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Recent Developments: The Uniform Arbitration Act

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Recent Developments: The Uniform Arbitration Act[1]

I. INTRODUCTION

The Uniform Arbitration Act is an annual project of the *Journal of Dispute Resolution*.[2] The project examines court opinions from the past year which have interpreted state versions of the Uniform Arbitration Act ("U.A.A.").[3] Currently, thirty-four states and the District of Columbia have adopted arbitration statutes based on the U.A.A.[4] The goal of the *Journal of Dispute Resolution* in creating this project is to promote uniformity in interpretation of the U.A.A. by describing the decisions and rationales of recent court opinions.

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.[5]

This section allows the court to grant deference to the validity of an arbitration agreement when a dispute arises over the control of a private agreement.

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1. This project was written and prepared by *Journal of Dispute Resolution* candidates under the direction of Associate Editor in Chief Carol J. Creamer and Note and Comment Editor Greg W. Pearman.

2. *See Recent Developments: The Uniform Arbitration Act*, 1994 J. DISP. RESOL. 311; *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 J. DISP. RESOL. 177; *Recent Developments: The Uniform Arbitration Act*, 1986 J. DISP. RESOL. 169; *Recent Developments: The Uniform Arbitration Act*, 1985 J. DISP. RESOL. 173; *Recent Developments: The Uniform Arbitration Act*, 1984 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). This project researched court opinions from September 1993 through December 1994.

4. Jurisdictions that have adopted arbitration statutes based on 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. U.A.A. § 1.

Arbitration proceedings have consistently been favored in most jurisdictions.[6] To further encourage arbitration, courts have been rather lenient in evaluating the technical aspects of agreements by stretching the issues subject to arbitration and severing arbitration clauses from contracts to find them valid.

A. Technicalities of a Valid Agreement

As with all contracts, arbitration agreements must meet certain requirements for a court to deem them valid.[7] In *Ehresman v. Bultynck & Co.*,[8] the Michigan Court of Appeals determined that the parties' signatures were not required elements for a valid arbitration agreement.[9] The plaintiff in *Ehresman* purchased stock in Bultynck when he became employed at the company as an accountant.[10] Bultynck required that Ehresman agree to three contracts: an employment agreement, a stock redemption agreement, and a deferred compensation plan agreement, as a condition of becoming a shareholder.[11] Both the stock redemption and employment agreement required arbitration if a dispute arose.[12]

Some time after accepting the agreements, Ehresman resigned from his position, left Bultynck and took a number of the company's clients with him.[13] Since the stock redemption agreement contained a covenant not to compete, Bultynck filed a demand for arbitration.[14] Arbitrators found and the trial court affirmed that all three agreements were valid, even though Ehresman had not signed them.[15]

In looking at Michigan's version of Section 1 of the U.A.A., the court of appeals found that no language specifically requires a written instrument to be signed by either or both of the parties.[16] The court looked to prior cases where it had held that written arbitration agreements do not have to be signed in order to be binding when mutuality of assent is established.[17] The court approved the principles of 17 C.J.S. *Contracts* Section 62 (1963):

> [A] signature is not always essential to the binding force of an agreement, and whether a writing constitutes a binding contract even though it is not signed or whether the signing of the instrument is a condition precedent to its becoming a binding contract usually depends

6. *E.g.*, Smith Barney Shearson, Inc. v. Finstad, 888 S.W.2d 111, 114 (Tex. Ct. App. 1994).
7. *Id.*
8. 511 N.W.2d 724 (Mich. Ct. App. 1994).
9. *Id.* at 726-27.
10. *Id.* at 725.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 726.
16. *Id.*
17. *Id.*

> on the intentions of the parties. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways . . . .[18]

The court found that Ehresman accepted delivery of the agreements and operated under their terms, conveying assent to the written contracts.[19] Thus, Ehresman was bound to the arbitration terms even though he did not sign the agreements.[20]

In addition to enforcing unsigned arbitration agreements,[21] courts have been lenient in determining if parties have met statutory notice requirements.[22] In *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, the court did not interpret the word "underline" narrowly.[23] Instead, the court determined the meaning of "underline" was to emphasize or cause to stand out.[24] The parties in *Soil Remediation* entered into a contract that stated in boldface type, with letters slightly larger than those in the font used for the text, that the contract was subject to the arbitration code of South Carolina,[25] which provides that the notice "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."[26]

The South Carolina Court of Appeals stated that the primary fundamental rule of the statutory construction of the legislature is to give full effect to the intent and purpose of the statute.[27] The court found the purpose of the notice requirement is to let the contracting parties know that the contract requires arbitration of disputes arising under the contract.[28] In rejecting a bright-line ordinary meaning rule, the court reasoned that this type of rule would not allow the notice to be computer printed because the statute requires the text to be "typed."[29] The court in *Soil Remediation Company* held that the notice satisfied the purpose completely because it was printed in all-capital, boldface letters.[30]

The Texas Court of Appeals also faced a notice question in *Al's Formal Wear of Houston, Inc. v. Sun*.[31] However, in *Al's Formal Wear*, the court found an arbitration agreement invalid when the parties did not follow the notice

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18. *Id.*
19. *Id.*
20. *Id.* at 726-27.
21. Ehresman v. Bultynck, 511 N.W.2d 724 (Mich Ct. App. 1994).
22. Soil Remediation Co. v. Nu-Way Envtl., Inc., 453 S.E.2d 253 (S.C. Ct. App. 1994), *cert. granted*, (July 26, 1995).
23. *Id.* at 254.
24. *Id.* at 256.
25. *Id.* at 254. *See* S.C. CODE ANN. § 15-48-10(a)(Law. Co-op. 1993).
26. *Id.*
27. *Id.*
28. *Id.* at 257.
29. *Id.* at 255.
30. *Id.* at 257.
31. 869 S.W.2d 442 (Tex. Ct. App. 1993).

requirements of the Texas General Arbitration Act.[32] In *Al's Formal Wear*, Sun entered into a contract with a formal shop to produce photographs.[33] The contract contained a provision that disputes would be subject to arbitration.[34] The arbitration provision appeared on the back of the contract and was not underlined.[35]

Article 224-1 of the Texas General Arbitration Act provides that an agreement will not be arbitrated "unless notice that a contract is subject to arbitration under this Act is typed in underlined capital letters, or is rubber stamped prominently, on the first page of the contract."[36] The court determined that this article supplants the common law and requires arbitration agreements to be in a particular form to be enforceable.[37] Therefore, the court held the arbitration agreement was not enforceable because the parties did not comply with the notice provisions of the Texas statute.[38]

Notice requirements were also a disputed issue when the Supreme Court of Montana determined that Montana's notice statute for arbitration agreements was not preempted by Section 2 of the Federal Arbitration Act ("F.A.A.").[39] In *Casarotto v. Lombardi*, the parties entered into a contract for a franchise that included an arbitration clause.[40] Instead of including the arbitration provision on the front of the agreement to comply with Montana law, the provision was written on the ninth page of the contract.[41]

The agreement would have complied with F.A.A. standards but it did not comply with Montana's U.A.A. notice requirements, requiring the court to determine how federal and state law worked together.[42] The Montana Supreme Court concluded that Congress did not intend to preempt the entire field of arbitration when it enacted the F.A.A.[43] Furthermore, the F.A.A. does not require parties to arbitrate when they have not agreed to do so.[44] The court found that Montana's notice requirement does not "undermine the goals and policies of the F.A.A." and is not preempted by the F.A.A.[45]

Lack of compliance with Montana's U.A.A. notice requirements was also the turning point for the dissent in *Chor v. Piper, Jaffray & Hopwood, Inc.*[46]

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32. *Id.* at 445.
33. *Id.* at 442-43.
34. *Id.* at 443.
35. *Id.*
36. *Id.* at 445.
37. *Id.*
38. *Id.*
39. Casarotto v. Lombardi, 886 P.2d 931, 939 (Mont. 1994).
40. *Id.* at 933.
41. *Id.*
42. *Id.* at 938.
43. *Id.* at 937.
44. *Id.* at 938-39.
45. *Id.* at 938.
46. 862 P.2d 26, 33 (Mont. 1993).

Montana's version of the U.A.A. specifically provides: "[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration."[47] Since the arbitration agreements in *Chor* did not comply with this statutory provision, the result was an easy one for the dissent.[48] However, the majority in *Chor* found that the arbitration agreement was valid because the plaintiff provided no showing of fraud or misrepresentation to treat the arbitration agreement any different than any other contract.[49]

B. Issues Subject to Arbitration

Not only must parties comply with certain technical rules to create a valid arbitration agreement, the issues submitted to arbitration must be those the party agreed to arbitrate and subject to arbitration under a state statute. Furthermore, when parties submit issues to arbitration, the arbitration panel's decision is an absolute bar to relitigation of those issues.[50] In *Brougher Agency, Inc. v. United Home Life Insurance Co.*,[51] United Home Life ("UHL") entered in to a general agency agreement with Brougher, an agency that sold group life insurance policies to small, self-insured companies.[52] UHL provided coverage on the insurance policies Brougher drafted and sold.[53] As UHL's agent and an intermediary with Lloyds of London, Brougher handled negotiations to obtain reinsurance for UHL from Lloyds.[54]

When Lloyds and UHL submitted a dispute over reimbursement of claims to arbitration, the panel found that Brougher was not an agent of Lloyds except as to specific ministerial acts in administering the contract, that Brougher had no binding authority and that neither party had committed fraud.[55] Brougher was not a party in the arbitration hearing, and the arbitrators awarded judgment to Lloyds.[56] The trial court confirmed the panel's decision and certified Lloyds' and Brougher's interlocutory appeal challenging the denial of their motions for summary judgment.[57]

On appeal, Lloyds argued that it was entitled to summary judgment on the question if the arbitrator's conclusions concerning the issue of misrepresentation were binding against Brougher and UHL under the doctrine of res judicata, which

47. *Id.* at 34. *See* MONT. CODE ANN. § 27-5-114 (1993).
48. *Id.*
49. *Id.* at 32.
50. Brougher Agency, Inc. v. United Home Life Ins. Co., 622 N.E.2d 1013 (Ind. Ct. App. 1993).
51. 622 N.E.2d 1013 (Ind. Ct. App. 1993).
52. *Id.* at 1015.
53. *Id.*
54. *Id.*
55. *Id.* at 1015-16.
56. *Id.* at 1016.
57. *Id.*

provides that a judgment on the merits is an absolute bar to a subsequent action between the same parties on the same claim.[58] Indiana statutory law does not set forth the issues subject to arbitration.[59] Rather, the parties' agreement governs the conditions, limitations, and restrictions upon an arbitrator in making an award.[60] Therefore, the court recognized that "[p]arties are only bound to arbitrate those issues which by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication."[61]

In *Angell Enterprises, Inc. v. Abram & Hawkins Excavating Co.*,[62] the Indiana Court of Appeals was again faced with questions whether certain issues were subject to arbitration and the scope of the arbitrator's power.[63] In this case, Angel contracted with Haver, a general contractor, to construct a supermarket.[64] When a dispute arose, the parties agreed to submit their claims to arbitration under the Owner's Liability Statute, which makes the owner directly liable to a subcontractor for unpaid services on a project, but limits the owner's liability to the amount the owner still owes to the general contractor.[65] Under this statute, the arbitrator awarded and the trial court confirmed a full settlement of the subcontractors' claims against Angell.[66]

On appeal, the parties in *Angell Enterprises, Inc.* continued to disagree as to whether a written arbitration agreement between a general contractor and Angell applied to subcontractors as well.[67] The appellate court recognized that Angell and the subcontractors did not enter into a written arbitration agreement.[68] In addition, since there was no evidence that the contract was intended to benefit the subcontractors, they could not increase their damages by prevailing under a third-party beneficiary theory.[69] The court reasoned that the subcontractors' only recovery was available under the Owner's Liability Statute which had already been settled.[70]

For a court to ascertain whether a claim can be arbitrated, it must determine the issues within the scope of the parties' arbitration agreement.[71] In *Louisiana Natural Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*,[72] the court

58. *Id.*
59. *Id.* at 1017.
60. *Id.*
61. *Id.*
62. 643 N.E.2d 362 (Ind. Ct. App. 1994).
63. *Id.* at 364.
64. *Id.* at 363.
65. *Id.* at 364.
66. *Id.*
67. *Id.* at 365.
68. *Id.*
69. *Id.*
70. *Id.*
71. Louisiana Natural Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc., 875 S.W.2d 458 (Tex. Ct. App. 1994).
72. 875 S.W.2d 458 (Tex. Ct. App. 1994).

determined that it should first look at the claims asserted on appeal to see if they fell within the scope of the agreement and then should consider whether any such claims were previously arbitrated.[73]

The arbitration agreement in *Louisiana Natural Gas Pipeline, Inc.* ("LNGP") stated that arbitration would be used by the parties if "Bludworth and LNGP disagree as to the quality and authorization of the repair work and the amount due therefor."[74] The Texas Court of Appeals determined that LNGP's allegations that Bludworth engaged in false, misleading or deceptive acts or practices in the conduct of trade or commerce with LNGP referred to the quality or authorization of the work or the amount due.[75] Thus, the court held that all of LNGP's claims were subject to arbitration.[76]

When an arbitration agreement states that the arbitration panel may award punitive damages, parties cannot argue that the panel has exceeded its power if it chooses to award such damages.[77] In *Kennedy, Matthews, Landis, Healy & Pecora, Inc. v. Young*,[78] the parties signed an arbitration agreement that stated: "The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim . . . to arbitration. . . . The undersigned parties further agree to abide by and perform any awards rendered pursuant to this agreement."[79] The Minnesota Court of Appeals held that "[h]aving agreed to submit to arbitration respondent's claim, including the issue of punitive damages, appellant cannot now assert that the panel exceeded its authority by hearing the very issue appellant asked it to hear."[80]

While the issues subject to arbitration are usually governed by the agreement itself, some states have created statutes that prevent arbitration in certain areas.[81] In *Great Plains Mutual Insurance Co. v. Mutual Reinsurance Bureau*,[82] the court determined that an agreement to arbitrate was void because a Kansas statute disallowed arbitration agreements in insurance contracts.[83] The court relied on the Tenth Circuit decision in *Mutual Reinsurance Bureau v. Great Plains Mutual Insurance Co.*,[84] which held that Kan. Stat. Ann. § 5-401 (1994) is a law enacted

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73. *Id.* at 461.

74. *Id.*

75. *Id.* at 461-62.

76. *Id.* at 462.

77. Kennedy, Matthews, Landis, Healy & Pecora, Inc. v. Young, 524 N.W.2d 752 (Minn. Ct. App. 1994).

78. 524 N.W.2d 752 (Minn. Ct. App. 1994).

79. *Id.* at 755.

80. *Id.*

81. Great Plains Mut. Ins. Co., Inc. v. Mutual Reinsurance Bureau, No. 89-1226-SAC, 1994 WL 262691 (D. Kan. May 10, 1994); Cannon v. Lane, 867 P.2d 1235 (Okla. 1993); Buraczynski v. Eyring, M.D., N0. 03A01-9402-CV-00053, 1994 WL 677487 (Tenn. Ct. App. Nov. 30, 1994), *appeal granted* (May 1, 1995).

82. No. 89-1226-SAC, 1994 WL 262691 (D. Kan. May 10, 1994).

83. *Great Plains Mut. Ins. Co.*, 1994 WL 262691, at *2 (Kan. Dist. Ct. May 10, 1994).

84. 969 F.2d 931 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 604 (1992).

for the purpose of regulating the "business of insurance."[85] With this precedent at hand, the District Court of Kansas stated that the case was essentially closed.[86]

When the issue of validity of an arbitration agreement in an insurance contract arose again in *Federated Rural Electric Insurance Co. v. Nationwide Mutual Insurance Co.*,[87] the District Court of Kansas was unable to quickly dismiss the case by applying its earlier precedent. The plaintiff in *Federated Rural Electric Insurance Co.* asked the court to declare void and unenforceable arbitration provisions of insurance policies issued in Ohio.[88] The reinsurance treaties were issued in Ohio and the parties agreed that the rule of *lex loci contractus* resulted in Ohio law governing the interpretation of the treaties.[89]

Ohio's version of the U.A.A. contained no exclusion of insurance contracts from the arbitration agreements recognized as valid and enforceable.[90] Therefore, the plaintiff in *Federated Rural Electric Insurance Co.* argued that the strong public policy behind the Kansas statute's prohibition of arbitration agreements in insurance barred Ohio's contrary law.[91] The court held that the Kansas public policy expressed in Kan. Stat. Ann. § 5-401 (1994) did not bar the application of Ohio law and that the arbitration agreements were enforceable without exception.[92]

The question of the validity of an arbitration agreement governing insurance also arose in *Cannon v. Lane*.[93] The Oklahoma Supreme Court determined that health maintenance organizations are insurance companies and arbitration agreements governing such groups are invalid under Oklahoma's version of the U.A.A.[94] The Oklahoma version of the U.A.A. states that the "act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies."[95]

In making its determination that health maintenance and health insurance organizations are essentially the same, the Oklahoma Supreme Court relied on three principles.[96] First, like health insurance organizations, health maintenance organizations must forward an application for a license to the State Insurance Commissioner to review fiscal responsibility.[97] Second, the court reasoned that health maintenance companies are merely alternatives to health insurance with

85. *Great Plains Mut. Ins. Co.*, 1994 WL 262691 at *2. *See* KAN. STAT. ANN. § 5-401 (1994), *repealed by* 1995 Kan. Sess. Laws 155.

86. *Id.*

87. 874 F. Supp. 1204 (D.Kan. 1995).

88. *Id.* at *4.

89. *Id.* at *3.

90. *Id.* at *4.

91. *Id.*

92. *Id.*

93. 867 P.2d 1235 (Okla. 1993).

94. *Cannon*, 867 P.2d at 1237.

95. *Id.* at 1236.

96. *Id.* at 1237.

97. *Id.*

periodic payments designed to help with health care.[98] Finally, the court found that health maintenance organizations are essentially health insurance companies because the definition of "Insurance" under the "Authorization of Insurers and General Requirements" lists health maintenance organizations as an insurance company.[99] Since the health maintenance organization was essentially an insurance company, the Oklahoma Supreme Court held that the contract in question referred to insurance and was expressly excluded from the provision of the U.A.A.[100]

Unlike insurance contracts where arbitration agreements are often void, the Tennessee Appellate Court upheld a contract for arbitration between a physician and his patient.[101] In *Buraczynski v. Eyring, M.D.*,[102] the plaintiffs signed arbitration agreements prior to undergoing medical treatment by Dr. Eyring.[103] When disputes arose over the medical services rendered, Dr. Eyring moved to compel arbitration.[104] In denying his motion, the trial court reasoned the agreement was not one contemplated by the state arbitration statute and lacked sufficient consideration.[105]

In making Tennessee's first assessment of the validity of an arbitration agreement between a physician and patient, the Tennessee Court of Appeals looked to the state's Uniform Arbitration Statute, Tenn. Code Ann. § 29-5-301 (1995).[106] The statute does not carve out an exception to bar its application to medical malpractice arbitration agreements.[107] However, the statute also does not provide special treatment for such agreements.[108] During its assessment, the court was concerned that unlike the bounds of a typical contractual relationship which are delineated by a written document, the bounds in a physician/patient relationship are constantly in flux, necessitating more open-ended agreements.[109] Despite these considerations, the court determined that the legislature should be the body to prohibit physician/patient arbitration agreements.[110] The court found that the arbitration agreements were enforceable under the statute and that Dr. Eyring's contractual agreement to be bound by the decision of the arbitrator was adequate consideration.[111]

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98. *Id.*
99. *Id.*
100. *Id.*
101. *Buraczynski*, 1994 WL 677487 at *3.
102. No. 03A01-9402-CV-00053, 1994 WL 677487 (Tenn. Ct. App. Nov. 30, 1994).
103. *Id.* at *1.
104. *Id.*
105. *Id.*
106. *Id.* at *2. *See* TENN. CODE ANN. § 29-5-301 (1995).
107. *Id.*
108. *Id.*
109. *Id.* at *3.
110. *Id.*
111. *Id.*

Even though the Tennessee legislature was silent on the validity of physician/patient arbitration agreements, some states that have adopted the U.A.A. specifically list the topics excluded from arbitration.[112] The Kansas legislature stated that arbitration agreements in employee/employer contracts are void.[113] The Kansas version of the U.A.A., Kan. Stat. Ann. § 5-401(c)(2) (1994), prevents contracts between an employer and employees or their respective representatives from contracting a valid arbitration agreement.[114] The defendant in *Baxter v. John Weitzel, Inc.*[115] argued that the language in Section 5-401(c)(2) referred only to labor contracts or collective bargaining agreements and not to contracts between an employer and a single employee.[116] Yet, when the court evaluated the legislative history behind the provision, it found no indication of organized labor opposition to the bill.[117] The court gave the provision its ordinary meaning and determined that all employment contracts are exempt from the Kansas U.A.A.[118]

Unlike *Baxter*, an employee in *Smith Barney Shearson, Inc. v. Finstad*[119] signed a specific arbitration agreement that he would arbitrate any dispute, claim or controversy that would arise between him and his firm or a customer, or any other person.[120] Since the parties agreed that a valid arbitration agreement existed, the Texas Court of Appeals need only determine if the arbitration agreement encompassed the employee's allegations against Smith Barney Shearson of slander, civil conspiracy, and intentional infliction of emotional distress.[121]

The employee's registration with the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE") led the rules of these two organizations to govern the dispute.[122] Both codes provide for the arbitration of disputes "arising out the business of a member."[123] The court had to determine whether the employee's allegations arose out of the business of Shearson, the employee's work, or termination.[124] The court found that allegations concerning all significant aspects of the employment relationship between Shearson and the employee, Finstad, were subject to arbitration.[125] The court held that Shearson's acts of filing false information about Finstad with the NASD and IRS, telling clients that Finstad had been terminated for cause, firing

112. Baxter v. John Weitzel, Inc., 871 P.2d 855 (Kan. Ct. App. 1994).
113. *Id.*
114. *Id.* at 857.
115. 871 P.2d 855 (Kan. Ct. App. 1994).
116. *Id.* at 858.
117. *Id.* at 859.
118. *Id.* at 860.
119. 888 S.W.2d 111 (Tex. Ct. App. 1994).
120. *Smith Barney Shearson, Inc.*, 888 S.W.2d at 115.
121. *Id.* at 114.
122. *Id.* at 115.
123. *Id.*
124. *Id.*
125. *Id.* at 117.

Finstad and giving him one hour to move and pressuring Finstad to recommend securities sponsored by the company were all subject to arbitration.[126]

C. Severability of Arbitration Clauses from a Contract

When the terms of a contract are the center of a dispute, an arbitration clause within the questioned contract is severable from the contract and binding on all parties.[127] In *Jackson Mills, Inc. v. B.T. Capital Corp.*,[128] the plaintiff brought an action asking the court to find that a shareholder agreement, which contained an arbitration clause, was null and void.[129] The Supreme Court of South Carolina's holding complied with "the general rule that the duty to arbitrate under an arbitration clause in a contract survives termination of the contract."[130] The *Jackson Mills* court further stated that it did not render arbitration agreements irrevocable under all circumstances.[131] "[W]hen a party has valid grounds upon which to challenge the arbitration clause itself[,] . . . arbitration may be avoided."[132] Since there was no challenge to the validity of the arbitration agreement, the Supreme Court of South Carolina found that the parties' dispute was controlled by arbitration.[133]

Similarly, the Maryland Court of Appeals determined that challenges to a contract do not affect the arbitration agreement in *Holmes v. Coverall North America*.[134] The court recognized that the parties had exchanged mutual promises to arbitrate disputes under their contract with each promise providing consideration for the other.[135] The Maryland Arbitration Act states that in adjudicating a petition for an order of arbitration or a stay pending arbitration, the consideration of the existence of an arbitration agreement is severable.[136] "The scope of the court's involvement extends only to a determination of the existence of an arbitration agreement."[137]

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126. *Id.* at 116-17.

127. Jackson Mills, Inc. v. B.T. Capital Corp., 440 S.E.2d 877 (S.C. 1994); Holmes v. Coverall North America, Inc., 649 A.2d 365 (Md. Ct. Spec. App. 1994).

128. 440 S.E.2d 877 (S.C. 1994).

129. *Jackson Mills, Inc.*, 440 S.E.2d at 878.

130. *Id.* at 879.

131. *Id.*

132. *Id.*

133. *Id.*

134. 649 A.2d 365 (Md. Ct. Spec. App. 1994).

135. *Id.* at 370.

136. *Id.*

137. *Id.* at 370-71.

D. Necessity of a Valid Contract

In *Anderson County v. Architectural Techniques Corp.*,[138] the appellants argued that if the contract containing an arbitration clause is not legally enforceable, then the arbitration clause could not be utilized by either party.[139] The Appellants contended that the agreement between the parties was not binding because it merely laid groundwork for future contracts between the parties.[140] However, the court found that the contract was clearly an agreement between the parties to govern future services and satisfied the requirements of a binding contract.[141]

The contract between the parties in *Anderson County* specifically provided that: "[a]ll claims, disputes and other matters in question between the parties to this agreement, arising out of or relating to this agreement or the breach thereof, shall be decided by arbitration . . . ."[142] The court concluded that this arbitration agreement met the requirements of Tennessee's version of the U.A.A. and the parties should submit controversies to arbitration.[143]

Unlike *Anderson County,* where the court granted authority to the arbitrators to settle the dispute, the court in *Florida Education Association/United v. Sachs*[144] determined that the existence of a valid contract was a question for the court rather than the arbitrator.[145] After reviewing the filings below, the court found that a valid contract and arbitration clause never existed.[146] Thus, the court reversed the order of the trial court that deferred to the arbitrator's decision on the existence of a contract.[147]

In *Phillips v. ACS Municipal Brokers, Inc.*,[148] the court stated that the Texas U.A.A. only applies "when a valid written agreement to arbitrate exists between the parties to the agreement or the contract."[149] The Texas act focuses on the parties to an agreement and not the transaction itself.[150] The court determined that there was no evidence of an enforceable agreement to arbitrate and that the separately executed registration agreements between the parties and National Association of Securities Dealers were not agreements between the parties as contemplated by the Texas act.[151]

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138. No. 03A01-9303-CH-00110, 1993 WL 346473 (Tenn. Ct. App. Sept. 9, 1993).
139. *Id.* at *4.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at *5.
144. 627 So. 2d 1240 (Fla. Dist. Ct. App. 1993).
145. *Id.* at 1240.
146. *Id.* at 1241.
147. *Id.*
148. 888 S.W.2d 872 (Tex. Ct. App. 1994).
149. *Id.* at 875.
150. *Id.*
151. *Id.* at 876.

E. Additional Facets of Section 1

In determining the validity of arbitration agreements, courts must also consider if the agreements violate any constitutional provisions. In *City of Chamberlain v. R.E. Lien, Inc.*,[152] the Supreme Court of South Dakota found that a state statute authorizing arbitration involving a municipal party was not unconstitutional.[153] R.E. Lien entered into a contract with the city of Chamberlain for the construction of water mains and sewer lines.[154] When a dispute arose over the work, the city refused to pay Lien, and Lien filed a demand for arbitration.[155] Since the agreement did not contain an arbitration clause, the city requested, and the trial court granted, a motion to quash and stay the arbitration proceeding.[156] The circuit court found that S.D. Codified Laws Ann. § 21-25A-1 (1987), which compelled the city to arbitrate under the American Institute of Architects' standard form, violated Article III, Section 26, of the South Dakota Constitution as a delegation of a municipal function.[157]

South Dakota law (Section 21-25A-1) sets out the conditions necessary for an arbitration agreement in South Dakota to be valid and does not exclude municipalities from entering into arbitration agreements.[158] Article III, Section 26 of the South Dakota Constitution provides in part that: "The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property, effects, whether held in trust or otherwise, or levy taxes, or to select a capital site, or to perform any municipal functions whatever."[159]

The Supreme Court of South Dakota found that Section 21-25A-1 does not violate Article III, Section 26, of the South Dakota Constitution, "as it does not delegate to any 'special commission, private corporation or association' the municipal power to contract."[160] The court stated that the municipalities should not be able to denounce their ability to arbitrate if they have the ability to freely enter into such agreements.[161]

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152. 521 N.W.2d 130 (S.D. 1994).

153. City of Chamberlain v. R.E. Lien, Inc., 521 N.W.2d 130, 133 (S.D. 1994).

154. *Id.* at 131.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 133. South Dakota law states:

> 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. This chapter also applies to arbitration agreements between employers and employees or between their respective representatives.

S.D. CODIFIED LAWS ANN. § 21-25A-1 (1987).

159. *Id.* at 132.

160. *Id.* at 133.

161. *Id.*

Additional changes under Section 1 of the U.A.A. occurred in *DeGroot v. Farmers Mutual Hail Insurance Co. of Iowa*,[162] where the court held that the decisions of appraisers were not synonymous with rulings of arbitrators and were not binding on the parties.[163] The plaintiff in *DeGroot* signed a hail insurance policy that contained a provision stating:

> In case the Insured and this company shall fail to agree as to the amount of loss, then, on written demand of either, each shall select a competent appraiser. . . .The appraisers shall . . . select a competent and disinterested umpire. . . . The appraisers and the umpire shall then appraise the loss and an award in writing of any two shall determine the amount of the loss.[164]

An Illinois Appellate Court determined that the agreement was void because it deprived the individual of his right to resort to the court for redress of grievances.[165] The court determined that the parties in the agreement did not agree to submit their dispute to binding arbitration by using the term "appraisal."[166]

Beyond determining that appraisers are not arbitrators under Section 1 of the U.A.A., a court found that arbitration can be precluded by a valid release when a contract expressly provides for arbitration.[167] In *USAA Property & Casualty Co. v. Brady*,[168] the defendant, Brady, settled with USAA and signed a release of all claims for uninsured motorist benefits arising from an automobile accident.[169] After signing the release, she demanded arbitration with USAA regarding the same uninsured motorist coverage for the identical accident.[170] USAA filed for a declaratory judgment and the trial court determined that the release was valid.[171] The Colorado Court of Appeals held that the release made all of Brady's arbitration claims invalid.[172]

As a general rule, courts are willing to stretch ambiguous statutes governing arbitration agreements to find a valid contract. However, if a law clearly disallows arbitration by particular parties or regarding a certain issue, courts have applied the plain language of the statute. With the cost of litigation increasing, judicial support of arbitration can only continue to increase. Since arbitration enjoys strong judicial support, attorneys should draft contracts with arbitration

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162. 643 N.E.2d 875 (Ill. App. Ct. 1994).
163. DeGroot v. Farmers Mut. Hail Ins. Co. of Iowa, 643 N.E.2d 875, 876 (Ill. App. Ct. 1994).
164. *Id.* at 875.
165. *Id.* at 876.
166. *Id.*
167. USAA Property & Casualty Co. v. Brady, 867 P.2d 203 (Colo. Ct. App. 1993).
168. *Id.*
169. *Id.* at 204.
170. *Id.*
171. *Id.*
172. *Id.* at 205.

clauses to avoid causing their clients to incur the larger fees and additional hours required by civil litigation.

III. SECTION 2: PROCEEDINGS TO COMPEL OR STAY ARBITRATION

Section 2 of the U.A.A. requires the court to compel arbitration when there is an arbitration agreement and one party refuses to arbitrate.[173] In making the determination whether to compel arbitration, the court is limited to deciding whether an agreement to arbitrate exists, whether the dispute involved is within the scope of the agreement and whether the right to arbitrate was waived.[174] The court is not free to examine the merits of the controversy.[175]

A. Agreement Between the Parties

Applying state statutes similar to Section 2 of the U.A.A., courts have addressed whether an agreement to arbitrate exists between two parties.[176] The Illinois Court of Appeals, in *City of Peru v. Illinois Power Co.*,[177] held that third-party beneficiaries of an agreement are not parties to the arbitration provisions of the agreement and therefore, cannot be compelled to participate in arbitration.[178] In *Teamsters Union Local 340 v. Portland Water District*,[179] the collective bargaining agreement had expired and in an effort to protest, the employees parked their cars at a location in violation of a district parking policy.[180] One employee was later fired for this action and his union sought arbitration.[181] The Supreme Judicial Court of Maine concluded that once a collective bargaining agreement expires, the parties lose their contractual rights and are no longer under an obligation to arbitrate.[182] This obligation ends unless the grievance involved a right that vested or a fact that occurred while the bargaining agreement was in effect.[183] The court determined that the employee's grievance, that he was terminated without "just cause," did not involve such a right.[184]

In *Chicago Insurance Co. v. Tarr*, the insured sought arbitration against Travelers Insurance Company, the insured's primary insurance carrier, but did not seek to compel arbitration with Chicago Insurance Company, a secondary

173. U.A.A. § 2(a).
174. Chicago Ins. Co. v. Tarr, 638 So. 2d 106, 108 (Fla. Dist. Ct. App. 1994).
175. Messa v. State Farm Ins. Co., 641 A.2d 1167, 1168 (Pa. Super. Ct. 1994).
176. *Chicago Ins. Co.*, 638 So. 2d at 108.
177. 630 N.E.2d 454 (Ill. App. Ct. 1994).
178. *Id.* at 457-58.
179. 651 A.2d 339 (Me. 1994).
180. *Id.* at 340.
181. *Id.* at 341.
182. *Id.*
183. *Id.*
184. *Id.* at 342.

insurance carrier.[185] The insured argued Chicago Insurance was bound by Travelers' arbitration clause because Chicago's policy stated that Chicago was bound by the "terms and conditions" of Travelers' insurance policy.[186] Travelers settled before arbitration and withdrew its defense arbitrator, so the arbitration was done ex parte.[187] The Florida District Court of Appeals stated that an ex parte arbitration award would not be compelled unless the insurance policy provided for ex parte arbitration.[188] The court found that neither policy provided for ex parte arbitration,[189] and that the insured should have filed an application to compel Chicago to arbitrate so the lower court would have resolved the issue of whether Chicago was obligated to arbitrate.[190]

In deciding whether an agreement to arbitrate exists, three courts have recently considered the effect conditions precedent and procedural requirements have on arbitration agreements. In *City of Alamo v. Garcia*,[191] a contract specified that before a party could compel arbitration, written notice of the demand for arbitration must be given to another party within a reasonable time.[192] The contract also required that the party compelling arbitration appoint an arbitrator and send both a copy of the notice and the appointment to the American Arbitration Association ("AAA").[193]The city of Alamo filed a notice with the court, directed to Garcia and the AAA, but did not appoint an arbitrator, nor indicate whether a copy of the notice was actually sent to the AAA.[194] The Texas Court of Appeals held that the city did not comply with the contractual requirements and therefore, was not entitled to have the dispute submitted to arbitration.[195]

In *Amalgamated Transit Union, Local 900 v. Suburban Bus Division of the Regional Transportation Authority*,[196] the Union submitted a grievance as called for in the agreement, but there was a question of whether it followed the correct agreement process.[197] Pace, a bus division of the regional transportation authority, argued that the grievance was delivered to the wrong person and was untimely.[198] Pace claimed the required grievance process was a condition precedent to their obligation to arbitrate.[199] The Illinois Court of Appeals

185. *Chicago Ins. Co.*, 638 So. 2d at 107.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 108.
190. *Id.*
191. 878 S.W.2d 664 (Tex. Ct. App. 1994).
192. *Id.* at 665.
193. *Id.*
194. *Id.* at 666.
195. *Id.*
196. 634 N.E.2d 469 (Ill. App. Ct. 1994).
197. *Id.* at 472.
198. *Id.* at 475.
199. *Id.* at 472-73.

determined that issues regarding conditions precedent are for the court to address and procedural matters were issues for the arbitrator.[200] The court held that an alleged failure to properly complete the required grievance process was a procedural issue and best decided by the arbitrator.[201]

In *St. John Sanitary District v. Town of Schererville*,[202] St. John sought to compel Schererville to arbitrate a dispute over the proposed increase of rates Schererville charged St. John for wastewater treatment.[203] The parties disagreed as to whether the issue of rate increases was arbitrable.[204] The Indiana Court of Appeals held that the issue was arbitrable because it was at the heart of the contract, and the court could not find with positive assurance that the issue was non-arbitrable, without specific contract exclusion.[205]

Schererville next argued that even if the contract included arbitration, St. John failed to make good faith efforts to renegotiate the rate increase which was a prerequisite to arbitration.[206] The court found St. John made several good faith efforts to renegotiate and only sought to compel arbitration after Schererville adopted the proposed rate change.[207] St. John did not name an arbitrator as required in the agreement, but the court found that neither party named an arbitrator and that St. John tried several times to preserve its right to seek arbitration.[208] The court concluded that fulfilling the prerequisites to arbitration in this situation was futile.[209] Therefore, St. John was not estopped from seeking arbitration.[210] The court stated that the party who refuses or fails to comply with the grievance procedure will not then be permitted to prevent arbitration by claiming that the procedure was not completed.[211]

B. Within The Scope of The Agreement

Once a court decides an agreement to arbitrate exists, the next question it must address is whether the dispute involved is within the scope of the agreement.[212] In *PSI Energy Inc. v. AMAX, Inc.*,[213] AMAX did not disagree

200. *Id.* at 474.
201. *Id.* at 475.
202. 621 N.E.2d 1160 (Ind. Ct. App. 1993).
203. *Id.* at 1161.
204. *Id.*
205. *Id.* at 1163.
206. *Id.*
207. *Id.*
208. *Id.* at 1163-64.
209. *Id.* at 1164.
210. *Id.*
211. *Id.* at 1163.
212. *Chicago Ins. Co.*, 638 So. 2d at 108 (quoting Piercy v. Bd. of Washington County, Florida, 576 So. 2d 806, 807 (Fla. Dist. Ct. App. 1991)).
213. 644 N.E.2d 96 (Ind. 1994).

about the validity of the arbitration clause.[214] The contract called for the parties to arbitrate whenever an agreement is reached where a "gross inequity has occurred."[215] AMAX argued it had not agreed to arbitrate the issue of whether a gross inequity of the contract had occurred.[216] The agreement was silent on this issue.[217] The Supreme Court of Indiana found that, absent language to the contrary, the question if a gross inequity occurred was an arbitrable issue.[218] The court based its decision on the fact that the parties chose all-encompassing language in the arbitration agreement and both sides bargained for each term of the contract.[219] The court stated that to rule on the issue of whether a gross inequity occurred would be deciding the merits of the controversy.[220]

In *Messa v. State Farm Insurance Co.*,[221] Messa filed a claim under the uninsured motorist provisions of its policy.[222] State Farm denied the claim, and Messa filed a petition to enforce the policy's arbitration agreement.[223] State Farm filed an answer which alleged the claim was barred by the statute of limitations.[224] The Superior Court of Pennsylvania found that a valid arbitration agreement existed and that the statute of limitations claim was within the scope of the arbitration agreement.[225] Therefore, it was an issue for the arbitrator and not the trial court.[226]

The court in *Grektorp v. City Towers of Florida, Inc.*[227] concluded that any doubts concerning the scope of an arbitration agreement should be resolved in favor of arbitration.[228] City Towers filed a claim alleging that its president, Grektorp, had breached his fiduciary duties by engaging in real estate transactions with his wife and a corporation owned by both and by receiving commissions from these transactions.[229] Grektorp moved to compel arbitration of City Towers' claim pursuant to the arbitration agreement in his employment contract.[230] The Florida Court of Appeals construed the clause that stated "any

214. *Id.* at 99.
215. *Id.* at 98.
216. *Id.* at 99.
217. *Id.* at 100.
218. *Id.*
219. *Id.* at 99-100.
220. *Id.* at 99.
221. 641 A.2d 1167 (Pa. Super. Ct. 1994).
222. *Id.* at 1168.
223. *Id.*
224. *Id.*
225. *Id.* at 1170.
226. *Id.*
227. 644 So. 2d 613 (Fla. Dist. Ct. App. 1994).
228. *Id.* at 614.
229. *Id.* at 613.
230. *Id.* at 613-14.

controversy" to reflect a broad arbitration agreement.[231] Therefore, the claim was within the scope of the contract's arbitration clause. [232]

In *Holmes v. Coverall North America, Inc.*,[233] Holmes purchased a franchise agreement from Coverall.[234] Holmes later rescinded the agreement when it found that Coverall was not approved to sell franchises until after the date of the agreement.[235] When Coverall failed to reimburse Holmes for money paid in connection with the agreement, Holmes filed a claim and Coverall sought to compel arbitration.[236] Holmes claimed that rescission of the contract is an issue for the court to decide in determining whether an agreement to arbitrate exists between parties.[237] The Maryland Court of Special Appeals held that the issue of rescission of an underlying contract is not a threshold issue, but one for arbitration.[238] The court found the parties might attempt to avoid the binding arbitration agreement by merely claiming that the formation of the entire contract was faulty, under Holmes' position.[239] The court stated that such a rule would be contrary to the intent of the arbitration law which states that courts decide only whether an arbitration agreement exists and not issues related to the underlying contract.[240]

A Maryland court also considered whether a dispute was within the scope of the agreement in *Contract Construction, Inc. v. Power Technology Center Limited Partnership*.[241] The court found the contract covered indemnification claims arising out of complaints filed by third parties injured on the construction site.[242] No part of the contract exempted claims for indemnification from arbitration.[243] Therefore, the Maryland Court of Special Appeals held that a third-party indemnification claim was subject to arbitration.[244] Powertech further argued that CCI had waived its right to arbitration by demanding arbitration prior to completing the procedural requirements designated in the contract.[245] The contract required the party to first submit its claim to an architect for resolution.[246] The court held that CCI had not waived arbitration because a demand for arbitration of a third-party claim is not a "claim" as stated in the

231. *Id.* at 614.
232. *Id.*
233. 633 A.2d 932 (Md. Ct. Spec. App. 1994).
234. *Id.* at 933.
235. *Id.* at 934.
236. *Id.* at 932-34.
237. *Id.* at 935.
238. *Id.* at 937.
239. *Id.* at 938.
240. *Id.*
241. 640 A.2d 251 (Md. Ct. Spec. App. 1994).
242. *Id.* at 258.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 259.

agreement.[247] Rather, the court stated it is simply an assertion that arbitration, not litigation, is the proper forum for resolving the respondent's claims.[248]

C. Agreement Waived

If a court decides there is an agreement to arbitrate and the dispute involved is within the scope of the agreement, it must next decide whether the right to arbitrate has been waived.[249] In *City of Cottonwood v. James L. Fann Contracting, Inc.*,[250] the city argued that the issue of timeliness is an issue for the court and not the arbitrator.[251] The court stated that apart from repudiation, timeliness is an issue of procedural condition for the arbitrator.[252] In addition, the party, seeking to prove that timeliness is an issue of repudiation for the court, carries a heavy burden.[253] The allegation must show clear evidence of prejudice to the party and a demand for arbitration so egregiously untimely that it is inconsistent with the intent to assert one's right to arbitrate.[254] The court found that Fann had not repudiated arbitration because: (1) it did not file suit against the city prior to compelling arbitration; (2) it did not acquiesce to a denial of arbitration, and (3) its attempt to compel arbitration showed that it did not voluntarily relinquish its right to arbitrate.[255]

In *City of Centralia v. Natkin & Co.*,[256] the city claimed that Natkin's prelitigation delay, along with the prejudice the city had suffered, constituted a waiver of Natkin's right to arbitration.[257] The Illinois Appellate Court found that preliminary settlement negotiations are not sufficient to waive arbitration if held in good faith, even if a period of three years has elapsed.[258] The city claimed that it was prejudiced because it incurred court costs and legal fees to sue Natkin.[259] On this point, the court concluded that the city could not claim prejudice, because Natkin filed for arbitration after the city's complaint was filed in court, and the city could have personally referred the matter to arbitration as stated in the agreement.[260] Finally, the city claimed arbitration should be stayed because of the potential claim against it by a party not subject to the arbitration

247. *Id.*
248. *Id.*
249. *Chicago Ins. Co.*, 638 So. 2d at 108.
250. 877 P.2d 284 (Ariz. Ct. App. 1994).
251. *Id.* at 288.
252. *Id.* at 292.
253. *Id.*
254. *Id.* at 291.
255. *Id.* at 290.
256. 630 N.E.2d 458 (Ill. App. Ct. 1994).
257. *Id.* at 460.
258. *Id.* at 461.
259. *Id.*
260. *Id.*

agreement.[261] The court disagreed, finding that prohibiting Natkin's right to arbitration would destroy the same right in many construction cases because there is often the potential for a third party to become involved in the case.[262]

IV. SECTION 3: APPOINTMENT OF ARBITRATORS

Section 3 of the U.A.A. requires that parties follow the method of appointment of arbitrators specified in their arbitration agreement.[263] If the method for any reason cannot be followed, the court, on application of a party, shall appoint an arbitrator.[264] In *Annapolis Professional Firefighters Local 1926 v. City of Annapolis*,[265] the parties had an agreement to mediate in their contract.[266] However, such mediation could not occur because the agency that was to provide such mediation was disbanded due to budget cuts.[267] The Maryland Court of Special Appeals was faced with the question of whether the situation voided the whole mediation agreement or required the court to appoint another mediator.[268] The court decided that a written agreement to submit disputes to any form of alternative dispute resolution, that is not otherwise against public policy, would be enforced to the same extent as if the chosen method was arbitration.[269] The court held that the mediation agreement was close enough to arbitration to apply the U.A.A.[270] and that the trial court could therefore appoint another mediator.[271]

V. SECTION 5: HEARING REQUIREMENT

Section 5 of the U.A.A. provides the mandatory procedural requirements for an arbitration hearing, unless parties otherwise provide for such in their agreements.[272] The Maryland Court of Special Appeals decided a case under this section of the U.A.A. in a claim for dissolution of marriage.[273] In *Kovacs v. Kovacs*,[274] the parties agreed to submit their dispute to a Jewish court according to Jewish law.[275] One spouse later argued that the proceedings were

261. *Id.* at 462.
262. *Id.* at 463.
263. U.A.A. § 3.
264. *Id.*
265. 642 A.2d 889 (Md. Ct. Spec. App. 1994).
266. *Id.* at 891-92.
267. *Id.*
268. *Id.* at 895.
269. *Id.*
270. *Id.* at 894.
271. *See id.* at 895.
272. U.A.A. § 5.
273. *Kovacs v. Kovacs*, 633 A.2d 425, 428 (Md. Ct. Spec. App. 1993).
274. *Id.*
275. *Id.* at 429.

not in accordance with the U.A.A. because her counsel was not permitted to make opening or closing statements or cross-examine witnesses as required by the U.A.A.[276] The court held that parties may waive their rights under the U.A.A. and submit their controversies to arbitration proceedings that do not meet all of the U.A.A. requirements.[277] The court recognized the validity of the special arbitration proceeding, as long as the parties voluntarily and knowingly agreed to the procedures.[278]

Another case where parties created their own procedural requirements for an arbitration proceeding is *Christian Dior, Inc. v. Hart Schaffner & Marx* ("HSM").[279] In *Christian Dior*, the plaintiff received an arbitration award for HSM's breach of a license termination agreement.[280] HSM claimed that the arbitrator's refusal to subpoena Dior's president denied it the opportunity to cross-examine a material witness.[281] However, the Illinois Appellate Court concluded HSM suffered no prejudice from the witness' absence.[282] Both parties had stipulated that the president had prematurely announced HSM's termination agreement and that the president was acting for Dior.[283] The only issue for arbitration was HSM's actions after the announcement and its impact on Dior.[284] The court found that HSM could not specify the nature of any testimony it sought from the president, other than what was stipulated.[285] The court also concluded the request for the president's appearance came too late and that HSM must accept responsibility for his not appearing.[286] HSM waited until the first day of arbitration to demand that a subpoena be issued, it never listed the president as a witness in the previous hearings, and the president lived in France, creating a real hardship in his quickly appearing for the proceedings.[287]

VI. SECTION 7: WITNESSES, SUBPOENAS, DEPOSITIONS

Section 7 of the U.A.A. stipulates that fees for a witness in an arbitration proceeding shall be the same as for a witness in the designated state court.[288] This section of the U.A.A. was in dispute in *Kerber v. Allied Group Insurance*,[289] where the parties participated in statutory no-fault arbitration.[290]

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276. *Id.* at 432.
277. *Id.* at 433.
278. *Id.*
279. 637 N.E.2d 546 (Ill. App. Ct. 1994).
280. *Id.* at 548.
281. *Id.* at 552.
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* at 549, 552.
288. U.A.A. § 7(d).
289. 516 N.W.2d 568 (Minn. Ct. App. 1994).

The arbitrator required Allied Group Insurance to pay Kerber's expert witness fees.[291] The no-fault arbitration rules promulgated by the state supreme court required that each side pay their own expert witness fees.[292] Therefore, the Minnesota Court of Appeals concluded that the arbitrator exceeded his authority by requiring Allied Insurance to pay the witness fees.[293] Kerber argued that the no-fault rules should be read together with the U.A.A., but the court disagreed.[294] The court did not find the U.A.A. language to be controlling and stated that when there is conflict between the two statutory provisions, the special provision of the no-fault statute prevails over the general U.A.A. provision.[295]

VII. SECTION 8: AWARD

U.A.A. Section 8 requires that arbitration awards be written and signed.[296] Further, it requires awards be made within the time specified by the parties' agreement, or if none stated, by a time set by the court.[297] A party must notify the arbitrator that the award has not been made within the time specified, or an objection to such tardiness is waived.[298] Any objection must be made prior to the party receiving the award.[299]

Section 8 of the U.A.A. was at issue in *Bureau of Employee Relations v. Maine State Employees Association, Seiu Local 1989*,[300] where the parties proceeded to arbitrate the sole issue of whether the dispute was arbitrable.[301] The arbitrator found it was arbitrable, and the Bureau of Employee Relations filed a motion to vacate the award.[302] The Supreme Judicial Court of Maine found that the U.A.A. does not define "award" but clearly decided that if the issue is considered arbitrable, the parties are to proceed to arbitration without first appealing the decision.[303] The court held that an arbitrator's decision on whether an issue is arbitrable is not an "award" and not appealable.[304]

The Illinois Appellate Court also looked at Section 8 of the U.A.A. in *Vascular Surgery Association v. Business Systems, Inc.*[305] In this case, BSI did

290. *Id.* at 569.
291. *Id.*
292. *Id.* at 570.
293. *Id.*
294. *Id.*
295. *Id.*
296. U.A.A. § 8(a).
297. U.A.A. § 8(b).
298. *Id.*
299. *Id.*
300. 639 A.2d 638 (Me. 1994).
301. *Id.* at 639.
302. *Id.*
303. *Id.* at 640.
304. *Id.*
305. 628 N.E.2d 285 (Ill. Ct. App. 1993).

not object to an untimely award until after the arbitrator gave it's decision.[306] The court concluded BSI had waived its objection to the tardiness of the award.[307] A dissenting arbitrator complained of the delay before the decision, but the court ruled that the U.A.A. clearly requires that a "party" object.[308] The court stated that the policy behind the rule is to prevent a party from waiting to see if the arbitrator's award is in its favor and then, if not, claim the ruling is invalid because of delay.[309]

VIII. SECTION 9: CHANGE OF AWARD BY ARBITRATORS

Section 9 of the U.A.A. provides authority for arbitrators to modify or correct awards based on an application from a party or on submission by the court.[310] The modified or corrected award is subject to the provisions in Section 11, 12 and 13.[311] Section 9 of the U.A.A. was addressed by the Florida District Court of Appeals in *Dade County Police Benevolent Association v. City of Homestead.*[312] An arbitrator stated the employee was demoted for "just cause," but the demotion penalty was "too excessive and severe."[313] The court found that the arbitrator's decision was ambiguous and remanded the matter to the arbitrator for clarification.[314]

The Missouri Court of Appeals also applied Section 9 of the U.A.A. in *Heineman v. Charno.*[315] Charno argued that the entry of an amended award involved reopening the hearing; therefore, Section 5 of the U.A.A. should apply.[316] Section 5 of the U.A.A. provides that at the hearing parties are entitled to be heard, present evidence and cross-examine witnesses.[317] The Missouri Court of Appeals held that changing an award under Section 9 does not require an additional hearing.[318] The court stated that Section 9 speaks of Sections 11, 12 and 13, but does not mention Section 5 and that the language of Section 9 clearly does not envision an additional hearing.[319]

306. *Id.* at 287.
307. *Id.*
308. *Id.*
309. *Id.*
310. U.A.A. § 9.
311. *Id.*
312. 642 So. 2d 24 (Fla. Dist. Ct. App. 1994).
313. *Id.* at 25.
314. *Id.*
315. 877 S.W.2d 224 (Mo. Ct. App. 1994).
316. *Id.* at 229.
317. U.A.A. § 5(b).
318. *Heineman*, 877 S.W.2d at 229.
319. *Id.*

IX. SECTION 10: FEES AND EXPENSES OF ARBITRATION

Section 10 of the U.A.A. provides that arbitrator's fees and expenses incurred during arbitration shall be paid according to the award.[320] Section 10 specifically does not address payment of attorney fees,[321] which was at issue in *Canon School District No. 50 v. W.E.S. Construction Co.*[322] In *Canon*, the Supreme Court of Arizona held that the U.A.A. prohibits the arbitrator and confirming court from awarding attorney's fees for the arbitration proceeding, but the confirming court may award attorney fees incurred in the confirmation hearing.[323] The court based its holding on the decision of a North Carolina case with identical facts.[324] The court stated the policy behind arbitration is to obtain an inexpensive and speedy disposition of the controversy.[325] Any other decision would encourage parties to go to court in confirmation proceedings for the sole purpose of seeking attorney fees from the arbitration proceeding.[326]

In *Marsh v. Loffler Housing Corp.*,[327] the court also faced the question of awarding attorney fees when the parties entered into an American Institute of Architects standard construction contract ("AIA").[328] According to the contract, any documents attached to the contract became part of the agreement.[329] The first document attached was a Home Improvement Contract ("HIC").[330] The HIC specifically provided that the homeowner would pay the contractor's attorneys fees in the event that payment of the contract had to be enforced by legal action.[331] The Maryland Court of Special Appeals decided that the language of the HIC must be read in relation to the dispute resolution provisions of the AIA.[332] Therefore, the arbitrator and the court had authority to award attorney fees.[333]

XII. SECTION 11: CONFIRMATION OF AWARDS

Unless a party urges the court to vacate, modify, or correct an arbitration award, Section 11 of the U.A.A. provides for the natural confirmation of the

320. U.A.A. § 10.
321. *Id.*
322. 882 P.2d 1274 (Ariz. 1994).
323. *Id.* at 1280.
324. *Id.* at 1278 (citing Nucor Corp. v. General Bearing Corp., 423 S.E.2d 747, 749-51 (1992)).
325. *Id.*
326. *Id.* at 1278-79.
327. 648 A.2d 1081 (Md. Ct. Spec. App. 1994).
328. *Id.* at 1083.
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.* at 1086.
333. *Id.* at 1087.

award within a set time period.[334] With such a high level of deference toward confirming arbitration awards, trial courts do not have substantial discretion to decide whether to confirm such awards. Yet, when an arbitration agreement and state statute fail to restrict the issues subject to arbitration, the trial court is allowed full discretion in deciding these issues.

A. Authority of the Trial Court

Trial courts do not have unfettered discretion to set aside arbitration awards.[335] Such awards only should be set aside "within the parameter of the arbitration agreement or the statute."[336] In *Hardaway v. Goodwill*,[337] the parties agreed to arbitrate a dispute involving an automobile accident.[338] After the arbitration award was published, the defendant moved for confirmation.[339]

Although the plaintiff did not oppose confirmation, the trial court refused to confirm the arbitration award, believing confirmation was a discretionary matter and that the parties had not agreed to be bound to arbitration.[340] The trial court judge stated: "I am mainly setting it [the arbitration award] aside on discretion . . . but I think there is considerable complaint about the award . . . ."[341] The Tennessee Court of Appeals held the reasons advanced by the trial court did not support its refusal of confirmation because there was no evidence to show the parties did not intend to be bound or come under the U.A.A.[342]

Similarly, Florida's Fifth District Court of Appeals held that:

> the trial court does not have any discretion and must confirm the award unless one of the parties seeks to vacate, modify, or correct the award within 90 days of delivery of the arbitrator's award, or unless there is an issue presented to the trial court in the motion to confirm which was not submitted to the arbitrator.[343]

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334. Section 11 of the U.A.A. states: "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." U.A.A. § 11.

335. Hardaway v. Goodwill, No. 03-A-01-9403CV000113, 1994 WL 585767, at *3 (Tenn. Ct. App. Oct. 19, 1994).

336. *Id.*

337. *Id.*

338. *Id.* at *1.

339. *Id.*

340. *Id.* at *3.

341. *Id.* at *4.

342. *Id.*

343. Moya v. Bd. of Regents, State Univ. Sys. of Florida, 629 So. 2d 282, 284 (Fla. Dist. Ct. App. 1993).

In *Moya v. Board of Regents, State University System of Florida*,[344] a career employee of the University of Central Florida was terminated after being reprimanded for using inappropriate language.[345] In an arbitration proceeding, the arbitrator awarded Moya reinstatement, backpay and removal of a written reprimand from his personal files.[346]

Moya filed a motion to modify the award more than ninety days after the arbitrator's decision.[347] The trial court promptly denied the motion.[348] On appeal, the court determined that if a party objects to the terms of the arbitrator's award, the party must petition the trial court within the ninety days or the trial court must confirm the arbitration award.[349]

Despite the general rule that a trial court must confirm an arbitration award in the absence of a motion to vacate, modify or correct the award,[350] a trial court is expected to exercise its discretion in certain instances. The Fifth District Court of Appeals in Florida found that a trial judge did have discretion to change an arbitration award pursuant to a properly raised defense.[351]

In *Montalvo v. Travelers Indemnity Co.*,[352] the parties agreed to arbitrate a dispute arising from an automobile accident.[353] The arbitrator awarded Montalvo $68,500 for his injuries in the accident.[354] Travelers failed to file a petition to modify the award during the 90-day time period and Montalvo filed a motion for confirmation of the award.[355] Instead of upholding the award, the trial court held Travelers responsible for only 50% of the arbitration award since Montalvo could collect additional insurance funds under another policy.[356] The trial court concluded that each insurance company's proportionate share was one-half of the total damages awarded because the policy limits under the insurance contracts were the same.[357] Since the issue of policy limits was not submitted to the arbitration panel, the appellate court determined that the trial court had discretion to confirm only half of the arbitration award.[358]

Unlike the decision in *Montalvo*, the court in *Anderson County v. Architectural Techniques Corp.*[359] found that the record lacked proof that the

344. 629 So. 2d 282 (Fla. Dist. Ct. App. 1993).
345. *Id.* at 283.
346. *Id.*
347. *Id.*
348. *Id.* at 284.
349. *Id.*
350. *Hardaway*, 1994 WL 585767 at *3.
351. Montalvo v. Travelers Indem. Co., 643 So. 2d 648, 650 (Fla. Dist. Ct. App. 1994).
352. 643 So.2d 648 (Fla. Dist. Ct. App. 1994).
353. *Id.* at 649.
354. *Id.*
355. *Id.*
356. *Id.* at 650.
357. *Id.*
358. *Id.*
359. No. 03A01-9303-CH-00110, 1993 WL 346473 (Tenn. Ct. App. Sept. 9, 1993).

appellants "did not participate in the arbitration hearing without raising the objection" of no arbitration agreement.[360] Since the record did not confirm that the parties had not discussed the lack of an arbitration agreement, the Western Tennessee Court of Appeals found the arbitrator's award should be confirmed.[361]

The First District Court of Appeals in Indiana also held that a trial court did not exceed its scope of authority when it allowed a partner to continue the partnership business after an arbitrator's order of dissolution.[362] In *Zeckel v. Paskins*,[363] Paskins sought partnership dissolution due to the misconduct of his partner, Zeckel.[364] Under the partnership agreement, the parties' dispute was subject to arbitration.[365] The arbitrator granted Paskins relief, finding that Zeckel willfully breached the partnership agreement.[366] Both parties asked the trial court to confirm the arbitration award within the 90-day time period.[367] Paskins requested that the partnership not be liquidated, while Zeckel argued that liquidation was mandatory.[368] The trial court confirmed the arbitration award and allowed Paskins to continue the business.[369]

Faced with the question of whether the trial court exceeded its authority in confirming the arbitration award by allowing Paskins to continue the business,[370] the court of appeals agreed with the lower court's decision.[371] The court stated that "the right of the innocent partner to continue the business following a wrongful dissolution can supersede the terms of the partnership agreement."[372] Coupling this principle with an unambiguous, complete and enforceable arbitration award, the court found that the trial court correctly confirmed the arbitrator's award.[373]

B. Jurisdiction of the Trial Court

In addition to the requirements of Section 11 of the U.A.A.,[374] Arizona requires that applications for confirmation of an arbitrator's award be filed and served "in the same manner in which complaints are filed and served in civil

360. Anderson County v. Architectural Techniques Corp., No. 03A01-9303-CH-00110, 1993 WL 346473, at *5 (Tenn. Ct. App. Sept. 9, 1993).

361. *Id.*

362. Zeckel v. Paskins, 625 N.E.2d 1284, 1288 (Ind. Ct. App. 1993).

363. 625 N.E.2d 1284 (Ind. Ct. App. 1993).

364. *Id.* at 1286.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* at 1285.

371. *Id.* at 1287.

372. *Id.*

373. *Id.*

374. *See supra* note 334.

actions."[375] This additional requirement created a question of the jurisdiction of the trial court in *City of Cottonwood v. James L. Fann Contracting*.[376]

The parties in *James L. Fann Contracting* entered into a construction contract which included an arbitration provision for disputes.[377] The parties agreed an engineer would be the initial interpreter of the contract and the judge for acceptability of work.[378] The agreement set up specific time limits for both the engineer to render his decision and for a demand for arbitration.[379] When a dispute over the specified time limits arose, the trial court ordered the parties to proceed to arbitration.[380] After arbitration, the parties brought the case back to the trial court to confirm the award without using the same manner in which complaints are filed and served in civil actions.[381]

The Arizona Court of Appeals determined that Ariz. Rev. Stat. Ann. § 12-1511 (1994) does not require commencement of a new action to confirm an award, as long as the trial court's jurisdiction has been invoked and a pending action has not formally concluded.[382] The court stated: "the need to file for confirmation as prescribed in the statute applies only to those situations in which the parties have not been previously subjected to the jurisdiction of the court in connection with the arbitration proceedings."[383] Thus, the trial court had jurisdiction over confirmation even though the parties did not comply with specific provisions of Section 12-1511.[384]

In an effort to give deference to the parties' decision to settle disputes through arbitration, trial courts generally do not set aside arbitration awards. However, when the parties' agreement does not include a certain issue or an arbitration panel fails to decide an issue of the dispute, the trial court has discretion to decide the issue. To avoid giving the trial court discretion to decide issues that a party prefers to arbitrate, attorneys should be sure such issues are included in the arbitration agreement.

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375. ARIZ. REV. STAT. ANN. § 12-1511 (1994).

376. 877 P.2d 284 (Ariz. Ct. App. 1994).

377. City of Cottonwood v. James L. Fann Contracting, Inc., 877 P.2d 284, 286 (Ariz. Ct. App. 1994).

378. *Id.* at 287.

379. *Id.*

380. *Id.* at 288.

381. *Id.*

382. *Id.* at 293.

383. *Id.*

384. *Id.*

XI. SECTION 12: VACATING AN AWARD

Once an arbitration award has been rendered only under limited circumstances will a court set aside the award under Section 12 of the U.A.A.[385] A great amount of deference is afforded to the arbitration award because the award was reached outside the confines of the court system. In fact, "[a] trial court does not have unfettered discretion to set aside an award [but must set it] aside within the parameter of the agreement or the statute."[386]

In order to vacate an arbitration award, some courts have found or have attempted to find nonstatutory reasons to vacate an arbitrator's award. For example, when the provisions of Section 12 are so constraining that a party's right to a jury trial is forfeited, then Section 12 will not be the exclusive method used to vacate an award.[387] Any attempts to expand Section 12 failed. For example, the Supreme Court of Montana refused to adopt a "manifest disregard of the law" as the standard for vacating an award.[388]

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385. U.A.A. Section 12 provides:

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 neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor 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 hearing 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 that 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 if 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.

386. *Hardaway*, 1994 WL 585767 at *3.

387. Williams v. Williams, 877 P.2d 1081, 1083 (Nev. 1994).

388. May v. First Nat'l Pawn Brokers, Ltd., 887 P.2d 185 (Mont. 1994).

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

A court has the power to vacate an award when it finds that the award was obtained by fraud, corruption, or undue means.[389] In *Garrell v. Blanton*,[390] respondent and appellant were real estate salesmen who submitted their dispute over a real estate commission to arbitration.[391] Arbitration was mandatory for members of the National Association of Realtors, but was voluntary between non-members and members.[392] Respondent was advised by the Board Grievance Committee that arbitration was mandatory in this situation.[393] The two parties arbitrated their dispute and appellant was awarded one-half of the real estate commission.[394] Later, respondent learned that appellant's membership had lapsed before arbitration, but he was reinstated without strict compliance with the regulations.[395] Respondent attempted to vacate the award arguing that the irregularities of appellant's membership status rose to the level of fraud or undue means.[396] Respondent argued that he was compelled to arbitrate or lose his membership privileges.[397]

The Supreme Court of South Carolina refused to vacate the award because respondent participated in the arbitration hearing without objecting to appellant's membership status.[398] Appellant's membership status was questioned during the arbitration hearing, but respondent continued with the arbitration hearing.[399] The court stated that the respondent did not argue that the award itself was fraudulent or unfair, only that the arbitration was unfair.[400] The arbitration was not unfair because respondent participated in the hearing without objecting to appellant's membership status.[401]

B. Arbitrator Partiality, Misconduct, and Bias

A court shall vacate an award when it finds evident partiality by an arbitrator.[402] The standard which constitutes "evident partiality" varies somewhat among jurisdictions. However, most courts by giving deference to arbitration have

389. U.A.A. § 12(a)(1).
390. 447 S.E.2d 840 (S.C. 1994).
391. *Id.*
392. *Id.* at 841.
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*
402. U.A.A. § 12(a)(2).

stated that for evident partiality to be established, the allegation ". . . must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative."[403] Evident partiality is usually demonstrated ". . . where the arbiter had an interest in the outcome of the proceeding, or a relationship with one of the parties involved."[404]

In *Pirsig v. Pleasant Mound Mutual Fire Insurance Co.*,[405] the insured made a claim to Pleasant Mound Insurance for tools stolen from his farm.[406] After a dispute arose over the value of the stolen tools, the insured and the insurance company agreed to arbitration under the terms of the policy.[407] Each party selected an appraiser and the two appraisers selected a neutral appraiser.[408] The insurance company's appraiser and the neutral appraiser met a couple of times before the appraisal hearing to exchange a list of the stolen tools and to arrange a date and time for the hearing.[409] These contacts were conducted with the insured appraiser's knowledge.[410] After the insurance company's appraiser and the neutral appraiser agreed on a value of the stolen tools, the insured's appraiser moved to vacate the award because of the contacts between the other two appraisers.[411]

The court refused to vacate the award, finding that the contacts between the appraisers did not constitute evident partiality.[412] The court failed to see evidence of partiality since the contacts were disclosed, they did not involve the merits of the dispute, and there was "no long standing relationship between the arbitrators that would lead a reasonable person to believe the neutral arbitrator would be partial to one party."[413]

Similarly, in *May v. First National Pawn Brokers, Ltd.*,[414] the court refused to vacate an arbitration award for evident partiality solely because the arbitrator had asked irrelevant questions and had "badgered" the party.[415] The court also refused to vacate the award by adopting a "manifest disregard of the law" standard.[416] The court was reluctant to adopt a standard that was not provided by statute or had not been adopted by other U.A.A. states.[417] In the concurring

403. John E. Reid & Assocs., Inc. v. Wicklander-Zulawski & Assocs., 627 N.E.2d 348, 353 (Ill. App. Ct. 1993) (quoting William B. Lucke, Inc. v. Spiegel, 266 N.E.2d 504, 508 (Ill. App. Ct. 1970)).

404. City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515, 520 (Tex. App. Ct. 1994).

405. 512 N.W.2d 342 (Minn.App. 1994).

406. *Id.* at 343.

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.* at 344.

413. *Id.*

414. 887 P.2d 185 (Mont. 1994).

415. *Id* at 189.

416. *Id.* at 190.

417. *Id.* at 191.

opinion, Justice Trieweiler stated that "a manifest disregard of the law" is evidence of partiality and should be included in the standard of review for vacating an award.[418]

The court, in *Giraldi By & Through Giraldi v. Morrell*,[419] also refused to vacate an award for evident partiality solely because some of the arbitrator's relatives were members of the health care profession.[420] The court stated that the statute required more than just an appearance of possible bias or sympathy toward a party.[421] Additionally, the court refused to impose an obligation on the arbitrator to disclose which members of his family were in the health care profession, stating that this matter could have been resolved by asking these questions before confirmation as the arbitrator.[422]

In *John E. Reid & Associates v. Wiklander-Zulawski & Associates*,[423] the court also refused to vacate an award based upon evident partiality solely because one of the witness' parents had a relationship with the arbitrator.[424] One of the party's attorneys revealed that a potential witness' parents had a personal and business relationship with the arbitrator.[425] The opposing party tried to remove the arbitrator for partiality, but the A.A.A. confirmed the arbitrator's appointment.[426]

The court refused to vacate the award because the opposing party failed to allege how the arbitrator's relationship with the witness' parents would lead the arbitrator to favor that party.[427] The opposing party failed to show how the witness' parents had an interest in the outcome of the arbitration because the parents were in the formal wear business, while the arbitration itself concerned a licensing agreement of a law enforcement training method.[428]

In *Chrobak v. Edward D. Jones & Co.*,[429] appellant sought to recover damages through arbitration for an investment he made with the respondent and later to vacate the arbitration decision.[430] An arbitration panel was formed to hear the appellant's claim.[431] After the hearing was over, but before a decision was rendered, one of the arbitrator's contended that another arbitrator should have been classified as a securities industry arbitrator rather than a public arbitrator.[432]

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418. *Id.* at 192.
419. 892 P.2d 422 (Colo. Ct. App. 1994).
420. *Id.* at 425.
421. *Id.*
422. *Id.*
423. 627 N.E.2d 348 (Ill. App. Ct. 1993).
424. *Id.* at 354.
425. *Id.* at 349.
426. *Id.*
427. *Id.* at 354.
428. *Id.*
429. 878 S.W.2d 760 (Ark. Ct. App. 1994).
430. *Id.* at 761.
431. *Id.*
432. *Id.*

The arbitration panel resigned and referred the matter to a new arbitration panel.[433] When the new panel was formed, the appellant suggested that it review the exhibits and taped recordings of the first hearing rather than hold a new hearing.[434] The second panel followed appellant's suggestion, and then issued a decision dismissing appellant's claim.[435] Appellant then moved to vacate the second panel's decision arguing that the decision was based upon the biased record of the first hearing.[436]

The motion to vacate the arbitration panel's decision was denied by the court because the appellant failed to establish a nexus between the first and second arbitration panels.[437] The court found that the appellant's insistence upon using the exhibits and recordings of the first hearing and that the appellant's knowledge of the first panel's problems estopped him from complaining of the first panel's defects.[438] In essence, the appellant failed to demonstrate how the possible bias of the first panel tainted the decision of the second panel.[439]

In *Sheffield Assembly of God Church, Inc. v. American Insurance Co.*,[440] a building contractor alleged evident partiality against an arbitrator because the arbitrator was associated with an attorney that represented another church against the building contractor ten years earlier.[441] The court denied the building contractor's motion to vacate because the attorney did not become associated with the arbitrator until the arbitrator had been selected for the arbitration, and it was not until a decision was made that the arbitrator became aware that the attorney represented a party against the current building contractor.[442] When the arbitrator discovered this information, he reported it to the A.A.A..[443] Subsequent to a full review, the A.A.A. affirmed his appointment as arbitrator.[444] The court concluded that nothing existed in the record that suggested bias.[445]

In *Monday v. Cox*,[446] a homeowner and a homebuilder submitted a dispute over a malfunctioning sprinkler to arbitration.[447] After the homeowner received nothing, the homeowner moved to vacate the award because of arbitrator bias.[448]

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433. *Id.* The arbitration panel resigned to avoid having its decision reversed for signs of impropriety.

434. *Id.*

435. *Id.*

436. *Id.* at 761-62.

437. *Id.* at 763.

438. *Id.*

439. *Id.*

440. 870 S.W.2d 926 (Mo. Ct. App. 1994).

441. *Id.* at 929.

442. *Id.* at 930.

443. *Id.*

444. *Id.*

445. *Id.*

446. 881 S.W.2d 381 (Tex. Ct. App. 1994).

447. *Id.* at 383.

448. *Id.* at 384.

The homeowner argued that the arbitrator was biased in favor of the homebuilder because its attorney was a member of the same law firm that had previously sued the arbitrator's construction company.[449] It was one of the attorney's partners, and not the attorney himself, that had previously sued the arbitrator's company.[450]

The court denied the motion to vacate the award because there was no evidence that the arbitrator knew the connection between the homebuilder's attorney and the law firm that had previously sued him.[451] The arbitrator did not discover the connection until after he had rendered a decision.[452] The court also stated that no bias existed because the arbitrator had no personal or financial relationship with the homebuilder or his attorney.[453]

C. Exceeding the Scope of Authority

A court shall vacate an award when an arbitrator exceeds his or her powers.[454] The scope of an arbitrator's authority is generally outlined in the arbitration agreement itself.[455] Therefore, an arbitrator exceeds his or her powers when he or she ". . . makes an award that is inconsistent with the terms of the parties agreement."[456]

In *Shearson Lehman Brothers, Inc. v. Hedrich*,[457] former employees of Shearson Lehman Brothers commenced an arbitration proceeding against their previous employer for money owed to them under a deferred compensation plan.[458] Under the compensation plan, a fully vested employee was to get his contributions to the plan plus an 11% return, but a nonvested employee was only to get a 5% return on his contributions.[459] The former employees were not vested because they were fired prior to vestment.[460] When the arbitrators awarded the employees their money under the compensation plan, they did not utilize either the vested plan or the nonvested plan in calculating the award.[461]

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449. *Id.*
450. *Id.*
451. *Id.*
452. *Id.*
453. *Id.*
454. U.A.A. § 12(a)(3).
455. Rhea-Dayton Educ. Assoc. v. Rhea County Bd. of Educ., No. 03A01-9401-CH-00021, 1994 WL 413180, at *3 (Tenn. Ct. App. Aug. 9, 1994) (citing International Talent Group, Inc. v. Copyright Management, Inc., 769 S.W.2d 217 (Tenn. Ct. App. 1988)).
456. *Rhea-Dayton Educ. Assoc.*, 1994 WL 413180 at *3.
457. 639 N.E.2d 228 (Ill. App. Ct. 1994).
458. *Id.* at 230.
459. *Id.* at 231.
460. *Id.* at 230-31.
461. *Id.* at 231.

The appellate court vacated the award stating that the arbitrators exceeded their authority by awarding the employees an amount that was not based on the unambiguous formulas in the agreements.[462] Since the employees were fired before vestment, the employees should have received an amount with a 5% return.[463]

In *State Farm Mutual Automobile Insurance Co. v. Stein*,[464] State Farm moved to vacate an award contending that the arbitrators exceeded their authority when they arbitrated a stacking issue which was not in the policy.[465] The insurance policy of the insured only provided for the arbitration of two issues, and neither addressed the stacking issue.[466] The court held that the arbitrators exceeded their authority because the stacking issue was not specifically within the insurance policy.[467] Since the arbitration clause within the insurance policy was a limited arbitration clause, only those specific issues listed could be arbitrated.[468]

In *City of Baytown v. C.L. Winter, Inc.*,[469] the court held that the arbitrators did not exceed their authority by awarding damages incurred by a contractor as the result of changed conditions and also did not exceed their powers by awarding expert witness and attorney fees.[470] The court stated that the arbitrators had the power to award damages for changed conditions because the arbitration clause in the contract provided for arbitration of "all disputes between them."[471] The attorney and expert witness fees were not improperly awarded because the contract authorized the arbitrators to award those expenses incident to arbitration to the party whose claim was upheld.[472]

In *Kennedy, Inc. v. Young*,[473] a stock purchaser was awarded $100,000 in punitive damages by an arbitration panel.[474] The stockbroker firm moved to vacate the punitive damage award on the grounds that the arbitrators exceeded their powers.[475] The appellate court found that the arbitrators had not exceed their power because the parties' arbitration agreement reflected that the issue of punitive damages was submitted to arbitration.[476] Once the parties agreed and

462. *Id.* at 232-33.
463. *Id.* at 233.
464. 886 P.2d 326 (Colo. Ct. App. 1994).
465. *Id.* at 328.
466. *Id.*
467. *Id.* at 329.
468. *Id.* at 328.
469. 886 S.W.2d 515 (Tex. Ct. App. 1994).
470. *Id.* at 519.
471. *Id.* at 518-19.
472. *Id.* at 519.
473. 524 N.W.2d 752 (Minn. Ct. App. 1994).
474. *Id.* at 754.
475. *Id.*
476. *Id.* at 755.

submitted the issue of punitive damages to arbitration, the stockbroker firm could not assert that the arbitrators exceeded their power.[477]

In *Duchscher v. Vaile*,[478] plaintiff and defendant submitted an automobile accident dispute to arbitration.[479] The arbitration agreement provided that all issues of liability and general and compensatory damages would be decided by arbitration.[480] However, the agreement specifically provided that each party would pay for their own attorney fees.[481] After arbitration finished, the arbitrator found for the plaintiff and awarded her $60,000 in special damages and $50,000 in general damages.[482] The arbitrator then announced that he intended to award the plaintiff her attorney fees, but the attorneys informed the arbitrator that each party was responsible for their own attorney fees.[483] The arbitrator then said he would amend the original decision by withdrawing the $50,000 general damage award.[484] After reconsidering the matter, the arbitrator awarded the plaintiff $90,000 in general damages rather the original $50,000.[485] The defendant moved to vacate the award arguing the arbitrator exceeded his authority by increasing the general damage award in order to award the plaintiff her attorney fees.[486]

The Montana Supreme Court refused to vacate the award finding that the arbitrator's statement about awarding attorney fees was not a final and binding arbitration award.[487] The final written award did not provide for attorney fees and the arbitrator stated in the award that he understood that the parties would pay for their own attorney fees.[488]

Parties sometimes claim that arbitrators exceed their authority when they disregard the law. In *Arnold v. Morgan Keegan and Co., Inc.*,[489] the appellate court vacated an award because the arbitrators exceeded their authority by totally disregarding the state law of securities.[490] The appellants argued that their stockbroker had materially misrepresented a stock investment in a certain company.[491] The stockbroker admitted he made the misrepresentation, and

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477. *Id.*
478. 887 P.2d 181 (Mont. 1994).
479. *Id.* at 182.
480. *Id.*
481. *Id.*
482. *Id.* at 183.
483. *Id.*
484. *Id.*
485. *Id.*
486. *Id.*
487. *Id.* at 184.
488. *Id.*
489. No. 03A01-9309-CH-00304, 1994 WL 265858 (Tenn. Ct. App. June 16, 1994).
490. *Id.* at *8.
491. *Id.* at *1.

according to the court, the state law mandated that the appellants recover for the loss caused by the misrepresentation.[492]

The Tennessee Court of Appeals noted that many jurisdictions did not hold a misapplication or mistake of law to be an excision of authority, but when arbitrators reach a result that is "completely irrational," then they have exceeded their authority.[493] The arbitration agreement in this case required the arbitrators to apply state law, and the arbitrators clearly failed to apply the state security laws.[494]

In *Stiffel, Nicolous and Co. v. Francis*,[495] the Missouri Court of Appeals held that a "manifest disregard of the law" did not constitute an arbitrator exceeding his authority.[496] The appellant in this case argued that the arbitration panel exceeded its authority by failing to follow the state's law regarding contract construction.[497] The appellate court disagreed, explaining that if the arbitration panel had disregarded the terms of the agreement or if the agreement had stated that the arbitrators were to decide the dispute as a court of law or equity would, then the arbitration panel would have exceeded its authority.[498] The court refused to recognize the "manifest disregard for the law" standard because it was not statutorily provided.[499]

Parties also have argued that arbitrators exceeded their powers not by failing to apply the law, but because they failed to apply the law. In *County of Hennepin v. Law Enforcement Labor Services, Inc., Local #19*,[500] two deputies were suspended by the sheriff's department for violating a citizen's Fourth Amendment rights.[501] The deputies' union appealed the decision and demanded arbitration according to their collective bargaining agreement.[502] The arbitrator reversed the deputies' suspension holding the sheriff's department did not have just cause to impose the suspension.[503] The sheriff's department moved to vacate the decision arguing that the arbitrator exceeded his authority by interpreting constitutional issues under the Fourth Amendment.[504]

The appellate court found that the arbitrator did not exceed his authority by interpreting constitutional law.[505] The arbitrator's decision whether the two deputies had been properly suspended necessitated that he determine whether the

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492. *Id.* at *8.
493. *Id.* at *7.
494. *Id.* at *8.
495. 872 S.W.2d 484 (Mo. Ct. App. 1994).
496. *Id.* at 485.
497. *Id.*
498. *Id.* at 485-86.
499. *Id.* at 486.
500. No. C4-93-1412, 1994 WL 71344 (Minn. Ct. App. March 8, 1994).
501. *Id.* at *1.
502. *Id.*
503. *Id.*
504. *Id.* at *2.
505. *Id.*

deputies violated the Fourth Amendment.[506] Since the parties submitted the issue of the suspension to arbitration and the issue of suspension required examination of the Fourth Amendment, the arbitrator did not exceed his power.[507]

D. Refusal to Postpone a Hearing or Hear Relevant Evidence

An arbitration award shall be vacated when a court determines that the arbitration proceeding was conducted in a prejudicial manner.[508] A party may be prejudiced when an arbitrator refuses to postpone a hearing upon the showing of sufficient cause, refuses to hear evidence material to the controversy, or otherwise conducts a hearing as to substantially prejudice the rights of a party.[509]

In *Cannon School District No. 50 v. W.E.S. Construction Co.*,[510] a dispute between a school district and a contractor was submitted to arbitration.[511] The school district and the contractor had entered into a contract in which the contractor was to begin work within five days after the school district had obtained all of necessary regulatory permits.[512] During the course of arbitration, a conflict of interest arose for the school district's attorney.[513] One of the contractor's witnesses included the State Fire Marshall, a client of the school district's attorney.[514] Because of the conflict of interest, the school district's attorney requested a continuance so the school district could acquire a new attorney.[515] The arbitration panel denied the motion for a continuance and the attorney's motion to withdraw as the school district's attorney.[516] After the arbitration panel issued a judgment for the contractor, the school district moved to vacate the award on the grounds that the panel had improperly refused to postpone the hearing.[517]

The court of appeals held that the arbitration panel's denial of a continuance was improper, but it was harmless error.[518] The court admitted that a conflict of interest existed between the school district's attorney and the contractor's witness,[519] but the school district was able to receive additional counsel.[520]

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506. *Id.*
507. *Id.*
508. U.A.A. § 12(a)(4).
509. *Id.*
510. 868 P.2d 1014 (Ariz. Ct. App. 1993), *vacated by*, 882 P.2d 1274 (Ariz. 1994).
511. *Id.* at 1018.
512. *Id.*
513. *Id.* at 1019.
514. *Id.*
515. *Id.*
516. *Id.* at 1020.
517. *Id.* at 1021.
518. *Id.* at 1024.
519. *Id.* at 1022.
520. *Id.* at 1024.

The court held that the arbitration panel's refusal to grant the continuance did not support a vacation of the award because the school district was able to present its case, and it was therefore not prejudiced.[521]

In reviewing the case, the Supreme Court of Arizona agreed with the lower court that the arbitrators' error did not warrant denying confirmation of the award, but vacated the court of appeals opinion.[522] The supreme court determined that the trial court had properly confirmed the arbitrator's award and properly awarded attorney's fees for the confirmation proceedings, but erred by awarding attorney's fees for the arbitration itself.[523] Under the terms of the U.A.A. itself, trial courts are precluded from awarding attorney fees if such fees are not included in the agreement to arbitrate.[524] Unlike the express provision excluding attorney fees not provided for in an arbitration agreement, the Arizona confirmation statute did not mention attorney fees.[525] Thus, attorneys fees in the confirmation proceeding were properly awarded.[526]

In *Christian Dior, Inc. v. Hart, Schaffner & Marx*,[527] a trademark licensor invoked arbitration against its licensee for breach of its license agreement.[528] The licensee requested and was granted postponement of the original hearing so that its attorney could relocate his office.[529] The licensee then requested another postponement, and the arbitration panel granted it.[530] When the licensee requested that the hearing scheduled on a Sunday be postponed to accommodate its attorney who was preparing for a jury trial, the arbitration panel refused to postpone it.[531] After the arbitration panel found in favor of the licensor, the licensee moved to vacate the award, arguing that the panel refused to postpone the arbitration hearing on the showing of good cause.[532] The licensee also moved to vacate the award on the fact that the arbitration panel had refused to issue a subpoena for a material witness.[533]

Addressing the issue of postponement, the court held that the arbitrators did not violate the U.A.A.[534] The court found that the licensee only demonstrated

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521. *Id.*

522. Canon School District No. 50 v. W.E.S. Constr. Co., 882 P.2d 1274, 1276 (Ariz. 1994).

523. *Id.*

524. *Id.* at 1277.

525. *Id.* at 1279.

526. *Id.*

527. 637 N.E.2d 546 (Ill. App. Ct. 1994), *appeal denied*, 642 N.E.2d 1275 (Ill. 1994).

528. *Id.* at 548.

529. *Id.* at 549.

530. *Id.*

531. *Id.*

532. *Id.* at 551. The licensee contended that it had good cause to postpone the hearing because the hearing followed the relocation of its attorney's office and immediately preceded its attorney's jury trial. *Id.*

533. *Id.* at 550-51.

534. *Id.* at 551.

that the Sunday arbitration date was inconvenient, not prejudicial.[535] The panel refused the third postponement in order to comply with the arbitration deadline, and the court noted that the Sunday hearing was actually scheduled that date to accommodate the licensee's attorney.[536] With regard to the panel's refusal to subpoena a witness, the court held that the panel did not violate the U.A.A.[537] The fact that the licensee had failed to show how the witness was material and the fact that the witness was not on the witness list for the two postponed hearings, led the court to conclude that the licensee had not suffered substantial prejudice.[538]

In *New Hampshire Insurance Co. v. State Farm Insurance Co.*,[539] State Farm filed for arbitration, alleging that the insured customer of New Hampshire was the party responsible for the medical expenses of the State Farm insured.[540] After New Hampshire Insurance received State Farm's notice of arbitration, it claimed that it mailed a request for a deferment of the arbitration hearing.[541] The arbitration panel denied receiving any deferment request and New Hampshire's attorney was unable to produce copies of the deferment request.[542] New Hampshire did not appear at the arbitration hearing, and a judgment was entered in favor of State Farm.[543] New Hampshire attempted to vacate the award on the ground that the arbitration panel had refused to postpone the hearing.[544] New Hampshire claimed that it had sufficient cause to defer the hearing because it had a personal injury suit involving the same claim pending in court at the same time as the arbitration proceeding.[545]

The court vacated the judgment because state rules require deferment of all arbitration claims until all companion suits were settled.[546] State Farm argued that the deferment request was never received, but the court stated that there was a rebuttable presumption that a "mailed matter, correctly addressed, stamped and mailed, was received by the party to whom it was addressed."[547] Since State Farm did not offer any evidence to rebut this presumption, it was presumed that the arbitration panel received the deferment.[548] The court directed that the judgment be vacated and the parties proceed with a new hearing.[549]

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535. *Id.*
536. *Id.*
537. *Id.*
538. *Id.* at 552.
539. No. 13902, 1994 WL 125038 (Del.Ch. March 31, 1994).
540. *Id.* at *1.
541. *Id.*
542. *Id.*
543. *Id.*
544. *Id.* at *4.
545. *Id.*
546. *Id.* This was in accordance with Rule 11 of the Delaware Arbitration Rules. *Id.*
547. *Id.* (citing State *ex rel.* Hall v. Camper, 347 A.2d 137, 139 (Del. 1975)).
548. *New Hampshire Ins. Co.*, 1994 WL 125038 at *4.
549. *Id.*

E. Lack of an Arbitration Agreement

A court shall vacate an award where there was no arbitration agreement.[550] In order for the court to vacate the award for lack of an agreement, a prior court must not have adversely determined that there was an agreement in proceedings under Section 2 of the U.A.A., and the party must not have participated in the hearings without objecting to the lack of an agreement.[551] Under some common law jurisdictions, a party that participated in arbitration and failed to withdraw before an award was made was bound by the award, despite his objection to the proceeding.[552]

In *Bruch v. CNA Insurance Co.*,[553] the trial court vacated an insurance arbitration award because the insurance contract only provided for binding arbitration up to the statutory minimum for bodily injury liability.[554] Since the statutory minimum limit for bodily injury was $25,000 and the arbitrators awarded the insured $90,000 plus costs, the trial court vacated the award and granted the insurance company's request for a jury trial.[555]

On appeal, the appellate court affirmed the lower court, explaining that under New Mexico's version of U.A.A. Section 12(a)(5), an award shall be vacated if there was no arbitration agreement.[556] Although the parties did have an arbitration agreement, the parties did not agree to arbitrate above the statutory minimum.[557] The court also noted that there had been no adverse determination and that the insurance company properly objected after it alerted the arbitrators that it would not agree to a binding award above the statutory minimum.[558]

In *R.D. Robinson, Inc. v. DQHSX, Inc.*,[559] the arbitrator in a construction contract dispute awarded the plaintiff attorney's fees plus interest.[560] The defendant moved to vacate the award, arguing that the agreement did not provide for interest and attorney's fees.[561] The appellate court refused to vacate the award, finding that the contract did provide for interest[562] and that since the contract did not expressly exclude the allowance of attorney's fees, the arbitrator

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550. U.A.A. § 12(a)(5).

551. *Id.*

552. *Al's Formal Wear of Houston, Inc.*, 869 S.W.2d at 445 (citing L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 352 (Tex. 1977)).

553. 870 P.2d 749 (N.M. 1994).

554. *Id.* at 750.

555. *Id.*

556. *Id.* at 751.

557. *Id.*

558. *Id.* at 752.

559. No. 03A01-9405-CH-00175, 1994 WL 585778 (Tenn. Ct. App. Oct. 20, 1994).

560. *Id.* at *1.

561. *Id.*

562. *Id.* at *2.

was free to award them.[563] Additionally, the parties represented to the arbitrator that the contract should be read to include attorney's fees.[564]

In *Hwang v. Tyler*,[565] the court refused to vacate an award based on a lack of an agreement since the matter had been adversely determined under a prior U.A.A. Section 2 hearing.[566] Tyler was hired to manage the renovation of a motel for Royal Motel, and he and three shareholders of Royal Motel entered into an agreement stipulating that disputes would be settled through arbitration.[567] Tyler and the three shareholders signed the agreement, but the signature line for Royal Motel was left blank.[568] Tyler was later fired and he filed for arbitration.[569] The three shareholders and Royal Motel moved to stay arbitration under Section 2 of the U.A.A. arguing that there was no agreement to arbitrate.[570] The trial court found that the agreement bound the shareholders and Tyler, but failed to bind Royal Motel.[571] The motion to stay arbitration was denied and the matter was submitted to arbitration.[572] The arbitrator found for Tyler and awarded him damages.[573] One of the shareholders appealed the arbitrator's award arguing that there was no arbitration agreement.[574]

The Illinois Court of Appeals refused to vacate the award holding that the issue of whether there was an arbitration agreement had already been adversely determined in the trial court below.[575] The shareholder argued that the award should have been vacated because he raised an objection during the arbitration proceeding.[576] In order to vacate an award under Section 12(a)(5), however, the issue must not have been adversely determined and the party must have raised an objection during the arbitration hearing.[577] The shareholder failed to meet both prongs of the test because the issue of an agreement had already been decided.[578]

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563. *Id.* at *1.

564. *Id.*

565. 625 N.E.2d 243 (Ill. App. Ct. 1993).

566. *Id.* at 246.

567. *Id.*

568. *Id.* at 244.

569. *Id.*

570. *Id.* The shareholders and Royal Motel argued that there was no agreement because it was only a draft or, alternatively, the agreement was not enforceable because Royal Motel had not signed. *Id.*

571. *Id.*

572. *Id.* The court granted the motion to stay as to counts III and IV and denied the motion to stay as to counts I and II of plaintiff's complaint.

573. *Id.*

574. *Id.* at 245.

575. *Id.*

576. *Id.*

577. *Id.*

578. *Id.* at 246.

F. Timing

A party must file his application to vacate an award within ninety days after delivery of a copy of the award to the applicant.[579] An exception to the ninety day rule occurs if the award was predicated upon corruption, fraud, or undue means, then the application to vacate is to be made ninety days after such grounds are known or should have been known.[580]

In *Sullivan v. Lemoncello*,[581] the United States Court of Appeals applied the Illinois version of U.A.A. Section 12(b) to bar the defendant from attacking the arbitration award.[582] The plaintiffs sought to enforce the award under section 301 of the Labor Management Relations Act.[583] Under this act, the statute of limitations is determined by reference to state law.[584] The court held that the Illinois version of the U.A.A. was the appropriate statute of limitations, and since the defendant sought to vacate the award past the ninety day limit, the defendant was barred from challenging the enforcement of the award.[585]

G. Public Policy

Occasionally, courts will go outside the confines of Section 12 to vacate an award. In *Williams v. Williams*,[586] an automobile accident victim moved to compel arbitration under a state compulsory arbitration statute for motor vehicle cases involving less than $25,000.[587] The arbitrator in *Williams* awarded the accident victim $21,500.[588] The lower court denied the defendant's motion for a new trial, finding that the defendant did not establish a right to vacate the award pursuant to the state compulsory arbitration statute,[589] which incorporates the state's version of U.A.A. Section 12.[590] In order to establish such a right, one had to meet the criteria of Section 12.[591] The defendants argued that these requirements placed an unconstitutional restriction on their right to obtain a jury trial.[592]

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579. U.A.A. § 12(b).

580. *Id.*

581. 36 F.3d 676 (7th Cir. 1994).

582. *Id.* at 681.

583. *Id.*; *see* 29 U.S.C. § 185 (1947).

584. *Sullivan*, 36 F.3d at 681 (citing United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 (1966)).

585. *Id.*

586. 877 P.2d 1081 (Nev. 1994).

587. *Id.* at 1082. The statute, Nev. Rev. Stat. § 38.215 (1969), was repealed on July 1, 1993.

588. *Id.*

589. *Id.*; *see* NEV. REV. STAT. §§ 38.145, 38.235 (1969).

590. *Williams*, 877 P.2d at 1082.

591. *Id.*

592. *Id.* at 1083.

The Nevada Supreme Court held the compulsory arbitration statute an unconstitutional infringement on a parties right to a jury trial.[593] Altough the court found Section 12 constitutional when applied to voluntary arbitration, applying its rigid requirements to compulsory arbitration made it unconstitutional.[594]

XII. SECTION 13: MODIFICATION OR CORRECTION OF AWARD

Section 13 of the U.A.A. allows judicial modification or correction of an award where (1) there was an evident miscalculation of figures or evident mistake in description, (2) arbitrators decide a matter not submitted to them, or (3) the award is imperfect in form.[595] If one of these grounds exists, the court may only modify the award in a way that effects the intent of the arbitrators.[596]

Despite the authority of courts to modify arbitration agreements, most have recognized that their review of arbitration awards is quite limited, and is not to exceed the grounds listed in Section 13 of the U.A.A. A corollary of this idea is that the trial judge reviewing an arbitration award cannot modify the award merely because he would have decided the case differently.[597] Therefore, courts find few occasions for the modifying or correcting of awards.

In *Marsh v. Loffler Housing Corp.*,[598] a Maryland appellate court affirmed the trial court's modification of an arbitration award to include attorney's fees.[599] The arbitration clause in the parties' contract provided for arbitration of "[a]ny controversy or claim arising out of or related to the contract."[600] The arbitrator was silent on the awarding of fees in the original award, which finds that payment should be made to the contractor, and after a motion by the contractor requesting that the award be clarified to include attorney fees.[601] The homeowner filed a motion with the trial court to vacate the award and the contractor filed a motion to modify the award to include attorney fees.[602] The trial court modified the award, adding attorney fees after an evidentiary hearing to determine the extent of the fees.[603]

The trial court justified modification under U.A.A. Section 13(a)(2),[604] finding that the arbitrator ruled upon an issue not submitted for arbitration.[605]

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593. *Id.*
594. *Id.*
595. U.A.A. § 13(a).
596. U.A.A. § 13(b).
597. City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515, 518 (Tex. App. 1994).
598. 648 A.2d 1081 (Md. App. 1994).
599. *Id.* at 1090.
600. *Id.* at 1083.
601. *Id.* at 1084.
602. *Id.*
603. *Id.*
604. *Id.*; *see* MD. CODE ANN., CTS. & JUD. PROC. § 3-223(b)(2) (1989).
605. *Marsh*, 648 A.2d at 1084.

The homeowner appealed, arguing that the issue of attorney fees had been submitted for arbitration because the contractor had requested attorney fees at several points: first, in its post-hearing brief to the arbitrator; second, in its response to the homeowner's motion to clarify before the arbitrator; and third, in its motion to modify the award.[606] The contractor responded by pointing out that neither party's submission of claims to the arbitrator included a request for attorney fees; and since the arbitrator's failure to award attorney fees was in essence a ruling on those fees, the arbitrator ruled on an unsubmitted issue.[607]

The appellate court reasoned that since the arbitration agreement required all arbitration claims to be submitted in writing and neither party had included a request for attorney fees in his submission of claims, the issue of fees was not before the arbitrator.[608] Further, even though the contractor had presented evidence at the arbitration hearing regarding the amount of its attorney fees, the appellate court found that it had never raised the issue of liability for fees.[609]

As to whether the arbitrator ruled on fees, the appellate court held that his silence on the issue could be construed as a ruling or a failure to rule; but either way, the trial court's modification was correct.[610] The appellate court held that the contract between the parties clearly provided for payment of attorney's fees to the contractor in the event of "legal action, or other collection action," and that arbitration qualified as a "collection action."[611] If the arbitrator did not rule on the fees, the trial court decided correctly because an arbitration award that does not conform to the clear requirements of the contract should be modified to conform to it.[612] On the other hand, if the arbitrator did rule on the fees, but ruled not to give them, he ruled on an issue not submitted to arbitration, and the award should be modified under Md. Code Ann. § 3-223(b)(2)(1989).[613]

Despite the trend exemplified by most courts to limit judicial review of arbitration awards to the grounds listed in Section 13, two courts have found grounds for review outside that section. In *Kovacs v. Kovacs*,[614] a Maryland appellate court found such grounds under the doctrine of *parens patriae*.[615] The trial court confirmed the arbitrator's ruling on custody, visitation, child support and alimony without independently considering the children's best interests before confirming an award in a divorce proceeding.[616] Read in conjunction with the

606. *Id.* at 1087.
607. *Id.*
608. *Id.* at 1088.
609. *Id.*
610. *Id.*
611. *Id.* at 1088-89.
612. *Id.* at 1090.
613. *Id.* at 1089; *see* Maryland's version of the U.A.A. § 13(a)(2) at MD. CODE ANN. § 3-223(b)(2) (1989).
614. 633 A.2d 425 (Md. App. 1993).
615. *Id.* at 431.
616. *Id.* at 430.

Maryland Family Law Article,[617] Section 13 required the trial court to independently consider these issues.[618] Similarly, a Florida appellate court held in *Montalvo v. Travelers Indemnity Co.*[619] that where the arbitration clause of an insurance policy allowed arbitration of only certain issues, the insurance company could raise for the first time the issue of policy limits at the confirmation hearing since the policy stated the issue could not be submitted to the arbitrator.[620] Therefore, the trial court had discretion to decrease the award by 50% in accordance with the policy limit.[621]

Grounds for review were also found through liberal interpretation of Section 13 in light of other state statutes. *Contract Development Corp. v. Beck*[622] involved a contract in Illinois under which Contract Development Corporation ("CDC") had agreed to supervise and coordinate the construction of the Becks' property.[623] The Becks refused to pay for services rendered and the case went to arbitration.[624] The arbitrator awarded damages to CDC for breach of contract.[625] The trial court confirmed this award and awarded damages for slander of title of $18,737.[626] On appeal, the appellate court held that, read in conjunction with Section 2-1303 of the Illinois Code of Civil Procedure which imposes a 9% post-judgment interest on all final judgments, Section 13 requires the trial court to assess the 9% statutorily mandated post-judgment interest upon confirmation of an award.[627] Therefore, it would be error for a trial court to confirm an award that fails to assess that interest upon motion for modification.[628]

Other courts were more apprehensive of review under Section 13. Some courts skirted review of the arbitration award under Section 13(a)(1), reasoning that the arbiter's decision did not constitute an "evident miscalculation."[629]

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617. Id. at 430-31; *see* MD. CODE ANN., FAMILY LAW § 8-103(a) (1984).

618. *Kovacs*, 633 A.2d at 431.

619. 643 So. 2d 648 (Fla. App. 1994).

620. *Id.* at 650.

621. *Id.*

622. 627 N.E. 2d 760 (Ill. App. 1994).

623. *Id.* at 762.

624. *Id.*

625. *Id.*

626. *Id.* at 762-63.

627. *Id.* at 769.

628. *Id.*

629. *See* School City of East Chicago, Indiana v. East Chicago Fed'n of Teachers, Local No. 511, A.F.T., 622 N.E.2d 166 (Ind. 1993) (the use of a 38 rather than a 39-week divisor to calculate salary was not an "evident miscalculation of figures" such as to justify modification of the award; rather, substituting the 39-week divisor for the 38-week divisor used by the arbiter would alter his conclusion on the substantive merits, not just the correction of the improper application of mathematical principles); Landmark v. Mader Agency, Inc., 878 P.2d 773 (Id. 1994) (miscalculation not evident because trial court unaware of it until considering a motion questioning arbiter's factual findings); *City of Baytown*, 886 S.W.2d at 515 (an evident miscalculation of figures must be clear, concise and conclusive from the record; in the absence of a transcript of arbitration proceedings the

Another justification for letting the award stand was reluctance to interfere with the arbiter's findings of fact or resolution of the merits of the controversy.[630] Review was held impermissible even where the arbiter made gross errors of law or fact which did not appear on the face of the award.[631] Further support for the authority of arbitration awards was found in the affirmation that the party seeking modification of an award has the burden of proving that one of the grounds listed in Section 13 exists,[632] and a holding that the U.A.A.'s failure to give *de novo* review was not unconstitutional.[633]

XIII. SECTION 14: JUDGMENT OR DECREE ON AWARD

U.A.A. Section 14 provides that once a court confirms, modifies or corrects an award, a judgment to that effect must be entered and enforced as any other judgment.[634] During the past year, courts have agreed that awards are not treated as judgments under the U.A.A. until the granting of an order under Section 14.[635] Further, they have recognized their review of an arbitration award is limited to the grounds provided in the U.A.A.[636]

The Supreme Court of Idaho held in *Western Industrial and Environmental Services*[637] that once the trial court enters judgment of an arbitration award that judgment is a final judgment for purposes of collateral estoppel.[638] The court reasoned that Section 14 requires a judgment entered pursuant to an arbitration award to be treated the same as other judgments.[639] Further, formal procedures normally found in a trial were present at the arbitration: the parties were given notice; they could formulate issues of law and fact in their memos to the arbitrator; they could present evidence and arguments; and the arbitration award was considered to be the final resolution between the parties.[640]

In *Canon School District No. 50 v. W.E.S. Construction Co.*,[641] the Arizona Supreme Court held that although the U.A.A. excludes the awarding of attorney fees by the arbitrator in Section 10, it does not exclude the awarding of attorneys

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court presumed adequate evidence to support the award).

630. *See* Lemna v. Harry F. Shea & Co., 628 N.E.2d 577 (Ill. App. 1993); Duchscher v. Vaile, 887 P.2d 181 (Mont. 1994); *Landmark*, 878 P.2d 773.

631. *Lemna*, 628 N.E.2d at 577.

632. *Duchscher*, 887 P.2d at 184.

633. New Hampshire Ins. Co. v. State Farm Ins. Co., No. 13092, 1994 WL 125038 (Del. Ch., March 31, 1994)).

634. U.A.A. § 14.

635. *See* Western Indus. & Envt'l Ser., Inc. v. Kaldveer Assocs., Inc., 887 P.2d 1048, 1051 (Idaho 1994); Mausbach v. Lemke, 866 P.2d 1146, 1148 (Nev. 1994).

636. *Mausbach*, 866 P.2d at 1149.

637. *Western Indus. & Envt'l Ser. Inc.*, 887 P.2d at 1048.

638. *Id.* at 1051.

639. *Id.*

640. *Id.*

641. 882 P.2d 1274 (Ariz. 1994).

fees by the trial court in confirming the award under Section 14.[642] Therefore, the trial court may award fees in confirming the award, but only those fees incurred in the confirmation award, and not in the arbitration process.[643] For this result, the court depended on the prefatory comment to the 1954 draft of the U.A.A. which states that court intervention in arbitration "must be prompt and simple or the values of arbitration will be largely dissipated through prolonged litigation."[644]

Finally, the Supreme Court of Nevada held in *Mausbach* that it would be an impermissible modification of an arbitration award for the trial court to add prejudgment interest to an award.[645] The Nevada prejudgment interest statute provides that the trial court shall impose prejudgment interest from the time the summons and complaint are served on all judgments and decrees, rendered by any court of justice.[646] The plaintiff maintained that this statute applied to arbitration awards because Nev. Rev. Stat. § 38.165 (1994), adopted from U.A.A. Section 14, requires that the judgment entered in confirming an arbitration award be enforced "as any other judgment or decree."[647] Therefore, plaintiff argued the trial court was required to add prejudgment interest to an award that did not include it.[648] Although the arbiter could award prejudgment interest from the time the summons and complaint were served, it would be an impermissible modification for the trial court to add such interest to an award that did not mention it because the only "enforcement" needed was the payment of the award as it stood and the defendant had already paid that amount.[649] Payment of prejudgment interest not included in the award could not be seen as "enforcement."[650]

Nevada law (Section 38.165) makes it clear that the trial court cannot deviate from the award upon confirmation under this section except to award costs and attorney fees related to obtaining the confirmation.[651] Therefore, what plaintiff was seeking was not confirmation of the award under Section 38.165, but modification of the award.[652] Thus, Section 38.165 did not apply because the plaintiff was not asking for enforcement "as any other judgment or decree."[653] However, it would be permissible for the trial court to add postjudgment interest.[654]

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642. *Id.* at 1279.

643. *Id.*

644. *Id.* at 1279-80 (quoting HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 204 (1954)).

645. *Mausbach*, 866 P.2d at 1150.

646. NEV. REV. STAT. § 17.130 (1994).

647. *Mausbach*, 866 P.2d at 1148.

648. *Id.*

649. *Id.* at 1150.

650. *Id.* at 1148.

651. *Id.*

652. *Id.* at 1148-49.

653. *Id.* at 1148.

654. *Id.* at 1150.

XIV. SECTION 17: COURT, JURISDICTION

A court's jurisdiction to consider arbitration agreements under U.A.A. Section 1 is conferred to courts in the language of Section 17. U.A.A. Section 17 provides that entering an arbitration agreement under U.A.A. Section 1 confers jurisdiction on state courts to enforce the agreement and enter judgment on awards thereunder.[655]

Kovacs v. Kovacs[656] held that the trial court has authority to order the parties to submit to arbitration that does not conform to the procedural requirements of the U.A.A., provided that the arbitration meets the standards of basic fairness or due process.[657] This authority came from reading Section 17 in conjunction with Maryland Rule E2, which provides that trial courts may confirm awards to which the U.A.A. is inapplicable, and Maryland Rule E3, which provides that any parties to a pending action who in writing request arbitration before trial will be ordered to arbitrate.[658] The court also held that parties can waive their rights under the U.A.A. and submit to arbitration issues that do not meet the U.A.A.'s requirements.[659]

Colorado amended its version of Section 17 to include jurisdiction for courts over arbitration pursuant to the parties' choice or state rules.[660]

XV. SECTION 19: APPEALS

Under U.A.A. Section 19, an appeal may be made to state appellate court when a trial court (1) denies an application to compel arbitration, (2) grants a stay of arbitration, (3) confirms or denies an application to confirm an award, (4) modifies or corrects an award, (5) vacates an award without giving a rehearing, or (6) enters a judgment on an award.[661] Courts have applied this section of the U.A.A. expansively in the last year.[662]

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655. U.A.A. § 17.

656. 633 A.2d 425 (1993).

657. *Id.* at 433.

658. *Id.*

659. *Id.*

660. COLO. REV. STAT. § 13-22-219 (1995) now provides:

> The term "court", as used in this part 2, means any court of competent jurisdiction of this state. The making of an agreement described in section 13-22-203 [U.A.A. § 1] providing for arbitration in this state, ***pursuant to the choice of the parties or pursuant to the choice of arbitration, mediation, or conciliation rules under which this state is determined to be appropriate,*** confers jurisdiction on the court to enforce the agreement under this part 2 and to enter judgment on an award under this part 2.

Id. (emphasis added).

661. U.A.A. § 19(a).

662. *See generally* Baxter, John Witzel, Inc., 871 P.2d 855 (Kan. Ct. App. 1994); Smith v. Edson, 888 P.2d 345 (Colo. Ct. App. 1994); McCarney v. Nearing, Staats, Prelogar & Jones, 866 S.W.2d 881 (Mo. Ct. App. 1993).

A Kansas appellate court held in *Baxter v. John Weitzel, Inc.*[663] that the denial of a motion to dismiss was appealable as if it was a motion to compel arbitration.[664] *Baxter* involved a breach of contract claim filed by an employee, Baxter, against his employer, Weitzel.[665] Baxter filed a complaint with the trial court, and Weitzel followed with a motion to dismiss under the theory that the parties had agreed to arbitrate all controversies.[666] The trial court held that U.A.A. Section 1 makes the arbitration clause an option for either party.[667] Since Baxter indicated his intent to waive the option to arbitrate, arbitration would not be compelled.[668] The appellate court held that although Weitzel did not file a motion to compel arbitration under Kan. Stat. Ann. § 5-402 (1994), adopted from U.A.A. Section 2, in the district court, its motion to dismiss had the same effect.[669] The motion to dismiss made reference to the arbitration clause and claimed that a dispute had arisen between the parties which was subject to that clause.[670] Therefore, the motion was treated as a motion to compel, insofar as its denial was appealable.[671]

In *Smith v. Edson*,[672] the Colorado Court of Appeals held that the U.A.A. controlled whether an order compelling arbitration was appealeable, despite the fact that arbitration was mandated by state statute and not the result of an agreement between the parties. The court held that such an order was not appealable.[673]

More strikingly, a Missouri Court of Appeals held in *McCarney v. Nearing, Staats, Prelogar & Jones*[674] that although an order compelling arbitration is not appealable under U.A.A. Section 19, a party can challenge that order by seeking a writ of prohibition.[675] *McCarney* involved a construction contract under which McCarney hired contractor Reinhardt.[676] Reinhardt filed a complaint alleging that McCarney failed to pay Reinhardt under the contract.[677] McCarney filed an answer and counterclaim, to which Reinhardt responded by filing a motion to stay the lawsuit pending arbitration.[678] The trial court issued an order granting this motion and McCarney filed a petition for a writ of prohibition against the order

663. 871 P.2d 855 (Kan. Ct. App. 1994).
664. *Id.* at 858.
665. *Id.* at 856.
666. *Id.*
667. *Id.* at 857.
668. *Id.*
669. *Id.* at 858.
670. *Id.*
671. *Id.*
672. Smith v. Edson, 888 P.2d 345 (Colo. Ct. App. 1994).
673. *Id.* at 346.
674. 866 S.W.2d 881 (Mo. Ct. App. 1993).
675. *Id.* at 887.
676. *Id.* at 885.
677. *Id.* at 886.
678. *Id.*

in the appellate court.[679] The appellate court granted a preliminary order in prohibition pending oral arguments on the writ.[680] After arguments, the appellate court held that although the writ of prohibition is an extreme remedy, it was available here.[681] Reinhardt argued that McCarney had an adequate remedy at law in that he could appeal any arbitration award; but the court felt that such an argument was better considered at the preliminary stage, and since preliminary relief had already been granted, the court decided the case on its merits.[682]

Other courts have applied Section 19 in a more straightforward fashion. In *Bureau of Employee Relations v. Maine State Employees Association, SEIU Local 1989,*[683] the Supreme Court of Maine held that the section provides no right of appeal from a trial court's order compelling arbitration; therefore, such an order is not appealable.[684] A Texas appellate court reached the same conclusion in *Gathe v. Cigna Healthplan of Texas.*[685] The denial of a motion to vacate an arbiter's decision that the suit was arbitrable was unappealable under this rationale because it functioned as a motion compelling arbitration.[686]

A Missouri appellate court held in *MLJ Investments, Inc. v. Reid*[687] that while Section 19 provides the right of appeal from an order confirming an arbitration award, that right did not apply where the arbiter's decision did not dispose of all the claims pending before him.[688] The court made this determination because confirmation of such an award does not constitute a final judgment.[689] Further, in *American Insurance Co. v. Cazort*[690] the Supreme Court of Arkansas held that Section 19 does provide a right of appeal from the denial of a motion to compel arbitration, even in light of a state statute limiting the right of appeal to final judgments.[691]

XVI. SECTION 21: UNIFORMITY OF INTERPRETATION

Section 21 of the U.A.A. provides that the U.A.A. should be interpreted uniformly throughout the states which have enacted it.[692] This section ensures uniform application of the U.A.A. throughout the nation. In fact, a Tennessee

679. *Id.*
680. *Id.*
681. *Id.*
682. *Id.*
683. 639 A.2d 638 (Me. 1994).
684. *Id.* at 640.
685. 879 S.W.2d 360 (Tex. App. 1994).
686. *Bureau of Employee Relations,* 639 A.2d at 640.
687. 877 S.W.2d 221 (Mo. Ct. App. 1994).
688. *Id.*
689. *Id.*
690. 871 S.W.2d 575 (Ark. 1994) (examining Rule 2 of Arkansas Rules of Appellate Procedure).
691. *Id.* at 578.
692. U.A.A. § 21.

appellate court held in *Arnold v. Morgan Keegan & Co.*[693] that courts do not look to other states' decisions under the U.A.A. as persuasive authority, but rather as a "supplement" to their own case law in *Arnold*.[694]

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693. No. 03A01-9309-CH-00304, 1994 WL 265858 (Tenn. Ct. App. 1994).
694. *Id.* at *5.