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Recent Developments: The Uniform Arbitration Act

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STUDENT PROJECT

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I. INTRODUCTION

This Article is an overview of recent court decisions that interpret state versions of the Uniform Arbitration Act ("U.A.A.").[1] Arbitration statutes patterned after the U.A.A. have been adopted by thirty-four states and the District of Columbia.[2] The goal of this project is to promote uniformity in the interpretation of the U.A.A. by articulating the underlying policies and rationales of recent court decisions interpreting the U.A.A.[3]

II. SECTION 1: VALIDITY OF ARBITRATION AGREEMENTS

In determining whether or not there exists a valid arbitration agreement, it must first be established that the parties actually agreed to be bound by such an agreement. If it is found that such an agreement exists, the court must then determine the scope of that agreement.

A. Determination of the Existence of an Agreement to Arbitrate

Courts are reluctant to invalidate an express arbitration agreement due to alleged contractual flaws. In *Knaffl v. Douglas Co.*,[4] Knaffl entered into a contract with The Douglas Company ("Douglas") to provide certain painting services as a subcontractor.[5] Knaffl subsequently filed a materialman's lien and brought suit against defendant[6] seeking payment for his services.[7] Douglas claimed that Knaffl's work and materials fell short of the specifications as set forth in the contract and filed a "motion to dismiss or for summary judgement, and an alternative motion for order

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1. UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 1 (1997).

2. Jurisdictions that have adopted arbitration statutes based on the U.A.A. include: 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.

3. This Article surveys cases decided between January 1, 1999 and December 31, 1999.

4. No. 03A01-9901-CH-00006, 1999 WL 894203 (Tenn. Ct. App. 1999).

5. *Id.* at *2.

6. *Id.* The owner of the property at issue, a trustee on the deed of trust, and two insurance companies as sureties were also named as defendants. *Id.*

7. *Id.* at *1.

to arbitration."[8] Douglas' motion to dismiss or for summary judgement was granted and the motion to compel arbitration was overruled.[9] After Knaffl's motion for amended judgement, both of Douglas' motions were denied pursuant to invalidation of the contract's venue selection clause, mandating that arbitration be conducted in Toledo, Ohio.[10] Douglas subsequently appealed the chancellor's denial of the motion to compel arbitration.[11] On appeal Knaffl argued that the arbitration agreement should be void due to a lack of consideration. Because Douglas possessed a unilateral right to invoke arbitration under the agreement, Knaffl claimed that there was a "lack of mutuality."[12] The Tennessee Court of Appeals disagreed and stated that "a contractual obligation to be bound by the decision of the arbitrator is sufficient consideration to support an arbitration agreement."[13] Pursuant to this finding, the court vacated the trial court's order denying Douglas' motion to compel arbitration but declared the venue selection clause as void under Tennessee law.[14]

Similarly, in following the proposition provided in the U.A.A. that a "written agreement to submit any existing controversy to arbitration . . . is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract,"[15] the court in *M. Swentor v. G. Swentor*[16] stated that a unilateral mistake by one party, believing that an agreement was not truly binding, is not sufficient grounds to set aside an arbitration agreement.[17] In this case, a property distribution established through arbitration pursuant to a divorce action was set aside due to the wife's belief that the family court would make the final decision as to the results of the agreement.[18] The South Carolina Court of Appeals stated that even though the family court had subject matter jurisdiction to decide whether or not the parties had agreed to submit their dispute to arbitration, the Arbitration Act precluded the family court from reviewing the substantive fairness of the agreement.[19]

In addition to common law contractual formalities, additional formalities may be imposed by state adoption of the U.A.A. In *Mueller v. Howard*,[20] Mueller, employee, brought suit against Howard, employer, alleging breach of contract, conversion, breach of fiduciary duty, and corporate dissolution.[21] Howard moved to dismiss all claims "alleging that the parties expressly agreed that any disputes under the agreement would be settled by arbitration."[22] The motion to dismiss was

8. *Id.* at *2.
9. *Id.*
10. *Id.* at *2 (Plaintiff's authority for invalidation of venue selection clause was TENN. CODE ANN. § 66-11-208 (1993)). *Id.*
11. *Knaffel*, 1999 WL 894203 at *2.
12. *Id.* at *3.
13. *Id.* at *4.
14. *Id.*
15. U.A.A. § 1.
16. 520 S.E.2d 330 (S.C. Ct. App. 1999).
17. *Id.* at 337-38.
18. *Id.* at 331.
19. *Id.* at 332-39.
20. 5 S.W.3d 182 (Mo. App. 1999).
21. *Id.* at 185.
22. *Id.*

denied.[23] Howard appealed the trial court's decision, alleging that the arbitration clause was enforceable.[24] Mueller claimed that the arbitration clause was not enforceable due to lack of notice proscribed in the Missouri version of the Uniform Arbitration Act.[25] The Missouri court of Appeals, Eastern District found that the agreement between the parties affected commerce and was thus subject to the Federal Arbitration Act ("F.A.A.").[26] Based on this finding, the court further stated that the F.A.A. preempts state arbitration acts and additional burdens proscribed by state acts will not defeat an arbitration clause which is otherwise valid under the F.A.A.[27] Therefore, the notice proscribed in Missouri Revised Statute § 435.460 was not necessary because the agreement at hand was covered by the F.A.A.[28]

Even though courts appear reluctant to negate an express arbitration agreement, decisions concerning arbitration agreements allegedly arising from implication or construction are not so uniformly enforced. In *United States Fidelity & Guaranty Co. v. Triple H Electric Co.*,[29] the Arkansas Court of Appeals decided that an agreement to arbitrate cannot arise by implication.[30] In this case, United States Fidelity & Guaranty Company claimed that an arbitration agreement in an earlier contract between the two parties implied an agreement to arbitrate subsequent similar issues.[31] The court stated that an implication that agreements to arbitrate would be binding in regard to subsequent contracts between parties would undermine the requirement that a party has to expressly agree, in writing, to arbitrate certain disputes before they can be bound by that agreement.[32]

However, in a similar case before the Colorado District Court, it was decided that the course of conduct of the parties was enough to establish a binding contract, including an arbitration agreement, even in the absence of a signature by either party.[33] Here, the course of conduct between the contractor and homeowners, whereby homeowners authorized an architect to solicit bids and homeowners accepted contractor's offer through the architect, was held to have established a binding contract including the arbitration agreement contained in the general conditions in the standard bid package sent by the architect to the contractor.[34]

Previous conduct leading to an arbitration agreement was emphasized in *Board of Education of the Appoquinimink School District v. Appoquinimink Education Ass'n*.[35] The primary dispute in this case concerned a provision contained in the Collective Bargaining Agreement between the school district and the education association stating that disability insurance would be provided in the amount of 66

23. *Id.*
24. *Id.*
25. *Id.* at 186 (citing, MO. REV. STAT. § 435.460 (1994)).
26. *Id.*
27. *Id.* at 187.
28. *Id.* at 186.
29. No. CA99-245, 1999 WL 1031264 (Ark. Ct. App. Nov. 10, 1999).
30. *Id.*
31. *Id.* at *2.
32. *Id.* at *3.
33. *Todd Habermann Constr. Inc. v. Epstein*, 70 F. Supp. 2d 1170, 1172-73 (D. Colo. 1999).
34. *Id.* at 1173.
35. No. CIV. A. 16812, 1999 WL 826492 (Del. Ch. Oct. 6, 1999).

2/3% of the employee's salary.[36] A disagreement as to whether the percentage of the employee's salary should be in addition to or include other sources of income was submitted to an arbitrator who decided that the proper interpretation of this clause was that the percentage of salary paid by the insurance is in addition to other sources.[37] Subsequent to the arbitrator's decision, negotiations between the parties resulted in changing the clause at issue to read that the percentage of the employee's salary paid by insurance would include other sources of income.[38] The school district decided that the modified provision would be applied retroactively and reduced insurance payments accordingly.[39] On behalf of the aggrieved employees, the association sought arbitration of the issue of whether or not the modification should be applied retroactively.[40] The school district argued that it was not obligated to comply because the retired employees were no longer "employees" as defined by the Collective Bargaining Agreement.[41] The court stated that even though the Delaware Uniform Arbitration Act did not apply, the broad language of the arbitration agreement within the Collective Bargaining Agreement entered into by the school district and the education association, coupled with the school district's previous course of performance was sufficient evidence of the parties' intent to submit to arbitration "claims concerning workers who retire as a result of disability."[42]

Although courts generally require a valid, written agreement to arbitrate disputes, they seem reluctant to invalidate such agreements due to lack of equal bargaining power between the parties. In *Brown v. Karemor International, Inc.*,[43] the court stated that an arbitration agreement does not compel arbitration of disputes unrelated to such agreement and that an agreement procured by fraud can be rescinded without seeking arbitration.[44] The court further stated that the standardized form contract containing the arbitration agreement might be classified as an adhesion contract; however, this alone does not render the contract unenforceable.[45] "Enforceability generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable."[46] Applying this concept, the court stated that whether an arbitration provision buried on the reverse side of the contract requiring disputes to be arbitrated in Carson City, Nevada, is reasonable was a valid issue and remanded the case to the Chancery Court for further proceedings.[47]

Likewise, in *Rembert v. Ryan's Family Steak Houses, Inc.*,[48] where an employee brought an action against a former employer claiming race and handicap

36. *Id.* at *1.
37. *Id.*
38. *Id.* at *2.
39. *Id.* at *3.
40. *Id.*
41. *Id.*
42. *Id.* at *10.
43. No. 01A01-9807-CH-00368, 1999 WL 221799 (Tenn. Ct. App. Apr. 1999).
44. *Id.* at *2.
45. *Id.* at *3.
46. *Id.* (citing Buraczynski v. Eyring, 919 S.W.2d 314, 316 (Tenn. 1996).
47. *Brown*, 1999 WL 221799 at 3.
48. 596 N.W.2d 208 (Mich. Ct. App. 1999).

discrimination, the Michigan Court of Appeals stated that a pre-dispute agreement to submit statutory employment discrimination claims to arbitration does not render a contract unenforceable as an adhesion contract provided that the agreement does not waive statutory rights, is procedurally fair, and the terms of the agreement are reasonable or the employee had a "meaningful choice."[49] The court also noted that agreements to arbitrate statutory claims are invalid if the statute itself prohibits such claims. However, this was not at issue in this case since neither the Civil Rights Act nor the Persons With Disabilities Civil Rights Act prohibit such agreements.[50]

Additionally, even if the court finds that a valid agreement to arbitrate does exist, the existence of such an agreement does not necessarily bind all parties involved in a particular dispute. In *Hetrick v. Friedman, D.P.M.*,[51] the court stated that a party cannot be compelled to submit an issue to arbitration unless they have previously agreed to do so.[52] In this case, Blue Cross and Blue Shield, ("BCBS") a health insurer, intervened as a plaintiff in a medical malpractice action "asserting a contractual lien against any judgement or settlement for reimbursement of benefits it paid under an insurance policy."[53] Even though plaintiffs Carolyn and Frank Hetrick had agreed to submit their malpractice claims to arbitration, the agreement was not binding to BCBS because they had not previously agreed to the same.[54] Rather than holding the arbitration agreement to be invalid, the Court simply stated that the original parties to the agreement were still bound by the agreement, but parties outside of the agreement were not.[55]

Even in the absence of a pre-dispute agreement to arbitrate, the issue of arbitrability may arise when parties subsequently agree to arbitrate their disputes. In the case of *Dahl v. Fred Meyer, Inc.*,[56] the employee-appellant claimed that he was wrongfully discharged and brought suit against employer-respondent under the Montana Wrongful Discharge From Employment Act §§ 39-2-901-915 and alleged that he was discharged due to respondent's desire to avoid paying his fringe benefits.[57] Subsequently, both parties agreed to submit the claim to arbitration and selected an arbitrator.[58] Respondent then moved to dismiss arbitration "on the basis that because the complaint alleged a motive for Respondent to discharge Appellant, the complaint was intended to state a cause of action under federal law, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461."[59] The arbitrator dismissed the arbitration and respondent moved for confirmation of the arbitrator's decision.[60] The district court confirmed the arbitrator's decision.[61] Respondent challenged the district court's confirmation of an arbitration award, even

49. *Id.* at 226.
50. *Id.* at 226-27.
51. 602 N.W.2d 603 (Mich. Ct. App. 1999).
52. *Id.* at 605.
53. *Id.*
54. *Id.*
55. *Id.* at 605-06.
56. 993 P.2d 6 (Mont. 1999).
57. *Id.* at 7.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

though he failed to object to the award before the arbitrator or the district court.[62] The Supreme Court of Montana stated that when a question of arbitrability arises, resolution is a matter of determination by the arbitrator.[63] Therefore, "by failing to move for an order vacating the award . . . [the appellant] waived its right to object to confirmation of the arbitration award."[64]

B. Determination of the Scope of the Agreement to Arbitrate

Once it has been found that a valid arbitration agreement does indeed exist, the courts must then decide the scope of that agreement. Furthermore, they must distinguish between claims that the parties have agreed to arbitrate and those which were intended to be settled judicially.

In *Frizzell Construction Co. v. Gatlinburg, L.L.C.*,[65] the chancery court withheld claims of fraudulent inducement from arbitration because Tennessee law did not permit arbitration of claims of fraud.[66] This dispute arose out of a contract between Gatlinburg L.L.C. ("Gatlinburg") and Frizzell Construction Company ("Frizzell") for the construction of a hotel.[67] Subsequent to a dispute regarding payments under the contract, Frizzell filed a "Complaint to Enforce Mechanic's Lien and for Breach of Contract."[68] In response, Gatlinburg argued that the contract was "fraudulently induced through Frizzell's misrepresentation of its expertise and ability to complete the project for the stated amount."[69] Frizzell argued that since the contract involved interstate commerce, the F.A.A. mandated that all disputes be submitted to arbitration.[70] On the issue of arbitrability, the chancellor held that the contract did not "involve interstate commerce so as to bring the contract under the F.A.A."[71] The Supreme Court of Tennessee held that since several of the participants in the project, including employees, contractors, vendors, banks, and a corporation insuring the project were from out of state, the contract did involve interstate commerce and thus, the F.A.A. is applicable.[72] However, the court also found that the contract evidences that the parties intended to resolve claims of fraudulent inducement judicially.[73]

Similarly, in *Midomo Co. v. Presbyterian Housing Development Co.*,[74] landowner Midomo brought suit against the Presbyterian Housing Development Company claiming fraudulent and negligent misrepresentation in conjuncture with a breach of contract claim regarding a proposed personal care facility.[75] The Superior Court of Pennsylvania stated that for an agreement to come within the

62. *Id.*
63. *Id.* at 8.
64. *Id.*
65. 9 S.W.3d 79 (Tenn. 1999).
66. *Id.* at 81.
67. *Id.*
68. *Id.*
69. *Id.* at 82.
70. *Id.*
71. *Id.*
72. *Id.* at 83-84.
73. *Id.* at 84-85.
74. 739 A.2d 180 (Pa. Super. Ct. 1999).
75. *Id.* at 183.

scope of the U.A.A., the "agreement must be in writing," and the "agreement must expressly provide for arbitration under the act."[76] The court then found that the agreement did not expressly cover tort claims, thus, claims of fraudulent and negligent misrepresentation were not covered under the agreement.[77] In deciding the arbitrability of tort claims, the Court of Appeals of Texas stated that when there is a valid arbitration agreement, the tort claims fall within the scope of the agreement except when "the alleged tort is so completely independent of the contract as to be actionable without reference to the contract."[78] In this case, BPA Fabrication, Inc. ("BPA") claimed that Jamak Fabrication, Inc. ("Jamak") had breached the asset-purchase and raw-materials-purchasing portions of a contract between the parties, alleging fraud and interference with contract claims "and claims that Jamak violated the Texas DTPA."[79] BPA initially sought arbitration of these issues under the dispute resolution clause of the contract, but, subsequently demanded declaratory relief alleging that these claims were not covered by the agreement.[80] Jamak moved to compel arbitration of all claims.[81] The court affirmed arbitration of these issues on the grounds that "[these claims] are neither independent of that contract, nor maintainable without reference to that contract."[82]

However, in *Ryan, M.D. v. Kontrick, M.D.*,[83] the Illinois Court of Appeals stated that parties are only obligated to arbitrate "those issues by clear language that they have agreed to arbitrate," and that arbitration agreements will not be extended by implication to encompass issues arising outside of the scope of the express provisions.[84] Thus, the court found that since the arbitration agreement did not expressly authorize arbitrator to make punitive damage awards, the arbitration agreement "cannot be extended by construction or implication" to encompass such awards.[85]

In the situation where an arbitration agreement is executed in connection with a business entity, determination of the scope of such an agreement may require additional consideration. In *Chazen v. Parton*,[86] former shareholders of the Knox Metals Corporation filed suit claiming fraud and breach of fiduciary duty against Chazen, a former officer and stockholder.[87] Chazen's motion to compel arbitration of the dispute pursuant to the arbitration provision contained in the Stock Purchase Agreement was denied by the trial court on the ground that "the dispute between the plaintiffs and Chazen did not arise out of or relate to the Stock Purchase Agreement."[88] On appeal, the Supreme Court of Alabama stated that the

76. *Id.*
77. *Id.* at 190.
78. *BPA Fabrication, Inc. v. Jamak Fabrication, Inc.*, No. 01-98-00765-CV, 1999 WL 977819, at *5 (Tex. App. Oct. 28, 1999).
79. *Id.* at *1.
80. *Id.*
81. *Id.*
82. *Id.* at *5.
83. 710 N.E.2d 11 (Ill. Ct. App. 1999).
84. *Id.* at 14.
85. *Id.* at 14.
86. 739 So.2d 1104 (Ala. 1999).
87. *Id.* at 1105.
88. *Id.* at 1106.

applicability of an arbitration agreement between parties is to be determined by general principles of state contract law.[89] Applying the aforementioned concept in conjuncture with the principle of lex loci contractus,[90] the court decided that under Tennessee law the arbitration agreement at issue only encompassed disputes between the "shareholders" and the "purchaser," not disputes among the shareholders themselves.[91] However, in addressing a similar issue, the Supreme Court of Delaware in *Elf Atochem North America, Inc. v. Jaffari*,[92] stated that a limited liability company is bound by the arbitration clause contained in the Limited Liability Company Agreement. The court found that since it is the members of the company who "are the real parties in interest," derivative claims brought against the company will be subject to the arbitration clause even though the agreement was not executed by the company but signed by the members.[93]

III. SECTION 2: PROCEEDINGS TO COMPEL OR STAY ARBITRATION

Section 2 of the U.A.A. deals with motions to compel or stay arbitration.[94] The party seeking to arbitrate must show an agreement, as provided in section 1 of the U.A.A., existed between the parties.[95] Upon motion to stay an arbitration, the court looks for the absence of an agreement to arbitrate the issue between the parties.[96]

A. Arbitration Agreements Between Contractors and Subcontractors

Arbitration clauses can not be implied into agreements because of prior dealings between two parties. In *United States Fidelity & Guaranty Co. v. Triple H Electric Co.*,[97] Triple H Electric Co. ("Triple H"), a subcontractor, sued Structural Systems, Inc. ("SSI"), the general contractor, and U.S. Fidelity & Guaranty Co. ("USF&G"), the surety, for money owed on a project in Fort Smith, Arkansas.[98] SSI and USF&G responded by filing a motion to compel arbitration.[99] The trial court denied this motion and SSI and USF&G brought this appeal.[100]

Triple H did the electric work for SSI on the construction of a Lowe's Home Improvement Center in Fort Smith, Arkansas.[101] Triple H encountered difficulty during this project and did not wish to bid on any future SSI projects, but SSI encouraged Triple H by assuring them that they "would have at least sixty days 'on

89. *Id.*
90. *Id.* Lex loci contractus provides for application of the law of the jurisdiction where the contract was executed. *Id.*
91. *Id.* at 1108.
92. 727 A.2d 286 (Del.1999).
93. *Id.* at 292-93.
94. U.A.A. § 2.
95. *Id.* § 2 (a).
96. *Id.* § 2 (b).
97. 1999 WL 1031264.
98. *Id.* at *1.
99. *Id.*
100. *Id.*
101. *Id.*

the slab,' *i.e.*, working from a concrete slab rather than the more troublesome and less efficient rock-base subfloor."[102] Based upon this assurance, Triple H submitted bids for two future SSI projects.[103] On July 27, 1995, SSI issued construction schedules for the two projects.[104] Upon review of the construction schedules, Triple H determined that it would not have the sixty days of "slab time" that it was assured.[105] Triple H then informed SSI that it would not complete the projects for the amount bid.[106] SSI replied that if Triple H did not perform, SSI would complete the work and bill any additional costs to Triple H.[107] One month later, Triple H sought payment for the work done on the Fort Smith project plus costs due to delays.[108] SSI refused to pay and claimed that Triple H owed SSI money for additional costs on the two new projects.[109]

Triple H brought suit in court, but SSI moved to compel arbitration based upon the contract from the Fort Smith project.[110] Triple H admitted that the Fort Smith claim was arbitrable, but denied that the claims on the two new projects were subject to arbitration.[111] The circuit court agreed with Triple H, stating that "no contracts existed between SSI and Triple H on the Shawnee and Muskogee jobs nor did the parties make any agreements to arbitrate."[112]

On appeal, SSI argued that Triple H signed a standard subcontract form in prior dealings with SSI that contained an arbitration clause, and therefore, Triple H impliedly agreed to arbitration on disputes arising from the two new contracts.[113] The court of appeals pointed out that the previously signed arbitration clause specifically stated that it only applies to disputes relating to "this contract."[114] The court went on to rule that arbitration clauses can not be "incorporated into separate agreements by implication alone."[115]

In *Knaffl v. Douglas Co.*[116], Knaffl, a painting subcontractor, sued the Douglas Company, the contractor, for payment on work done at an apartment complex.[117] The Douglas Company, claiming that Knaffl did not perform the contract as signed, moved for summary judgement or alternatively to compel arbitration.[118] The chancellor initially denied the motion for arbitration and granted the motion for summary judgement, but due to a venue selection clause, later denied both motions.[119] Upon appeal, the appellate court determined that the only issue properly

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at *2.
114. *Id.*
115. *Id.*
116. 1999 WL 894203.
117. *Id.*
118. *Id.* at *2.
119. *Id.*

before them to determine was the motion to compel arbitration.[120] Knaffl asserted two arguments: "(1) the arbitration clause was void for lack of consideration, and (2) the arbitration clause was void because it violated Tenn. Code Ann. section 66-11-208."[121] The court of appeals quickly brushed aside the first argument by reasoning that agreeing to be bound by an arbitrator's decision was sufficient consideration.[122] The court of appeals also dismissed the second argument by finding that the adoption of the Uniform Arbitration Act shows a legislative policy favoring arbitration.[123] The court then concluded that the contract between the parties, "while still complying with Tenn. Code Ann. section 66-11-208," required arbitration.[124]

D. Wilson Construction Co. v. Cris Equipment Co.,[125] is a case of a contractor suing a subcontractor for indemnification.[126] Wilson completed a construction project for the McAllen Independent School District in Texas.[127] The McAllen School District then brought a suit to compel arbitration against Wilson for using deficient fill dirt and was awarded a settlement of $2,150,000.[128] Wilson then sought to arbitrate for indemnification against Cris Equipment Co., Inc. ("Cris"), the subcontractor responsible for the fill dirt.[129] Cris requested voluntary mediation, but an agreement could not be met and an arbitration hearing was set for March 3, 1997.[130] In the meantime, Cris filed a petition in Harris County seeking declaratory judgment, restraining order and to enjoin arbitration.[131] The case was voluntarily transferred to Hidalgo County where Wilson responded by filing a plea for abatement and a motion to compel arbitration.[132] The trial court denied the plea and the motion.[133] As a result, Wilson filed an interlocutory appeal and petition for writ of mandamus.[134]

The appellate court first determined that the TGAA, the Texas version of the U.A.A.,[135], was the controlling law in the case.[136] Wilson asserted five arguments on appeal:

> (1) the trial court erred in denying the motion to compel arbitration and in failing to abate Chris's suit pending arbitration, (2) the trial court erred in failing to hold that the arbitrator, rather than the trial court, decides the issue of timeliness, (3) that if the trial court decides timeliness, Wilson's arbitration demand was timely, (4) the trial court erred in considering the

120. *Id.* at *3.
121. *Id.*
122. *Id.*
123. *Id.* at *4.
124. *Id.*
125. 988 S.W.2d 388 (Tex. App. 1999).
126. *Id.* at 391.
127. *Id.*
128. *Id.*
129. *Id.* at 392.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. TEX. CIV. PRAC. & REM. CODE §§ 171.002 to 171.020 (West 1999).
136. *Id.*

> merits of Wilson's claims or Chris's alleged defenses as grounds to avoid arbitration, and (5) Cris was estopped from questioning timeliness in the trial court on the eve of the final arbitration hearing."[137]

Cris responded by arguing:

> (1) under the applicable version of the TGAA, Wilson has no right to arbitration because Wilson is not a non-profit entity, (2) Texas trial courts do decide if conditions precedent have been satisfied when considering whether to compel arbitration, (3) according to the terms of the contract documents, Wilson's arbitration demand was barred by limitations, and (4) Cris has not relinquished its right to have a trial court declare if arbitration rights exist.[138]

The appellate court first decided to use the 1997 version of the TGAA reasoning that no substantial differences existed between the earlier versions and the most current version.[139] The court next moved on to Cris's argument that the TGAA only applies to non-profit organizations.[140] Looking at the probable intention of legislature, coupled with the fact that Texas adopted the U.A.A., "which is not limited to non-profit corporations," the court concluded that the TGAA applies to for profit organizations.[141] The appellate court then moved on to the issue of who determines whether or not an arbitration demand is timely.[142] The court found that the trial court may determine if the breach of a condition precedent bars the right to compel arbitration.[143] The appellate court then determined that Wilson was not barred from compelling arbitration because of the terms specifically set out in the contract between Wilson and Cris.[144] The appellate court concluded that the trial court erred in denying Wilson's motion to compel arbitration and remanded the case to the trial court.[145]

In *United States of America ex rel. Tanner v. Daco Construction, Inc.*,[146] the United States District Court of Northern Oklahoma ruled on a dispute involving the Miller Act.[147] In this case, Tanner, a subcontractor, brought suit against Daco Construction, Inc. ("Daco"), a general contractor, for payment due on survey work on a project.[148] Daco sought to compel arbitration and Tanner countered by claiming that part of the dispute involved the Miller Act,[149] which he believed could not be arbitrated and the other part of the dispute should not be severed because all the

137. *Id.* at 392-93.
138. *Id.* at 393.
139. *Id.*
140. *Id.* at 394.
141. *Id.* at 394-95.
142. *Id.* at 395.
143. *Id.*
144. *Id.* at 396-97.
145. *Id.* at 398.
146. 38 F. Supp. 2d 1299 (N.D. Okla. 1999).
147. *Id.* at 1300 (citing 40 U.S.C. § 270).
148. *Id.*
149. 40 U.S.C. § 270.

issues arose from the same facts.[150] The court found that Miller Act claims were arbitrable, but in this case the agreement between the parties did not cover arbitration of Miller Act claims.[151] However, the court found that the underlying issue in dispute was arbitrable and that the court was required to compel arbitration of that issue even if "the result would be the possibly inefficient maintenance of separate proceedings in different forums."[152] The court concluded that the underlying issues were to be arbitrated, but that the Miller Act Claims were open to litigation.[153]

B. Motions to Compel Arbitration as Applied to Employer Employee Relationships

In *Correll v. Distinctive Dental Services, P.A.*,[154] the issue was whether or not a claim brought under the Minnesota Human Rights Act ("MHRA")[155] precluded arbitration.[156] Correll, a dentist, was fired from Distinctive Dental because his wife worked at a competing dental office within seven miles of Distinctive Dental in violation of an anti-competition clause in Correll's contract.[157] Correll claimed that this was marital status discrimination in violation of the MHRA.[158] Distinctive Dental moved to compel arbitration, but the circuit court ruled that the MHRA precluded arbitration.[159]

The Minnesota Court of Appeals addressed this question and attempted to "harmonize the MHRA and the MUAA."[160] The court of appeals came to the conclusion that the MHRA does not void the contractual agreement to arbitrate.[161] The court reasoned that precluding arbitration in this case would interfere with the parties ability to freely contract.[162] The court also discussed the probable intention of the legislature not to override contracts and the strong policy in Minnesota favoring arbitration.[163] The appellate court concluded that the district court erred in judgement and ordered the parties to submit to arbitration.[164]

In *Towles, v. United Healthcare Corp.*,[165] Towles, a doctor, sued his former employer, United Healthcare Corporation ("UHC"), after being dismissed.[166] UHC moved to compel arbitration, but was denied by the circuit court resulting in this appeal. The Appellate Court of South Carolina found three issues to determine: "1.) Whether the FAA applies, 2.) whether United and Towles formed a valid and

150. *Id.* at 1301.
151. *Id.* at 1301-02.
152. *Id.* at 1303-04 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985)).
153. *Id.* at 1306.
154. 594 N.W.2d 222 (Minn. Ct. App. 1999).
155. Minn. Stat. §§ 363.01 - 363.20 (1998).
156. *Correll*, 594 N.W.2d at 224.
157. *Id.* at 223.
158. *Id.*
159. *Id.*
160. *Id.* at 225.
161. *Id.* at 227.
162. *Id.* at 225.
163. *Id.* at 225-26.
164. *Id.* at 227.
165. 524 S.E.2d 839 (S.C. Ct. App.1999).
166. *Id.* at 842.

binding arbitration agreement, and 3.) whether the agreement covers Towles' claims."[167] The court found that the F.A.A. did apply, because interstate commerce was involved.[168] The court then found that an arbitration agreement was formed because Towles signed an agreement to follow the rules in his employee handbook.[169] Last, the court found that the agreement did cover Towles' claims and that if there was any doubt as to the scope of arbitrability it should be resolved in favor of arbitration.[170] The appellate court concluded that the parties should be compelled to arbitrate.[171]

Mueller v. Hopkins & Howard, P.C.[172] also involved an employee suing his former employer.[173] Mueller brought suit against Hopkins & Howard, P.C. ("Hopkins & Howard") and Hopkins & Howard moved to have the case dismissed citing an arbitration agreement in its contract with Mueller.[174] The trial court dismissed the motion and this appeal was brought.[175] The only issue on appeal is whether or not Mueller's action should be dismissed and arbitration compelled.[176] The appellate court found that the motion to dismiss was sufficient to be considered a request to compel arbitration.[177] The appellate court then applied the F.A.A. to the contract.[178] Looking at the contract between Mueller and Hopkins & Howard, the appellate court concluded that the trial court erred and that the parties should be compelled to enter into arbitration.[179]

C. Judicial Review of Arbitrability

In *Southern California Edison Co. v. Peabody Western Coal Co.*,[180] the Supreme Court of Arizona was asked to decide whether an order compelling arbitration was subject to review.[181] The trial court ordered arbitration following a motion by Peabody Western Coal Co. ("Peabody") and the court of appeals dismissed the appeal for lack of jurisdiction finding that the order to compel arbitration "was interlocutory, and therefore, nonappealable under *Roeder v. Huish*."[182] Southern California Edison Co. ("the Utilities") then filed a petition for review with the Supreme Court of Arizona.[183]

The court in *Roeder* held that an order to compel arbitration is appealable only after the confirmation of the arbitration award is sought and not prior to the

167. *Id.* at 843.
168. *Id.*
169. *Id.* at 844-5.
170. *Id.* at 846.
171. *Id.* at 847.
172. 5 S.W.3d 182.
173. *Id.* at 185.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 186.
178. *Id* at 186-87.
179. *Id.* at 188.
180. 977 P.2d 769 (Ariz. 1999).
181. *Id.* at 770.
182. *Id.* at 771 (citing Roeder v. Huish, 467 P.2d 902 (Ariz. 1970)).
183. *Southern Cal. Edison Co.*, 977 P.2d at 771.

arbitration.[184] The Utilities argued that it is illogical to go through a lengthy arbitration process before resolving whether the issue was arbitrable in the first place.[185] The Supreme Court of Arizona admitted that this issue has pros and cons on each side, but upheld the appellate court's decision.[186] The court reasoned that allowing appeals from orders to compel arbitration, "would destroy the benefits of arbitration as a speedy, efficient, and inexpensive method of dispute resolution."[187] The court also pointed out, "that the law favors arbitration of disputes that the parties have agreed to arbitrate."[188] The court then looked to the U.A.A. and F.A.A. which both state that only orders denying arbitration are appealable.[189] The court did recommend an avenue for appeal in the conclusion.[190] The court suggested that a party can "request that the trial judge enter a final order or judgement under Rule 54(b) or A.R.S. section 12-2101."[191] The aforementioned ruling is appealable and if the judge refuses to make such a ruling that decision can be challenged on a special action.[192]

In *Board of Education of the Appoquinimink School District v. Appoquinimink Education Ass'n*,[193] the Court of Chancery of Delaware was faced with a motion to compel arbitration filed by the Appoquinimink Education Association ("Association").[194] The court found that the only issue was arbitrability of the grievance at issue.[195] The court found that although the DUAA,[196] the Delaware version of the U.A.A., did not apply, it did provide guidance.[197] The court ruled that the issue of arbitrability was one for the court to determine, not the arbitrator.[198] In order to determine the arbitrability of the issue the court looked at both the contract and prior conduct between the parties.[199] The court determined that the dispute was arbitrable due to the language of the contract and a prior arbitration between the parties in 1996.[200]

184. *Roeder*, 467 P.2d at 904.
185. *Southern Cal. Edison Co.*, 977 P.2d at 771.
186. *Id.* at 773.
187. *Id.* at 772.
188. *Id.* at 773.
189. *Id.* at 774.
190. *Id.* at 776.
191. *Id.*(citing ARIZ. R. CIV. P. 54(b) (2000)).
192. *Id.*
193. 1999 WL 826492.
194. *Id.* at *1.
195. *Id.* at *4.
196. DEL. CODE ANN. tit. 10 §§ 5701-5725 (1999).
197. *Id.*
198. *Appoquinimink Sch. Dist.*, 1999 WL 826492 at *5.
199. *Id.* at *8.
200. *Id.* at *10.

D. Compelling Arbitration Based on the Scope of the Arbitration Agreement

In *BPA Fabrication, Inc. v. Jamak Fabrication, Inc.*,[201] BPA Fabrication, Inc. ("BPA") appealed an order to compel arbitration.[202] BPA argued that the under the Texas Act,[203] as applied to arbitration, the parties at hand were not subject to arbitration and that the issue arbitrated was not under the scope of the arbitration agreement.[204] The court of appeals first addressed the issue concerning the Texas Act where BPA claimed that the Texas Act limited arbitration to nonprofit organizations.[205] The court, however, rejected this argument citing holdings in previous cases including *Wilson Construction Co. v. Chris Equipment Co.*, which was discussed in section A of this article.[206] The court also stated that the Texas Act was adopted from the U.A.A. and the U.A.A. applied to for profit organizations.[207]

Next, the court looked at the scope of the arbitration agreement to determine if the issue in the case was arbitrable.[208] The court applied the F.A.A. test of "whether the extra-contractual claims are factually intertwined with the contract claims," and the Texas Act test of, "whether the alleged tort is so completely independent of the contract as to be actionable without reference to the contract."[209] After reviewing these tests the court upheld the motion to compel arbitration.[210]

The Superior Court of Pennsylvania assessed whether or not an arbitration agreement covered tort claims in *Midomo Co., Inc. v. Presbyterian Housing Development Co.*[211] Midomo Co., Inc. ("Midomo") brought a six part suit against Presbyterian Housing Development Co. ("PHDC") alleging fraudulent misrepresentation, nondisclosure, negligent misrepresentation, and breach of contract contingency clause.[212] Midomo also filed for interference with contract, breach of oral contract, and breach of contract implied in fact against Presbyterian Homes, Inc (PHI).[213] PHDC and PHI claimed that all six counts were subject to arbitration due to the contract between the parties or the fact that the issues arose out of the contract between the parties.[214] The court stated that arbitration was a matter of contract and looked at the four corners of the agreement between the parties to determine the issue of arbitrability.[215] The court found that the counts based in tort and the counts against PHI were all outside of the scope of arbitrability laid out in the contract.[216]

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201. 1999 WL 977819.
202. *Id.* at *1.
203. TEX. CIV. PRAC. & REM. CODE §§ 171.002 to 171.020.
204. *BPA Fabrication*, 1999 WL 977819 at *4-5.
205. *Id.* at *4.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at *5.
210. *Id.*
211. 739 A.2d 180.
212. *Id.* at 186.
213. *Id.*
214. *Id.*
215. *Id.* at 187-90.
216. *Id.* at 190.

The court did find that the third count, breach of the contract contingency clause, was subject to arbitration due to the contract between the parties and ordered that count to be settled in arbitration.[217]

In *Comdisco, Inc. v. Dun & Bradstreet Corp.*,[218] the appellate court reviewed a motion to compel arbitration and the actual scope of the arbitration.[219] The issue in this case arose pursuant to an arbitration contract between Comdisco and Dun & Bradstreet.[220] Comdisco terminated a lease with Dun & Bradstreet which triggered an "early termination value" provision in the original contract between the parties.[221] This provision required Comdisco to pay the "fair market value" of the equipment leased from Dun & Bradstreet.[222] The parties could not agree to what the "fair market value" was, so an arbitration agreement was entered.[223] A dispute over the arbitration agreement then ensued and Dun & Bradstreet filed a motion to compel arbitration with the court.[224] The original trial court denied the motion to compel arbitration.[225] Dun & Bradstreet appealed and the appellate court reversed and remanded to the trial court.[226] The trial court then ruled in favor of arbitration and added that all disputes over "fair market value" were within the scope of the arbitration.[227]

The case came before the appellate court for a second time on appeal from Comdisco.[228] The court found that arbitration should be compelled and the only issue was the trial court's interpretation of the scope of the arbitration agreement.[229] Comdisco argued that some of the issues in dispute were outside of the scope of the arbitration agreement.[230] The court found that if the contract was clear then the court could define the scope of the arbitration agreement, but if the contract was ambiguous then the scope of the arbitration agreement was to be determined by the arbitrator.[231] After review of the contract the appellate court found it to be ambiguous and left the scope of the arbitration to be determined by the arbitrator.[232]

IV. SECTION 7: WITNESSES, SUBPOENAS, DEPOSITIONS

Under section 7 of the U.A.A., an arbitrator, much like a regular judge, may: (1) issue subpoenas for witnesses and production of various documents, (2) set terms

217. *Id.* at 191.
218. 713 N.E.2d 698 (Ill. App. Ct. 1999).
219. *Id.*
220. *Id.* at 699.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 700.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 701-2.
230. *Id.* at 701.
231. *Id.* at 701-02.
232. *Id.* at 703.

and conditions that allow depositions to be taken of witnesses who cannot be subpoenaed or are unable to attend the hearing, (3) compel a person under subpoena to testify, and (4) require fees for attendance as a witness equivalent to a court of law.[233]

It is within the arbitrator's power to refuse to allow discovery depositions.[234] In *Barry v. Telander*,[235] the Minnesota Court of Appeals held that the arbitrator did not exceed his powers by preventing the plaintiff from deposing the defendant doctor or other hospital personnel.[236] Plaintiff Barry sued Dr. Telander for negligence, battery and breach of contract.[237] After disagreement over whether to arbitrate or place the matter on the trial calendar, Dr. Telander moved to compel arbitration.[238] To develop a punitive damages claim, Barry then sought to depose the defendant and hospital nurses.[239] The arbitrator granted Dr. Telander's motion for a protective order to prevent the depositions.[240] On appeal, Barry argued, without explanation, that the arbitrator exceeded his powers by issuing the protective order.[241] The court found that the U.A.A. did not compel the arbitrator to allow the discovery depositions.[242]

V. SECTION 9: CHANGE OF AWARD BY ARBITRATORS

Section 9 of the U.A.A. explains the process of applying to change or to clarify an arbitration award.[243] Any applications for the change of an award must be made within twenty days after the delivery of the award and written notice must be sent to the opposing party stating that any objections must be made within ten days.[244]

In *Fradella v. Petricca*,[245] the U.S. Court of Appeals, First Circuit, looked at the issue of whether or not ministerial corrections to arbitration awards tolled the time limitation on applications to change arbitration awards.[246] On December 18, 1997, Fradella was ordered to pay Petricca $25,000 in compensatory damages following an arbitration hearing.[247] However, the arbitration forms mistakenly stated that the decision was made in accordance with Massachusetts law instead of New York law.[248] The error was corrected on February 23, 1998, but the arbitral award was still

233. U.A.A. § 7.
234. *Id.*
235. No. C4-99-452, 1999 WL 619020, at *1 (Minn. Ct. App. Aug. 17, 1999) (no page numbers assigned).
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. U.A.A. § 9.
244. *Id.*
245. 183 F.3d 17 (1st Cir. 1999).
246. *Id.* at 18.
247. *Id.*
248. *Id.*

dated December 18, 1997.[249] Fradella's counsel requested that the arbitration award be dated as to the correction on February 23, but this request was denied and the award was recorded as of December 18, 1997.[250]

On March 25, 1998, Fradella moved to vacate the award and Petricca responded by filing for dismissal based upon the fact that the motion to vacate was seven days late.[251] The district court ruled for Petricca and Fradella brought this appeal.[252] Fradella argued that the February 23rd amendment to the award was substantial and should change the date of finality.[253] The appellate court upheld the district court's decision and listed several reasons for doing so.[254] First, the only issue at controversy was unambiguously decided on December 18, 1997.[255] Second, if ministerial problems with arbitration awards tolled the limitations period then a clever party could preclude the running of the period indefinitely by asserting some form of error.[256] Last, it would defeat the purpose of arbitration, to expediously resolve disputes, to allow small errors to impede the finality of decisions.[257]

VI. SECTION 10: FEES AND EXPENSES OF ARBITRATION

While it seems to be fairly well settled that most of the fees and expenses of arbitration may be awarded according to the arbitrator's discretion, in the absence of an agreement to the contrary, this does not necessarily encompass the award of attorney's fees.

In *Camelot Investments, LLC v. LANDesign, LLC*,[258] Camelot Investments, LLC ("Camelot"), "the developer of a residential subdivision," brought suit against LANDesign, LLC ("LANDesign") alleging defective work in regard to LANDesign's planning and engineering services.[259] LANDesign moved to compel arbitration based on an arbitration agreement contained in an addendum to the parties' original contract.[260] In response, "Camelot argued that none of the documents concerning design services included an arbitration clause."[261] The trial court found that the execution of the addendum indicated that the parties had intended to apply its provisions to the entire contract and subsequently dismissed the complaint for want of subject matter jurisdiction.[262] Upon LANDesign's motion seeking costs and attorney's fees, the court entered an order for fees in the amount

249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 19.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 20.
257. *Id.*
258. 973 P.2d 1279 (Colo. Ct. App. 1999).
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*

of $5,165.75.[263] Camelot argued that since the trial court lacked subject matter jurisdiction, "it also lacked jurisdiction to award attorney's fees."[264] The Colorado Court of Appeals stated that the U.A.A. provides that while the arbitrator's expenses and fees and other such expenses of arbitration are appropriately awarded by the arbitrator, attorney's fees, unless specifically agreed to within the arbitration agreement, are not.[265] The court then decided that the references to "arbitration" and "litigation" within the provision dealing with attorney fees allowed a fair reading that attorney's fees could be recovered, by court order, whether or not they were a product of arbitration or litigation.[266] However, the court did not find that the language of the agreement expressly authorized an arbitrator to award attorney's fees.[267] Thus, the court found that the court ordered award of attorney's fees was not in err "and its order is not void for lack of jurisdiction."[268] The court further stated that pursuant to its reading of the agreement, attorney's fees could reasonably be interpreted to encompass appellate attorney fees and the issue was remanded to the trial court to determine reasonableness of an award.[269]

Similarly, in *Compton v. Lemon Ranches, LTD.*,[270] the Colorado Court of Appeals decided that under the U.A.A., absent an agreement to the contrary, an arbitrator is not allowed to award attorney's fees but is allowed to award other costs and fees "incurred in the arbitration."[271] In this case, defendants, Lemon Ranches LTD., entered into a "Settlement Stipulation" with plaintiffs, Thomas L. and Patricia Ann Compton, in order to resolve a partnership dispute and replevin action.[272] Pursuant to the stipulation, the parties submitted their dispute to binding arbitration with the trial court retaining jurisdiction to enforce the terms of the arbitration.[273] Additionally, the trial court entered an order that "(e)ach side shall pay its own attorney fees and costs," and also provided that the arbitrator would decide the "ultimate responsibility for the arbitration fee."[274] Prior to entering a final judgement, the arbitrator requested information from both parties as to their attorney fees and costs.[275] In response to an award favoring defendants and awarding attorney fees of $8,006.51, plaintiffs moved to vacate and/or modify the award as to both the substantive portions and the award of attorney fees.[276] The court of appeals found that since the original stipulation did not allow for attorney fees, the only basis for the award of such fees would have been a subsequent agreement between the parties that an award of such fees was within the scope of the arbitrator's discretion.[277]

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263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 1281.
267. *Id.*
268. *Id.*
269. *Id.* at 1280.
270. 972 P.2d 1078 (Colo. Ct. App. 1999).
271. *Id.* at 1079-1080.
272. *Id.* at 1079.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* at 1080.

Based upon this finding, the court determined that the parties' conduct of providing the arbitrator with the requested information as to attorney fees and costs, did not constitute an agreement that the arbitrator would be allowed to award such fees.[278]

In *Marathon Oil Co. v. Arco Alaska, Inc.*,[279] Marathon Oil Company ("Marathon") entered into an arbitration agreement with Arco Alaska, Inc. ("Arco") regarding a dispute as to whether or not Marathon had the right to terminate an agreement whereby Marathon supplied gas to Arco and as to the price of gas delivered.[280] Subsequent to the arbitrator's final decision, Marathon moved that the superior court either modify or vacate the award.[281] The superior court denied Marathon's motion and then granted Arco's request for attorney's fee incurred in defending the arbitrator's decision.[282] On appeal, Marathon argued that the superior court erred in regard to its award of attorney's fees as well as its refusal to modify the arbitrator's decision.[283] As to the claim of err or in regard to the award of attorney's fees, the Supreme Court of Alaska decided that the placement of the requirement that each party bear its own costs and fees within a paragraph dealing solely with arbitration did not preclude the award of costs and fees in an action to vacate the arbitration award.[284] Further, the court stated that the U.A.A. provides that superior courts may award attorney's costs and fees "to the prevailing party in an action to affirm or modify an arbitration agreement."[285]

VII. SECTION 11: CONFIRMATION OF AN AWARD

Section 11 of the U.A.A. states that, "the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award."[286] In the case of modification or correction the court is to look at sections 12 and 13 of the U.A.A.[287]

A. Confirmation of Arbitration Awards

In *Policeman's Benevolent Ass'n, Local 292 v. Borough of North Haledon*,[288] the Supreme Court of New Jersey was asked to determine if a party can seek confirmation of an arbitration award after a statutory time limit had run.[289] The Policeman's Benevolent Association ("PBA") was involved in an arbitration with the Borough of North Haledon ("the Borough") in which the arbitrator ruled in favor of

278. *Id.*
279. 972 P.2d 595 (Alaska 1999).
280. *Id.* at 598.
281. *Id.* at 599.
282. *Id.*
283. *Id.* at 599-600.
284. *Id.* at 603.
285. *Id.*
286. U.A.A. § 11.
287. *Id.*
288. 730 A.2d 320 (N.J. 1999).
289. *Id.* at 322.

the PBA.[290] The New Jersey version of the U.A.A. sets a time limitation of three months after the delivery of the award for confirmation or vacation of the award.[291] After the arbitration award, the PBA waited four months and then filed for confirmation in the chancery court.[292] The Borough responded two months later by filing for vacation of the award.[293] The chancery court confirmed the award and barred the Borough's counterclaim as untimely.[294] The dispute then moved to the appellate division where both sides motions were ruled as untimely.[295]

Subsequently, the New Jersey Supreme Court looked into the matter of time limitations as applied to the confirmation and vacation of arbitration awards.[296] The court construed the New Jersey arbitration statute as applying to summary actions to confirm awards only.[297] The court suggested that an action could still be brought at common law to confirm the award.[298] The court made this decision by applying the F.A.A. which limits summary confirmation actions to one year, but has no time limit on common law confirmation actions.[299] The court also took into account policy considerations, finding that, "[d]epriving the parties of common-law confirmation would consign them to a legal limbo."[300] Denying the parties the ability to confirm the award would put them back in the same position before the arbitration, defeating the whole purpose of the process.[301] However, the court went on to say that if parties do wish to be confined to a certain time limit then they should set that time limit out in their contract.[302] The court remanded the issue to the chancery court to rule on the confirmation.[303]

The Appellate Court of Illinois examined the confirmation of arbitration awards in *Everen Securities, Inc. v. A.G. Edwards & Sons, Inc.*[304] Everen Securities, Inc. ("Everen") and A.G. Edwards and Sons, Inc. ("A.G. Edwards") arbitrated a dispute over two employees leaving Everen for A.G. Edwards and allegedly breaching fiduciary duties and misappropriating trade secrets in the process.[305] The arbitrator ruled for Everen and Everen commenced this action to confirm the award, but A.G. Edwards responded by filing a counter suit asking for vacation of the award based upon the theory that the arbitration panel exceeded their scope of authority.[306]

The appellate court began their review of the decision by pointing out that review of an arbitration award is limited and the arbitration is to be upheld whenever

290. *Id.*
291. *Id.* at 322.
292. *Id.* at 322.
293. *Id.*
294. *Id.* at 323.
295. *Id.*
296. *Id.*
297. *Id.* at 324-25.
298. *Id.* at 325.
299. *Id.*
300. *Id.*
301. *Id.* at 326.
302. *Id.*
303. *Id.*
304. 719 N.E.2d 312 (Ill. Ct. App. 1999).
305. *Id.* at 315.
306. *Id.* at 315-16.

possible.[307] The appellate court looked at the transcripts from the arbitration hearing to make their determination because the panel did not provide any rationale with its decision.[308] A.G. Edwards' main complaint was that the arbitrators committed a gross error of law by allowing the testimony of a witness by Everen.[309] A.G. Edwards, however, failed to rebut the testimony of Everen's witness at the arbitration.[310] A gross error of law is required to overcome the appellate court's standard of review over the trial court of abuse of discretion in this case.[311] The appellate court concluded that without rebuttal of Everen's witness there is no proof that the arbitrators committed a gross error of law and the award should be confirmed.[312]

The Texas Court of Appeals, First Circuit, started their analysis of *BPA Fabrication, Inc. v. Jamak Fabrication, Inc.*[313] similarly to the Illinois Appellate Court by stating that every reasonable presumption is given in favor of the arbitration award.[314] In this case, Jamak Fabrication, Inc. ("Jamak") sought to confirm an arbitration award and BPA Fabrication, Inc. ("BPA") sought to have the award vacated based on the premise that one of the arbitrators was partial.[315] This claim by BPA was based on the fact that Jamak owned machinery purchased from a company that one of the arbitrators represented as an attorney.[316] The appellate court dismissed this claim finding that a business relationship does not automatically disqualify an arbitrator and BPA presented no evidence of actual bias at the arbitration.[317]

In *Scheidly v. Travelers Insurance Co.*,[318] Scheidly attempted to have the confirmation of an arbitration award overturned.[319] Scheidly claimed that the arbitrators violated the U.A.A. by confirming that the arbitration award included the damages for loss of consortium.[320] The court did not address the merits of the case finding that this suit was barred by res judicata.[321]

B. Denial of Confirmation of an Arbitration Award

In *Blount Excavating, Inc. v. Denso Manufacturing Tennessee, Inc.*,[322] the Tennessee Court of Appeals was asked to review a case where the circuit court refused to confirm an arbitration award.[323] Denso Manufacturing Tennessee, Inc.

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307. *Id.* at 316.
308. *Id.* at 318.
309. *Id.*
310. *Id.* at 319.
311. *Id.* at 318.
312. *Id.*
313. 1999 WL 977819.
314. *Id.* at *6.
315. *Id.*
316. *Id.*
317. *Id.*
318. 1999 WL 144107 (E.D. Pa. March 15, 1999).
319. *Id* at *1.
320. *Id.*
321. *Id.*
322. 1999 WL 1068678 (Tenn. App. Nov. 29, 1999).
323. *Id.* at *1.

("Denso") brought the original action to confirm the arbitration award rendered in their favor.[324] The trial court refused to confirm the award and Denso brought this appeal.[325] The appellate court found that they had limited review in this matter looking for "clear error" by the trial court and accepting the trial courts determination of facts unless they it is found to be "clearly erroneous."[326] The arbitration award was denied by the trial court because it was found that the arbitrator was not a neutral third party in violation of Tennessee's Uniform Arbitration Act.[327] The arbitrator in question was an architect who was under the employment of Denso.[328] The court upheld the trial court's decision because the arbitrator in the action was not impartial as required by the Tennessee Arbitration Act.[329]

VIII. SECTION 12: VACATING AN AWARD

There are several conditions in section 12 under which the court will vacate an award upon application of a party.[330]

A. Evident Partiality by Neutral Arbitrator

Under section 12 an award shall be vacated where there is evident partiality by a neutral arbitrator or corruption or misconduct by any arbitrator prejudicing the rights of any party.[331] Courts will not review the impartiality of arbitrators until after an award has been issued.[332]

In *Bohinick v. State Farm Mutual Automobile Insurance Co.*,[333] the insured initiated arbitration under her underinsured motorist coverage.[334] Bohinick appointed an arbitrator, State Farm Mutual Automobile Insurance Co. ("State Farm") appointed its arbitrator, and finally the neutral arbitrator was appointed around February 1995.[335] Because the neutral arbitrator had failed to set an arbitration date, on July 28, 1995, Bohinick requested the neutral's recusal.[336] The first neutral arbitrator recused himself and the second was not appointed until December 14, 1995.[337] Arbitration finally took place in December 1996, and on March 11, 1996, Bohinick was awarded $270,000.[338] Bohinick brought a breach of contract claim

324. *Id.*
325. *Id.*
326. *Id.* at *2.
327. *Id.* at *4. *See* TENN. CODE ANN. § 29-5-304 (1999).
328. *Blount*, 1999 WL 1068678 at *5.
329. *Id.* at *5 - 6.
330. U.A.A. § 12.
331. U.A.A. § 12(a)(2).
332. *See* Crim v. Pepperidge Farm, Inc., 32 F. Supp. 2d 326, 330 (D. Md. 1999).
333. No. CIV.A. 98-CV-2278, 1999 WL 238947 (D. Pa. Mar. 29, 1999).
334. *Id.* at *1.
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*

alleging that "State Farm postponed the arbitration proceedings through 'a secret ex parte communication with the neutral arbitrator.'"[339] Finding the claim to be a collateral attack on the arbitration award, the court applied the most nearly applicable section of the Pennsylvania Uniform Arbitration Act regarding vacating an award.[340] The court dismissed the breach of contract claim holding that Bohinick alleged misconduct, but did not allege that her rights were in any way prejudiced, and the proper remedy would be to vacate rather than award damages.[341]

B. Application for Vacatur of Award Within Ninety Days

A party must move for vacation of an award within ninety days from the delivery of a copy of the award unless the condition is fraud, corruption, or undue means.[342] If this is the case, the application must be made within ninety days from discovery of such grounds or ninety days from when it should have been discovered.[343] Time limits are strictly enforced by the courts.[344] Where no arbitration award exists under the U.A.A., these time restrictions are not applicable.[345]

In *International Technologies Integration, Inc. v. Palestine Liberation Organization*,[346] the district court denied the Palestinian National Authority's ("PNA") motion to vacate the award.[347] International Technologies Integration, Inc. ("ITI") had initiated arbitration proceedings against PNA through the American Arbitration Association ("AAA") for breach of contract and served PNA with copies of every submission to the arbitrator.[348] PNA never responded and the arbitrator conducted the proceeding ex parte, awarding damages to ITI on October 15, 1997.[349] The award was filed on November 13, 1997, and delivered to PNA on November 26, 1997.[350] PNA did not remove the action to the district court until March 24, 1998, more than ninety days after delivery of the award.[351] Pursuant to Rule 40 of the AAA's Commercial Arbitration rules, ITI properly served notice on PNA and under Virginia's arbitration act, PNA was time-barred from asserting any grounds for vacating the award.[352]

In *Premier Private Security Inc. v. International Union, United Plant Guard Workers of America; Local No. 796*,[353] Premier Private Security, Inc. ("Premier")

339. *Id.*
340. *Id.* at *2. *See* PA. CONS. STAT. § 7314 (1998).
341. *Bohinick*, 1999 WL 238947 at *2.
342. U.A.A. § 12(b).
343. *Id.*
344. Groves v. Groves, 704 N.E.2d 1072, 1076 (Ind. Ct. App. 1999).
345. *Blount*, 1999 WL 1068678 at *1, *5.
346. 66 F. Supp. 2d 3 (D.D.C. 1999).
347. *Id.* at 4. Palestinian National Authority is the political entity in which the Palestinian judicial, legislative, and executive powers are reposed. *Id.* at 5.
348. *Id.* at 6-7.
349. *Id.* at 7-8.
350. *Id.* at 15.
351. *Id.*
352. *Id.* at 11, 14.
353. No. 98-6233, 1999 WL 218944 (10th Cir. Apr. 15, 1999).

sought to vacate an arbitration award covering payment of fringe benefits in favor of the union.[354] The initial award was entered on March 14, 1997, and Premier received it on March 28, 1997.[355] Premier filed a motion to vacate on July 3, 1997, more than ninety days after the issuance and receipt of the initial award.[356] The union moved to dismiss contending that the motion to vacate was time-barred by the Oklahoma U.A.A., but Premier contended the period was inapplicable without arguing what period or statute should apply.[357] The district court found that the arbitration act's ninety-day period barred Premier's action and the circuit court agreed.[358]

The ninety-day period is not tolled by filing a request with the arbitrator to reconsider the award.[359] Indiana courts have held that the time period for filing a motion to vacate begins to run from the date of the award, regardless of whether a request for reconsideration is pending with the arbitrator.[360] The court found that the Indiana U.A.A. does not require a party to await an arbitrator's decision before petitioning the trial court to vacate an award.[361] This result furthers the purpose of the U.A.A. to resolve disputes more efficiently and expeditiously than traditional litigation.[362]

C. Arbitrator Exceeding the Scope of Authority

Under section 12(a)(3), an award shall be vacated where the arbitrator exceeded their powers.[363]

In *Everen Securities, Inc. v. A.G. Edwards & Sons, Inc.*,[364] former employees of a securities firm, Carlson and Wright, moved to vacate the arbitration panel's award of damages for breach of contract and misappropriating trade secrets.[365] The motion to vacate was denied and the defendants appealed, claiming "the NYSE arbitration panel exceeded the scope of its authority by reopening and taking evidence on the trade secret issue."[366] Since the trial court had determined in preliminary injunction hearings that Everen's client names and addresses were not trade secrets, Carlson and Wright claimed the panel's decision to revisit the trade secrets issue warranted reversal.[367] The court stated that "findings made as a result of a preliminary injunction request are not final and do not bind the parties at subsequent stages of the

354. *Id.* at *1.
355. *Id.* at *2.
356. *Id.*
357. *Id. See* OKLA. STAT. ANN. tit. 15, § 812.C (West 1993) (following ninety-day rule for application for vacation of award).
358. *Premier*, 1999 WL 218944 at *4.
359. *Groves*, 704 N.E.2d at 1072.
360. *Id.* at 1076.
361. *Id.* at 1075.
362. *Id.* at 1076.
363. U.A.A. § 12(a)(3).
364. 719 N.E.2d 312.
365. *Id.* at 314.
366. *Id.* at 316-17.
367. *Id.* at 317.

case" therefore, ". . . the circuit court's holding was not binding upon the arbitration panel's subsequent consideration of the matter."[368]

In *D & E Construction Co. v. Denley*,[369] the trial court entered an order vacating the entire arbitration award on the basis that the arbitrators had exceeded their powers in awarding attorneys' fees to D&E Construction Co. ("D&E").[370] D&E had submitted a claim for arbitration, pursuant to agreement, following Denley's alleged breach of a construction contract.[371] Although D&E's claim did not originally include attorneys' fees, the arbitration panel awarded $13,000 in fees to D&E.[372] Under Tennessee law, "[t]he 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 . . . the award."[373] A trial court could be held in error for awarding attorneys' fees under this scenario and the arbitration panel could have made an error of law, but the court deemed it "insufficient to invalidate an award fairly and honestly made."[374] The court reversed and remanded to the trial court for further proceedings on the other issues raised by Denley's petition to vacate the award.[375]

In *Ruggiero v. State Farm Mutual Automobile Insurance Co.*,[376] the parties agreed to arbitrate an underinsured motorist coverage claim.[377] On April 30, 1997, the arbitrators notified the parties that they had reached a decision on all issues.[378] On June 4, 1997, the award letter was issued stating that a majority of the arbitrators found in favor of plaintiff Ruggiero and that the relevant figure for determining applicability of underinsured motorist coverage "is the amount of actually available tortfeasor coverage, rather than the maximum applicable tortfeasor coverage."[379] Unbeknownst to the parties and the arbitrators, a Delaware Supreme Court opinion had reached exactly the opposite determination in an unreported opinion on May 16, 1997.[380] State Farm Mutual Automobile Insurance Co. ("State Farm") sent the opinion to the arbitrators on June 10, 1997, and the arbitrators treated it as a timely motion for rehearing.[381] On September 10, 1997, the arbitrators withdrew the June 4 award in favor of Ruggiero and substituted a new award in favor of State Farm based on the Delaware Supreme Court opinion.[382]

Ruggiero appealed seeking to vacate the award, claiming that the arbitrators' exceeded their power and the U.A.A. grants the authority to vacate awards only to the court.[383] The court held that the arbitrators' authority to resolve the dispute

368. *Id.*
369. No. 02A01-9812-CH-00358, 1999 WL 685883 (Tenn. Ct. App. Sept. 3, 1999).
370. *Id.* at *2.
371. *Id.* at *1.
372. *Id.*
373. *Id.* at *5 (quoting TENN. CODE ANN. § 29-5-313(a)(5) (Supp. 1997)).
374. *Id.* (quoting Turner v. Nicholson Properties, Inc., 341 S.E.2d 42, 44 (N.C. Ct. App. 1986)).
375. *Id.* at *6.
376. No. 16075, 1999 WL 499459 (Del. Ch. June 23, 1999).
377. *Id.* at *1.
378. *Id.* at *2.
379. *Id.* at *2-3.
380. *Id.* at *3.
381. *Id.*
382. *Id.* at *4.
383. *Id.* at *5.

ended on April 30 and they exceeded their authority by entertaining State Farm's letter as a post-hearing Rule 59 motion.[384]

In *Quick & Reilly, Inc. v. Zielinski*,[385] investor Zielinski filed a claim for arbitration with the National Association of Securities Dealers against a brokerage firm and its employee/broker alleging various violations of securities exchange laws.[386] Zielinski requested reasonable attorney fees which the arbitration panel awarded after "consider[ing] the arguments of the parties, as well as the Illinois Securities Law of 1953 . . . and determin[ing] that authority existed for an award of attorney[s] fees to . . . [Zielinski]."[387] The brokerage firm filed a petition to vacate the portion of the award assessing attorney fees against them, alleging that the arbitration panel exceeded their authority because none of the claims asserted by Zielinksi permitted an award of attorney fees.[388] The court stated that under Illinois law, attorney fees may not be awarded unless specifically authorized by statute or provided for in the contract between the parties.[389] Because no agreement to arbitrate existed, none of the statutes relied upon by Zielinksi allowed for attorney fees, and no reference was made in her claim to the Illinois Securities Law of 1953 which authorizes such fees, the court held that the panel exceeded its authority in awarding attorney fees.[390]

The court in *Nelson v. Livingston Rebuild Center, Inc.*,[391] held that the district court erred when it remanded the motion to vacate portions of the award regarding extra living expenses and out-of-pocket losses for attorneys fees to the arbitrator.[392] Following the arbitrator's decision to award damages to a former employee under the Wrongful Discharge From Employment Act, the employer moved the district court to vacate parts of the decision.[393] The district court remanded the decision to the arbitrator who made an amended award.[394] The Supreme Court of Montana found that the provision of the Montana U.A.A. permitting a district court to vacate awards upon a finding that the arbitrator exceeded his powers was not a provision under which an arbitrator could correct an award.[395] Thus, the arbitrator was without statutory authority to make substantive changes to the original award.[396]

In *Ryan v. Kontrick*,[397] an arbitration award from a breach of partnership agreement provided for punitive damages and attorneys fees.[398] The arbitration agreement between the parties provided for reasonable attorneys fees, but not punitive damages, and stated the agreement would be governed by Illinois law.[399]

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384. *Id.* at *7-8.
385. 713 N.E.2d 739 (Ill. App. Ct. 1999)
386. *Id.* at 741. *See* 815 ILL. COMP. STAT. 5/13 (West 1999).
387. *Quick*, 713 N.E.2d at 741.
388. *Id.*
389. *Id.* at 744. *See* 710 ILL. COMP. STAT. 5/10 (West 1999).
390. *Quick*, 713 N.E.2d at 744.
391. 981 P.2d 1185 (Mont. 1999).
392. *Id.* at 1188.
393. *Id.* at 1185.
394. *Id.*
395. *Id.* at 1187.
396. *Id.*
397. 710 N.E.2d. 11, 13 (Ill. App. Ct. 1999).
398. *Id.* at 13.
399. *Id.*

On appeal to vacate the award, Kontrick argued that the punitive damages award exceeded the scope of the arbitrator's authority under the agreement.[400] The arbitrator had applied Commercial Arbitration Rules of the A.A.A., but the language of the arbitration agreement specified that Illinois law governed.[401] "Under Illinois law, punitive damages may be awarded by an arbitrator only where there is an express provision authorizing such relief in the arbitration agreement."[402] The court vacated the punitive damages portion of the award because it exceeded the arbitrator's authority under Illinois law and the terms of the agreement.[403] Finding the issue unreviewable, the court also denied Kontrick's claim that the award of attorney's fees should be vacated because it lacked supporting evidence.[404]

In another Illinois case regarding punitive damages, *City of Chicago v. Water Pipe Extension, Bureau of Engineering Laborers' Local No. 1092*,[405] the city and the union both filed petitions to vacate portions of the arbitrator's award.[406] The circuit court denied both petitions and appeals were made by both parties.[407] Arbitration was initiated by the union over alleged violations of the collective bargaining agreement and submitted to an arbitrator who had arbitrated fourteen prior shift change grievances between the parties.[408] The arbitrator concluded that double time was the overtime remedy for hours worked by water department employees outside their normal shifts on the dates at issue based on his December 2, 1992, decision that this would be the remedy for future violations.[409] The arbitrator also ruled that the sewer department did not violate the agreement by canceling shifts on the dates at issue based on section 9.12 of the agreement.[410] Since the case arose under the Illinois Public Labor Relations Act, "the arbitration award must be enforced if the arbitrator acts within the scope of his authority and his award draws its essence from the [collective bargaining agreement]."[411] The agreement did not provide for the authority to impose punitive damages and the arbitrator's statements, coupled with the fact that the double time relief exceeded the overtime pay in the agreement, led the court to conclude the award was punitive.[412] The court reversed the double time remedy for water department employees because the arbitrator exceeded his authority.[413] However, given the whole of the agreement and the plain language of section 9.12, the court found that the part of the award regarding the sewer department drew its essence from the agreement and affirmed the award.[414]

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400. *Id.*
401. *Id.*
402. *Id.* at 14 (quoting Edward Electronic Co. v. Automation, Inc., 593 N.E.2d 833 (Ill. App. Ct. 1992)).
403. *Id.* at 16.
404. *Id.*
405. 707 N.E.2d 257 (Ill. App. Ct. 1999).
406. *Id.* at 257.
407. *Id.*
408. *Id.* at 259.
409. *Id.* at 260.
410. *Id.* Section 9.12 (a) addressed departments which historically curtailed operations due to low temperature but (b) specifically excludes Local 1092. *Id.* at 259.
411. *Id.* at 261.
412. *Id.* at 262-3.
413. *Id.* at 263-4.
414. *Id.* at 264.

In *McFerren v. B & B Investment Group*,[415] a dispute over fee ownership to real estate was submitted to arbitration.[416] The plaintiff, McFerren, sought to vacate the award under Michigan law, which prohibited submission of any issue involving fee ownership of real estate to arbitration.[417] The appellate court vacated the judgment of the trial court affirming the award because the arbitrator exceeded the scope of his authority under Michigan law.[418]

In *Vore v. Howell Construction Co.*,[419] the owner and contractor on a construction project arbitrated disputes over payment and work stoppage and the owner sought to vacate the award.[420] The owner listed grounds for vacating the award based on the theory that the arbitration panel had exceeded its powers.[421] The court held that the arbitration panel did not exceed its powers because it did not determine the rights and obligations of third parties and the owner's remaining grounds for vacating the award were arguably based on the contract.[422]

D. Contravening Public Policy

"Courts may refuse to enforce arbitration awards that contravene well defined public policy ascertained by reference to laws and legal precedents and not from general considerations of supposed public interest."[423] In *Everen,* Carlson and Wright argued that Everen succeeded in arbitration because four of the five employees in a branch office left to take positions with A.G. Edwards, referring to this as a "raid" theory of recovery.[424] Because no reference was made to laws or legal precedents endorsing such a "raid" theory, the court refused to overturn the award.[425]

E. Gross Errors of Law

Generally, arbitration awards will only be overturned for gross errors of fact or law if those errors appear on the face of the award.[426] In *Everen,* Carlson and Wright also argued that the arbitration panel committed gross errors of law in awarding damages by finding breach of a fiduciary duty and presuming that Carlson and Wright would have remained with Everen forever for the purposes of damages calculations.[427] Because the evidence showed Carlson had significant managerial

415. 233 Mich. App. 505 (Mich. Ct. App. 1999).
416. *Id.* at 508.
417. *Id.*
418. *Id.* at 513.
419. No. CIV.A. 98-2391-KHV, 1999 WL 156057 (D. Kan. Jan. 4, 1999).
420. *Id.* at *1.
421. *Id.* at *2.
422. *Id.* at *4.
423. *Everen*, 719 N.E.2d at 317.
424. *Id.*
425. *Id.*
426. *Id.* at 318.
427. *Id.* at 318-19.

and supervisory responsibilities for the branch office and the lost profits were based on a terminable year figure, the court affirmed the trial court's denial to vacate.[428]

F. No Arbitration Agreement Existed

An award shall be vacated where "[t]here 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."[429]

In *DMS Properties-First, Inc. v. P.W. Scott Associates, Inc.*,[430] an agreement was entered into by Peder W. Scott, the president of Scott, and Dennis Salter.[431] The agreement contained no mention of DMS Properties-First, Inc. ("DMS") and was never revised to substitute DMS for Salter.[432] Pursuant to the agreement, DMS filed a notice of intention to arbitrate against Scott that said unless Scott applied to enjoin the arbitration within twenty days after service, Scott was thereafter barred from objecting on grounds that a valid agreement was not made.[433] Scott did not file a motion to enjoin the arbitration and a year and a half later DMS filed a demand for arbitration.[434] Scott moved to dismiss the arbitration on the ground that there was no arbitration agreement with DMS.[435] The arbitration panel found insufficient evidence of a binding agreement to arbitrate between Scott and DMS and issued an award dismissing arbitration.[436] DMS sought to vacate the award and the court denied the motion under a deferential review where substantial evidence supported the arbitrators' decision.[437]

IX. SECTION 13: MODIFICATION OR CORRECTION OF AWARD

The grounds established for the modification of an arbitral award under Section 13 of the U.A.A. are technical in nature.[438] Specifically, the U.A.A. allows for court action to modify an award if: (1) figures have been miscalculated or persons or property incorrectly described, (2) the arbitrator awarded upon a matter not submitted and that award can be corrected without affecting the merits, or (3) the award is imperfect in form.[439] Application for modification or correction must be made within ninety days of receipt of the award and can be joined, in the alternative,

428. *Id.* at 319.
429. U.A.A. § 12(a)(5).
430. No. CIV.A.16450, 1999 WL 1261335 (Del. Ch. July 19, 1999).
431. *Id.* at *1.
432. *Id.*
433. *Id.*
434. *Id.* at *2.
435. *Id.*
436. *Id.* at *3.
437. *Id.* at *6.
438. *Ruggiero*, 1999 WL 499459, at *4. Although the court in *Ruggiero* was referring to Delaware's Uniform Arbitration Act in making this statement, the language of the Delaware Act is modeled after that of the U.A.A. *Id.*
439. U.A.A. §13.

with an application to vacate.[440] The court can confirm the award as received or as properly modified.[441]

A. Remand to the Arbitrator

An issue of remand is confronted in *Office & Professional Employees International Union, Local No. 471 v. Brownsville General Hospital*.[442] A hospital employee was suspended after a sexual harassment complaint was received and agreed to undergo counseling as a condition of reinstatement. However, a breakdown in the counseling relationship occurred and resulted in termination of the sessions.[443] Brownsville General Hospital terminated the employee and the employee appealed. The matter was referred to an arbitrator. The arbitrator found that the hospital did not have the right to terminate the employee but could keep him from returning to work until the counseling had been completed.[444] The union then filed a lawsuit seeking reinstatement on the grounds that the employee was in substantial compliance and pled, in the alternative, for remand to the arbitrator for clarification as to whether the completed counseling sessions had to be with the originally assigned doctor.[445] The hospital appealed the district court's decision to remand the matter to the arbitrator.[446] The district court held, and the Third Circuit affirmed, that remand for clarification did not violate the doctrine of functus officio as the hospital contended.[447]

The doctrine of functus officio bars an arbitrator from revisiting the merits of an award issued by an arbitrator on the theory that once an award is announced, the arbitrator has exhausted all of his or her power.[448] One of the exceptions to this doctrine allows an arbitrator to revisit the decision "where the award, although seemingly complete, leaves doubt as to whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify."[449] The third circuit reasoned that determining whether the arbitrator intended the counseling to be completed by the assigned therapist or any therapist is an issue that fits foursquare within this exception. Thus, short of remand, the district court could only have granted or denied reinstatement based on their perception of what the arbitrator intended. Remand for clarification would leave no doubt and would be "more likely to give the parties the award for which they bargained."[450]

Another decision supporting remand was Casias v. Dairyland Insurance Co.[451] In *Casias*, the New Mexico Court of Appeals held that the trial court erred by

440. *Id.*
441. *Id.*
442. 186 F.3d 326 (3d Cir. 1999).
443. *Id.* at 328.
444. *Id.* at 329.
445. *Id.* at 330.
446. *Id.* at 331.
447. *Id.* Functus officio is Latin for "a task performed" *Id.*
448. *Id.* The basis for the doctrine is that arbitrators are not as insulated from outside influences as judges. *Id.*
449. *Id.* (citing Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 332 (3d Cir. 1991)).
450. *Local No. 471*, 186 F.3d at 333.
451. 975 P.2d 385 (N.M. Ct. App. 1999).

confirming an arbitration award without clarification pertaining to the amount of the award.[452] The parties agreed to arbitration to determine the amount of underinsured motorist payment in dispute. The parties also agreed that the amount already obtained by the tortfeasor would be used as an offset against the amount paid under the underinsured motorist coverage as required by state law.[453] When the insured moved for confirmation of the award, the insurance company presented an affidavit showing that the arbitrators had not considered the offset amounts and moved for remand to the arbitrators for clarification. The court refused and confirmed the award.[454] Citing the New Mexico Arbitration Act,[455] the court of appeals noted that "review of arbitration awards cannot be based on questions of law or fact" but rather are "generally limited to allegations of fraud, partiality, misconduct, excess of powers or technical problems in execution of the award."[456] Furthermore, "the scope of matters to be decided is determined by the parties."[457] The arbitration agreement that the parties entered into called for arbitration over any disagreement between them.[458] Since the parties agreed to the offset amount, this was a matter outside the scope of the arbitration.[459] Therefore, the trial court should have confirmed the award only after subtracting the offset amount or remanded to the arbitrators for clarification.[460]

In *Ruggiero v. State Farm Mutual Automobile Insurance Co.*,[461] the arbitrators impermissibly withdrew an award and offered a substitute award after a request for reconsideration by the insurance company. After the arbitrator's final award, the Supreme Court of Delaware decided a case contradicting the outcome. When the insured moved to confirm the award, the insurance company, having learned of the decision, requested reconsideration of the award and the arbitrators complied.[462] No party contends that the arbitrators knew of the decision prior to announcing the award.[463] The Court of Chancery of Delaware, upon being asked to confirm this new finding, held that arbitrators may not modify what they intended to be a final award "even where the final award results from an erroneous application of Delaware law."[464] As rationale for this holding the court cited §13 of the Delaware Arbitration Act[465] which allows "largely technical grounds" for modifying an award.[466] In the memorandum opinion, Judge Steele articulated the basis for holding the arbitrators to the original decision in spite of the fact that it would be in contradiction of Delaware law.

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452. *Id.* at 386.
453. *Id.* at 388.
454. *Id.*
455. N.M. STAT. ANN. § 44-7 (Michie 1978).
456. *Casias*, 975 P.2d at 388.
457. *Id.* at 390.
458. *Id.*
459. *Id.*
460. *Id.* at 391.
461. 1999 WL 499459.
462. *Id.* at *3.
463. *Id.*
464. *Id.* at *1.
465. DEL. CODE. ANN. tit. 10 § 5701.
466. *Ruggiero*, 1999 WL 499459 at *4.

> I recognize that my efforts to keep arbitration a streamlined, efficient alternative dispute resolution mechanism results in the anomaly that this Court must sanction reinstatement of an award subsuming a ruling contrary to Delaware law. It is far more important, however, to support and even encourage the strong public policy of limiting arbitration procedure and practice to an efficient, effective streamlined process rather than endorse the commitment of parties' resources to motion practice, which would defeat the commendable goal of providing a truly viable alternative dispute resolution mechanism.[467]

In *Nelson v. Livingston Rebuild Center, Inc.*,[468] a wrongful discharge action in Montana, the district court remanded an arbitration award back to the arbitrator and confirmed the award as amended by the arbitrator.[469] The Supreme Court of Montana held that the district court was without statutory authority to remand the award.[470] After an arbitrator awarded plaintiff, Nelson, $94,569 for wrongful discharge the defendant, Livingston Rebuild Center, Inc. ("LRC") moved to vacate a portion of the award.[471] The district court did not decide the issue but reappointed the arbitrator to do so and the arbitrator reduced the award by more than $66,000.[472] This reappointment was based on LRC's claim that the arbitrator "exceeded his powers" in the original award by awarding for items not covered in state law.[473] Citing the Montana Uniform Arbitration Act ("MUAA"),[474] the supreme court noted that the only statutory grounds for a court to order modification of an award by the arbitrator are for miscalculations, mistakes, imperfection of form or clarification.[475] The part of the award vacated was substantive, not technical, therefore exceeding the plain language of the MUAA.[476] The court did not squarely answer LRC's contention that the MUAA and the WDFEA were in conflict and that the WDFEA prohibited the type of damages originally awarded but answered that "the fact that damages might not have been awarded in a court of law is not grounds for vacating the award."[477] Comparing court review of an arbitration to judicial review of an appellate court, the supreme court stated, "Courts do not sit to hear claims of factual and legal error by an arbitrator . . . . If courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined."[478]

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467. *Id.* at *7.
468. 981 P.2d 1185.
469. *Id.*
470. *Id.*
471. *Id.* at 1186.
472. *Id.*
473. *Id.* at 1187. Specifically the Wrongful Discharge from Employment Act ("WDFEA"). *Id.*
474. MONT. CODE ANN. § 27-5 (1999).
475. *Nelson*, 981 P.2d at 1187.
476. *Id.*
477. *Id.* at 1188.
478. *Id.*

B. Interest

Idaho and Illinois courts recently considered questions of modifications of awards involving interest. In *Schilling v. Allstate Insurance Co.*,[479] an arbitration panel believed they lacked jurisdiction to award prejudgment interest or attorney's fees and expressly declined to do so.[480] The district court modified the award and awarded prejudgment interest and Allstate appealed asserting that the district court erred in doing so.[481] The Supreme Court of Idaho held that the district court's action was proper as the lack of prejudgment interest was a "miscalculation," and the Idaho statute allowed for correction of a miscalculation.[482]

In Pekin Insurance Co. v. Benson,[483] the circuit court found that defendant-appellee, Benson, was entitled to underinsured motorist's coverage but granted plaintiff's request to stay the arbitration required by the insurance contract pending appeal of the Court's decision.[484] As a condition of the stay, the court imposed an award of prejudgment interest on any ensuing arbitral award.[485] Plaintiff accepted the stay order but appealed the assigned interest.[486] The Appellate Court of Illinois, under the Illinois Uniform Arbitration Act,[487] found that a stay is not a final order resolving the rights of the parties and, thus, not appealable.[488] Additionally, plaintiff could not appeal the imposition of prejudgment interest alone as it and the stay order were a single, interlocutory appeal.[489] The court further argued that, even if jurisdiction existed to review the interest imposition separate from the stay order, "plaintiff has waived any objection to the . . . terms of the stay by . . . accepting the benefits."[490]

C. The Essence Test

The Pennsylvania Supreme Court decided two cases in 1999 applying the "essence" test to review an arbitration decision. Under the "essence" test, "an arbitration award must derive its 'essence' from the collective bargaining agreement to pass judicial review."[491] In January of 1999, the court invalidated an arbitration decision interpreting a collective bargaining agreement where such an agreement incorporated elements of state law and the arbitrator's decision was contrary to that

479. 980 P.2d 1014 (Idaho 1999).
480. *Id.* at 1015. Petitioner's claim for attorney's fees was later dropped. *Id.*
481. *Id.*
482. *Id.* at 1018. The Idaho U.A.A. 7-913 is virtually identical to the U.A.A. in its description of when a modification will be allowed. In dissent, Chief Justice Trout argued that the arbitrators' belief that they did not have jurisdiction to award prejudgment interest was a mistake of law, not a miscalculation, and the district court was without power to correct that mistake. *Id.*
483. 714 N.E.2d 559 (Ill. App. Ct. 1999).
484. *Id.* at 562.
485. *Id.*
486. *Id.*
487. 710 ILL. COMP. STAT. 5/1-5/23 (West 1996).
488. *Pekin Ins. Co.*, 714 N.E.2d at 567.
489. *Id.*
490. *Id.* at 568.
491. Mifflinburg Area Educ. Ass'n v. Mifflinburg Area Sch. Dist., 724 A.2d 339, 342 (Pa. 1999).

law.[492] Under the Pennsylvania Uniform Arbitration Act,[493] "a court in reviewing an arbitration award . . . shall . . . modify or correct the award where the award is contrary to law . . . ."[494] "The 'essence' test remains the standard of judicial review for arbitration awards which are subject to section 7302(d)(2) of the U.A.A."[495] The court applied and clarified this standard in December of 1999 in *State System Of Higher Education (Cheyney University) v. State College University Professional Ass'n (PSEA-NEA)*.[496] The court declared that the "essence" standard will be used in analyzing arbitration awards involving collective bargaining agreements under the U.A.A. and, as such, the court will conduct a two-part analysis. "First, the court shall determine if the issue as properly defined is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement . . . the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the collective bargaining agreement."[497] This is a standard of great deference.[498]

D. Time Limit

The U.A.A. allows for application to the court to modify or correct an award within ninety days after delivery of a copy of the award to the applicant.[499] In *Groves v. Groves*,[500] a dispute over modification of child support was submitted to arbitration.[501] After the arbitrator's decision was released, Mrs. Groves filed a timely request for reconsideration by the arbitrator based on her belief that Mr. Groves had submitted false information to the arbitrator.[502] The arbitrator refused to reconsider without the consent of both parties and Mr. Groves did not consent.[503] Mrs. Groves then filed a Motion for Modification or Correction of the Award but her filing was more than ninety days after notice.[504] Mrs. Groves argued that the motion was filed within ninety days of her notification that the arbitrator would not reconsider and that the time should have been tolled while awaiting this decision.[505] The court of appeals, applying the Indiana Arbitration Act,[506] which is based on the U.A.A., found that there was no requirement for Mrs. Groves to wait for the arbitrator to announce

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492. *Id.* at 343.
493. 42 PA. CONS. STAT. ANN. § 7301-7320 (West 1998).
494. *Id.* § 7302(d)(2).
495. *Mifflinburg* 724 A.2d at 344 n.6. *See* County of Centre v. Musser, 548 A.2d 1194, 1200 (Pa. 1988); Austin Area Educ. Ass'n v. Austin Area Sch. Dist., 159 Pa. Commw. Ct. 640, 644 n.6 (Pa. Commw. Ct. 1993).
496. 743 A.2d 405 (Pa. 1999).
497. *Id.* at 413.
498. *Id.*
499. U.A.A. § 13(a).
500. 704 N.E.2d 1072.
501. *Id.*
502. *Id.* at 1073.
503. *Id.*
504. *Id.*
505. *Id.* The court acknowledges that at least one state has held that the time limit should be tolled until the arbitrator has ruled on a request for reconsideration based on due process and judicial economy concerns. *Id.* at 1074.
506. IND. CODE § 34-57 (Michie 1998).

a decision to reconsider before filing the motion for modification; these can be done at the same time.[507] In addition, the Indiana U.A.A. has a provision tolling the ninety-day limit for accusations of fraud.[508] Given this, the court reasoned that the legislature would have spoken specifically any time it intended the time period be tolled.[509] The court also noted that, since the purpose of the U.A.A. is to "provide a more efficient, expeditious manner in which to resolve disputes," time limits have been strictly enforced.[510]

X. SECTION 14: JUDGMENT OR DECREE ON AWARD

"Upon the granting of an order confirming, modifying, or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court."[511]

In two similar cases, the Eastern District of Pennsylvania granted summary judgment to State Farm when arbitration awards, confirmed and rendered, were challenged collaterally.[512] Neither plaintiff appealed the arbitration award, but attacked the award collaterally by seeking damages for breach of contract.[513] The court held, in both cases, that the strong public policy valuing arbitration as an "expeditious and inexpensive method of resolving disputes" precluded this type of collateral attack[514] and the appropriate relief for alleged misconduct during arbitration under the Pennsylvania version of the U.A.A.[515] would have been to have the award vacated, not seek damages.[516]

In *Vandenberg v. Superior Court*,[517] the Supreme Court of California held that "a private arbitration award, even if judicially confirmed, may not have nonmutual collateral estoppel effect under California law unless there was an express agreement to that effect in the particular case." [518] In so holding, the court cautioned that the result was to be applied narrowly and not be applied to any strict res judicata issue.[519] In *Vandenberg*, the court of appeals found that "a party to a private arbitration is not barred from relitigating issues decided by the arbitrator when those issues arise in a different case involving a different adversary and different causes of action."[520] The

507. *Groves*, 704 N.E.2d. at 1075.
508. *Id.*
509. *Id.*
510. *Id.* at 1076. The Court also includes an appeal to the legislature to act in clarification if this decision is contrary to their intention. *Id.*
511. U.A.A. § 14.
512. *Bohinick*, 1999 WL 238947 at * 1 & McCabe v. State Farm Mut. Auto. Ins. Co., 36 F. Supp. 2d 666 (E.D. Pa. 1999).
513. *McCabe*, 36 F. Supp. 2d at 673 & *Bohinick*, 1999 WL 238947 at *2.
514. *McCabe*, 36 F. Supp. 2d at 673.
515. PA. CONS. STAT. ANN. § 7301-7320 (West 2000).
516. *Bohinick* 1999 WL 238947 at *2.
517. 982 P.2d 229 (Cal. 1999).
518. *Id.* at 234.
519. *Id.* At 234 n.2.
520. *Id.* at 236.

court of appeals reasoned that private arbitration lacks many of the safeguards associated with litigation in a court.[521]

In this action, the insured sued commercial general liability insurers on various causes of action including failure to settle and/or indemnify as to the underlying claim.[522] In affirming the court of appeals' decision, the Supreme Court of California argued that the fairness of the application of collateral estoppel to future claims depends, to some extent, on the "judicial nature" of the prior forum.[523] Further, since the purpose of collateral estoppel is to protect the integrity of the courts, that purpose is mooted by a private arbitration.[524] By insisting on an express agreement between the parties that the doctrine of collateral estoppel be binding, the court deferred to the contractual nature of an agreement to arbitrate.[525] The court concluded that it is counterintuitive to assume the parties meant for the doctrine to apply, absent an express agreement to the contrary, based on the traditionally limited role of the courts in arbitration and the parties' obvious desire to invoke that role.[526] Finally, the court rejected the argument that, since California law gives confirmed arbitration awards the force and effect of civil judgment, nonmutual collateral estoppel is appropriate because fairness is always a component in invoking collateral estoppel.[527]

XI. SECTION 15: JUDGMENT ROLL, DOCKETING

In *Judith v. Graphic Communications International Union*,[528] the primary issue was one of appeal and will be discussed under the analysis in that section.[529] Docketing, however is mentioned by the court and deserves a note. In this sexual harassment suit, the trial court gave an oral ruling on defendant's Motion for Dismissal of Action and Referral to Arbitration that it was dismissing the case "in favor of arbitration."[530] "No written order or docketing of a judgment ever followed."[531] The issue in this case became whether that order was final for purposes of appeal. The court noted that the lack of docketing "presents another potentially significant bar to finality."[532] Many courts are similarly confronted with the issue of finality in the appeal of an arbitration award.[533]

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521. *Id.*
522. *Id.* at 229.
523. *Id.* at 237.
524. *Id.* at 240.
525. *Id.*
526. *Id.* at 239-40.
527. *Id.* at 241. Justice Brown, in his concurring and dissenting opinion, argues that the California provision giving civil judgment weight to confirmed awards is "clear and unambiguous," and may permit collateral estoppel with or without an express agreement. *Id.* at 246.
528. 727 A.2d 890 (D.C. 1999).
529. *See* discussion *infra* of U.A.A. § 19.
530. *Judith*, 727 A.2d at 891.
531. *Id.* at 891 n.2.
532. *Id.*
533. *See* discussion *infra* of U.A.A. § 19.

XII. SECTION 17: JURISDICTION OF THE COURT

Once a valid arbitration agreement is formed under section one of the U.A.A., any court of competent jurisdiction of the state has the power to enforce and enter judgment on an award under the agreement.[534]

A. Enforcing the Arbitration Agreement

In *Dahl v. Fred Meyer, Inc.*,[535] the parties agreed to arbitrate Dahl's wrongful discharge claim.[536] Before the hearing date, employer Fred Meyer, Inc. moved to dismiss arbitration because the complaint alleged a motive for discharge and intended to state a cause of action under Employee Retirement Income Security Act ("ERISA").[537] The arbitrator dismissed finding that ERISA required exclusive federal court jurisdiction.[538] Dahl moved to amend his complaint to delete the portion that involved ERISA, but the district court denied leave to amend and confirmed the arbitrator's decision, dismissing Dahl's complaint with prejudice.[539] On appeal, the Supreme Court of Montana found that Dahl "failed to object to the arbitrator's decision either before the arbitrator, or before the district court" and once the parties agreed to arbitration the district court was without jurisdiction to allow Dahl to amend his complaint.[540] The court stated that "once the parties agree to arbitration, the district court has authority only to confirm, modify and confirm, or vacate and remand for rehearing."[541]

Vanderheyden v. Ajay, Inc.[542] involved a contractual dispute over the construction of a movie theater.[543] The contract contained an arbitration clause, but when the owner terminated the contract before the construction was completed, the contractor filed suit pursuant to Tennessee law which permits "any remedy in a court of proper jurisdiction."[544] The trial court stayed the proceedings and ordered the parties to arbitrate as stipulated in the contract, but granted the contractor's interlocutory appeal.[545] Finding the Tennessee Uniform Arbitration Act[546] to be a general statute, the court of appeals determined that Tennessee Code Annotated § 66-11-144(h) specifically applied to this situation and therefore the trial court erred in ordering arbitration.[547]

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534. U.A.A. § 17.
535. Dahl v. Meyer, Inc., 993 P.2d 6.
536. *Id.* at 7.
537. *Id. See* 29 U.S.C. § 1001-1191 (1994).
538. *Dahl*, 993 P.2d at 7.
539. *Id.*
540. *Id.* at 7-8.
541. *Id.* at 8.
542. No. 02A01-9803-CH-00070, 1999 WL 562716 (Tenn. Ct. App. Aug. 2, 1999).
543. *Id.* at *1.
544. *Id. See* TENN. CODE ANN. § 66-11-144 (covering contracts for the improvement of real property specifically).
545. *Vanderheyden*, 1999 WL 562716, at *2.
546. TENN. CODE ANN. § 29-5-302 (Supp. 1998) (providing that any agreement between parties to submit disputes to arbitration is binding and enforceable, and courts are granted jurisdiction to enforce arbitration awards).
547. *Vanderheyden*, 1999 WL 562716, at *4-5.

In another contractor case, *Polytech School District v. J.A. Moore & Sons, Inc.*,[548] the parties' agreement contained the procedures for handling disputes.[549] The agreement provided that "[t]he Owner shall, in its sole discretion, elect whether the Contractor's claim shall proceed by way of arbitration or litigation" and "[i]f the Owner does not give the Contractor timely notice of election, then the Contractor shall be required to have such claim determined by litigation."[550] Finding the contractor to have no contractual authority to demand arbitration, the court enjoined arbitration and concluded the owner's "three-and-one-half-month delay in raising the jurisdictional issue [was] reasonable in light of the parties' efforts at negotiating an informal settlement of their differences."[551]

In *Parr v. Tower Management Co.*,[552] the trial court granted a joint motion by the parties to arbitrate.[553] After the arbitrator made the award to the plaintiffs and the defendants had paid it, two of the plaintiffs fired their attorney and appealed the arbitration pro se, seeking to disavow it.[554] The appellate court noted that the U.A.A. grants only a narrow standard of review and without a verbatim transcript of the arbitration proceedings, the trial court was not in a position to review the award.[555] The court affirmed the trial court's decision to uphold the award, finding that the pro se plaintiffs were bound by the arbitration because their voluntary participation ratified the unauthorized conduct of their attorney in agreeing to arbitration.[556]

In *Dresser Industries, Inc. v. Global Industrial Technologies, Inc.*,[557] the parties had agreed to arbitrate disputes according to the F.A.A.[558] Dresser Industries, Inc., a Delaware corporation, sought to enjoin the arbitration contending that most of the claims were barred by the statute of limitations and the remaining claim was not ripe.[559] Global Industrial Technologies, Inc. filed a motion to dismiss, arguing that the court lacked subject matter jurisdiction because the F.A.A. allows arbitrators to rule on whether claims were time-barred and ripe.[560] The court found that although the Delaware Uniform Arbitration Act was inapplicable, it did not divest the court of traditional equity jurisdiction.[561]

Following the *Nash* test,[562] the court found it unlikely that where the parties agreed to arbitrate the subject of the underlying dispute they intended for other

548. No. Civ.A1400-K, 1999 WL 504780 (Del. Ch. July 8, 1999).
549. *Id.* at *1.
550. *Id.*
551. *Id.* at *3.
552. No. 01A01-9811-CV-00573, 1999 WL 415169 (Tenn. Ct. App. June 23, 1999).
553. *Id.* at *1.
554. *Id.* at *2-3.
555. *Id.* at *7.
556. *Id.*
557. No. Civ.A.16967, 1999 WL 413401 (Del. Ch. June 9, 1999).
558. *Id.* at *1.
559. *Id.*
560. *Id.* at *1.
561. *Id.* at *3-4. *See* DEL. CODE ANN. tit. 10, § 5702(a) (1999) (conferring jurisdiction only when the parties' agreement provides for arbitration in the state). The agreement in question provided for arbitration in Texas. *Id.* at *3.
562. *See* Nash v. Dayton Superior Corp., 728 A.2d 59 (Del. Ch. 1998) (stating that the test requires (1) the threshold question of whether the dispute, on the face of the arbitration clause, is subject to arbitration and (2) the ultimate question of whether a legal remedy is available and fully adequate). *Id.*

related issues to affect the "arbitrability."[563] Under the second prong of the *Nash* test, the court found that Dresser would have the opportunity to raise the defenses in arbitration and have judicial review of the decision.[564] Therefore, an adequate legal remedy existed for Dresser and his claims for lack of subject matter jurisdiction were dismissed.[565]

In *Elf Atochem North America, Inc. v. Jaffari*,[566] the parties undertook a joint venture to create and market a water-based maskant and created a limited liability corporation ("LLC"), Malek LLC, in Delaware.[567] The LLC agreement provided that all disputes would be submitted to arbitration in California.[568] Elf Atochem North America, Inc. ("Elf") later brought suit for equitable remedies in the Delaware Court of Chancery, but the court found the aforementioned agreement governed the question of jurisdiction and granted Jaffari's motion to dismiss.[569] On appeal, Elf argued that the derivative claims it brought on behalf of Malek LLC were not governed by the arbitration and forum selection clauses of the agreement because Malek LLC was not a party to the agreement.[570]

The court stated that the LLC is simply the joint business vehicle of the members and the Delaware Limited Liability Company Act ("Act") was designed to permit maximum flexibility in entering into agreements to govern the parties' relationship.[571] The court also stated that Elf had contracted away its right to bring a derivative action in Delaware by the terms of the limited liability agreement.[572] The policy of the Act is to give maximum effect to the freedom of contract and enforceability of LLC agreements and the court found no reason that the parties could not contract to alter default jurisdictional provisions of Delaware law.[573] The court subsequently affirmed dismissal of Elf's complaint for lack of subject matter jurisdiction.[574]

XIII. SECTION 18: VENUE

The venue section of the U.A.A. calls for the initial application to be made in the county specified by the agreement, or if a hearing has already been held, the county where that hearing took place. Otherwise, venue is found in the county where the adverse party resides or has a business unless there is not a residence or place of business in the state, then any county.[575] In *Knaffl v. Douglas Co.*,[576] the

563. *Dresser*, 1999 WL 413401, at *6.
564. *Id.*
565. *Id.* at *6-7.
566. 727 A.2d 286.
567. *Id.*
568. *Id.* at 288.
569. *Id.* at 289.
570. *Id.* at 293.
571. *Id.* The Act is codified in Chapter 18 of Title 6 of the Delaware Code.
572. *Id.* at 294.
573. *Id.* at 295. *See* DEL. CODE ANN. tit. 6, § 18-1101(b) (1999).
574. *Elf*, 727 A.2d at 296.
575. U.A.A. §18.
576. 1999 WL 894203, at*1.

venue provision in the contract specified venue in Lucas County, Ohio, in violation of Tennessee law which prohibited any venue invoking the laws of another state.[577] The court of appeals found that the legislature had "embraced a policy favoring enforcement of arbitration agreements" by adopting the U.A.A.[578] and found authority under that statute and state contractual law to sever the venue clause from the rest of the arbitration agreement, thus "resolving any doubts in favor of arbitration."[579]

XIV. SECTION 19: APPEALS

Section 19 reads:

> (a) An appeal may be taken from:
> (1) An order denying an application to compel arbitration made under Section 2;
> (2) An order granting an application to stay arbitration made under Section 2(b);
> (3) An order confirming or denying confirmation of an award;
> (4) An order modifying or correcting an award;
> (5) An order vacating an award without directing a rehearing; or
> (6) A judgment or decree entered pursuant to the provisions of this act.
> (b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.[580]

A. Finality and Interlocutory Appeals

In *Colorado School District's Self Insurance Pool v. J.P. Meyer Trucking & Construction, Inc.*,[581] the school district's self insurance pool sought to recover amounts paid for personal injury to people injured in an accident with defendant.[582] The defendant moved to dismiss claiming the court lacked jurisdiction since the matter was subject to mandatory arbitration.[583] The trial court denied defendant's motion but did not make the order final under applicable state rules and the defendants appealed the denial of their Motion to Dismiss.[584] Colorado School District's Self Insurance Pool contends that the court of appeals lacks jurisdiction since the trial court's order was never final.[585] Under Colorado law, interlocutory

577. *Id.* at *3.
578. TENN. CODE ANN. §§ 29-5-301 - 29-5-318 (Supp.1995).
579. *Knaffl*, 1999 WL 894203, at *4.
580. U.A.A. §19.
581. 996 P.2d 257 (Colo. Ct. App. 1999).
582. *Id.* at 259.
583. *Id.*
584. *Id.*
585. *Id.*

orders are not appealable unless there is a specific statutory provision.[586] Here, that statute is the Uniform Arbitration Act and it authorizes an interlocutory appeal from "an order denying an application to compel arbitration."[587] In this case, the court found that the "[t]rial court's denial of defendant's Motion to Dismiss was equivalent to the denial of a motion to compel arbitration" which gave the court of appeals jurisdiction.[588]

Pennsylvania law requires that, for an agreement to arbitrate to be covered by the Uniform Arbitration Act,[589] it must be in writing and expressly invoke the act.[590] Interlocutory orders are not appealable unless a specific statutory provision allows for it and the U.A.A. allows for appeal to be taken from a "court order denying an application to compel arbitration."[591] In *Midomo Co. Inc.*, the interlocutory appeal was in the form of a preliminary objection requesting the court to verify an arbitration agreement existed.[592] The court, however, refused to "exalt form over substance" and claimed jurisdiction for the appeal by holding that the order denying the preliminary objection was the equivalent of one denying the motion to compel arbitration.[593] In *Lowther v. Roxborough Memorial Hospital*,[594] however, the superior court refused to apply the U.A.A. because it was not expressly stated in the agreement to arbitrate.[595] The court explained that, absent an express agreement to use the U.A.A., common law principals as reflected in a separate statutory provision apply.[596]

Two Missouri cases present a somewhat inconsistent synthesis of state law and the U.A.A. Missouri Supreme Court Rule 74.01(b) allows the court to enter judgment "as to one or more parties only upon an express determination that there is no just reason for delay."[597] Further, Missouri's Uniform Arbitration Act allows for appeal from "an order denying application to compel arbitration" but all appeals must be taken "as from orders or judgments in a civil case."[598] In a civil case, "for a judgment to be final and appealable it must dispose of all issues and parties in the case."[599] Given these parameters, the southern district, in *Garwood v. Port Arrowhead Marina, Inc.*,[600] found that an appeal from the trial court's order denying a Motion to Stay Proceedings and Compel Arbitration was not appealable because the trial court did not expressly find that "there is no just reason for delay."[601] The eastern district, however, found a motion to dismiss raised the arbitration question and could be treated as a motion to compel, making the denial of that motion

586. *Id.*
587. COLO. REV. STAT. ANN. § 13-22-221(1)(a) (West 1999).
588. *Colo. Sch. Dist.*, 996 P.2d at 259.
589. PA. CONS. STAT. ANN. §7301-7320.
590. *Midomo*,. 739 A.2d at 183.
591. *Id.*
592. *Id.*
593. *Id.* at 184.
594. 738 A.2d 480 (Pa. Super. Ct. 1999).
595. *Id.* at 483-85.
596. *Id.* at 483-84.
597. MO. SUP. CT. RULES. (1998).
598. MO. REV. STAT. § 435.440 (1994).
599. MO. SUP. CT. RULE 74.01(b).
600. 996 S.W.2d 153 (Mo. Ct. App. 1999).
601. *Id.* at 155.

appealable.[602] The eastern district found that it was unnecessary for the trial court to expressly find that "there is no just reason for delay" because the U.A.A. preempted any state law that serves as an additional barrier to arbitration.[603]

Bridgestone/Firestone v. McQueen[604] concerned a suit for wrongful termination. The employer filed a Motion to Stay Litigation and Compel Arbitration under an Employee Dispute Resolution Plan.[605] The trial court denied the motion and held that the plan was a contract of adhesion not supported by adequate consideration.[606] The employer appealed and, invoking the Kentucky Uniform Arbitration Act,[607] argued that the act specifically allowed for appeal from a denial of a motion to compel arbitration.[608] The employee noted that the act specifically exempted employment agreements and the court agreed, dismissing the appeal.[609]

The District of Columbia Court of Appeals dismissed an appeal from a trial court's granting of defendant's Motion for Dismissal of Action and Referral to Arbitration in *Judith v. Graphic Communications International Union*.[610] The court reasoned that, "while a denial of arbitration is appealable, an order to compel arbitration is not."[611] The court continued by pointing out that, had the trial court simply stayed the litigation, appeal would have been improper.[612] The court concluded "a number of courts have treated rulings for dismissal in favor of arbitration as if they were orders to stay litigation. Such a result avoids elevating form over substance and promotes . . . proarbitration purposes."[613]

B. The Scope of Review

In *Knarr v. Erie Insurance Exchchange*,[614] after an accident with an uninsured motorist, appellant commenced action against Erie Insurance Exchange ("Erie") that proceeded to arbitration.[615] The arbitrators awarded a total of $110,305.00 but reduced it to $51,617.80 after deducting anticipated social security benefits.[616] Both parties moved to vacate and/or modify and the trial court held that the disability benefits had been improperly subtracted.[617] Erie appealed the trial court's reinstatement of the original award to the superior court, which reversed the trial court on the grounds that it had improperly used the Arbitration Act of 1927 and not

602. *Mueller*, 5 S.W.3d at 186.
603. *Id.* at 188.
604. 3 S.W.3d 366 (Ky. Ct. App. 1999).
605. *Id.* at 366-67.
606. *Id.* at 366.
607. KY. REV. STAT. ANN. §§ 417.010 - 417.240 (Michie 1992).
608. *Bridgestone/Firestone*, 3 S.W.3d at 367.
609. *Id.*
610. *Judith*, 727 A.2d at 890.
611. *Id.* at 891.
612. *Id.*
613. *Id.* at 892.
614. 723 A.2d 664 (Pa. 1999).
615. *Id.* at 665.
616. *Id.*
617. *Id.*

the 1980 Act.[618] The Supreme Court of Pennsylvania found that the superior court erred by raising the issue sua sponte.[619] Erie had not raised the issue of the 1980 Act at either the trial or appellate level and thus, waived its right to do so.[620] Therefore, on the theory of waiver or improper resurrection of the issue, the order of the trial court was reinstated.[621] Similarly, in *Knaffl v. Douglas Co.*,[622] failure to raise the applicability of the Federal Arbitration Act at the trial court constituted a waiver of the ability to invoke those rules on appeal.[623]

In another case, after completion of arbitration and the deposit of awards, plaintiff, dissatisfied with her award, fired her attorney and sought to disavow the arbitration.[624] Tennessee operates under the Uniform Arbitration Act[625] that governs the scope of judicial review of arbitration awards."[626] This standard is narrow and it is well established that the courts serve a limited role in review of arbitration.[627] In this case, the parties willingly participated in the arbitration and made no complaint about the process.[628] The court of appeals found that, without a complete arbitral or trial court transcript, there was no record upon which to exercise their limited scope of review.[629] In addition, parties "cannot acquiesce and indeed fully participate in the arbitration and then, disappointed with the outcome, disavow the action of their attorney and agent."[630]

XV. SECTION 21: UNIFORMITY OF INTERPRETATION

Section 21 of the U.A.A. is meant to assure that the states that adopt the U.A.A. all interpret it in the same way.[631] In *Bridgestone/Firestone v. McQueen*,[632] the Kentucky Court of Appeals upheld a circuit court's decision basing their reasoning on the fact that the U.A.A. is to be interpreted the same between the states that have enacted it.[633] McQueen brought suit against Bridgestone/Firestone ("Firestone") alleging wrongful discharge.[634] Firestone made a motion to compel arbitration, but

618. *Id.* Pursuant to the 1927 Act a trial court could modify or correct an award where, among other things, the award is "contrary to law." *Id.* The 1980 Act eliminated this language. *Id.*
619. *Id.* at 666.
620. *Id.* at 665.
621. *Id.* at 666.
622. *Knaffl*, 1999 WL 894203, at *2.
623. *Id.*
624. *Parr*, 1999 WL 415169, at *1,*2. After Plaintiff Parr fired her attorney, she represented herself during the rest of the proceeding, creating voluminous paperwork attacking the actions of her former attorney. *Id.*
625. TENN. CODE ANN. §§ 29-5-301 - 29-5-318 (Supp. 1995).
626. *Parr*, 1999 WL 415169, at *3 (citing Int'l Talent Group, Inc. v. Copyright Mgmt., Inc., 769 S.W.2d 217, 218 (Tenn. Ct. App. 1988)).
627. *Id.*
628. *Id.* at *4.
629. *Id.* at *6.
630. *Id.* at *4.
631. U.A.A. § 21
632. 3 S.W.3d 366.
633. *Id.* at 367 n.3.
634. *Id.* at 366.

the trial court denied it.[635] Firestone then sought this appeal which McQueen opposed reasoning that the trial court order was interlocutory and unappealable.[636] The appellate court dismissed the appeal citing *J&K Cement Construction, Inc. v. Montalbano Builders, Inc.*[637] and *Kansas Gas & Electric Co. v. Westinghouse Electric Corp.*[638] and invoking U.A.A. section 21 which requires the court to follow other states interpretations of the U.A.A.[639]

XVI. SECTION 25: TIME OF TAKING EFFECT

Section 25 of the U.A.A. covers when the act takes effect.[640] In *Millennium Solutions, Inc. v. Davis*,[641] the issue in front of the court was when a provision of the U.A.A. adopted by Nebraska took effect.[642] The Supreme Court of Nebraska interpreted this issue based upon normal statutory interpretation.[643] The court first looked at the intent of legislature in enacting the statute.[644] The court determined this statute represented a substantive change to the law and, "unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively," then the statute is only to be applied prospectively.[645] The statute in question did not express an intention to be applied retroactively so the court determined that the statute only applies to issues initiated after the statute was passed.[646]

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635. *Id.*
636. *Id.* at 367.
637. 456 N.E.2d 889 (Ill. App. Ct. 1983).
638. 861 F.2d 420 (4th Cir. 1988).
639. *Bridgestone/Firestone*, 3 S.W.3d at 367-68.
640. U.A.A. § 25.
641. 603 N.W.2d 406 (Neb. 1999).
642. *Id.* at 409.
643. *Id.*
644. *Id.* at 409-10.
645. *Id.*
646. *Id.* at 410-11.

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