

**Arizona Adopts the Revised Uniform Arbitration Act  
Arizona State Law Journal, Volume 43, page 481**

**2011 Supplement**

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ARBITRABILITY OF DISPUTES

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

In footnote 61 there is discussion of the separability doctrine. Depending whether the contract containing an arbitration provision is challenged or whether the arbitration agreement is challenged, the issue will be decided by either an arbitrator or a judge. In *WB, The Building Co., LLC v. El Destino LP*, 257 P.3d 1182 (Ariz. Ct. App. 2011), the court held that a party does not have to challenge an arbitration agreement on grounds distinct from its challenge to the contract and may challenge both the arbitration agreement and the contract on similar grounds. So long as the arbitration agreement itself is separate and distinctly challenged, the resolution of the issue is determined by the court. In this case the court also upheld the trial court's ruling that an arbitration agreement was unenforceable because the contractor had not complied with the applicable licensing statutes and therefore could not enter into an enforceable agreement.

Citing to the Comments of the Revised Uniform Arbitration Act, the Washington Court of Appeals held that an agreement to nonbinding arbitration was not covered by Washington's adoption of the Revised Uniform Arbitration Act. *Rimov v. Schultz*, 253 P.3d 462 (Wash. Ct. App. 2011).

NONWAIVABLE PROVISIONS

In *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 214 P.3d 954 (Wash. 2009), the court of appeals held that under Washington's adoption of the Revised Uniform Arbitration Act, parties could not by agreement waive the right to seek judicial review of an arbitration award. The Supreme Court of Washington affirmed the decision but chose to do so based on

the prior version of the Washington's arbitration act. In a footnote, however, the court observed that the RUAA makes the "prohibition on waiver or variation of judicial review explicit." *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 246 P.3d 785, 787 n.1 (Wash. 2011). The comparable provision in Arizona's adoption of the Revised Uniform Arbitration Act (the AZ-RUAA") is A.R.S. § 12-3004(C)

#### INTERIM REMEDIES

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

#### CONSOLIDATION

A ruling by a trial court consolidating two arbitrations was upheld in *Cummings v. Budget Tank Removal & Env'tl. Servs., LLC*. 260 P.3d 220 (Wash. Ct. App.). The court held that because the arbitration statute makes consolidation discretionary, the decision to consolidate arbitrations is reviewed for an abuse of discretion. In applying Washington's arbitration law to the facts of the case, the court made several observations. The requirement that the separate arbitrations arise from related transactions "ensures that the claims involved in the proceedings are sufficiently similar that consolidation will lead to an efficient resolution." *Id.* at 225. The requirement that there be common questions of law or fact does not mean that "identical facts" may

possibly be decided differently. The court described this as to “narrow [a] reading” of the statute. *Id.* at 226. The comparable provision in the AZ-RUAA is A.R.S. § 12-3010.

#### CONFIRMATION, VACATUR AND MODIFICATION OF THE AWARD

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

In *Low v. Minichino*, 2011 WL 4511666, \*10 (Haw. Ct. App. Sept. 29, 2011), the court set forth a three-part test to determine when an arbitration award must be vacated where it is procured by fraud. “First, the movant must establish fraud by clear and convincing evidence. Second, the fraud must not have been discoverable, upon the exercise of due diligence, prior to or during the arbitration. Third, the movant must demonstrate that the fraud had a material effect on a dispositive issue in the arbitration.” The comparable provision in the AZ-RUAA” is A.R.S. § 12-3023(A)(1).

In *Ruiz v. City of North Las Vegas*, 255 P.3d 216 (Nev. 2011), the court held that in an arbitration between a union and the city, a member of the union was not “party” who was permitted to make a motion to vacate an arbitration award. The comparable provision in the AZ-RUAA is A.R.S. § 12-3023(A).

In *James Valley Grain, LLC v. David*, 802 N.W.2d 158 (N.D. 2011), the court held that the filing of a motion to confirm an award does not extend the 90-day deadline in which to challenge an arbitration award. The comparable provision in the AZ-RUAA is A.R.S. § 12-3023(B).

#### REMEDIES, FEES AND EXPENSES OF ARBITRATION

Interpreting the AZ-UAA, the court in *WB, The Building Co., LLC v. El Destino LP*, 257 P.3d 1182 (Ariz. Ct. App. 2011) held that because an arbitration is not an “action” under A.R.S. § 12-341.01, fees may not be awarded for services performed in an arbitration under that statute. Citing *City of Cottonwood v. James I. Fann Contracting, Inc.*, 877 P.2d 284 (Ariz. Ct. App. 1994), the court held attorneys’ fees incurred in an arbitration may be awarded when the fees are intertwined with other fees that may be recovered pursuant to A.R.S. § 12-341.01.