proceeding.⁷⁷

⁷⁴ Section 8 is one of the provisions of the RUAA that may not be waived in a predispute arbitration agreement. RUAA § 4(b)(1). The AAA Commercial Rules permit an arbitrator to “take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.” R-37(a). The AAA Commercial Rules also establish a procedure for the expedited appointment of an “emergency arbitrator” in cases where there is a “need of emergency relief prior to the constitution of the panel.” R-38(b).

⁷⁵ RUAA § 8.

⁷⁶ *Id.* § 8(b)(1). The AZ-RUAA has been interpreted to authorize an arbitrator 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).

⁷⁷ RUAA § 8 cmt. 4.

An interim ruling by an arbitrator prior to the issuance of a final award may be incorporated into an award and confirmed by the court.⁷⁸ A party may move the court for an expedited order confirming the award, in which case the court “shall summarily decide the motion.”⁷⁹ The court must confirm the award unless the court vacates, modifies or corrects the award under the applicable provisions of the RUAA.⁸⁰

Addressing the issue of whether seeking interim relief from a court constitutes a waiver of arbitration, the RUAA provides that before an arbitrator is appointed, upon a showing of “good cause,” a court may enter an order for an interim remedy “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.”⁸¹ Even after an arbitrator is appointed, a party may still seek an interim remedy in court but “only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.”⁸² The RUAA is clear that by seeking interim relief from a court, a party does not waive the right of arbitration.⁸³

IX. INITIATION OF ARBITRATION

A party initiates an arbitration by giving “notice” in a “record” in accordance with the parties’ agreement, 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.”⁸⁴

⁷⁸ *Id.* § 18.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* § 8(a). According to the Comments to the RUAA, *see id.* § 8 cmt. 3, this provision is derived from cases such as *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 215 (7th Cir. 1993), where the court upheld the decision of the district court granting a temporary restraining order prior to the initiation of the arbitration because it “served to maintain the status quo without prejudice to the merits of any of the parties’ claims or defenses until an arbitration panel could consider the issues presented.” Although not explicit in the statute, the Comments to the RUAA provide that after “a court makes a ruling [under this section] an arbitrator is allowed to review the ruling in appropriate circumstances.” RUAA § 8 cmt. 6.

⁸² RUAA § 8(b)(2). The Comments to the RUAA suggest the court’s role under these circumstances should be “limited.” *Id.* § 8 cmt. 3.

⁸³ *Id.* § 8(c).

⁸⁴ *Id.* § 9(a). In a predispute agreement to arbitrate, a party may “not unreasonably restrict the right . . . to notice of the initiation of an arbitration.” *Id.* § 4(b)(2). Notice of

The notice must describe the “nature of the controversy and the remedy sought.”⁸⁵ Appearance at a hearing constitutes a waiver to an objection for lack of or insufficiency of notice, unless an objection is made at the outset of the hearing.⁸⁶

X. CONSOLIDATION OF ARBITRATION PROCEEDINGS

The RUAA solves a problem common in construction disputes where there are separate arbitration agreements involving related parties or when similar or the same issues are subject to different arbitration proceedings. So long as an arbitration agreement does not prohibit consolidation, the RUAA permits a court to consolidate arbitration proceedings under the following circumstances:⁸⁷

the initiation of an arbitration under the AAA Commercial Rules “may be served on a party by mail addressed to the party or its representative at the last known address or by personal service . . . provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.” R-43(a).

The Colorado Court of Appeals held under the CO-RUAA that a letter did not give notice of the initiation of arbitration where, among other things, it only referred to a contract containing an arbitration provision, without mentioning arbitration, or when the dispute would be submitted to arbitration. *Braata, Inc. v. Oneida Cold Storage Co.*, 251 P.3d 584 (Colo. Ct. App. 2010). The formal requirements for initiating an arbitration apply even if a party is not seeking a “claim” against the other party but starting an arbitration based upon an anticipated claim of the adverse party. *Ueoka v. Szymanski*, 114 P.3d 892, 900–01 (Haw. 2005). Notice must be given to all parties to the arbitration agreement “not just to the party against whom a person files an arbitration claim.” RUAA § 9 cmt. 4. Insufficient notice of an arbitration alone will not result in vacatur of an award. There must also be “prejudice substantially” affecting the “rights of a party.” RUAA § 23(a)(6).

⁸⁵ *Id.* § 9(a). A notice of arbitration that simply said one party wanted to proceed with the arbitration of a dispute with the opposing party did not comply with WA-RUAA because it did not describe the nature of the controversy and the remedy sought. *Wescott Homes LLC v. Chamness*, 192 P.3d 394, 398 (Wash. Ct. App. 2008).

⁸⁶ RUAA § 9(b). “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.” *Harper Hofer & Assocs., LLC v. Northwest Direct Marketing, Inc.*, 2014 WL 5840498, at *4 (Colo. Ct. App. Nov. 6, 2014).

⁸⁷ RUAA. § 10. According to the Comments, this provision makes sense for several reasons. As in the judicial forum, consolidation effectuates efficiency in conflict resolution and avoidance of conflicting results. By agreeing to include an arbitration clause, parties have indicated that they wish their disputes to be resolved in such a manner. In many cases, moreover, a court may be the only practical forum within which to effect consolidation.

Id. § 10 cmt. 3. This section is not intended to address the validity of arbitration agreements in class-wide disputes. Heinsz, *supra* note 2, at 16. The Washington Court of Appeals held that decisions of a trial court with respect to consolidation, being discretionary, are reviewed under an abuse of discretion standard. *Cummings v. Budget Tank Removal &*

1. There are separate arbitration agreements (or separate arbitration proceedings) involving the same parties, or one of the parties has an arbitration agreement (or is in an arbitration proceeding) with a third party;⁸⁸
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; and
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.⁸⁹

This provision is a departure from cases under the FAA which have consistently prohibited consolidation of arbitration proceedings absent an agreement permitting consolidation.⁹⁰

Envtl. Servs. LLC, 260 P.3d 220 (Wash. Ct. App. 2011). The court commented on a number of provisions of the consolidation section of the WA-RUAA. The requirement that separate arbitrations arise from the related transactions “ensures that the claims involved in the proceedings are sufficiently similar that consolidation will lead to an efficient resolution.” *Id.* at 225.

Because this section can be changed by agreement of the parties, the consolidation provisions in the American Institute of Architects Contract Documents which permit consolidation without the necessity of court approval, would not be affected by adopting the RUAA.

⁸⁸ Although the heading to RUAA § 10 refers to the “Consolidation of Separate Arbitration Proceedings,” the body of the section refers to “separate agreements to arbitrate or separate arbitration proceedings.” *Id.* § 10(a)(1). Thus, the New Mexico Court of Appeals held under a “common sense reading” of the statute consolidation may be ordered where there are separate arbitration agreements even though proceedings have not yet been initiated. *Lyndoe v. D.R. Horton, Inc.*, 287 P.3d 357, 360-61 (N.M. Ct. App. 2012); *contra* *In re United Public Workers, AFSCME, Local 646, AFL-CIO*, 244 P.3d 609, 613-14 (Haw. Ct. App. 2010).

⁸⁹ This provision is based on court rulings that have taken the view a “court should not require a party requesting consolidation to demonstrate that the parties clearly meant such a result but should apply a standard of whether it is more likely than not that the parties intended consolidation. . . . Thus, where imposition on contractual expectations will not be substantial, a court should order consolidation.” Heinsz, *supra* note 2, at 14.

⁹⁰ *E.g.*, *Connecticut Gen. Life Ins. Co. v. Sun Assur. Co. of Canada*, 210 F.3d 771, 774 (7th Cir. 2000) (“[T]he court has no power to order such consolidation if the parties’ contract does not authorize it. But in deciding whether the contract does authorize it the court may resort to the usual methods of contract interpretation, just as courts do in

XI. APPOINTMENT, NEUTRAL ARBITRATORS AND DISCLOSURE

The RUAA is similar to the UAA as it provides (1) that the parties' agreed upon method for selecting an arbitrator shall be followed, and (2) if that method fails, and there is no agreement to select an arbitrator or if the arbitrator is unable to act and a successor has not been appointed, the court is authorized to appoint the arbitrator.⁹¹

The rules for appointment and disclosure differ depending upon whether the arbitrator is to be a neutral arbitrator or a non-neutral arbitrator. Under the Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics), neutral arbitrators are expected to be "independent and impartial."⁹² Non-neutral arbitrators, on the other hand, "may be predisposed toward the party who appointed them."⁹³

interpreting other provisions in an arbitration clause."); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984).

⁹¹ Compare RUAA § 11(a), with UAA § 3. Citing this provision of the UT-RUAA, the Supreme Court of Utah held that where the parties have agreed on a method for selecting an arbitrator, "that method 'must' be followed." *Peterson & Simpson v. IHC Health Servs., Inc.*, 217 P.3d 716, 720 (Utah 2009). The court is also authorized to appoint an arbitrator if an arbitrator ceases to serve or is unable to act during an arbitration proceeding. RUAA § 11(a). In an arbitration agreement calling for arbitration to be administered by the National Arbitration Forum which was no longer administering consumer arbitrations, citing to the OK-RUAA and cases under the FAA, the Oklahoma intermediate appellate court held a court may appoint a substitute arbitrator where the choice of arbitrator is "merely an ancillary logistical matter." *Bennett v. Eskridge Auto Group*, 326 P.3d 544, 547 (Ok. Ct. App. 2014) (citation omitted). But if the "arbitration clause's selection of an arbitrator is 'integral' to the agreement, the failure of the chosen arbitration forum is fatal to the arbitration clause itself." *Id.* In that case, the party opposing arbitration did not argue the selection of the National Arbitration Forum was integral to the agreement to arbitrate.

This provision may be waived in a predispute agreement to arbitrate. RUAA § 4. Thus, where the parties have adopted the AAA Commercial Rules, appointment of the arbitrator(s) will be governed by those Rules. R-12, 13.

⁹² THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, NOTE ON NEUTRALITY (Mar. 1, 2004) [hereinafter CODE OF ETHICS], available at https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased; see generally Bruce Meyerson & John M. Townsend, *Revised Code of Ethics for Commercial Arbitrators Explained*, 59 DISP. RES. J. 10 (2004).

⁹³ CODE OF ETHICS at Canon X(A)(1). Non-neutral arbitrators are often appointed where an arbitration agreement provides that each party is to designate a party-appointed arbitrator, and those arbitrators are to select a third, neutral arbitrator. Under the AAA Commercial Rules, however, party-appointed arbitrators are presumed to be neutral unless the parties specifically designate the party-appointed arbitrators to be non-neutral. AAA COMMERCIAL RULES, R-13(b). The RUAA does not use the term "party-appointed" arbitrator but does refer to "[s]pecial problems . . . presented by tripartite panels involving non-neutral arbitrators." RUAA § 12 cmt. 5.

The RUAA contains a specific caveat regarding the appointment of neutral arbitrators. Neutral arbitrators may not have a “known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party.”⁹⁴ Except in a contract of adhesion, this provision may be waived by the parties, even in a predispute arbitration agreement,⁹⁵ because parties “may choose to have a person with the type of interest or relationship described in this subsection serve as a neutral arbitrator.”⁹⁶

Although the Code of Ethics⁹⁷ and arbitration rules of the prominent administering agencies⁹⁸ provide that arbitrators shall make certain disclosures to the parties before accepting appointment, neither the FAA nor the UAA has such a requirement. The RUAA has changed that. All arbitrators, whether they are neutral or non-neutral arbitrators, before accepting an appointment, after making a “reasonable inquiry,”⁹⁹ must disclose to all parties and to the other arbitrators “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator.”¹⁰⁰ This is an

⁹⁴ *Id.* § 11(b).

⁹⁵ *See id.* § 4(b). Because this provision may be changed only to the “extent permitted by law,” *id.* §4(a), in an adhesion agreement, the stronger party cannot unilaterally choose the arbitrator. *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1990). By adopting the AAA Commercial Rules, arbitrators, even party-appointed arbitrators (as distinguished from party-appointed non-neutral arbitrators) are presumed to be neutral, R-13(b), and “shall be impartial and independent.” R-18(a).

⁹⁶ RUAA § 11 cmt. 1.

⁹⁷ CODE OF ETHICS, Canon II.

⁹⁸ *E.g.*, AAA COMMERCIAL RULES, R-17.

⁹⁹ RUAA § 12. What constitutes a reasonable inquiry will vary depending upon the circumstances. “For instance, an attorney in a law firm may be required to check with other attorneys in the firm to determine if acceptance of an appointment as an arbitrator would result in a conflict of interest” RUAA § 12 cmt. 3. *See generally* *Nordic PLC Constr., Inc. v. LPIHGC, LLC*, 359 P.3d 1 (Haw. 2015).

¹⁰⁰ *Id.* § 12(a). The court in *Westgate Resorts, LTD v. Consumer Protection Group*, 289 P.3d 420 (Utah 2012) correctly held that all arbitrators, whether neutral or non-neutral are required to make the same disclosures. Another aspect of that case was decided incorrectly by the court. 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 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 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

objective standard.¹⁰¹ This obligation may be waived completely in a predispute agreement by the parties as to non-neutral arbitrators, and may be waived as to neutral arbitrators so long as the disclosure obligation is not unreasonably restricted.¹⁰² This information includes, but is not limited to, any financial or personal interest in the outcome of the arbitration proceeding and any existing or past relationship with any of the parties, their counsel, a witness or another arbitrator.¹⁰³ This obligation continues after appointment.¹⁰⁴

The RUAA links the issue of disclosure to the grounds on which an arbitration award may be vacated. First, if an arbitrator discloses information that would likely be considered to affect the impartiality of the arbitrator and a party timely objects to the appointment or continued service of the arbitrator, the objection “may” be a ground for vacating the award.¹⁰⁵ Second, if the arbitrator fails to disclose such information, the failure to disclose the information also may constitute a ground on which to vacate the award.¹⁰⁶

Although the statute is silent on this point, the Comments to the RUAA indicate the basis for vacatur is quite limited with respect to the lack of disclosure by non-neutral arbitrators. Although not apparent from the wording of the RUAA itself, according to the Comments,¹⁰⁷ with respect to a non-neutral arbitrator, an award would be vacated only where the arbitrator fails to disclose information that amounts to “corruption,”¹⁰⁸ or engages in “misconduct prejudicing the

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 he was not neutral because he was party-appointed is incorrect. The court chose not to consider whether Burbridge’s first-cousin relationship was one likely to “affect the impartiality of the arbitrator.” *Id.* at 427.

¹⁰¹ RUAA § 12 cmt. 3.

¹⁰² *Id.* § 4(a), (b)(3).

¹⁰³ *Id.* § 12(a)(1)–(2).

¹⁰⁴ *Id.* § 12(b). The Code of Ethics provides that for “a reasonable period of time after the decision of a case” arbitrators should avoid circumstances that would “reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation” of a particular relationship or interest. CODE OF ETHICS, Canon I(C).

¹⁰⁵ RUAA § 12(c). A timely objection is one normally made prior to the arbitration hearing or within a reasonable time after the party learns or should have learned of the lack of disclosure. *Id.* § 12 cmt. 4. This section is permissive, the intent being to give courts “wider latitude in deciding whether to vacate an award.” *Id.*

¹⁰⁶ *Id.* § 12(d).

¹⁰⁷ *Id.* § 12 cmt. 5.

¹⁰⁸ *Id.* & § 23 (a)(2)(B).

rights of a party.”¹⁰⁹ Moreover, as to non-neutral arbitrators, disclosure requirements may be waived in their entirety.¹¹⁰

There is a specific consequence if a neutral arbitrator fails to disclose a “known, direct and material interest in the outcome of the arbitration or a known, existing and substantial relationship with a party.” In such cases, the arbitrator is “presumed” to act with evident partiality.¹¹¹ In a predispute arbitration agreement, the parties cannot “unreasonably restrict” the obligations of neutral arbitrators to disclose facts required by this section.¹¹² Finally, if the parties’ arbitration agreement adopts particular procedures for challenges to an arbitrator, “substantial compliance” with those procedures is required as a condition precedent to a motion to vacate an award on the grounds set forth in RUAA section 23(a)(2).¹¹³

XII. IMMUNITY

Unlike the UAA, the RUAA contains a grant of immunity to arbitrators identical to the immunity granted to judges when they act in a judicial capacity.¹¹⁴ This immunity applies not only to the arbitrator, but to an “arbitration organization” as well.¹¹⁵ Arbitral immunity is defined as follows:

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.¹¹⁶

¹⁰⁹ *Id.* § 12 cmt. 5 & § 23 (a)(2)(B).

¹¹⁰ *See id.* § 4 & cmt. 4(b).

¹¹¹ *Id.* § 12(e). “The shifting of the burden of proof in this limited and somewhat extreme situation will require the neutral, who is in the best position to know the exact nature and extent of the interest or relationship, to explain the matter.” Heinsz, *supra* note 2, at 19. Furthermore, it would be the “burden of the party defending the award to rebut the presumption by showing that the award was not tainted by the non-disclosure or there in fact was no prejudice.” RUAA § 12 cmt. 4.

¹¹² *Id.* § 4(b)(3).

¹¹³ *Id.* § 12(f).

¹¹⁴ *Id.* § 14. This is a nonwaivable provision. *Id.* § 4(c).

¹¹⁵ *Id.* § 14(a). The doctrine of arbitral immunity has been extended to arbitration organizations. Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith, 477 F.3d 1155 (10th Cir. 2007).

¹¹⁶ RUAA § 14(a). “The doctrine of arbitral immunity provides that ‘arbitrators are immune from civil liability for acts within their jurisdiction arising out of

The immunity granted by the RUAA is intended to supplement “any immunity under other law.”¹¹⁷ “[A]rbitral immunity has a two-fold goal; to protect arbitrators from suit, and to ensure that there is a body of individuals willing to perform the service.”¹¹⁸ Arbitral immunity is not lost despite the failure of an arbitrator to make proper disclosures under RUAA section 12(c).

With two exceptions, where an arbitrator’s ruling is the subject of litigation, neither the arbitrator nor a representative of an arbitration organization is “competent to testify” regarding the matter, nor can either 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 . . . acting in a judicial capacity.”¹¹⁹ The first exception involves claims by an arbitrator or arbitration organization “against a party to the arbitration proceeding.”¹²⁰ It would seem this situation would arise only where a claim is brought against a party for nonpayment of fees. If a claim is brought by an arbitrator to collect fees, and a counterclaim is brought attacking the arbitration award, the arbitrator would be allowed to testify as to the claim for fees, but the “arbitrator cannot be required to testify or produce records as to the party’s counterclaim attacking the merits of the award.”¹²¹

The second exception concerns the situation where a motion to vacate an award is made on the grounds set forth in RUAA section 23(a)(1) or (2), and where a *prima facie* case for vacating the award is

their arbitral functions in contractually agreed upon arbitration hearings.” Sacks v. Dietrich, 663 F.3d 1065, 1069 (9th Cir. 2011) (citation omitted).

One attorney in an arbitration asked the arbitrator to remove an opposing counsel from the arbitration because of his conduct. The arbitrator denied the request and called a recess. During the recess, the plaintiff alleged the attorney whom he sought to eject assaulted him in the lobby. The arbitrator did not observe the altercation. In a suit against the arbitrator and the arbitral organization, a New Jersey court, citing the NJ-RUAA and common law, dismissed the case holding the “act of calling a recess and denying an application to remove an attorney from an arbitration proceeding falls directly within the adjudicative functions of the arbitrator.” *Malik v. Rutenberg*, 942 A.2d 136, 142 (N.J. Super. Ct. App. Div. 2008).

¹¹⁷ RUAA § 12(b).

¹¹⁸ *Cort v. Am. Arbitration Ass’n*, 795 F. Supp. 970, 973 (N.D. Cal. 1992).

¹¹⁹ *Id.* § 14(d). Judges have been permitted to testify in court proceedings in a limited category of situations. *Phillips v. Clancy*, 733 P.2d 300, 304–05 (Ariz. Ct. App. 1986).

¹²⁰ RUAA § 14(d)(1).

¹²¹ *Id.* § 14 cmt. 5.

made.¹²² These provisions involve claims an award was “procured by corruption, fraud or other undue means” or where there was “evident partiality” by a neutral arbitrator, corruption by an arbitrator or “misconduct by an arbitrator prejudicing the rights of a party.”

If an action is brought against an arbitrator or an arbitration organization or its representative, or if a party seeks to compel testimony or the production of documents from the foregoing, and if a court finds that immunity applies or if it finds the arbitrator not competent to testify, the court “shall” award the arbitrator, arbitrator organization or their representative, reasonable attorneys’ fees and other reasonable expenses of litigation.¹²³

XIII. THE ARBITRATION PROCESS

The procedures governing an arbitration hearing are set forth in section 15.¹²⁴ This section establishes default rules, as it is one of the sections of the RUAA that can be waived by the parties in a predispute arbitration agreement.¹²⁵ Under these default rules, an arbitrator “may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.”¹²⁶ Consistent with the arbitrator’s power to manage the arbitral process, an arbitrator may hold conferences with the parties before the arbitration hearing and “among other matters . . . determine the admissibility, relevance, materiality and weight of any evidence.”¹²⁷

¹²² *Id.* § (d)(2). “A party’s allegation of these grounds without a showing of independent, objective evidence should be insufficient to require an arbitrator to testify or produce records from the arbitration proceeding.” *Id.* § 14 cmt. 5.

¹²³ *Id.* § 14(e).

¹²⁴ The comparable provision in the UAA is section 5.

¹²⁵ See RUAA § 4. The AAA Commercial Rules cover the arbitration process in detail.

¹²⁶ *Id.* § 15(a). “The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute” AAA COMMERCIAL RULES, R-32(b).

¹²⁷ RUAA § 15(a). The AAA Commercial Rules provide an arbitrator “shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.” AAA COMMERCIAL RULES, R-34(b). “It should be noted that the rules of evidence are inapplicable in an arbitration proceeding” RUAA § 15 cmt. 1. If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but the arbitration hearing must be conducted by all of the arbitrators. *Id.* § 13. The comparable provision in the UAA is section 4 (“The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this act.”).

The RUAA provides that at the hearing, the parties have a “right to be heard, to present evidence material to the controversy and to cross-examine witnesses.”¹²⁸ Clarifying an area of uncertainty, the RUAA grants to arbitrators the power to decide a request for summary disposition of a claim or issue.¹²⁹ This would presumably include requests comparable to motions to dismiss for failure to state a claim for relief, motions for judgment on the pleadings, and motions for summary judgment. The arbitrator is permitted to grant summary disposition if all parties agree or if one party makes a request for summary disposition and the other party has a reasonable opportunity to respond.¹³⁰

The RUAA establishes a number of procedural requirements for the scheduling of the arbitration hearing.¹³¹

1. The arbitrator shall set the time and place of the hearing and give notice at least five days before the hearing begins. Unless a party objects to the sufficiency of the notice at the beginning of the hearing, the party’s appearance waives the objection.
2. A hearing may be adjourned at the request of a party, for good cause shown, or on the arbitrator’s own initiative.
3. A hearing may not be postponed to a time later than that set forth in the arbitration agreement unless the parties agree to a later date.
4. A decision may be made based on the evidence “produced,” even if a party who was notified of the hearing does not appear.
5. A court may direct an arbitrator to conduct the hearing “promptly” and render a “timely” decision.
6. A party to an arbitration proceeding may be represented by a lawyer.¹³²

¹²⁸ RUAA § 15(d).

¹²⁹ *Id.* § 15(b) and cmt. 3.

¹³⁰ *Id.* § 15(b)(1)–(2). The AAA Commercial Rules provide that the “arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.” R-33.

¹³¹ *Id.* § 15(c).

¹³² *Id.* § 16. This provision is similar to section 6 of the UAA. That section provides that a waiver of the right to be represented by an attorney “prior to the proceeding or hearing is ineffective.” The right to be represented by counsel is a nonwaivable right in a predispute agreement to arbitrate. *See id.* § 4(b)(4). The AAA Commercial Rules

In addition to establishing greater detail for the regulation of the arbitration process, the RUAA grants to arbitrators substantial authority to compel the attendance of witnesses at arbitration proceedings. Arbitrators may issue subpoenas for the attendance of a witness, and for the production of records and “other evidence” at any hearing, and may administer oaths.¹³³

The method for service of a subpoena is not waivable in a predispute arbitration agreement;¹³⁴ a subpoena must be served and enforced in the same manner as a subpoena in a civil action.¹³⁵ “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 the applicable jurisdiction.¹³⁶

provide a party may be represented by counsel “or other representative of the party’s choosing.” AAA COMMERCIAL RULES, R-26. Where parties have adopted the AAA Commercial Rules a question periodically arises whether a party in arbitration may be represented by someone who is not a licensed attorney. In most states the representation of a party in arbitration is considered the practice of law. *E.g.*, *Matter of Creasy*, 12 P.3d 214 (Ariz. 2002); *Nisha, LLC v. Tribuilt Constr. Group, LLC*, 388 S.W.3d 444 (Ark. 2012); *Disciplinary Counsel v. Alexicole, Inc.*, 822 N.E.2d 348 (Ohio Sup. Ct. 2004); *contra Prudential Equity Group, LLC v. Ajamie*, 538 F.Supp.2d 605 (S.D.N.Y. 2008). Labor arbitration, however, is viewed differently. The prevailing rule is a nonlawyer can represent a party in an arbitration arising from a dispute involving a collective bargaining agreement. *E.g.*, *In re Town of Little Compton*, 37 A.3d 85 (R.I. 2012); CAL. CIV. PRO. CODE § 1282.4 (2015) (“[A]ny party to an arbitration arising under collective bargaining agreements in industries and provisions subject to either state or federal law may be represented in the course of . . . those proceedings by any person, regardless of whether that person is licensed to practice law in this state.”); *see generally* Perry A. Zirkel, *Non-Attorney Representatives in Labor Arbitration: Unauthorized Practice of Law?*, 70 DISP. RES. J. 1 (2015).

A related issue is whether an attorney licensed in one jurisdiction can represent a party in an arbitration in another jurisdiction. Many states have adopted ABA MODEL RULE OF PROF’L CONDUCT R. 5.5(c)(3) (2003), (or substantially similar versions) which provides that a lawyer licensed in one jurisdiction can represent a party in an arbitration (mediation or other alternative dispute resolution proceeding) in another jurisdiction “if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission.” *See generally* Bruce E. Meyerson, *An Update on Multijurisdiction Practice and ADR in AAA HANDBOOK ON ARBITRATION PRACTICE* (2d ed. 2016).

¹³³ RUAA § 17(a). The subject of witnesses, subpoenas and depositions is covered under the UAA in section 7. The provisions of RUAA sections 17(a) and (b) may not be changed in a predispute arbitration agreement. *Id.* § 4(b)(1).

¹³⁴ *Id.* § 4(b)(1).

¹³⁵ *Id.* § 17(a).

¹³⁶ *Id.* § 17(f). *Colorado Mills, LLC v. SunOpta Grains & Foods Inc.*, 269 P.3d 731 (Colo. 2012) (a court lacks the authority to enforce a subpoena issued by an arbitrator to an out-of-state nonparty).

Unlike the UAA, the RUAA contemplates greater use of depositions in arbitration. To make the arbitration proceeding “fair, expeditious and cost effective,” a party, or a witness, can request that the arbitrator permit a deposition to be used as evidence.¹³⁷ With respect to discovery in general, discovery is permissible “as the arbitrator decides is appropriate . . . taking into account the needs of the parties . . . and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective.”¹³⁸ The Comments to the RUAA provide insight into the purpose of this provision:

[U]nless the contract specifies to the contrary, discretion rests with the arbitrators whether to allow discovery. The discovery procedure . . . is intended to aid the arbitration process and ensure an expeditious, efficient and informed arbitration, while adequately protecting the rights of the parties. Because [this section] is waivable . . . the provision is intended to encourage parties to negotiate their own discovery procedures.

At the same time, it should be clear that in many arbitrations discovery is unnecessary and that the discovery contemplated . . . is not coextensive with that which occurs in the course of civil litigation under federal or state rules of civil procedure. Although [the section] allows an arbitrator to permit discovery so that parties can obtain necessary information, the intent of the language is to limit that discovery by considerations of fairness, efficiency, and cost. Because [the section] is subject to the parties’ arbitration agreement, they can decide to eliminate or limit discovery as best suits their needs. However, the default standard . . . is meant to discourage most forms of discovery in arbitration.¹³⁹

A further comment of the Drafting Committee is instructive: “The simplified, straightforward approach to discovery reflected in [this

¹³⁷ *Id.* § 17(b).

¹³⁸ *Id.* § 17(c). “The Drafting Committee intended that the full panoply of discovery mechanisms under modern rules of civil procedure would normally not be appropriate for arbitration unless the parties specifically incorporate them into their arbitration agreement.” Heinsz, *supra* note 2, at 46–47; *see generally* Richard J. Tyler, *Discovery in Arbitration*, 35 CONSTR. LAW. 5 (Winter 2015).

¹³⁹ RUAA § 17 cmt. 3.

section] is premised on the *affirmative duty of the parties to cooperate in the prompt and efficient completion of discovery.*¹⁴⁰

The RUAA permits subpoenas and depositions to be used for discovery without distinguishing between party and nonparty witnesses.¹⁴¹ This is a significant departure from the FAA where courts have reached different conclusions over whether an arbitrator has subpoena power to permit prehearing discovery directed at nonparties.¹⁴²

The RUAA grants clear powers to the arbitrator to enforce discovery orders. In addition to the arbitrator's power to issue subpoenas, the arbitrator may order a party to comply with discovery-related orders and "take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action" in the applicable jurisdiction.¹⁴³ In addition, a party or the arbitrator may seek enforcement of a subpoena from the court "in the manner for enforcement of subpoenas in a civil action."¹⁴⁴ Similarly,

¹⁴⁰ *Id.* § 17 cmt. 4 (emphasis added).

¹⁴¹ *See id.* § 17(c). Because this section is waivable, it is "intended to encourage parties to negotiate their own discovery procedures." RUAA § 17 cmt. 3.

¹⁴² *Compare Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 212 (2d Cir. 2008) (an arbitrator's subpoena authority under section 7 of the FAA does not include the authority to subpoena nonparties for prehearing discovery), *with* *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 872 (8th Cir. 2000) (implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing); *see generally* Int'l Comm. Disputes Comm. & Arbitration Comm. New York City Bar Ass'n, *A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing* (2015) available at <http://www2.nycbar.org/pdf/report/uploads/20072911-ABCNYModelArbitralSubpoena.pdf>. Because of the "unclear case law," this section "specifically states that arbitrators have subpoena authority for discovery matters under the RUAA." RUAA, § 17 cmt. 6.

¹⁴³ *Id.* § 17(d). This section grants to arbitrators all of the power judges have to enforce discovery orders. *See generally* Philip D. O'Neill, *The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse*, 60 DISP. RES. J. 60 (Nov. 2005–Jan. 2006). Even in the absence of specific statutory authority arbitrators have the power to impose sanctions under the bad faith exception to the American Rule regarding the award of attorneys' fees, *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064–65 (9th Cir. 1991), and the authority granted to arbitrators under the terms of an arbitration agreement. *See, e.g., Reliastar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.*, 564 F.3d 81, 86–87 (2d Cir. 2009) (a broad arbitration clause confers authority on arbitrators to sanction a party that participates in bad faith); *Pollin v. Kellwood Co.*, 103 F. Supp.2d 238, 242 (S.D.N.Y. 2000) (arbitration agreement permitted arbitrators to grant any remedy or relief that would be available in court).

¹⁴⁴ RUAA § 17(a). Because arbitration awards are not self-enforcing, "a nonparty who disagrees with a subpoena or other order issued by an arbitrator simply need not comply.

an arbitrator may also issue protective orders “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” the applicable jurisdiction.¹⁴⁵

The RUAA also is intended to facilitate the arbitration process occurring in another state. A court in a state that has adopted the RUAA has the power to enforce a subpoena or discovery order for the attendance of a witness or the production of records 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.”¹⁴⁶ Under this provision a party may take a subpoena issued by an arbitrator in a state, even one that has not adopted the RUAA, directly to a court in a state that has adopted the RUAA, where the subpoena can be enforced by that court subject to the provisions of that state’s version of the RUAA.¹⁴⁷ A subpoena or discovery order issued by an arbitrator in another state must be served in the state that has adopted the RUAA in the same manner provided by law for enforcement of subpoenas in a civil action.¹⁴⁸

XIV. THE ARBITRATION AWARD

An arbitrator must make a “record” of an award which must be signed or “otherwise authenticated” by each arbitrator who concurs with the award.¹⁴⁹ The arbitrator or arbitration organization must give “notice” of the award, including a copy of the award, to each party to

At that point the party to the arbitration proceeding who wants the nonparty to testify or produce information must proceed in court to enforce the arbitral order.” RUAA § 17 cmt. 8.

¹⁴⁵ *Id.* § 17(e).

¹⁴⁶ *Id.* § 17(g).

¹⁴⁷ Heinsz, *supra* note 2, at 50–51.

¹⁴⁸ RUAA § 17(g).

¹⁴⁹ *Id.* § 19(a). The term “otherwise authenticated” is “intended to conform with the Electronic Signatures in Global and National Commerce Act.” This means that an “arbitrator can execute an award by an electronic signature which is intended to mean ‘an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.’” RUAA § 19 cmt. (citation omitted). The comparable provision in the UAA is section 8. This section of the RUAA may be changed in a predispute agreement to arbitrate. *See* RUAA § 4(a).

the arbitration.¹⁵⁰ The notice provision is one that is waivable and can therefore be superseded by the parties' agreement.¹⁵¹

An arbitration award must be made within the time specified in the parties' arbitration agreement, or if not specified therein, by the court; the parties may agree to extend the time or the court may order that the time be extended.¹⁵² A party waives an objection to an untimely award if an objection is not made before the party receives notice of the award.¹⁵³

A preaward ruling by an arbitrator may be incorporated into a final award.¹⁵⁴ When an award incorporates a preaward ruling, the prevailing party may seek from a court an expedited ruling to confirm the award, in which case the court shall summarily decide the issue.¹⁵⁵ An arbitrator's decision denying a request for a preaward ruling is not subject to judicial review until after a final award is entered.¹⁵⁶ Although preaward rulings are subject to vacatur, modification or correction if incorporated into an award under section 19, there is no provision for an appeal from a court decision on a preaward ruling.¹⁵⁷

XV. CHANGE OF AWARD BY THE ARBITRATOR

Although an arbitrator is *functus officio* and is without authority to redetermine the merits of the arbitration after a final award is made, there are certain exceptions in section 20 of the RUAA.¹⁵⁸ To change

¹⁵⁰ *Id.* § 19(a).

¹⁵¹ *See id.* § 4.

¹⁵² *Id.* § 19(b). The comparable provision in the UAA is section 8(b). The AAA Commercial Rules provide an award shall be made no later than thirty days from the closing of the hearing. AAA COMMERCIAL RULES, R-45.

¹⁵³ RUAA § 19(b).

¹⁵⁴ *Id.* § 18. The UAA does not address preaward rulings by arbitrators.

¹⁵⁵ "The intent of the term 'expedited' is that a court should, to the extent possible, advance on the docket a matter involving the enforcement of an arbitrator's preaward ruling in order to preserve the integrity of the arbitration proceeding which is underway." RUAA § 18 cmt. 2.

¹⁵⁶ *Id.* § 18 cmt. 4.

¹⁵⁷ *Id.* § 18 cmt. 3.

¹⁵⁸ The comparable provision in the UAA is section 9. "The *functus officio* doctrine provides that an arbitration panel is without authority to reconsider an issue once the panel has issued a final decision . . ." U.S. Life Ins. Co. v. Superior Nat'l Ins. Co., 591 F.3d 1167, 1177 n.11 (9th Cir. 2010). Under federal arbitration law there are exceptions to this rule: "an arbitrator can correct a mistake which is apparent on the face of his award, complete an arbitration if an award is not complete, and clarify an ambiguity in

an arbitration award, the moving party must make a motion to the arbitrator within twenty days after the party receives notice of the award.¹⁵⁹ An opposition to the motion must be made within ten days thereafter.¹⁶⁰ The grounds on which an award may be changed are the following:

- there is an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property in the award;
- the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted;
- the arbitrator has not made a final and definite award on a claim submitted by the parties to the arbitration proceeding; or
- to clarify the award.

A court can also refer a matter back to the arbitrator to modify or correct an award. If a motion is pending in court to confirm, vacate, modify or correct an award under RUAA sections 20-24, the court can submit “a claim” to the arbitrator to modify or correct the award for any of the reasons set forth above.¹⁶¹ If an award is modified or corrected as provided for under section 20, a new award would be issued pursuant to section 19, subject to confirmation, vacatur, and 20-24.¹⁶²

the award.” *McClatchy Newspapers v. Cent. Valley Typographical Union No. 46*, 686 F.2d 731, 734 n.1 (9th Cir. 1982). Unlike the RUAA, however, the FAA has no statutory grounds by which an award may be modified or corrected. With the exception of RUAA section 20(d), the provisions of section 20 may be changed in a predispute agreement to arbitrate. R-50 of the AAA Commercial Rules governs the terms on which an arbitrator may modify an award.

Under the comparable provision of the NJ-RUAA, a court held this section did not permit an “arbitrator to change his or her mind or to reconsider his or her decision in the guise of clarification.” *Kimm v. Blisset, LLC*, 905 A.2d 887, 897 (N.J. Super. Ct. App. Div. 2006).

¹⁵⁹ RUAA § 20(b).

¹⁶⁰ *Id.* § 20(c).

¹⁶¹ *Id.* § 20(d).

¹⁶² *Id.* § 20(e).

XVI. REMEDIES, FEES AND EXPENSES OF ARBITRATION¹⁶³

Unlike the UAA which is silent on the issue,¹⁶⁴ the RUAA grants to arbitrators the explicit power to award punitive damages or “other exemplary relief” if such an award is authorized by law in a civil action involving the same claim.¹⁶⁵ The evidence presented at the hearing must justify the award of punitive damages under the legal standard otherwise applicable.¹⁶⁶ If an arbitrator awards punitive damages, the arbitrator must specify the facts justifying the award as well as the legal basis of the award; the amount of punitive damages must be stated separately in the award.¹⁶⁷

In a significant change from the UAA, the RUAA authorizes an arbitrator to award attorneys’ fees and “other reasonable expenses of arbitration” if an award of fees and expenses “is authorized by law in a civil action involving the same claim,” or by agreement of the parties.¹⁶⁸

¹⁶³ This topic is covered in section 21 of the RUAA. These provisions may be changed in a predispute agreement to arbitrate.

¹⁶⁴ *Id.* § 21(a). The UAA makes no reference to punitive damages.

¹⁶⁵ Under the wording of this section, an award of punitive damages must be authorized under applicable law. The “parties by agreement cannot confer such authority on an arbitrator where the arbitrator by law could not otherwise award such relief.” RUAA § 21 cmt. 1. Under the FAA it is well established that arbitrators have the authority to award punitive damages. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

¹⁶⁶ RUAA § 21(a).

¹⁶⁷ *Id.* § 21(e). This language permits a reviewing court to “pass upon the legal propriety of a punitive damages award.” Heinsz, *supra* note 2, at 24. Thus, this section establishes a standard of judicial review of punitive damage awards different than the standard of judicial review applicable to other arbitral rulings.

¹⁶⁸ RUAA § 21(b). Section 10 of the UAA has been held to prohibit the recovery of attorneys’ fees in arbitration absent an agreement of the parties: “Unless otherwise provided in the agreement to arbitrate, the arbitrator’s expenses and fees . . . not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.” *See Canon School Dist. No. 50 v. W.E.S. Constr. Co.*, 882 P.2d 1274, 1280 (Ariz. 1994) (“Our consideration in this case is limited to arbitration proceedings under the Uniform Arbitration Act where the agreement to arbitrate does not include an attorney’s fee provision. In those types of proceedings, neither the arbitrators nor the confirming court may award attorney’s fees for the arbitration itself.”). In *Westgate Resorts, Ltd. v. Adel*, 2016 WL 67717 (Utah Jan. 5, 2016), an arbitration panel awarded attorneys’ fees for “post-arbitration proceedings.” The court reversed the award of fees holding that the UT-RUAA provision, identical to Section 21(b) of the RUAA, did not permit an arbitrator to award post-arbitration fees. The court stated the “decision-makers most familiar with [the] attorney’s work during the confirmation proceedings and

The RUAA, like the UAA, grants to arbitrators broad power to fashion remedies, even those that would not be permissible in court:

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 . . . or for vacating an award¹⁶⁹

The intent of this provision is to allow

an arbitrator to order broad relief even that beyond the limits of courts which are circumscribed by principles of law and equity. . . . The purpose of including this language . . . was to insure that arbitrators have a great deal of creativity in fashioning remedies; broad remedial discretion is a positive aspect of arbitration.¹⁷⁰

This section, however, is waivable in a predispute arbitration agreement so that parties can agree to limit or eliminate certain remedies “to the extent permitted by law.”¹⁷¹

resulting appeal were the courts We think it best to assign to those courts sole responsibility for granting attorney fees in those proceedings” *Id.* at *4.

¹⁶⁹ RUAA § 21(c). Section 12(a) of the UAA provides: “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.” The AAA Commercial Rules provide that an “arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties” R-47(a). Of course, an arbitrator’s power is not without limits. *E.g.*, *Bosack v. Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009) (an arbitration award must “draw its essence” from the parties’ agreement).

¹⁷⁰ RUAA § 21(c) cmt. 3; *see Heinsz, supra* note 2, at 22. The Supreme Court of Utah cited this provision in the UT-RUAA holding the “broad grants” of authority to arbitrators were an additional reason why the court permitted an arbitrator to remove members of a limited liability company. *Duke v. Graham*, 158 P.3d 540, 546 (Utah 2007).

¹⁷¹ RUAA § 4(a). In *Couch Investments, LLC v. Peverieri*, 346 P.3d 1299 (Or. Ct. App. 2015), the parties stipulated the only issue to be resolved by the arbitrator concerned whether the tenant or the landlord was liable under a lease. The arbitrator not only decided the issue of liability but went further ordering specific remedies not within the scope of the stipulation. The court held the parties’ stipulation was not intended to waive the broad power under the OR-RUAA of an arbitrator to order remedies the arbitrator “considers just and appropriate under the circumstances of the arbitration proceeding.” *Id.* at 1305.

The RUAA also permits an arbitrator to award the expenses of arbitration if an award of expenses is authorized in a civil action.¹⁷² Thus, the use of the word “expenses” should have the same meaning as “costs” which are awarded to the successful party in civil litigation.¹⁷³ In a separate provision, the RUAA provides that an “arbitrator’s expenses and fees, together with other expenses, must be paid as provided in the award.”¹⁷⁴ This section appears to create a special obligation by the parties to pay the arbitrator’s expenses and fees which are not covered by cost statutes of most states. The use of the phrase “together with other expenses,” is confusing. In general, expenses are covered under section 21(b) and are the same expenses that may be awarded in a civil action involving the same claim—“costs.” Expenses of the arbitrator are covered under section 21(d). The only category of expenses seemingly not specifically addressed would be the fees, if any, paid to an arbitration organization. This is certainly an expense of arbitration and presumably is included within the phrase “other expenses.”

XVII. CONFIRMATION, VACATUR AND MODIFICATION OF THE AWARD

After a party receives notice of an award, a party may move the court for an order confirming the award. The court “shall issue a confirming order” unless the award is modified or vacated.¹⁷⁵ The RUAA contains no time limit within which a motion to confirm an award must be filed.¹⁷⁶ The Drafting Committee of the RUAA rejected language from the FAA that limits such a motion to one year.

¹⁷² RUAA § 21(b).

¹⁷³ *Id.* § 21(b). In addition to the recovery of expenses permitted in a comparable civil action, parties in their arbitration agreement may authorize the award of other expenses not otherwise permitted by law. RUAA § 21 cmt. 2.

¹⁷⁴ *Id.* § 21(d).

¹⁷⁵ *Id.* § 22. A Hawaii appellate court rejected the argument a case is moot where an award has been satisfied. Applying the HI-RUAA, the court held an award should be confirmed regardless of whether the award has been satisfied prior to confirmation. *Mikelson v. United Servs. Auto. Ass’n*, 227 P.3d 559, 565 (Haw. Ct. App. 2010). Section 11 of the UAA provides that “[u]pon application of a party, 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” under sections 12 and 13 of the UAA.

¹⁷⁶ *See* RUAA § 22. The UAA similarly contains no time limit within which to bring a motion to confirm an award

The Comments to the RUAA indicate it was the “consensus” of the Drafting Committee that a state’s general statute of limitations for the filing and execution of a judgment should apply.¹⁷⁷

Under the RUAA, a party may move to vacate an award up to ninety days after the party receives notice of the award or up to ninety days after the moving party receives notice of a modified or corrected award.¹⁷⁸ If the moving party alleges the award was “procured by corruption, fraud or other undue means,” the motion must be made within ninety days after the party learns of the basis of the motion or when the basis should have been known through the exercise of reasonable care.¹⁷⁹ Thus, even if a party promptly moves to confirm an award, the RUAA provides the losing party may have up to ninety days from when the opposing party received notice of the award in which to file a motion to vacate an award.¹⁸⁰ In some cases, that delay could be very disadvantageous to the prevailing party.¹⁸¹

The grounds¹⁸² set forth in the RUAA providing for judicial review of arbitration awards are:¹⁸³

¹⁷⁷ *Id.* § 22 cmt. 2.

¹⁷⁸ *Id.* § 23(b). See UAA § 12(b).

¹⁷⁹ RUAA § 23(b). UAA § 12(b).

¹⁸⁰ RUAA § 23(b).

¹⁸¹ The OR-RUAA has a better alternative providing that after a motion to confirm an award is filed, the court must confirm the award unless a motion to vacate or modify the award is filed within twenty days. OR. REV. STAT. § 36.700(1) (West, Westlaw through 2015 Reg. Sess.).

¹⁸² There is no provision in the RUAA which permits an arbitration award to be reviewed for factual or legal error. See *OK Lumber Co., Inc. v. Alaska R.R. Corp.*, 123 P.3d 1076, 1078 (Alaska 2005).

¹⁸³ RUAA § 23(a). The comparable section in the UAA is section 12(a). The section on vacatur is one that cannot be waived by the parties, even after a dispute arises. RUAA § 4(c). “Parties cannot waive or vary the statutory grounds for vacatur” RUAA § 4 cmt. 4(e). An agreement to preclude completely any judicial review of an arbitration award has been held unenforceable because it deprives a court of the ability to follow the standards of review which “themselves embody legislative and judicial determinations as to the appropriate level and scope of review.” *Van Duren v. Rzasa-Ormes*, 926 A.2d 372, 381 (N.J. Super. Ct. 2007). Similarly, in *Optimer Int’l, Inc. v. RP Bellevue, LLC*, 214 P.3d 954, 958 (Wash. Ct. App. 2009), the parties’ arbitration agreement provided the decision of the arbitrator would be final and nonappealable. After the award was entered, the losing party appealed claiming the arbitrator exceeded his powers. The court of appeals held the restriction on judicial review of the award in the arbitration agreement was invalidated by the terms of the WA-RUAA which prohibit any waiver of the grounds for judicial review of arbitration awards. *Id.* at 960.

- the award was procured by corruption, fraud or other undue means;¹⁸⁴
- there was evident partiality by an arbitrator appointed as a neutral arbitrator;¹⁸⁵

Under the FAA parties may negotiate to eliminate appellate review of a district court ruling, *MACTEC, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005), but they may not prohibit judicial review by a district court of an arbitration award. *Hoelt v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003); *see In re Wal-Mart Wage and Hour Empl. Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) (“Permitting parties to contractually eliminate all judicial review of arbitration awards would not only run counter to the text of the FAA, but would also frustrate Congress’s attempt to ensure a minimum level of due process for parties to an arbitration.”).

¹⁸⁴ Like cases under the FAA, *e.g.*, *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 858 (4th Cir. 2010), under the RUAA, proof that an award was procured by “undue means” requires clear and convincing evidence amounting to fraud or corruption that was not discoverable upon the exercise of due diligence prior to or during the arbitration, and was materially related to an issue in the arbitration. *Sylver v. Regents Bank, N.A.*, 300 P.3d 718, 721-22 (Nev. 2013); *MBNA Am. Bank v. Hart*, 710 N.W.2d 125, 129 (N.D. 2006). The Arizona Court of Appeals held under the AZ-UAA, that “undue means” requires proof of intentional misconduct amounting to bad faith in the procurement of the arbitration award. *FIA Card Servs., N.A. v. Levy*, 200 P.3d 1020, 1022 (Ariz. Ct. App. 2008). An arbitration award was vacated on the grounds of undue means where the court found the arbitrator’s contact with counsel for a party “was impermissible under the rules of arbitration and tainted the deliberation proceedings.” *Goldsberry v. Hohn*, 583 P.2d 1360, 1363 (Ariz. Ct. App. 1978).

¹⁸⁵ The meaning of “evident partiality” has been extensively litigated in cases under the FAA. *See generally* RUAA § 12 cmt. 1. The United States Court of Appeals for the Ninth Circuit has held that to show evident partiality a party must establish “specific facts indicating actual bias toward or against a party” or that the arbitrator failed to disclose information that creates a reasonable impression of bias. *Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634, 645–46 (9th Cir. 2010). The Oregon appellate court defined evident partiality this way when it interpreted a similar provision in the OR-RUAA: “To establish evident partiality, the objecting party need only show that the arbitrator was *inclined* to favor one side, not that the arbitrator actually acted upon that inclination, such that the arbitrator’s decision was affected to the detriment of the other party.” *Prime Props., Inc. v. Leahy*, 228 P.3d 617, 621 (Or. Ct. App. 2010). “[E]vident partiality” means the “appearance of bias” or where a reasonable person would conclude that an arbitrator was “partial to one party to the arbitration.” *Wages v. Smith Barney Harris Upham & Co.*, 937 P.2d 715, 720–21 (Ariz. Ct. App. 1997). Evident partiality may exist even though a relationship between a neutral arbitrator and a party or attorney in the arbitration does not arise until after the arbitration. The Hawaii Supreme Court, relying on cases under the FAA, vacated an award when it found “there was a concrete possibility that an attorney-client relationship would develop between the arbitrator and the law firm of party counsel.” *Noel Madamba Contracting LLC v. Romero*, 364 P.3d 518, 530 (Haw. 2015). Evident partiality applies to “vacatur only for a neutral arbitrator . . . because non-neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them. As such, these non-neutral, party-appointed arbitrators are not expected to be impartial in the same sense as neutral arbitrators.” RUAA § 23 cmt. 1.

- there was corruption by an arbitrator;
- there was misconduct by an arbitrator prejudicing the right of a party to the arbitration proceeding;¹⁸⁶
- the arbitrator refused to postpone the hearing on a showing of sufficient cause;
- the arbitrator refused to consider evidence material to the controversy;
- the arbitrator conducted the hearing contrary to the provisions in RUAA section 15 so as to prejudice substantially the rights of a party to the arbitration;¹⁸⁷
- the arbitrator exceeded the arbitrator's powers;¹⁸⁸
- there was no agreement to arbitrate unless the person participated in the arbitration without raising an objection at the outset of the proceeding,¹⁸⁹ or

¹⁸⁶ An arbitration award was not vacated by the Utah Supreme Court because there was no showing of the claimed misconduct by the arbitrator actually prejudiced the rights of a party. *Watergate Resorts, LTD v. Consumer Protection Group, LLC*, 289 P.3d 420 (Utah 2012).

¹⁸⁷ A comparable provision in the UT-RUAA was described this way:

[An] arbitrator's discovery decisions can provide grounds for vacatur if those decisions prevent a party from exercising statutorily-guaranteed rights to an extent that 'substantially prejudice[s]' the complaining party. At a minimum, a discovery decision must be sufficiently egregious that the [superior] court is able to identify specifically what the injustice is and how the injustice can be remedied.

Hicks v. UBS Fin. Servs., Inc., 226 P.3d 762, 771 (Utah Ct. App. 2010). The Alaska Supreme Court, continuing to follow its standard of judicial review under the AK-UAA, held it will review "arbitration management decisions for gross error." *Moore v. Olson*, 351 P.3d 1055, 1071 n.10 (Alaska 2015).

¹⁸⁸ Citing Section 10(a)(4) of the FAA, the Supreme Court held that a party claiming an arbitrator exceeded his powers "bears a heavy burden." *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068 (2013). An arbitral decision "even arguably construing or applying the contract" will be upheld "regardless of a court's view of its (de)merits." *Id.* (citation omitted). However, arbitrators do exceed their powers when they refuse to enforce an arbitration agreement based upon their "own policy choice[s]." *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 667 (2010) (vacating arbitration award refusing to enforce a class action waiver). An arbitration award may not be vacated on this ground even though the arbitrator granted relief on a theory not raised by the prevailing party. *Johnson v. Aleut Corp.*, 307 P.3d 942 (Alaska 2013).

¹⁸⁹ The purpose of this section is to "establish that if there is no valid arbitration agreement, then the award can be vacated; however, the right to challenge an award on this ground is conditioned upon the party who contests the validity of an arbitration

- the arbitration was conducted without proper notice of the initiation of the proceeding so as to prejudice substantially the rights of a party.¹⁹⁰

If an award is vacated on any ground other than where there is no agreement to arbitrate, a court may order a rehearing.¹⁹¹ If an award is vacated because the award is procured by “corruption, fraud or other undue means,” or because of “corruption by an arbitrator,” the rehearing must be held before a new arbitrator.¹⁹² If an award is vacated on any other ground, the new hearing may be held before the arbitrator who made the award or the arbitrator’s successor.¹⁹³ Upon rehearing, an award must be entered within the same time as the initial award.¹⁹⁴

An important related issue is the subject of a United States Supreme Court decision involving federal arbitration law. In *Hall Street Associates, LLC v. Mattel, Inc.*¹⁹⁵ the United States Supreme Court held the grounds for judicial review of arbitration awards under the FAA are exclusive. The Supreme Court found unenforceable an arbitration agreement which provided that any arbitration award could be reviewed for errors of law or lack of substantial evidence to support any findings of fact. The decision in *Hall Street Associates* has called into question whether nonstatutory grounds for judicial review of arbitration awards remain possible under the FAA. The federal courts of appeal are split on the question of whether the common law doctrine of manifest disregard of the law remains viable after the decision in *Hall Street Associates*.¹⁹⁶

agreement raising this objection no later than the beginning of the arbitration hearing.” RUA § 23 cmt. 2. This basis for vacating an arbitration award is not contrary to the well-established doctrine that nonsignatories to arbitration agreements, may, under certain circumstances, be able to compel arbitration or may be compelled to arbitrate. *E.g.*, *Kong v. Allied Prof'l Ins. Co.*, 750 F.3d 1295 (11th Cir. 2014); *Crawford Prof'l Drugs Inc. v. CVS Caremark Corp.*, 748 F.3d 249 (5th 2014).

¹⁹⁰ This ground for vacating an arbitration award is not in the UAA.

¹⁹¹ RUA § 23(c). UAA § 12(c).

¹⁹² RUA § 23(c); *see* UAA § 12(c).

¹⁹³ RUA § 23(c); UAA § 12(c).

¹⁹⁴ RUA § 23(c); UAA § 12(c).

¹⁹⁵ 552 U.S. 576 (2008).

¹⁹⁶ The First, Fifth, Seventh, Eighth and Eleventh Circuits have held that “manifest disregard” is no longer viable. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 660 F.3d 281 (7th Cir. 2011); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010); *Medicine Shoppe Intern., Inc. v. Turner Inv., Inc.*, 614 F.3d 485, 489 (8th Cir.

The Comments to the RUAA offer insight into the thinking of the Drafting Committee on this issue. The Drafting Committee specifically declined to include manifest disregard of the law as a basis for judicial review as well as another nonstatutory ground for judicial review—where an award violates public policy.¹⁹⁷ Although the RUAA does not expressly provide these nonstatutory grounds may be used to vacate an arbitration award, according to the Drafting Committee, “[b]ecause these bases for vacating arbitral awards have traditionally been nonstatutory, courts may still use these standards in appropriate cases.”¹⁹⁸

A matter of great debate among the Drafting Committee members concerned whether to expressly include in the RUAA a provision permitting a court to vacate an award on grounds the parties themselves negotiated, like the provisions which were the subject of the decision in *Hall Street Associates*.¹⁹⁹ Although specific language

2010); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); *Ramos-Santiago v. UPS*, 524 F.3d 120 (1st Cir. 2008). The Second, Fourth, Sixth, Ninth and Tenth Circuits have continued to use the manifest disregard standard. *Wachovia Sec., LLC v. Brand*, 671 F.3d 472 (4th Cir. 2012); *Biller v. Toyota Motor Corp.*, 668 F.3d 655 (9th Cir. 2012); *Jock v. Sterling Jewelers*, 646 F.3d 113, 121-22 (2d Cir. 2011); *Lynch v. Whitney*, 419 Fed. Appx. 826 (10th Cir. 2011); *Coffee Beanery Ltd. v. WW, LLC.*, 300 F. App'x 415, 419 (6th Cir. 2008). In *Whitehead v. Pullman Group, LLC*, 811 F.3d 116, 120 (3d Cir. 2016), the Third Circuit declined to decide whether the manifest disregard doctrine survived the decision in *Hall Street Associates*, but if it did, according to the court, it requires more than legal error; the arbitrator's award “must fly in the face of clearly established legal precedent.” (citation omitted).

¹⁹⁷ RUAA § 23 cmt. C(5). Because the public policy ground for vacating an arbitration award existed in the District of Columbia before its adoption of the RUAA, the District of Columbia Court of Appeals held the doctrine remains alive in the District. *A1 Team USA Holdings, LLC v. Bingham McCutchen LLP*, 998 A.2d 320, 327 (D.C. 2010). The DC-RUAA includes a provision different than the RUAA. It provides an award may be vacated “on other reasonable ground[s].” *Id.* The court in *A1 Team USA Holdings* held this provision did not authorize “merits” review of an arbitration award. *Id.* at 326. The Nevada Supreme Court has held the NV-RUAA permits judicial review based on nonstatutory grounds, such as manifest disregard of the law, or where an award is arbitrary, capricious or unsupported by the agreement. *Bohlmann v. Byron John Printz & Ash, Inc.*, 96 P.3d 1155, 1157 (Nev. 2004); see *Westgate Resorts, Ltd. v. Adel*, at *5 (permitting vacatur under the doctrine of manifest disregard of the law).

¹⁹⁸ Heinsz, *supra* note 2, at 35.

¹⁹⁹ RUAA § 23 cmt. B; see Heinsz, *supra* note 2, at 27–30.

No single issue consumed more of the Drafting Committee's time and energies than the question of whether section 23 of the RUAA should incorporate a provision expressly permitting parties to contractually “opt-in” to either judicial or appellate arbitral review of arbitration awards for errors of law, fact, or any other grounds not prohibited by applicable law.

was omitted from the RUAA to enable this, the Drafters contemplated that a so-called “opt-in” provision would be permissible where authorized under applicable law. The Comments provide:

This decision not to include in the RUAA a statutory sanction of expanded judicial review of the “opt-in” device effectively leaves the issue of the legal propriety of this means for securing review of awards to the developing case law under the FAA and state arbitration statutes. Consequently, parties remain free to agree to contractual provisions for judicial review of challenged awards, on whatever grounds and based on whatever standards they deem appropriate until the courts finally determine the propriety of such clauses.²⁰⁰

The Drafting Committee did not foreclose completely the availability of an opt-in provision, or whether the nonstatutory grounds of vacatur (e.g., manifest disregard of the law, violation of public policy) are available to review arbitration awards.

XVIII. MODIFICATION OR CORRECTION OF AN AWARD

In a provision virtually identical to the UAA, the RUAA permits a party to ask a court to modify or correct an award within ninety days of receiving notice of the award or within ninety days of receiving notice of a modified or corrected award.²⁰¹ A court must correct or modify an award where (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person or thing or property referred, (2) the arbitrator made an award on a claim not submitted and the award may be corrected without affecting the merits of the decision, or (3) the award is imperfect in a matter of form not affecting the merits of the decision. If a motion under this section is granted, the court “shall” modify or correct the award, and,

Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 84 (2001).

²⁰⁰ RUAA § 23 cmt. B(5). “As the Official Comments make clear, however, the decision not to include an opt-in section in the RUAA was not intended to prohibit parties from agreeing to such review where appropriate.” Heinsz, *supra* note 2, at 30. In *Chang v. Siu*, 323 P.3d 735 (Ariz. Ct. App. 2014), the Arizona Court of Appeals held, without deciding whether the AZ-RUAA permitted expanded judicial review of arbitration awards, the “mere reference” in the arbitration agreement of a “right to appeal” to the court of appeals did not establish that the parties agreed to expand the scope of judicial review.

²⁰¹ RUAA § 24(a); UAA § 13.

unless a motion to vacate the award is pending, confirm the award as modified or corrected.²⁰² A motion to modify or correct an award may be joined with a motion to vacate the award.²⁰³

XIX. JUDGMENT ON AWARD

Upon granting an order vacating an award without directing a rehearing, confirming an award, or modifying or correcting an award, the court must enter a judgment accordingly.²⁰⁴ In such a proceeding,²⁰⁵ as well as in “subsequent judicial proceedings,”²⁰⁶ a court may allow “reasonable costs.” Furthermore, in the event of a contested proceeding, the court may confirm an award, vacate an award, modify or correct an award, or grant the prevailing party reasonable attorneys’ fees and other reasonable expenses where an award is vacated, without a rehearing or modification or correction.²⁰⁷ The purpose of this section is to promote the “statutory policy of finality of arbitration awards,” because the “[p]otential liability for the opposing parties’ post-award litigation expenditures will tend to discourage all but the most meritorious challenges of arbitration awards.”²⁰⁸

²⁰² *Id.* § 24(b). A North Carolina appellate court held this section does not permit a trial court to modify an award to include prejudgment interest if not provided for in the arbitration award. *Blanton v. Isenhower*, 674 S.E.2d 694 (N.C. Ct. App. 2009).

²⁰³ RUAA § 24(c).

²⁰⁴ *Id.* § 25(a).

²⁰⁵ *Id.* 25(b). A similar provision exists under UAA section 14.

²⁰⁶ *Id.*

²⁰⁷ *Id.* § 25(c). The right to recover attorneys’ fees in connection with proceedings in which an award is challenged was included in the RUAA by the Drafting Committee to discourage “unwarranted assaults on arbitral determinations.” Heinsz, *supra* note 2, at 36. [The Drafting Committee] meant for a court to use its discretion . . . to take into account equitable considerations. Where the appropriateness of an arbitrator’s decision is a close question or the public interest is enhanced by making the law clearer in the area of vacatur, a court should not hesitate to withhold attorney’s fees and other costs if that would better serve the interests of justice.

Id. at 37. “The right to recover post-award litigation expenses does not apply if a party’s resistance to the award is entirely passive” RUAA § 25 cmt. 4. Interpreting the similar provision in the HI-RUAA, that state’s intermediate appellate court held the right to recover attorneys’ fees did not apply in a judicial proceeding to enforce a judgment. *United Pub. Workers Local 646 v. City & Cnty. of Honolulu*, 194 P.3d 1163, 1170 (Haw. Ct. App. 2008).

²⁰⁸ RUAA § 25 cmt. 3.

XX. JURISDICTION

Any court having jurisdiction over the dispute and the parties may enforce an agreement to arbitrate.²⁰⁹ On the other hand, where the parties' arbitration agreement provides the arbitration is to occur, that state's courts have exclusive jurisdiction to enter judgment on an award.²¹⁰ In other words, the location of the arbitration determines if a court has jurisdiction to confirm an arbitration award.²¹¹ The purpose of this latter provision is to "prevent forum-shopping in confirmation proceedings and to allow party autonomy in the choice of location of the arbitration and its subsequent confirmation proceedings."²¹²

XXI. VENUE

Motions made under the RUAA seeking judicial relief must be made in the court of the county where the agreement to arbitrate specifies the arbitration is to be held or where the hearing actually has been held.²¹³ If a location is not specified in the arbitration agreement or if the arbitration has not been held, venue is proper in the trial court of any county in which an adverse party resides or has a place of business. If the adverse party does not reside in the state or does not have a place of business in the state, venue is proper in any county.²¹⁴ Unless a court directs otherwise, all subsequent motions must be made in the court hearing the initial motion.

²⁰⁹ *Id.* § 26(a). "This provision intends to prevent a party, particularly one with superior bargaining power, from requiring the other party to determine the enforceability of an arbitration agreement only in a distant forum." Heinsz, *supra* note 2, at 51. Any state with jurisdiction over the dispute and the parties may enforce an agreement to arbitrate. RUAA § 26 cmt. 2. Where there is an independent basis of federal court jurisdiction, a federal court may enforce an agreement to arbitrate. *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 918–19 (9th Cir. 2009).

²¹⁰ RUAA § 26(b).

²¹¹ Even though this section uses the word "judgment," it is intended to apply to the confirmation of an award. RUAA § 26 cmt. 3.

²¹² *Id.*

²¹³ RUAA § 27. The venue provision is intended to give "priority to the county in which the arbitration hearing was held." RUAA § 27 cmt. 1. The venue provision in the UAA is section 18.

²¹⁴ RUAA § 27.

XXII. APPEALS FROM ARBITRATION AWARDS

The manner of taking an appeal under the RUAA is the same “as from an order or a judgment in a civil action.”²¹⁵ However, there are only certain rulings in arbitration from which an appeal may be taken. They are:

- an order denying an application to compel arbitration;²¹⁶
- an order granting an application to stay arbitration;²¹⁷
- an order confirming or denying confirmation of an award;²¹⁸
- an order modifying or correcting an award;²¹⁹

²¹⁵ *Id.* § 27(b). The appeal provisions in the UAA are similar to the RUAA. UAA § 19.

²¹⁶ *Id.* § 28(a)(1). Under the DC-RUAA, appeals may be taken from orders denying or granting a motion to compel arbitration. *Biotechpharma, LLC v. Ludwig & Robinson*, 98 A.3d 986 (D.C. 2014); *see County of Hawaii v. UniDev LLC*, 301 P.3d 588 (Haw. 2013) (the enumerated grounds for appeal in the HI-RUAA are not exclusive and appeals may be taken from an order compelling arbitration). In a case under the AZ-UAA, the Arizona Supreme Court created a unique procedure to permit judicial review of trial court rulings compelling arbitration. *So. Cal. Edison Co. v. Peabody Western Coal Co.*, 977 P.2d 769 (Ariz. 1999):

An order compelling arbitration is not a final judgment and is therefore not appealable A party may, however request that the trial court judge enter a final order or judgment under Rule 54(b) If the trial judge makes such an order it is appealable. If the trial judge refuses . . . the aggrieved party may challenge that decision by special action [Arizona’s procedure permitting interlocutory appeals]. If the appellate court determines the trial court abused [its] discretion in refusing to include language of finality, the court should accept jurisdiction and consider the merits of the arbitrability issue.

In *Andrew v. Am. Import Center*, 110 A.3d 626, 629 (D.C. 2015), the court considered whether by permitting appeals from an order granting a motion to compel arbitration, “the RUAA violates § 602(a)(4) of the Home Rule Act by impermissibly expanding this court’s jurisdiction.” The court held the granting of a motion to compel arbitration has the practical effect of an injunction for which an interlocutory appeal is permitted. The court’s decision was heavily influenced by its understanding of the growth of arbitration in consumer contracts. “[W]e are satisfied that the current and frequent inclusion of arbitration clauses in consumer contracts of adhesion justifies our conclusion that a consumer compelled to arbitrate with a commercial entity pursuant to such a clause suffers significant injury . . . such that an order compelling arbitration in this context operates as an order granting an injunction and necessitates our immediate, interlocutory review.” *Id.* at 636.

²¹⁷ *Id.* § 29(a)(2).

²¹⁸ *Id.* § 29(a)(3). Because the RUAA permits a court to deny confirmation of an award, vacate the award and direct a hearing, *id.* § 23(c), a question arises whether such orders are appealable. The Supreme Court of Nevada has held that because such orders do not “bring an element of finality to the arbitration process,” they are not appealable. *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 204 P.3d 1262, 1266 (Nev. 2009).

- an order vacating an award without directing a rehearing;²²⁰ or
- any final judgment from a proceeding under the RUAA.²²¹

XXIII. CONCLUSION

The law of arbitration has changed dramatically since the promulgation of the UAA in 1955 and its adoption throughout the United States. The promulgation of the RUAA in 2000 and its subsequent adoption in eighteen states and the District of Columbia is bringing greater uniformity to the law of arbitration. As arbitration law continues to become more uniform throughout the country, lawyers, and their clients, will benefit knowing that arbitration procedures will be the same, or similar, wherever, and whenever, a dispute subject to arbitration arises.

²¹⁹ RUAA § 28(a)(4).

²²⁰ *Id.* § (a)(5). An order denying confirmation of an award and also vacating the award while directing a rehearing is not appealable under the UT-RUAA. *Westgate Resorts, LTD v. Consumer Protection Group, LLC*, 289 P.3d 420 (Utah 2012).

²²¹ *Id.* § (a)(6).

