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Recent Developments: The Uniform Arbitration Act

Dawn Chapman

Carol Creamer

Cynthia Davenport

Tim Gorman

Recent Developments: The Uniform Arbitration Act[1]

I. INTRODUCTION

Recent Developments: The Uniform Arbitration Act, a project prepared annually since 1983,[2] is a survey of recent court decisions that interpret state versions of the Uniform Arbitration Act ("U.A.A.").[3] Currently, thirty-four states and the District of Columbia have adopted arbitration statutes patterned after the U.A.A.[4] The purpose of this project is to promote uniformity in interpretation of the U.A.A. by explaining the underlying policies and rationales of recent court decisions.[5]

II. SECTION 1: VALIDITY OF ARBITRATION AGREEMENTS

Section 1 of the U.A.A. provides that:

> [a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.[6]

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1. This project was prepared by Journal of Dispute Resolution Candidates under the direction of Associate Editor in Chief John Moore and Note and Comment Editor Laura Kintz.

2. *See Recent Developments: The Uniform Arbitration Act*, 1993 J. DISP. RESOL. 397; *Recent Developments: The Uniform Arbitration Act*, 1992 J. DISP. RESOL. 411; *Recent Developments: The Uniform Arbitration Act*, 1991 J. DISP. RESOL. 417; *Recent Developments: The Uniform Arbitration Act*, 1990 J. DISP. RESOL. 471; *Recent Developments: The Uniform Arbitration Act*, 1989 J. DISP. RESOL. 237; *Recent Developments: The Uniform Arbitration Act*, 1988 J. DISP. RESOL. 247; *Recent Developments: The Uniform Arbitration Act*, 1987 MO. J. DISP. RESOL. 177; *Recent Developments: The Uniform Arbitration Act*, 1986 MO. J. DISP. RESOL. 169; *Recent Developments: The Uniform Arbitration Act*, 1985 MO. J. DISP. RESOL. 173; *Recent Developments: The Uniform Arbitration Act*, 1984 MO. J. DISP. RESOL. 207; *Recent Developments: The Uniform Arbitration Act*, 48 MO. L. REV. 137 (1983).

3. UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 5 (1985) [hereinafter "U.A.A."].

4. Jurisdictions which have adopted arbitration statutes patterned after the U.A.A. are Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and Wyoming.

5. This Article surveys cases decided between September 1992 and September 1993.

6. U.A.A. § 1.

A. Enforceability

Under Section 1, courts must determine whether "such grounds as exist at law or in equity" require revocation of an agreement to arbitrate.[7] If such grounds do not exist, the agreement is enforceable and the parties must submit their dispute to arbitration. Recent arbitration cases include a variety of situations in which courts have considered the enforceability of arbitration agreements.

In *Anderson County v. Architectural Techniques Corp.*,[8] the Tennessee Court of Appeals held the parties' arbitration agreement to be enforceable.[9] The court stated that if a contract containing an arbitration clause is unenforceable, neither party may utilize the arbitration clause.[10] However, the court disagreed with the County's contention that failure to list specific projects in the contract rendered it insufficiently definite to be enforced.[11]

The Texas Court of Appeals also found an enforceable arbitration agreement in *Hearthshire Braeswood Plaza Limited Partnership v. Bill Kelly Co.*,[12] Hearthshire and Kelly entered into a contract that contained an arbitration provision.[13] Kelly argued the arbitration provision was unenforceable because Kelly had signed the contract but Hearthshire had not.[14] The court disagreed, explaining that absent a showing of special circumstances, a party is bound by the contact he has signed.[15]

When considering arbitration agreements in domestic disputes, courts have often held them to be enforceable. In *Bandas v. Bandas*,[16] a Virginia court looked to other jurisdictions for guidance and declared that arbitration agreements may be used in divorce proceedings.[17] The court stated that such agreements are binding and should be subject to the same standard of review as any other contract case.[18]

In *Miller v. Miller*,[19] a mother appealed a Pennsylvania trial court's determination that an agreement to arbitrate a child custody dispute as part of a

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7. *Id.*
8. No. 03A01-9303-CH-00110, 1993 WL 346473 (Tenn. Ct. App. 1993).
9. *Id.* at *5.
10. *Id.* at *4.
11. *Id.*
12. 849 S.W.2d 380 (Tex. Ct. App. 1993).
13. *Id.* at 382-83.
14. *Id.* at 392.
15. *Id.* The court explained further that a contract does not have to be signed by both parties to be valid. *Id.*
16. 430 S.E.2d 706 (Va. Ct. App. 1993).
17. *Id.* at 708.
18. *Id.* Setting forth this standard of review, the court stated that "arbitration agreements should be upheld unless the agreement is against public policy or unconscionable, which are two grounds to set aside a contract in equity." *Id.*
19. 620 A. 2d 1161 (Pa. Super. Ct. 1993).

marital settlement agreement was void as against public policy.[20] The Superior Court of Pennsylvania disagreed with the trial court and stated that parties should be able to settle their domestic disputes, including those involving custody, through arbitration if they choose to do so.[21] However, the Superior Court emphasized that an arbitration award regarding custody shall not be binding on a court if the award is challenged as not being in the best interests of the child.[22]

In *Freeman v. Prudential Securities, Inc.*,[23] the Oklahoma Court of Appeals held an arbitration provision in an investment contract signed by a conservator to be unenforceable.[24] The appellee in *Freeman* filed suit alleging that the prior conservator of her son's estate was persuaded to enter into an investment contract through material misrepresentations and omissions of fact.[25] Prudential answered, demanding arbitration pursuant to the arbitration provision of the investment contract.[26] The *Freeman* Court held that the conservator was without authority to enter into the contract, and therefore the arbitration provision was unenforceable.[27]

1. Adhesion Contracts

Courts are less likely to enforce an agreement to arbitrate when the agreement is part of an adhesion contract.[28] In *Broemmer v. Abortion Services of Phoenix, Ltd.*,[29] the plaintiff signed a standardized "Agreement to Arbitrate" form prior to undergoing a clinical abortion.[30] The plaintiff suffered a punctured uterus as a result of the procedure, and subsequently filed a malpractice claim.[31] The defendant motioned to dismiss the claim, asserting that arbitration was required pursuant to the contract.[32] The Arizona Supreme Court found the agreement to be an adhesion contract, and considered the reasonable expectation of the parties in determining whether the agreement to arbitrate was binding.[33] Because the

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20. *Id.* at 1162.
21. *Id.* at 1163-64.
22. *Id.* at 1164.
23. Freeman v. Prudential Securities, Inc., 856 P.2d 592 (Okla. Ct. App. 1993).
24. *Id.* at 594.
25. *Id.* at 593.
26. *Id.*
27. *Id.* at 594.
28. A contract of adhesion is a standardized form "offered to consumers of goods and services on essentially a take it or leave it basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract." Broemmer v. Abortion Services of Phoenix, Ltd., 840 P. 2d 1013, 1015 (Ariz. 1992) (citing Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d 345, 356 (Cal. Ct. App. 1976)).
29. 840 P. 2d 1013 (Ariz. 1992).
30. *Id.* at 1014.
31. *Id.* at 1015.
32. *Id.*
33. *Id.* at 1016.

clinic did not attempt to explain the contract to the plaintiff, who was under emotional stress and who had only a high school education and no experience in commercial matters, the court held that the arbitration agreement was unenforceable.[34]

The North Carolina Court of Appeals also refused to enforce an arbitration clause in an adhesion contract in *Routh v. Snap-On Tools Corp.*[35] The court stated that an agreement to arbitrate should be independently negotiated if it is included in a contract containing other provisions.[36] The requirement of independent negotiation of an arbitration agreement "militates against its inclusion in contracts of adhesion."[37] The court based its decision on the finding that Snap-On never discussed the arbitration provision with Routh and that Routh believed when he signed the contract he was only agreeing to a repayment schedule of his debt to Snap-On.[38]

2. *Right of Access to Courts*

Another issue relating to enforceability of an arbitration agreement is whether the agreement unlawfully restricts the right of access to courts. In *Value Car Sales, Inc. v. Bouton*,[39] the trial court declared the agreement unlawfully restrictive and refused to enforce arbitration.[40] The Florida Court of Appeals reversed, holding that the parties waived their right of access to the courts by agreeing to arbitration in lieu of litigation.[41]

In *D. Wilson Construction Co., Inc., v. McAllen Independent School District*,[42] the Texas Court of Appeals also held that arbitration clauses do not unlawfully restrict the right of access to courts.[43] The court determined that in entering into the arbitration agreement, the parties waived their rights of access to the courts.[44] The court also relied on the strong presumption in favor of arbitration in reaching its decision.[45]

B. Scope of the Agreement

In determining whether a particular dispute is within the scope of the arbitration clause and is therefore subject to arbitration, courts generally favor

34. *Id.* at 1017.
35. 423 S.E. 2d 791 (N.C. Ct. App. 1992).
36. *Id.* at 794 (citing Blow v. Shaughnessy, 313 S.E. 2d 868, 876-877 (N.C. Ct. App. 1984)).
37. *Id.*
38. *Id.* at 795.
39. 608 So. 2d 860 (Fla. Dist. Ct. App. 1992).
40. *Id.* at 861.
41. *Id.*
42. 848 S.W. 2d 226 (Tex. Ct. App. 1992).
43. *Id.* at 231.
44. *Id.*
45. *Id.* (citing Lehman Hutton, Inc. v. Tucker, 806 S.W. 2d 914, 919 (Tex. Ct. App. 1991)).

arbitration. In *United Engineers & Constructors, Inc. v. Imo Industries, Inc.*,[46] the parties entered into a contract that contained a broad arbitration clause.[47] United Engineers sought to enjoin the defendants from proceeding to arbitration on the issue of consequential damages, claiming that consequential damages were specifically excluded by a limited liability clause in the contract.[48] The court stated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."[49] The court further asserted that the presumption in favor of arbitration is even stronger in light of the broad arbitration provision to which the parties agreed.[50] Refusing to issue the injunction, the court declared that the limited liability clause did not restrict the authority of the arbitrators to decide the dispute.[51]

C. Modifications of State Statute

Several states have modified Section 1 of the U.A.A., which affects the validity of some arbitration agreements. Among the modifications are the addition of a notice requirement and the exclusion of certain types of contracts from U.A.A. application.

1. Notice Requirements

In *Timms v. Greene*,[52] the plaintiff filed a negligence action seeking damages for injuries she claimed occurred while she was a resident at the defendants' nursing home.[53] The defendants motioned to dismiss, claiming arbitration was required pursuant to the contract plaintiff signed upon becoming a resident.[54] The court refused to enforce the arbitration agreement because the contract did not comply with the notice requirements of the South Carolina Uniform Arbitration Act.[55] Further, the court rejected the defendant's argument

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46. Civ. A. No. 12611, 1993 WL 43016 (Del. Ch. 1993).

47. The clause stated in part, "All claims, disputes and other matters in question arising out of, or relating to, this Contract or the interpretation or breach thereof, shall be decided by arbitration . . . ." *Id.* at *2.

48. *Id.* at *4.

49. *Id.* at *5 (citing Moses Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983)).

50. *Id.* at *5.

51. *Id.* at *7.

52. 427 S.E. 2d 642 (S.C. 1993).

53. *Id.* at 642.

54. *Id.*

55. *Id.* at 642-43. The notice requirements of the South Carolina Uniform Arbitration act as contained in Section 15-48-10 (Supp. 1991) is as follows:

(a). . . Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration. *Id.* at 643.

that interstate commerce was involved, which might have rendered the agreement enforceable under the Federal Arbitration Act.[56]

In another South Carolina case, *Osteen v. T.E. Cuttino Construction Co.*,[57] the court again determined that an arbitration agreement did not comply with the state's notice requirement.[58] However, defendant Cuttino asserted that the Federal Arbitration Act, which does not contain similar notice requirements, applied, and therefore, enforcement of the agreement was required.[59] The court explained that the issue of whether state or federal law governs an arbitration agreement is determined by the intention of the parties.[60] The court further stated that if an agreement is ambiguous and is capable of an interpretation that will make it valid, it will be given that interpretation.[61] Examining a choice of law provision in the contract, the court held that the parties intended for arbitrators to apply the substantive law of South Carolina to determine the validity and construction of the contract.[62] Therefore, the choice of law provision did not apply to the arbitration proceedings, and the agreement to arbitrate was enforceable under the Federal Arbitration Act.[63]

2. *Particular Contracts*

Some states have modified their versions of the Uniform Arbitration Act to render them inapplicable to certain types of contracts. For example, the Oklahoma Uniform Arbitration Act states that the Act does not apply to "contracts with reference to insurance except for those contracts between insurance companies."[64] In *Cannon v. Lane*,[65] the court held that a contract between the State of Oklahoma and a health maintenance organization was a contract with reference to insurance which was expressly excluded from application of the state's U.A.A.[66] The court then applied common law principles to the agreement, and held it unenforceable as contrary to public policy.[67]

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56. *Id.* at 642-43; *see also* American Physicians Service Group, Inc. v. Port Lavaca Clinic Associates, 843 S.W. 2d 675 (Tex. Ct. App. 1992) (holding that the arbitration agreement did not comply with the notice requirements of the Texas General Arbitration Act).

57. 434 S.E. 2d 281 (S.C. 1993).

58. *Id.* at 282-83.

59. *Id.* at 283. Cuttino asserted that the Federal Arbitration Act ("F.A.A.") should apply since the contract involved interstate commerce. The court stated that the F.A.A. does not automatically apply to contracts involving interstate commerce, but rather the intent of the parties to be bound by state or federal law governs. *Id.*

60. *Id.*

61. *Id.* at 284.

62. *Id.*

63. *Id.*

64. OKLA. STAT. ANN. tit. 15, § 802(A) (West 1991).

65. 867 P.2d. 1235 (Okla. 1993).

66. *Id.* at 1237.

67. *Id.* at 1239.

III. SECTION 2: PROCEEDINGS TO COMPEL OR STAY ARBITRATION

A. Agreement Between the Parties

Section 2 of the U.A.A. requires a court to compel arbitration on the motion of one of the parties, unless the other party opposes the motion by denying the existence of an arbitration agreement.[68] Upon this opposition the court must make a determination of the existence of the agreement.[69] The court's decision should follow a two-step process: (1) the court must determine if there is in fact an agreement to arbitrate, and (2) the court must determine whether the dispute for which a party sought to compel arbitration is covered under the arbitration clause in the contract.[70]

In *Barter Exchange, Inc. of Chicago v. Barter Exchange, Inc.*,[71] the First District Appellate Court of Illinois held that the determination of the existence of an arbitration agreement must be made solely on the face of the agreement.[72] In interpreting the agreement, the court must not consider any factors extraneous to the record, such as the performance of the parties subsequent to signing the contract.[73]

Another Illinois court decided in *Cusamano v. Norrell Health Care, Inc.*[74] that in order for the court to grant a motion to stay the proceedings, the party seeking to avoid the arbitration must specifically allege that its assent to the arbitration agreement was fraudulently induced.[75] For an arbitration clause to be declared invalid, there must be more than a simple allegation that there was no contract.[76] The court reasoned that such an allegation is too general and feared that allowing such claims would open the floodgates, allowing parties to avoid arbitration without just cause.[77] The court stated that to hold otherwise "could effectively end arbitration of contractual disputes in Illinois because almost any plaintiff can find some theory or claim upon which to allege that no contract existed, thereby avoiding arbitration."[78]

An Illinois federal court reached a similar conclusion in *Tyco Laboratories, Inc. v. Dasi Industries, Inc.*[79] The court concluded that if the dispute is aimed at the contract as a whole and not the arbitration agreement specifically, the issue

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68. U.A.A. §2(a).

69. *Id.*

70. Central Bucks School District v. Pennsylvania Labor Relations Board, 629 A.2d 196, 199-200 (Pa. Commw. Ct. 1993).

71. 606 N.E.2d 186 (Ill. App. Ct. 1992).

72. *Id.* at 190.

73. *Id.*

74. 607 N.E.2d 246 (Ill. App. Ct. 1993).

75. *Id.* at 250-51; *see* U.A.A. §2(e).

76. *Id.*

77. *Id.* at 251.

78. *Id.*

79. No. 92C5712, 1993 WL 356929 (N.D. Ill. 1993).

of enforceability is one for the arbitrator rather than the court.[80] As long as the dispute falls within the scope of the agreement to arbitrate, which is clearly the case when the arbitration agreement is unlimited as to the contract, the only issue for the courts to consider is whether the agreement itself existed.[81]

Although the existence of a valid arbitration agreement is central to the court's decision of whether to compel arbitration, the Superior Court of Pennsylvania held in *Langston v. National Media Corp.*[82] that this determination is not necessary to all issues of the case.[83] For example, even without a definitive determination of an arbitration agreement, the trial court still has the authority to grant injunctive relief in an arbitrable dispute.[84] The arbitration issue can be temporarily bypassed and the court need only determine whether the prerequisites for the injunction are themselves justified.[85]

The enforceability of the arbitration agreement between the parties is determined in accordance with normal contract principles.[86] If an agreement to arbitrate is found to exist, the court must enforce it.[87] In *Christy v. Kelly*,[88] Christy opened an investment account and signed an agreement to arbitrate any dispute concerning the account.[89] When there were significant losses from the account, the joint owner sued and moved to compel arbitration.[90] Christy alleged that he had not understood the agreement at the time he signed it.[91] The court held that in the absence of some allegation of fraud or duress, Christy's simple failure to read or understand the arbitration provision did not justify avoiding its enforcement.[92] In doing so, the court stated that judicial economy was not a legitimate reason for nonenforcement of the arbitration provision.[93]

In keeping with traditional contract tenets, the court in *North American Van Lines v. Collyer*[94] held that an agreement should be enforced upon finding that the arbitration clause is valid, the dispute is within the scope of the clause, and the right to arbitrate was not waived.[95] Above all, the parties should be entitled to the benefit of their valid contractual bargain.[96] Although the concept of

80. *Id.* at *7.
81. *Id.* at *6.
82. 617 A.2d 354 (Pa. Super. Ct. 1992).
83. *Id.* at 356.
84. *Id.* at 357.
85. *Id.*
86. North American Van Lines v. Collyer, 616 So.2d 177, 178-79 (Fla. Dist. Ct. App. 1993).
87. U.A.A. §2(a).
88. 497 N.W.2d 194 (Mich. Ct. App. 1992).
89. *Id.* at 195.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. 616 So.2d 177 (Fla. Dist. Ct. App. 1993).
95. *Id.* at 178.
96. *Id.*

arbitration is somewhat new, the court found that traditional common law contract principles apply and that these principles may not be ignored.[97] Therefore, where the agreement is clear and unambiguous, a court is not justified in refusing to enforce the arbitration provision solely because of extraneous factors, such as the financial situation of one of the parties.[98]

The concept of incorporation applies to arbitration agreements as it does in any other contract situation.[99] In *D. Wilson Construction Co.*,[100] a separate document was plainly incorporated into the contract between the parties.[101] The Texas Court of Appeals ruled that one party's failure to read an incorporated document did not invalidate an arbitration agreement contained therein.[102] The court noted that a party who signs a contract is charged with notice of its contents.[103] As long is there is no fraud, duress or some other traditional defense to the contract the incorporated provision is enforceable.[104]

It is fairly well settled that the existence of an arbitration agreement is a question of law to be decided by the courts.[105] Some courts, however, have held that where there is a question as to the existence of an arbitration agreement, the question should be left to the arbitrator. In *Phoenixville Area School District v. Phoenixville Area Education Association*,[106] the Commonwealth Court of Pennsylvania determined that the trial court erred in granting a stay of the proceedings where there was some doubt as to whether the contract could have been interpreted to cover the dispute.[107] In other words, if any uncertainty exists, the clause should be given to the arbitrator to decide whether the dispute is grievable.[108]

Additional persons who were not parties to the original contract containing the arbitration agreement are often involved in contract disputes. In these situations, the parties to the contract can still be compelled to arbitrate.[109] Although arbitration proceedings cannot be compelled against those who were not parties to the arbitration agreement, the Illinois Court of Appeals held in *Jacob v. C & M Video, Inc.*[110] that the disputed claims could be divided to allow partial

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97. *Id.* at 178-79.

98. *Id.* at 178.

99. D. Wilson Construction Co., Inc. v. McAllen Independent School District, 848 S.W. 2d 226, 229 (Tex. Ct. App. 1992).

100. 848 S.W.2d at 226.

101. *Id.* at 230.

102. *Id.*

103. *Id.* (citing Estate of Degley v. Vega, 797 S.W.2d 299, 304 (Tex. App. Ct. 1990)).

104. *D. Wilson Construction Co.*, 848 S.W.2d 226, 230.

105. Azcon Construction Co., Inc. v. Golden Hills Resort Inc. 498 N.W.2d 630, 633 (S.D. 1993) (citing City of Hot Springs v. Gunderson's Inc. 322 N.W.2d 8, 11 (S.D. 1982)).

106. 624 A.2d 1083 (Pa. Commw. Ct. 1993).

107. *Id.* at 1087.

108. *Id.*

109. Jacob v. C & M Video, Inc., 618 N.E.2d 1267, 1271 (Ill. App. Ct. 1993).

110. *Id.*

arbitration in accordance with the original agreement.[111] The court based its decision on the fact that the contract parties had bargained for arbitration, and therefore, their interests are independent in that respect to the interests of the third parties.[112] The court noted that agreements in which the dispute clearly falls within the scope of the agreement are generally enforced despite claims by third parties.[113]

Valid arbitration agreements are also enforced in spite of the pendency in court of an action directly related to the issue sought to be arbitrated. In *Boyce v. St. Paul Property and Liability Insurance Co.*,[114] the Pennsylvania Superior Court fount that the pendency of related actions does not mandate a stay of the arbitration.[115] The court decided that related actions before a trial court had no relevance to the arbitration agreement.[116] Above all, the parties' agreement to arbitrate is the controlling provision.[117]

The Illinois Court of Appeals in *Hwang v. Tyler*[118] held that the trial court's determination of the existence of an arbitration agreement becomes final and binding if the issue is not appealed.[119] Such a ruling is deemed to be "adverse" to that party and to have it reviewed, an appeal must be made on this issue.[120] If there is no appeal, then the issue is no longer covered under Section 2.[121] To have the arbitrator's award vacated, the parties must follow the procedures laid out in U.A.A. Section 12.[122]

B. Waiver

The rights of parties under Section 2 of the U.A.A. can be waived by any or all of the parties.[123] The question of whether or not a waiver has occurred is for the court to decide, and the court's jurisdiction in the matter may not be contracted away by the parties.[124] The commencement of arbitration proceedings does not waive the right to stay them, as long as there is a showing of no agreement to

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111. *Id.* at 1271.

112. *Id.* at 1273.

113. *Id.* at 1274 (citing Atkins v. Rustic Woods Partners, 525 N.E.2d 551, 556 (Ill. App. Ct. 1988)).

114. 618 A.2d 962 (Pa. Super. Ct. 1992).

115. *Id.* at 967 (citing Sanitary Sewer Authority v. Dial Associates Construction Group, Inc., 532 A.2d 862, 863 (Pa. Super. Ct. 1987) (referring to UNIFORM ARBITRATION ACT §7304(b) (1955)).

116. *Id.*

117. *Id.*

118. 625 N.E.2d 243, 245 (Ill. App. Ct. 1993).

119. *Id.* at 245.

120. *Id.*; UNIFORM ARBITRATION ACT §12(a)(5) (1955).

121. *Hwang*, 625 N.E.2d at 245.

122. *Id.*

123. U.A.A. § 2.

124. J.F. Hennessy Co., Inc. v. Barlow, No. 9175, 1992 WL 368824 at *2 (Mass. App. Div. 1992) (citing Home Gas Corp. of Mass. v. Walter's of Hadley, Inc., 532 N.E.2d 681 (Mass. 1989)).

arbitrate.[125] In *C & M Video*,[126] the Illinois Court of Appeals noted that waiver is generally not favored and only occurs when a party's actions are inconsistent with the arbitration agreement.[127]

In *Garrell v. Blanton*,[128] the South Carolina Court of Appeals found that participation in arbitration without requesting a stay or objecting to the proceedings waives the right to contest the validity of the arbitration agreement.[129] Seeking a stay from the court is the only way to contest the arbitration proceedings.[130]

The right to compel arbitration can also be waived. The Texas Court of Appeals in *Howell Crude Oil Co. v. Tana Oil & Gas Corp.*[131] held that normal pretrial preparations, such as discovery and other procedures, do not qualify as such a waiver.[132] The court noted that strong public policy considerations favor arbitration.[133] Despite these considerations, the court recognized that arbitration is not warranted in every situation.[134] The court reasoned that as long as a party is open about its intention to seek arbitration proceedings, it should not have to surrender the rights it would otherwise have under the normal litigation process in the hope that the court will indeed compel arbitration.[135] If that was the case, parties would be dissuaded from moving to compel arbitration for fear that if their motion were denied they would be unfairly disadvantaged in subsequent litigation by their lack of preparation.[136]

Similar to pretrial preparations, inaction has not been held to constitute a waiver of arbitration rights.[137] The Arizona Court of Appeals in *Heinig v. Hudman*[138] held that failure to seek a stay of proceedings leading to the first judgment does not bar the right to compel subsequent arbitration proceedings.[139] The court ruled that if no opportunity has been given to determine unresolved issues under the initial arbitration, those issues may be pursued later.[140] However, the right to compel arbitration of the unresolved issues must be separate

125. Hilton Head Resort v. Resort Investment Corp., 429 S.E.2d 459, 462 (S.C. Ct. App. 1993).
126. 618 N.E.2d 1267 (Ill. App. Ct. 1993).
127. *Id.* at 1269 (citing Burnett v. Safeco Insurance Co., 590 N.E.2d 1032, 1041 (Ill. App. Ct. 1992)).
128. 428 S.E.2d 8 (S.C. Ct. App. 1993).
129. *Id.* at 10.
130. U.A.A. § 2.
131. 860 S.W.2d 634 (Tex. Ct. App. 1993).
132. *Id.* at 638.
133. *Id.* at 636 (citing Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. Ct. App. 1992)); Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914, 919 (Tex. Ct. App. 1991)).
134. *Id.* at 638.
135. *Id.*
136. *Id.*
137. Heinig v. Hudman, 865 P.2d 110 (Ariz. Ct. App. 1993).
138. 865 P.2d 110 (Ariz. Ct. App. 1993).
139. *Id.* at 118.
140. *Id.*

from those in the original arbitration or res judicata bars the later action, just as in litigation.[141]

Delays in requesting arbitration are also not an automatic waiver of the right to enforce the arbitration agreement.[142] In determining whether the right to compel arbitration has been waived, the court should consider prejudice to the other party.[143] In *D. Wilson Construction Co.*,[144] the parties spent over a year negotiating their dispute before submitting it to the court.[145] Arbitration was requested within a month of the commencement of the proceedings. Because no evidence showed that the delay prejudiced the other party, the court held that waiver of the right to enforce the agreement did not occur.[146]

IV. SECTION 3: APPOINTMENT OF ARBITRATORS

Under Section 3 of the U.A.A., selection of the arbitrator(s) to hear the dispute is usually controlled by the arbitration agreement.[147] *Ditto v. RE/MAX Preferred Properties*[148] involved a dispute between Ditto and her former employer, RE/MAX.[149] The arbitration agreement provided that the arbitrators were to be current RE/MAX employees selected by a RE/MAX manager.[150] The trial court struck down the provision due to the possibility that potential arbitrators would be biased.[151] After the provision was invalidated, the court was not required to anticipate that the parties' demand a substitute arbitrator by granting a stay of the proceedings until such a request was made.[152] The court held that the trial court could immediately assign another arbitrator and was not required to wait for the parties themselves to decide on a substitute.[153]

V. SECTION 5: HEARING REQUIREMENT

U.A.A. Section 5 contains several procedural requirements that must be followed in arbitration hearings. In *Jaycox v. Ekeson*,[154] the Supreme Court of

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141. *Id.*
142. *D. Wilson Construction Co.*, 848 S.W.2d at 230 (citing Transwestern Pepeline Co. v. Horizon Oil & Gas Co., 809 S.W.2d 589, 592 (Tex. Ct. App. 1991)); USC Corp. v. West, 759 S.W.2d 764, 767 (Tex. Ct. App. 1988)).
143. *Id.*
144. 848 S.W.2d 226.
145. *Id.* at 230.
146. *Id.*
147. U.A.A. § 3.
148. 861 P.2d 1000 (Okla. Ct. App. 1993).
149. *Id.* at 1001.
150. *Id.*
151. *Id.* at 1003.
152. *Id.* at 1004.
153. *Id.*
154. 857 P.2d 35 (N.M. 1993).

New Mexico considered whether or not failure to comply with the procedural requirements is fatal error that renders the hearing invalid. In the case, Jaycox did not receive proper notice of the hearing and was unable to attend.[155] Ekeson asserted that Jaycox would not have been able to attend the hearing even if proper notice had been given.[156] Ekeson maintained that absent a showing of prejudice, the notice error was not harmful, and argued that the award should be valid.[157] The court disagreed, and held that the lack of notice was improper *per se* and that Jaycox was not required to show actual prejudice.[158] The court stated the opportunity to testify and offer contrary evidence are matters of right which cannot be easily discounted.[159]

VI. SECTIONS 9, 12 & 13: CHANGE OF AWARD

Requirements for the modification and vacation of arbitrators' decisions are specified in U.A.A. Section 12 and Section 13. However some procedural guidelines for the filing of such motions are set out in U.A.A. Section 9.[160]

In *Humphreys v. Joe Johnston Law Firm, P.C.*,[161] the Iowa Supreme Court held that the procedure for changing an arbitration award can be controlled by the agreement between the parties.[162] The agreement in *Humphreys* provided that the arbitrator had authority to determine the procedural aspects of the case.[163] Within this authority, the arbitrator was found to have broad discretionary power in decision making.[164] The court ruled that with the grant of such power, the arbitrator was not required to consider an application for modification from one of the parties.[165]

Under Section 9, the parties have 20 days to file with the arbitrator a motion to change the award.[166] The court may disregard the time constraint in a case where proceedings to confirm, modify or vacate an award are pending in the court.[167] In the case of a pending motion, only the court may make submission to change the award; the parties themselves may not apply directly to the

155. *Id.* at 36.
156. *Id.* at 37.
157. *Id.*
158. *Id.*
159. *Id.* at 38.
160. U.A.A. § 9.
161. 491 N.W.2d 513 (Iowa 1992).
162. *Id.* at 517.
163. *Id.*
164. *Id.*
165. *Id.*
166. U.A.A. § 9.
167. Baxter Health Care Corp. v. Harvard Apparatus, Inc., 617 N.E.2d 1018, 1022 (Mass. App. Ct. 1993).

arbitrator.[168] The requirements in Sections 12 and 13 for vacating or modifying the award still apply to the action however.[169]

In procedural as well as substantive aspects, the agreement between the parties is of primary concern. Most power is given to the arbitrator to handle the proceedings, and the court will only interfere where there is no agreement or when absolutely necessary.[170]

VII. SECTION 10: FEES AND EXPENSES OF ARBITRATION

In interpreting Section 10[171] of the U.A.A., courts have agreed that arbitrators are prohibited from awarding attorney's fees unless the agreement to arbitrate specifically says otherwise.[172] In *Lee v. Smith Barney, Harris Upham & Co., Inc.*[173] the panel of arbitrators entered an award ordering the parties to "bear their own costs and expenses, including attorney's fees."[174] Smith sought modification of the award, claiming the arbitrators had no authority to award attorney's fees.[175] The Florida District Court of Appeal affirmed the trial court's modification, focusing on the state's long-established policy of excluding resolution of attorney's fees from authority of the arbitrators.[176]

A North Carolina Court held not only that arbitrators may not grant attorney's fees, but further that the court confirming the award may not add attorney's fees.[177] The decision in *Nucor Corp. v. General Bearing Corp.*[178] set forth policy considerations for disallowing attorney's fees in arbitration proceedings.[179] The court explained that the U.A.A. was intended to encourage efficient and uncomplicated dispute resolution without attorney's fees, which are the major expense of litigation.[180]

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168. *Id.*

169. *Id.*; *see* UNIFORM ARBITRATION ACT §§12, 13 (1955).

170. *Central Bucks School District*, 629 A.2d at 198-99.

171. U.A.A. Section 10 provides: "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct or the arbitration, shall be paid as provided in the award."

172. *See* Nucor Corp. v. General Bearing Corp., 423 S.E. 2d 747 (N.C. 1992); Baxter Health Care Corp. v. Harvard Apparatus, Inc., 617 N.E. 2d 1018 (Mass. Ct. App. 1993).

173. 626 So. 2d 969 (Fla. Dist. Ct. App. 1993).

174. *Id.* at 970.

175. *Id.*

176. *Id.* The court distinguished Pierce v. J.W. Charles-Bush Securities, Inc., 603 So. 2d 625 (Fla. Dist. Ct. App. 1992). In *Pierce*, the court upheld an arbitration award of attorney's fees, but only because the parties stipulated in advance that the issue of attorney's fees would be arbitrable. *Pierce*, 603 So.2d at 971.

177. *Nucor Corp.*, 423 S.E. 2d at 751.

178. *Id.*

179. *Id.*

180. *Id.*

In *Garceau v. Iowa Kemper Insurance Co.*,[181] the plaintiff demanded arbitration when a dispute arose concerning the amount of damages he had suffered.[182] After the panel had awarded damages, the plaintiff sought an order requiring the defendant to pay his arbitrators' fees and costs amounting to several thousand dollars.[183] The defendant argued the insurance policy required the parties to pay their own expenses.[184] The court ordered the defendant to pay the fees and costs, declaring the provision void as against public policy.[185] The court explained that requiring the plaintiff to pay his own expenses would penalize him for choosing arbitration as a method of alternative dispute resolution.[186]

VIII. SECTION 11: CONFIRMATION OF AN AWARD

Pursuant to U.A.A. Section 11, courts are required to confirm arbitration awards upon application of a party unless one of the parties sets forth grounds for vacating or modifying the award.[187] Courts generally confirm an arbitration award unless a party demonstrates one of the grounds for modification or vacation specifically enumerated in Sections 12 and 13 of the U.A.A. For example, in *Fernandez v. Farmers Insurance Company of Arizona*,[188] two automobile accident victims petitioned for modification or correction of an award.[189] The petitioners claimed the award was "imperfect as a matter of form" because the arbitrators used an incorrect method to determine the amount of underinsured motorist benefits they were entitled to receive.[190] The court held that its review of the award was strictly limited, and therefore, confirmed the award.[191] The court explained that if it modified awards based on honest mistakes of the arbitrators then "arbitration would be transformed from a final determination of the controversy into merely the first step in the resolution of a dispute."[192]

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181. 859 P. 2d 243 (Colo. Ct. App. 1993).

182. *Id.* at 244.

183. *Id.*

184. *Id.*

185. *Id.* at 245.

186. *Id.*

187. U.A.A. § 11 provides: "Upon 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 as provided in Sections 12 and 13."

188. 857 P.2d 22 (N.M. 1993).

189. *Id.* at 24.

190. *Id.*

191. *Id.* at 25-26.

192. *Id.* at 26. *See also*, Boyce v. St. Paul Property and Liability Insurance Co., 618 A. 2d 962 (Pa. Super. Ct. 1992). In *Boyce*, the insurance company appealed an order confirming an award, claiming the arbitration award was "contrary to the law." *Boyce*, 618 A.2d at 968. The court declared itself bound by the statutory grounds for modification and vacation of awards and affirmed confirmation of the award. *Id.*

In *South Washington Associates v. Flanagan*[193] the parties signed a stipulation for arbitration shortly before trial.[194] The stipulation provided that any appeal of the arbitration award would be reviewed under the same standards applied to appeals from the state trial courts.[195] The court concluded that the parties' attempt to empower the courts to conduct substantive review of the arbitration was void and unenforceable.[196] Therefore, the court held that the U.A.A. requirement of limited review supported confirmation of the award.[197]

An Illinois court considered whether to confirm an arbitration award in light of a statutory requirement that it be a written and signed award.[198] In *Just Pants v. Wagner*[199] the contract expressly provided that any disputes would be resolved by arbitration in accordance with applicable rules of the American Arbitration Association ("A.A.A.").[200] The A.A.A. rules required that an award be a "written, signed award."[201] The court confirmed the award upon its determination that a letter signed by the arbitrator and attached to the memorandum of his award fulfilled the statutory requirement.[202]

IX. SECTION 12: VACATION OF AWARDS

Traditionally, jurisdictions that have adopted the U.A.A. have conducted very limited review of arbitration awards. In applying such deferential standards, the reviewing courts have advanced arbitration as an effective, efficient and determinative form of alternative dispute resolution. When faced with the decision of whether to affirm or vacate an arbitration award, reviewing courts find guidance in Section 12 of the U.A.A.[203]

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193. 859 P. 2d 217 (Colo. Ct. App. 1993).

194. *Id.* at 219.

195. *Id.* at 219. The relevant portion of the stipulation provided:

> The Uniform Arbitration Act [§13-22-21, et seq., C.R.S. (1987 Repl. Vol. 6A)] shall apply for the purpose of the confirmation of the arbitrators' award. The parties further agree that for the purpose of any appeal to the Colorado Court of Appeals or the Colorado Supreme Court the arbitrators' award shall be reviewed using the same standard as findings of fact and the conclusions of law by a Colorado District Court.

Id.

196. *Id.* at 221.

197. *Id.*

198. Just Pants v. Wagner, 617 N. E. 2d 246, 248 (Ill. App. Ct. 1993).

199. *Id.*

200. *Id.* at 247.

201. *Id.* at 248.

202. *Id.* at 253.

203. Section 12 provides as follows:

> (a) Upon application of a party, the court shall vacate an award where:
>
> (1) The award was procured by corruption, fraud or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers;

In certain jurisdictions, the legislature has expanded the basic statutory language of the U.A.A. by placing certain arbitration agreements beyond the scope of statutory review. For example, the Illinois version of Section 12[204] of the U.A.A. exempts arbitration of collective bargaining agreements from the statutory standard of review.[205] However, in accordance with the generally accepted principle of granting substantial deference to arbitration awards, Illinois courts have conceded that when applied to collective bargaining proceedings, the common law standard of review is more restrictive than that provided by statute.[206]

Alternatively, other jurisdictions have expanded the grounds on which a party may prevail on a motion to vacate an arbitration award. For example, conduct such as "behavior beyond the bounds of natural justice, excess of authority, or a manifest mistake of fact or law appearing on the face of the award" may support the party's motion to vacate.[207] Although the standard and scope of review differ among the several jurisdictions that have adopted the U.A.A., courts reviewing arbitration awards appear very hesitant to interfere with an arbitrator's decision.

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(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration without raising the objection; but the fact 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.

(b) An application under this Section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in clause (5) of Subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with Section 3, or of the award is vacated on grounds set forth in clauses (3) and (4) of Subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 3. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

U.A.A. § 12.

204. 710 I.L.C.S. 5/12(e) (1989).

205. Chicago Transit Authority v. Amalgamated Transit Union, 614 N.E.2d 120, 123-24 (Ill. App. Ct. 1993).

206. *Id.* at 126. The Illinois Supreme Court has established that the common law standard of review will protect an arbitration award pursuant to a collective bargaining agreement unless the award fails to "draw its essence" from the contract. *Id.* at 125.

207. JBC of Wyoming Corp, Inc. v. City of Cheyenne, Wyoming et. al., 843 P.2d 1190, 1194-95 (Wyo. 1993).

A. Procurement of Award by Corruption, Fraud or Other Undue Means

Generally, a reviewing court does not have the power to review an arbitration award based merely on allegations of arbitrator error as to the facts or law.[208] The arbitration award will be treated as "a final and conclusive resolution to the parties' dispute" provided that the award was made honestly, fairly and within the scope of the submission presented to the arbitrator.[209] However, under certain circumstances, such as when the arbitrator's mistake of fact or law is so egregious, the reviewing court, by implication, may find evidence of fraud, misconduct or lack of fair and impartial judgement, and therefore, vacate the arbitration award.[210]

In *Fernandez v. Farmers Insurance Co. of Arizona*,[211] Flora and Ruby Fernandez ("the Insureds") made claims against the underinsured motorist provision of their insurance policy provided by Farmers Insurance Company of Arizona ("Farmers").[212] The Insureds were involved in an automobile accident in which they sustained injuries in excess of the at fault driver's liability coverage.[213] After the Insureds and Farmers were unable to agree on the total amount of the Insureds' damages, arbitration was ordered in accordance with the terms of the insurance policy.[214] In determining the amounts to be recovered from Farmers, the arbitration panel limited the award to the amount of the Insureds' individual damages in excess of the $60,000 limit as provided in the tortfeasors liability coverage.[215] As a result of this calculation Flora Fernandez received $15,000, and Ruby Fernandez was not entitled to any underinsured motorist benefits.[216]

The Insureds requested the district court to review the award on the grounds the arbitration panel misapplied the applicable law when determining the amount of underinsured benefits to be awarded to the Insureds.[217] The district court agreed with the Insureds and remanded the award back to the arbitration panel to apply the applicable law.[218] After the district court's order remanding the award, Farmer's request for an interlocutory appeal was granted by the New Mexico

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208. Fernandez v. Farmers Ins. Co. of Arizona, 857 P.2d 22, 25-26 (N.M. 1993).

209. *Id.* at 26.

210. *Id.* at 26.

211. 857 P.2d 22.

212. *Id.* at 23.

213. *Id.* at 23. The single limit policy provided for a maximum of $60,000 of liability coverage. Of this amount, Ruby Fernandez received $25,000 and Flora Fernandez received $20,000. A passenger in the Fernandez automobile received the remaining $15,000.

214. *Id.* at 23. The arbitration panel determined Ruby and Flora Fernandez's damages to be $32,500 and $75,000 respectively.

215. *Id.* at 24.

216. *Id.*

217. *Id.*

218. *Id.*

Supreme Court.[219] Because the calculation of underinsured motorist benefits involving multiple claimants was in such an uncertain state in New Mexico, the Supreme Court concluded that, although a mistake of law may have been made, the mistake did not evidence any conduct that provided a valid grounds for vacating the arbitration award.[220]

B. Arbitrator Partiality, Misconduct and Bias

Because the arbitrator is free to decide the facts and determine the law during the arbitration process with substantial insulation from appellate review, the courts carefully scrutinize any allegation or appearance of impropriety; such scrutiny helps to assure the impartiality of the arbitration process.[221] Although the relationship between the parties and the arbitrator may be subjected to careful scrutinization, the arbitration award will be vacated only upon a substantial showing of bias or partiality on the part of the arbitrator.[222]

In *Wyoming Game and Fish Commission v. J.R. Thornock*,[223] the court refused to vacate the arbitration award solely because a member of the arbitration panel had a brother who was married to a party's sister.[224] Since the record reflected no other evidence of misconduct, the court concluded that without more such a remote marriage relationship failed to establish any evidence of partiality on the part of the arbitration panel.[225]

In *Town of Silver City v. Garcia*,[226] Garcia, a police officer discharged from the Silver City Police Department for allegedly having sex with a seventeen-year-old girl while on duty, elected to have his disciplinary matter resolved through binding arbitration.[227] The arbitration award which included the reinstatement of Garcia to his rank prior to discharge was attacked by the City's petition to

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219. *Id.* at 24-25.

220. *Id.* at 26. At the time of the arbitration award, the appellate courts of New Mexico had not addressed the situation where multiple claimants were involved in the calculation of underinsured benefits.

221. *See* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 148-50 (1968); *But see* Creative Homes and Millwork, Inc. v. Hinkle, 426 S.E.2d 480 (N.C. Ct. App. 1993) (determining the "appearance of impropriety" standard as set forth in Commonwealth Coatings too narrow and recognized that "[o]ther jurisdictions that have considered the issue favor disclosure, but the majority view appears to be that an award will not be disturbed where the undisclosed relationship is not substantial." (citing Ruffin Woody and Assoc., Inc. v. Person County, 374 S.E.2d 172 (N.C. Ct. App. 1988)). *Id.* at 482-83.

222. *Ditto*, 861 P.2d at 1003 (stating the proposition that "[t]he law does not require arbitrators to be completely impartial or disinterested, so long as they are able to adjudicate the parties' dispute fairly and impartially."). *Id.*

223. 851 P.2d 1300 (Wyo. 1993).

224. *Id.* at 1305.

225. *Id.*

226. 857 P.2d 28 (N.M. 1993).

227. *Id.* at 31.

vacate.[228] The City attempted to establish partiality by arguing that the arbitrator refused to properly evaluate and consider the corroborative evidence offered at the hearing.[229] In order to meet its burden of proving partiality, the court required the city to provide supporting evidence that was "direct, definite and capable of demonstration rather than remote, uncertain, or speculative."[230] Since the City was unable to meet the required burden, the court held that the district court correctly decided not to vacate the arbitration award.[231] The court concluded that a finding of partiality could not be inferred from adverse evidentiary rulings or imputed from the manner in which the arbitrator evaluates evidence; at best, the City's allegations of partiality were speculative, indefinite and uncertain.[232]

A presumption of bias may also arise when an arbitrator and a party to the arbitration are involved in the negotiation of a separate matter.[233] In *Drinane v. State Farm Mutual Automobile Insurance Co.*,[234] the plaintiffs, Thomas, Edward and Geraldine Drinane, filed suit in circuit court attempting to have an arbitration award vacated on the grounds that the arbitrator failed to disclose a pre-existing relationship with State Farm and its attorneys Querrey and Harrow.[235] The arbitrator, an attorney with a private practice, was involved in pending litigation against an individual whose liability insurer also happened to be State Farm; the arbitrator failed to disclose the nature of the relationship to the parties involved.[236]

In order to overcome the presumption of bias created by this nondisclosure, State Farm submitted affidavits that detailed the relationships between the parties involved in the present arbitration and the action involving the arbitrator's client.[237] The court was satisfied that neither the representatives of State Farm nor its law firm handling the present arbitration dispute participated in any of the proceedings concerning the arbitrator's pending claim against the insurance company.[238] Thus, no bias on the part of the arbitrator was found.[239]

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228. *Id.* The district court refused to vacate the award.

229. *Id.* at 34.

230. *Id.* at 34 (citing Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1147 (10th Cir. 1982), *cert. denied*, Grace v. Santa Fe Pac. R.R., 459 U.S. 838 (1982)).

231. *Id.*

232. *Id.*

233. Drinane v. State Farm Mutual Automobile Insurance Company, 606 N.E.2d 1181, 1185 (Ill. 1993). *See also* Bruder v. Country Mutual Insurance Company, 620 N.E.2d 355 (Ill. 1993) (stating that either party is not precluded from selecting an arbitrator with whom the party has a business or financial relationship as long as the efforts in rendering the award comport with U.A.A. and the arbitration provisions of the insurance policies). *Id.* at 364.

234. 606 N.E.2d 1181 (Ill. 1993).

235. *Id.* at 1182-83.

236. *Id.* at 1182. State Farm was also represented by Querrey and Harrow in the arbitration proceedings currently in question.

237. *Id.* at 1185.

238. *Id.*

239. *Id.* at 1185-86

In *Graceman v. Goldstein*,[240] the Gracemans entered into a transaction with Goldstein and seven other investors ("Buyers") to sell their interest in a chain of womens fashion stores.[241] The clothing stores subsequently went out of business and a dispute concerning the terms of the transaction arose between the Gracemans and the Buyers.[242] Subsequent to an arbitration proceeding, the Gracemans appealed a circuit court's decision to vacate an arbitration award in their favor.[243] The award was vacated based on the finding of evident partiality on behalf of the arbitrator in favor of the Gracemans.[244] In support of their claim of bias, the Buyers alleged conduct both during the arbitration proceedings and post-award that they believed provided evidence of partiality.[245]

The appellate court found that even if the allegations of post-award conduct were true, such bias would be irrelevant when considering a motion to vacate an arbitration award.[246] The court explained that the conduct of the arbitrator should be reviewed based on any alleged partiality during the arbitration proceedings and not after an award has been rendered.[247] In regard to the alleged conduct that transpired during the arbitration process, the court recognized the general rule that a party's failure to object to the arbitrator's improper conduct at the time the party becomes aware of such behavior or before the publication of the arbitration award will result in a waiver of the party's right to object after the award has been issued.[248]

C. Arbitrator Exceeding the Scope of Authority

In order to successfully challenge an arbitration award on the grounds that an arbitration panel exceeded its authority, the party attempting to vacate the award must provide clear, strong, and convincing evidence.[249] In addition, the party must demonstrate that it has been prejudiced by the arbitrators' conduct.[250] The arbitration panel will be found to have exceeded its power when making an award beyond the scope of authority granted by the parties or the operative documents and when deciding issues unrelated to those submitted to arbitration.[251] An arbitration award will not be vacated simply because the court

240. 613 A.2d 1049 (Md. Ct. Spec. App. 1992).
241. *Id.* at 1051.
242. *Id.* at 1051-52.
243. *Id.* at 1051.
244. *Id.*
245. *Id.* at 1053.
246. *Id.* at 1055.
247. *Id.*
248. *Id.* at 1056.
249. Allied American Ins. Co. v. Culp, 612 N.E.2d 41, 44 (Ill. App. Ct. 1993).
250. *Id.*
251. Applewhite v. Sheen Financial Resources, Inc., 608 So.2d 80, 83 (Fla. Dist. Ct. App. 1992).

disagrees with the panel's decision.[252] Furthermore, to allow the arbitrator the ability to exercise substantial latitude in resolving the dispute, some jurisdictions will vacate an arbitration award only after being convinced the award was "completely irrational."[253]

In *Wyoming Game and Fish Commission v. Thornock*,[254] J.R. Thornock, a Wyoming property owner, brought a claim pursuant to a wildlife statute seeking compensation for the cost to construct a fence designed to keep elk out of stored hay.[255] Thornock's claim was rejected because the compensation sought was not for damages caused by wildlife and was not otherwise covered by the statute.[256] The claim was subsequently arbitrated, which resulted in an award to Thornock.[257] In support of its petition to set aside the award, the Commission argued that the arbitration panel exceeded its power when it awarded Thornock expenses for a claim not covered by the statute.[258] The Supreme Court of Wyoming agreed and vacated the arbitration award.[259]

In *Town of Silver City v. Garcia*,[260] the city argued that by using the wrong standard of proof when evaluating the evidence presented, the arbitrator exceeded his authority.[261] The court rejected the city's argument by finding that arbitrators do not exceed their authority when making mistakes of fact or law.[262] Instead, the court concluded that arbitrators will exceed their power when they attempt to resolve issues beyond the scope of the arbitration agreement.[263]

In *Boyce v. St. Paul Property and Liability Insurance Co.*,[264] Andrea Boyce was injured when the ambulance in which she was riding was struck by an uninsured motorist.[265] After St. Paul refused Boyce's claim under the ambulance services's uninsured motorist policy, she demanded arbitration as provided by the terms of the insurance policy.[266] The arbitration panel awarded Boyce

252. Office of the State Auditor v. Minnesota Assoc. of Professional Employees, 504 N.W. 2d 751, 754-55 (Minn. 1993) (citing Children's Hosp., Inc. v. Minnesota Nurses Ass'n, 265 N.W.2d 649, 652 (Minn. 1978)).

253. Carlson v. Farmers Ins. Group of Companies-Farmers Ins. Exch. 492 N.W.2d 579, 581 (N.D. 1992). *Cf.* Wichinsky v. Mosa, 847 P.2d 727, 731 (Nev. 1993) (explaining that an arbitration award will not be enforced if determined to be arbitrary, capricious or unsupported by the agreement).

254. 851 P.2d 1300, 1302 (Wyo. 1993).

255. *Id.* at 1302.

256. *Id.*

257. *Id.* at 1303.

258. *Id.* at 1304.

259. *Id.* at 1306.

260. 857 P.2d 28 (N.M. 1993).

261. *Id.* at 32.

262. *Id.*

263. *Id.*

264. 618 A.2d 962 (Pa. Super. Ct. 1992).

265. *Id.* at 964. Boyce was not an employee of the ambulance service; she was a neonatal and pediatric nurse at a hospital which contracted with the ambulance service to perform transport.

266. *Id.*

$1,393,500.[267] However, the trial court vacated the award on the grounds that it exceeded the $1,000,000 policy limit and ordered a rehearing to re-assess the damages.[268] Without conducting a rehearing, the arbitration panel reduced Boyce's award to the $1,000,000 policy limit.[269] St. Paul then filed a petition to vacate the amended award, arguing that the arbitration panel exceeded its authority by not conducting the rehearing as ordered by the trial court.[270]

The appellate court refused to vacate the award.[271] The court reasoned that since the trial court vacated the award exclusively because the award exceeded the policy limits, there was no need to conduct another hearing on the issue of damages.[272] Since both parties had previously been afforded the opportunity to present all relevant evidence concerning the issue of damages, the court found that conducting another full-blown hearing was unnecessary.[273]

D. Refusal to Postpone Hearing or Hear Relevant Evidence

An arbitration award may be set aside when a reviewing court determines the arbitration proceedings to have been conducted in a prejudicial manner.[274] For example, either party may be prejudiced when the arbitrator refuses to postpone a hearing upon a showing of sufficient cause, refuses to hear evidence material to the controversy, or otherwise conducts the hearing so as to substantially prejudice one of the parties.[275] A party attempting to vacate an award by asserting that the arbitrator refused to hear certain evidence must prove not only that they were "substantially prejudiced" but also that the disputed evidence was "material" to the resolution of the issues in dispute.[276]

In *Humphreys v. Joe Johnston Law Firm,*[277] the parties were entangled in a dispute arising from the attempted transfer of the Humphreys' law practice to the Johnston law firm.[278] The parties agreed to submit the controversy to arbitration.[279] Unsatisfied with the arbitration award, Humphreys filed a petition

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267. *Id.* at 965.
268. *Id.*
269. *Id.* at 965-66.
270. *Id.*
271. *Id.* at 966.
272. *Id.*
273. *Id.*
274. U.A.A. §12(a)(4).
275. *Id. See also* Aetna Casualty and Surety Co. v. Deitrich, 803 F.Supp. 1032, 1040 (M.D.Pa. 1992) (stating that pending third party actions arising out of underinsured motorists claims do not constitute "good cause").
276. Canteen Corp. v. Former Foods, Inc., 606 N.E.2d 174, 180-81 (Ill. App. Ct. 1992). *See also* Silver City v. Garcia, 857 P.2d 28, 33 (N.M. 1993) (defining "material" evidence as evidence that relates to the matter in dispute or that has a reasonable relation to the issue to be decided).
277. 491 N.W.2d 513 (Iowa 1992).
278. *Id.* at 514.
279. *Id.*

to vacate in district court which was subsequently denied. Humphreys then appealed to the Supreme Court.[280]

Humphreys' petition to vacate was supported by claims that he was prejudiced by the arbitrator's failure to consider certain items of evidence.[281] Since some of the exhibits entered as evidence were missing after the arbitration proceedings had concluded, Humphreys contended that the arbitrator failed to consider the exhibits when determining the award.[282] The Court maintained that absent any evidence to the contrary, the arbitrator is presumed to have considered the evidence.[283] Even if Humphreys' allegations were true, the claim would still have failed because an arbitrator's failure to consider certain evidence is not in itself sufficient to vacate an arbitration award.[284]

If an arbitrator's refusal to postpone the proceedings upon a sufficient showing of good cause is shown to be an abuse of discretion, the arbitration award may be vacated.[285] An abuse of discretion may be found when the arbitrator's decision is contrary to logic or reason.[286] In *Jaycox v. Ekeson*,[287] the parties agreed to have their civil dispute submitted to binding arbitration.[288] Two arbitration hearings were conducted at which both parties and two other witnesses testified.[289] Because he was out of the state on a military assignment and did not receive timely notice, Jaycox was unable to attend the third and final hearing, and his attorney made an oral motion to continue the hearing.[290]

The arbitrator denied the motion to continue, and the hearing, conducted in the absence of Jaycox, resulted in an unfavorable award.[291] Jaycox then filed an application to vacate the award on the grounds that he was prejudiced by both the lack of timely notice and the arbitrator's refusal to continue the hearing.[292] In finding that Jaycox's prior military commitment was sufficient cause to support his motion for a continuance, the court concluded that the arbitrators refusal to continue the hearing was contrary to logic and reason.[293] Although Jaycox had been afforded the opportunity to testify and cross examine Ekeson at the prior hearings, the court, in vacating the award, found that Jaycox had been sufficiently

280. *Id.*
281. *Id.* at 517.
282. *Id.*
283. *Id.*
284. *Id.*
285. Jaycox v. Ekeson, 857 P.2d 35, 38 (N.M. 1993).
286. *Id.*
287. 857 P.2d 35.
288. *Id.* at 36.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.* at 38.

prejudiced by both the lack of timely notice and his inability to attend the hearing, to testify and to offer evidence.[294]

E. Public Policy

Occasionally, the courts are asked to go beyond the provisions of the U.A.A. and vacate an arbitration award that violates some "well-defined" and "dominant" public policy of a given jurisdiction.[295] In *State Auditor v. Minnesota Ass'n of Professional Employees*,[296] an employee from the state auditor's office was discharged for falsifying expense reports and engaging in other activities that compromised the integrity and credibility of the auditor's office.[297] The Minnesota Association of Public Employees challenged the discharge.[298] The arbitration resulted in a finding that the Auditor's Office lacked "just cause" to discharge the employee.[299] The district court vacated the arbitration award because the award violated "an explicit, well-defined, and dominant" public policy favoring the honesty and integrity of individuals responsible for ensuring public funds are properly expended.[300] Upon review, the court of appeals reversed the district court, and a subsequent appeal to the Minnesota Supreme Court resulted.[301]

The Minnesota Supreme Court determined that the employee's conduct may have violated the "well-defined" and "dominant" public policy advanced by the district court, but that the district court's focus was misplaced.[302] In vacating an arbitration award because it violates public policy, the court must direct its attention to whether the award, if enforced, would violate the "well defined" and "dominant" public policy, and must not focus on the conduct of the employee.[303] The Supreme Court of Minnesota concluded that the arbitration award reinstating the employee was not violative of any "well-defined" and "dominant" public policy.[304]

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294. *Id.*

295. State Auditor v. Minnesota Ass'n. of Professional Employees, 504 N.W.2d 751, 752 (Minn. 1993).

296. 504 N.W.2d 751.

297. *Id.* at 753.

298. *Id.*

299. *Id.*

300. *Id.* at 754.

301. *Id.* at 754-55. The appellate court noted the deferential standard of review when it determined that pursuant to the terms of the collective bargaining agreement the arbitrator had the authority to determine the issue of "just cause". *Id.*

302. *Id.* at 757.

303. *Id.*

304. *Id.* at 758.

F. Timing

A party's application to vacate an arbitration award must be filed within ninety days after the delivery of a copy of the award to the applicant.[305] The ninety day period will not be extended when an opposing party files a petition to confirm the award.[306] Therefore, when a response to a petition to confirm the award contains allegations supporting vacatur, the party must file the response within the ninety day period in order to be timely.[307] However, when a party files an application to modify the arbitration award pursuant to Section 9 of the U.A.A., the ninety day period provided in Section 12 will be tolled until the Section 9 petition is resolved.[308] Thereafter, the party attempting to vacate the award has ninety days from the time of delivery of the court's decision to file the petition to vacate, regardless of outcome of the petition to modify.[309]

X. SECTION 13: MODIFICATION OR CORRECTION OF AWARD

As one can see from U.A.A. Sections 11 and 12, judicial review of arbitration awards is extremely limited under the U.A.A. The Supreme Court of Iowa recently said, "To allow a court to 'second guess' an arbitrator by granting a broad scope of review would nullify those advantages [inherent in arbitration]."[310]

To apply to the court for modification or correction of an award, a party must allege one of the statutory grounds found in Section 13. The court can only change the award if: (1) there is an evident miscalculation or error in description; (2) the arbitrator considered a claim she was not supposed to consider; or (3) the award is not in the correct form.[311] If the court does not find one of these errors, it has no choice but to confirm the award.[312]

Nucor Corp. v. General Bearing Corp.[313] involved a stock purchase agreement. The agreement provided for arbitration and for expenses to be divided equally between the parties.[314] An arbitration panel awarded Nucor over $1.5 million for General Bearing's breach of the stock purchase agreement.[315] However, the arbitration panel did not award attorney's fees.[316] The panel stated

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305. U.A.A. § 12(b).
306. Hough v. Howington, 627 N.E.2d 36, 39 (Ill. App. Ct. 1993).
307. *Id.*
308. *Id.* at 39-40.
309. *Id.* at 40.
310. *Humphreys*, 491 N.W.2d at 515 (quoting Sergeant Bluff-Laton Educ. Ass'n v. Sergeant Bluff-Laton Community School Dist., 282 N.W.2d 144, 147 (Iowa 1978)).
311. U.A.A. § 13(a).
312. U.A.A. § 13(b).
313. 423 S.E.2d 747 (N.C. 1992).
314. *Id.* at 748.
315. *Id.* at 749.
316. *Id.*

that it believed it lacked the authority to do so because the agreement did not provide for attorney's fees, and N.C. GEN. STAT. § 1.567.11 (1993) (U.A.A. § 10) specifically excludes the awarding of attorney's fees unless the arbitration agreement allows otherwise.[317]

Nucor filed a motion with the superior court requesting confirmation of the arbitration panel's award and asking the court to award attorney's fees.[318] The superior court granted both requests.[319] General Bearing appealed the superior court's award of attorney's fees, but the North Carolina Court of Appeals affirmed.[320] General Bearing appealed again and the Supreme Court of North Carolina reversed, holding that the trial court lacked the power to change the arbitrator's award by adding attorney's fees.[321] The court stated that N.C. GEN. STAT. § 1.567.14 (1993) (U.A.A. § 13) provides the exclusive grounds for changing an arbitration award, and none of the grounds are applicable to adding attorney's fees.[322]

In contrast, in *Mossman v. CNC Ins. Assoc., Inc.*,[323] the Delaware Court of Chancery found that in an action to confirm an arbitration award, the court could hear an additional claim that did not arise until after the arbitration award came into being.[324] The court felt that the statutory claim did not change the arbitration award.[325] Therefore, the claim could be heard despite the limitations on changing an award in Delaware's Arbitration Act.[326]

A. Section 13(a)(1): Evident Miscalculations

In *Applewhite v. Sheen Fin. Resources, Inc.*,[327] the arbitrators awarded $37,053.02 to Sheen because Applewhite breached a non-competition clause in their employment contract.[328] The arbitrators designated as costs $8,018.51 of the amount awarded.[329] The circuit court confirmed Sheen's award.[330] On appeal, Applewhite argued that the arbitrator miscalculated the award because over

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317. *Id.*

318. *Id.*

319. *Id.* The court awarded the attorney's fees pursuant to N.C. GEN. STAT. § 6-21.2(2) (1993). This statute mandates the awarding of attorney's fees when certain contractual arrangements are breached.

320. *Id.*

321. *Id.* at 751.

322. *Id.*

323. No. 1202-K, 1993 WL 330062 (Del. Ch. Aug. 19, 1993).

324. *Id.* at *1-2. The additional claim came under the Wage Payment and Collection Act which mandates statutory damages and attorney's fees to be awarded once wages are found to be due. DEL. CODE. ANN. tit. 19, §§ 1103(b) and 1113(c) (1985).

325. *Id.*

326. *Id.*; *see* DEL. CODE ANN. tit. 10, § 5715 (1975); U.A.A. § 13.

327. 608 So.2d 80 (Fla. Dist. Ct. App. 1992).

328. *Id.* at 82.

329. *Id.*

330. *Id.*

$4,000 of arbitration costs had already been paid.[331] The Florida District Court of Appeal found that such a miscalculation was not evident from the award.[332] There was nothing in the award to indicate that the $8,018.51 in costs included any amount for arbitration costs.[333] Therefore, the circuit court had correctly confirmed the award under FLA. STAT. ch. 682.14 (1990) (U.A.A. § 13).[334]

As can be seen by *Applewhite*, Section 13(a)(1) has been interpreted very narrowly. To warrant judicial correction, the error must be completely obvious from the award itself.[335] Most, but not all, are probably mathematical or typographical errors.[336]

An example of what is not considered an evident miscalculation is found in *Renaissance Enter., Inc. v. Ocean Resorts, Inc.* [337] Renaissance, a travel agency, brought two claims against the resort for breach of a contract: (1) approximately $100,000 for nonpayment of commissions; and (2) $748,682 for nonpayment of military referral fees.[338] The arbitration award said, "Renaissance is entitled to the sum of $51,770.40 plus interest in the amount of $17,796.33. . . . This award is in full settlement of all claims and counterclaims submitted to this arbitration."[339] On appeal, Renaissance argued that the award included interest on the entire $51,770.40, and that according to the contract, Renaissance was not entitled to receive interest on military referral fees.[340] Therefore, Renaissance argued, the $51,770.40 award did not include any amount for military referral fees.[341] Consequently, the award should have been modified by the circuit court to include an amount for military referral fees.[342] The South Carolina Court of Appeals rejected the argument, stating that the award did not qualify for judicial review under S.C. CODE ANN. § 15-48-130 (Law. Co-op. 1976) (U.A.A. §12(a)).[343] Even if the award did not include any amount for military referral fees, there was nothing in the award to indicate that the arbitrator had miscalculated.[344] It was far more evident that Renaissance's military referral fees claim had failed.[345]

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331. *Id.* at 83.
332. *Id.*
333. *Id.*
334. *Id.*
335. *See, e.g., Humphreys*, 491 N.W.2d at 517.
336. *See Humphreys*, 491 N.W.2d at 517.
337. 426 S.E.2d 821 (S.C. Ct. App. 1992).
338. *Id.* at 822.
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.* at 823.
344. *Id.*
345. *Id.*

In *Mossman*,[346] the defendant asked the Delaware Court of Chancery to modify or correct an arbitration award because it contained a miscalculation.[347] The court explained that it could not review the arbitrator's award because there was no "evident" miscalculation as required by DEL. CODE ANN. tit. 10, § 5715(a)(1) (1975) (U.A.A. § 13(a)(1)).[348] Utilizing DEL. CODE ANN. tit. 10, § 5711 (1975) (U.A.A. § 9), the court directed the defendant to take the award back to the arbitrator for correction announcing that "the arbitrator himself would not be bound by [the] high [evident miscalculation] standard but could correct any miscalculation he made, whether evident or not, so long as upon honest consideration he concludes that he has made a miscalculation."[349]

B. Section 13(a)(2): Matters Not Submitted

Another ground for review found in Section 13 is that the arbitrator awarded on a matter not submitted. However, it is not a ground for review if the arbitrator does not award on matters that were submitted. In *Humphreys*,[350] the arbitration provision referred to several agreements the parties had entered into on the same day.[351] The arbitrator determined the contractual issues surrounding those agreements and ignored the many tort and property claims that Humphreys and his son submitted.[352] The Supreme Court of Iowa said the arbitrator's failure to consider certain evidence or to award on everything submitted is not a ground for review under Section 13.[353]

C. Ninety Day Time Limit

In addition to limiting the grounds for modification or correction of an award, Section 13 imposes a ninety day time limit when applying for correction or modification. The short time period for applying for a Section 13 review is consistent with the policy of making arbitration an efficient, speedy process.[354] It assures that any challenge to the award will be promptly made and finality will occur as quickly as possible.[355] In *United Technology and Resources, Inc. v. Dar Al Islam*,[356] the arbitrator refused to award attorney's fees to United.[357] Because United failed to make a timely motion, it was barred from challenging the

346. No. 1202-K, 1993 WL 330062.
347. *Id.* at *1.
348. *Id.* at *2.
349. *Id.*
350. 491 N.W.2d 513.
351. *Id.* at 516.
352. *Id.* at 516-17.
353. *Id.*
354. United Technology and Resources, Inc. v. Dar Al Islam, 846 P.2d 307, 310 (N.M. 1993).
355. *Id.*
356. 846 P.2d 307.
357. *Id.*

arbitrator's refusal.[358] The court did not reach the issue of whether United's challenge was appropriate under Section 13 because, by not applying in ninety days, United waived its right to present any substantive defenses to the confirmation of the award.[359] The court cited many cases discussing the strict deadline on raising defenses to confirmation of an arbitration award.[360]

If an award is not absolutely clear regarding a party's award, the party should file a Section 9 application within twenty days for clarification or should file a motion for confirmation within the Section 13 ninety-day limit. In *Eatman's, Inc. v. Martin Engineering, Inc.*,[361] Eatman's and Martin had a contract dispute which they submitted to arbitration.[362] The arbitrator found in favor of Martin and awarded a specific amount of damages plus attorney fees.[363] The award did not specify the amount of attorney fees.[364] When Martin made a motion to confirm over one year later, Eatman's opposed it as an untimely motion for modification because the trial court would have to set attorney fees.[365] The trial court awarded attorney fees, but the South Carolina Court of Appeals reversed, holding that setting the attorney fees was a modification that required application within ninety days.[366]

At least one court has recently held that the timely filing of a Section 9 application with the arbitrator tolls the time for requesting judicial review under Sections 12 and 13 until the Section 9 application is decided by the arbitrator.[367] Once the party receives delivery of the arbitrator's decision on a Section 9 application, the party has ninety days to request the court to vacate, modify or correct the award.[368] If the limitation period was not extended in this situation, a party could lose the right of judicial review under Sections 12 and 13 whenever an arbitrator failed to dispose of a Section 9 application within ninety days.[369] Tolling the time period furthers the policy of giving one tribunal the chance to fix its own mistakes before review by another tribunal.[370]

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358. *Id.* at 308.
359. *Id.* at 311.
360. *Id.* at 311 n.3.
361. 428 S.E.2d 736 (S.C. Ct. App. 1993).
362. *Id.* at 736.
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.* at 736-37.
367. Hough v. Howington, 627 N.E.2d 36, 39-40 (Ill. App. Ct. 1993) (citing Konicki v. Oak Brook Racquet Club, 441 N.E.2d 1333 (Ill. App. Ct. 1982)).
368. *Id.* at 40.
369. *Id.*
370. *Id.*

XI. SECTION 14: JUDGMENT OR DECREE

Under U.A.A. Section 14, once a court confirms an arbitration award, it should be entered as a judgment and enforced as such.[371] The court can award costs for the confirmation hearing and everything thereafter.[372] The court does not have to make written findings of fact or conclusions of law. This was held to be true even when a state statute required the trial court to make specific findings concerning property to be divided in a divorce decree.[373] Because the parties agreed to arbitration, both the arbitrator and the court were excused from making specific findings.[374]

A court's Section 14 power to award costs does not expressly include the power to award attorney's fees. However, in *Canon School District No. 50 v. W.E.S. Constr. Co.*,[375] the trial court awarded attorney's fees incurred in the confirmation proceedings pursuant to a different Arizona statute.[376] The Arizona Court of Appeals upheld the award saying that ARIZ. REV. STAT. ANN. § 12-1514 (1982) (U.A.A. § 14) does not bar such awards.[377]

XII. SECTION 16: APPLICATIONS TO COURT TREATED AS MOTIONS

Section 16 directs that applications to the court to confirm, vacate, modify or correct an award should be treated the same as motions.[378] The court and the parties should follow that court's rules for making and hearing motions, including its rules on notice.[379] Section 16 also says that the initial notice of the application should be served like a summons is traditionally served in actions of that court.[380]

In *Hough v. Howington*,[381] Howington argued that Hough's application to confirm the award was not served properly under Section 16 because the notice of the application was served upon him by mail instead of by summons.[382] Howington's argument failed because he had already made a general appearance in the action; therefore, the court ruled that re-service was not necessary and mere notice was sufficient.[383] However, the court stated that if a party had not

371. U.A.A. § 14.
372. *Id.*
373. Hughes v. Hughes, 851 P.2d 1007 (Idaho Ct. App. 1993).
374. *Id.* at 1010.
375. 868 P.2d 1014 (Ariz. Ct. App. 1993).
376. *Id.* at 1024. The court relied on ARIZ. REV. STAT. ANN. § 12-341.01(A) (1992).
377. *Id.* at 1026.
378. U.A.A. § 16.
379. *Id.*
380. *Id.*
381. 627 N.E.2d 36 (Ill. App. Ct. 1993).
382. *Id.* at 40.
383. *Id.* at 40-41.

previously made a general appearance or the court had not otherwise obtained jurisdiction, Section 16 would probably require service by summons.[384]

In *Humphreys v. Joe Johnston Law Firm, P.C.*,[385] the parties agreed to arbitrate their claims and an arbitration hearing was conducted.[386] After the award was made, Humphreys filed an application to modify, correct, or vacate which was heard by the trial court and subsequently denied.[387] On appeal, Humphreys argued that his due process rights were violated because he was not allowed full discovery prior to the hearing on his application.[388] The Supreme Court of Iowa firmly rejected this argument.[389] The court explained that due process does not require full discovery to a motion hearing and Section 16 requires a hearing on an application to modify, correct, or vacate to be treated exactly like a motion hearing.[390]

Similarly, Section 16 does not allow a party to use a Section 12 or Section 13 hearing to assert new claims which were not part of the arbitration sought to be enforced. The Massachusetts courts confirmed this in *Baxter Health Care, Corp. v. Harvard Apparatus, Inc.*[391] Harvard attempted to assert a counterclaim at a hearing to decide Baxter's application for confirmation.[392] The trial court dismissed the counterclaim and the Massachusetts Court of Appeals affirmed, saying that MASS. GEN. L. ch. 251, § 15 (1988) (U.A.A. § 16) only authorizes the making and hearing of motions at confirmation hearings.[393]

XIII. VENUE

Illinois addressed the question of venue in *Mazur v. Quarters Designs, Inc.*[394] In *Mazur*, a contract between the parties required arbitration of any disputes.[395] After a dispute arose, an arbitration hearing held in Cook County resulted in a $9,635 award against Mazur.[396] Mazur filed a complaint in Will County seeking to vacate, modify or correct the award, obtain a declaratory judgment that the award not be enforced, and recover damages for the professional negligence of Quarters.[397] Quarters filed a motion to transfer to Cook County pursuant to ILL. REV. STAT. ch. 710, para, 5/17 (1992) (U.A.A. § 18) which

384. *Id.*
385. 491 N.W.2d 513 (Iowa 1992).
386. *Id.* at 514.
387. *Id.*
388. *Id.* at 517.
389. *Id.* at 517-18.
390. *Id.*
391. 617 N.E.2d 1018 (Mass. App. Ct. 1993).
392. *Id.* at 1020.
393. *Id.* at 1021.
394. 619 N.E.2d 763 (Ill. App. Ct. 1993).
395. *Id.*
396. *Id.*
397. *Id.* at 763-64.

provides that Section 12 and Section 13 applications shall be filed in the court where the initial application was made.[398] The trial court denied the motion to transfer and Quarters appealed.[399] On appeal, Mazur argued that the general venue provisions of Illinois should apply because he was seeking other relief in addition to a vacation or modification of the award.[400] Under the general provisions, Mazur could presumably choose his forum because there were multiple venues available.[401] The appellate court reversed and remanded with directions to make the transfer to Cook County.[402] The court stated that under a settled rule of statutory construction, the specific venue provision of the Arbitration Act must prevail over Illinois' general venue provisions, therefore, the case must be heard in Cook County.[403]

In *Thomson McKinnon Securities, Inc. v. Slater*,[404] the plaintiff filed an application to confirm an arbitration award in Broward County.[405] The plaintiff's application relied on the Federal Arbitration Act ("F.A.A.").[406] The defendant filed a motion to dismiss because Broward County was not the proper venue under the F.A.A..[407] The Circuit Court of Broward County dismissed, finding that the application was not within its venue according to the F.A.A..[408] The plaintiff then filed the application in Duval County, where the defendant resided, pursuant to the Florida Arbitration Code.[409] The Circuit Court of Duval County also dismissed plaintiff's application stating that plaintiff should have appealed Broward County's decision, rather than attempt to re-litigate the issue in Duval County.[410] The Florida Court of Appeals reversed, holding that refiling in Duval County, an acceptable venue under the Florida Code, was proper.[411]

XIV. SECTION 19: APPEALS

Section 19 authorizes an appeal if the trial court: (1) denies an application to compel arbitration; (2) grants an application to stay arbitration; (3) confirms or denies confirmation of an award; (4) modifies an award; (5) vacates an award without directing a rehearing; or (6) enters a judgment or decree.[412]

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398. *Id.* at 764.
399. *Id.*
400. *Id.*
401. *Id. See* ILL. REV. STAT. ch. 735, para. 5/2-101 et seq. (1992).
402. *Id.* at 765.
403. *Id.*
404. 615 So.2d 781 (Fla. Dist. Ct. App. 1993).
405. *Id.* at 782.
406. *Id.*
407. *Id.*
408. *Id.*
409. FLA. STAT. ch. 682.19 (1990) (U.A.A. § 18). *Id.*
410. *Id.* at 783.
411. *Id.*
412. U.A.A. § 19.

Two of these authorized appeals are interlocutory: the appeal allowed from orders refusing to compel arbitration; and the appeal allowed from orders staying arbitration. Normally, interlocutory appeals are not allowed, but the U.A.A. authorizes them because these two types of orders jeopardize the speed and cost-savings of arbitration.[413] In contrast, granting an application to compel arbitration or refusing to stay arbitration does not affect the efficiency of arbitration; therefore, these orders are not immediately appealable.[414]

Does the U.A.A. authorize interlocutory appeals when it is questionable whether the U.A.A. applies, such as when the arbitration agreement does not comply with the requirements of U.A.A. Section 1? Two Texas courts have recently considered this question and have come up with different answers. In *American Physicians Service Group, Inc. v. Port Lavaca Clinic Ass'n*,[415] the issue was whether the Texas Court of Appeals had jurisdiction to hear an appeal of the denial of a motion to compel arbitration.[416] This type of interlocutory appeal would normally be authorized by the Texas Arbitration Act,[417] but the appellee urged that this particular appeal was not authorized by the Act because the arbitration clause in the contract at issue did not comply with the Act's requirements.[418] Prior cases have held that the Act is only implicated when these requirements were met, and if the Act is not implicated, no interlocutory appeal is allowed.[419] *Port Lavaca* expressly overruled those cases and allowed the appeal.[420] However, in conflict with *Port Lavaca* is *Central Nat'l Insurance Co. of Omaha v. Glover*,[421] which subsequently relied on the cases that *Port Lavaca* had overruled.[422]

Other courts have considered the issue of when an appeal is authorized under the other provisions of Section 19. In *National Avenue Bldg. Co. v. Stewart*,[423] a property owner sought to have an arbitration award in his favor confirmed by the circuit court.[424] The circuit court issued a memorandum declining to rule on the application.[425] The property owner appealed to the Missouri Court of

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413. Des Moines Asphalt & Paving Co. v. Colcon Industries Corp., 500 N.W.2d 70, 72 (Iowa 1993).

414. *See, e.g.*, Anderson County v. Architectural Techniques Corp., No. 03A01-9205CH184, 1993 WL 5921 (Tenn. Ct. App. Jan. 14, 1993).

415. 843 S.W.2d 675 (Tex. Ct. App. 1992).

416. *Id.* at 676.

417. TEX. REV. CIV. STAT. ANN. art. 238-2(A)(1) (West 1993).

418. *Id.* at 677. The Act provided that the agreement to arbitrate must be highlighted in bold print or stamped on the contract. *Id.*

419. Warranty Underwriters Insurance Co. v. Lara, 805 S.W.2d 894 (Tex. Ct. App. 1991); Capital Income Properties v. Waldman, 835 S.W.2d 152 (Tex. Ct. App. 1992).

420. *Lavaca*, 843 S.W.2d at 677.

421. 856 S.W.2d 490 (Tex. Ct. App. 1993).

422. *Id.* at 491-92.

423. 838 S.W.2d 514 (Mo. Ct. App. 1992).

424. *Id.* at 515.

425. *Id.*

Appeals which determined that the circuit court's memorandum was not an appealable order.[426]

A Colorado court has determined that until there has been an arbitration award on the merits and a court order confirming that award, a party cannot appeal. More specifically, a party cannot appeal when an arbitrator directs arbitration and the trial court confirms that decision because it would not be an award on the merits.[427] In *Thomas v. Farmers Insurance Exchange,*[428] the arbitrator examined the Thomas' insurance policy with Farmers Insurance Exchange to determine whether the parties were required to arbitrate Thomas' claim.[429] The arbitrator decided that, under the policy, the parties were required to arbitrate the claim and ordered them to do so.[430] The defendant applied for confirmation of the arbitrator's decision and the trial court confirmed it.[431] The defendant then appealed the trial court's confirmation.[432] The appellate court found the defendant's appeal premature, stating that the trial court's order confirming the arbitrator's determination was not confirmation of an award on the merits, thus it was interlocutory and not ripe for review.[433]

The Oklahoma Court of Appeals recently stressed that the availability of appellate review under Section 19 should not affect the impartiality of the arbitration.[434] The court was faced with an arbitration agreement which allowed one party to select all the members of the arbitration panel and stated that "the fact that some other judge or panel of judges will review the arbitrator's decision does not detract from the initial importance of impartiality in the decision-making process."[435]

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426. *Id.* at 516. However, in a subsequent opinion, the same court issued a writ of mandamus to compel the circuit court to rule on the application for confirmation. Stewart v. McGuire, 838 S.W.2d 516 (Mo. Ct. App. 1992).

427. Thomas v. Farmers Insurance Exchange, 857 P.2d 532 (Col. Ct. App. 1993).

428. *Id.*

429. *Id.* at 533.

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* at 534-35.

434. Ditto v. Re/Max Preferred Properties, 861 P.2d 1000, 1003 (Okla. Ct. App. 1993).

435. *Id.* at 1003.