ARTICLE 7A - Uniform Arbitration

44-7A-1. Short title; definitions.

(a) The provisions of this act may be cited as the "Uniform Arbitration Act" [44-7A-1 NMSA 1978].

(b) As used in the Uniform Arbitration Act:

(1) "arbitration organization" means an association, agency, board, commission or other entity that is neutral and initiates, sponsors or administers an arbitration proceeding or is involved in the appointment of an arbitrator;

(2) "arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate;

(3) "court" means a court of competent jurisdiction in this state;

(4) "disabling civil dispute clause" means a provision modifying or limiting procedural rights necessary or useful to a consumer, borrower, tenant or employee in the enforcement of substantive rights against a party drafting a standard form contract or lease, such as, by way of example, a clause requiring the consumer, tenant or employee to:

(a) assert a claim against the party who prepared the form in a forum that is less convenient, more costly or more dilatory than a judicial forum established in this state for resolution of the dispute;

(b) assume a risk of liability for the legal fees of the party preparing the contract, but a seller, lessor or lender may exact for a buyer, tenant or borrower an obligation to reimburse the seller, lessor or lender for a reasonable fee paid to secure enforcement of a promise to pay money;

(c) forego access to the discovery of evidence as provided in the rules of procedure of a convenient judicial forum available to hear and decide a dispute between the parties;

(d) present evidence to a purported neutral person who may reasonably be expected to regard the party preparing the contract as more likely to be a future employer of the neutral person;

(e) forego recourse to appeal from a decision not based on substantial evidence or disregarding the legal rights of the consumer, tenant or employee;

(f) decline to participate in a class action; or

(g) forego an award of attorney fees, civil penalties or multiple damages otherwise available in a judicial proceeding;

(5) "knowledge" means actual knowledge;

(6) "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, governmental agency, governmental instrumentality, public corporation or any other legal or commercial entity;

(7) "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

(8) "standard form contract or lease" means a written instrument prepared by a party for whom its use is routine in business transactions with consumers of goods or services, borrowers, tenants or employees.

History: Laws 2001, ch. 227, § 1.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Malicious abuse of process. — For purposes of the tort of malicious abuse of process, arbitration proceedings are judicial proceedings, and the improper use of process in an arbitration proceeding to accomplish an illegitimate end may form the basis of a malicious abuse of process claim. *Durham v. Guest*, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19, *rev'g* 2007-NMCA-144, 142 N.M. 817, 171 P.3d 756.

Malicious abuse of process in arbitration proceedings. — The plaintiffs' allegation that the defendant issued a subpoena during an arbitration proceeding for the purpose of extortion is sufficient to state a malicious abuse of process claim when the defendant did not initiate the arbitration proceeding against the plaintiffs. *Durham v. Guest*, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19, *rev'g* 2007-NMCA-144, 142 N.M. 817, 171 P.3d 756 and *overruling in part DeVaney v. Thriftway Marketing Corp.*, 1998-NMSC-001, 124 N.M. 512, 953 P.2d 277.

Cases under prior law. — The pre-2001 cases below were decided under the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978. Because of the similarities between the two laws, the case annotations have been retained and included as annotations to the 2001 Uniform Arbitration Act.

Legislative intent in enacting Uniform Arbitration Act and the policy of the courts in enforcing it is to reduce caseloads in the courts, not only by allowing arbitration, but also by requiring controversies to be resolved by arbitration where contracts or other documents so provide. *Dairyland Ins. Co. v. Rose*, 1979-NMSC-021, 92 N.M. 527, 591

P.2d 281; *Daniels Ins. Agency, Inc. v. Jordan*, 1982-NMSC-148, 99 N.M. 297, 657 P.2d 624.

Uniform Arbitration Act supersedes conflicting common-law authority. *Andrews v. Stearns-Roger, Inc.*, 1979-NMSC-089, 93 N.M. 527, 602 P.2d 624.

In New Mexico, arbitration proceedings and awards are governed both by common law and by the Uniform Arbitration Act, but provisions of the act govern where the act conflicts with the common law. Daniels Ins. *Agency, Inc. v. Jordan*, 1982-NMSC-148, 99 N.M. 297, 657 P.2d 624.

Announced policy of New Mexico favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties, and to this end the legislature has assigned the courts a minimal role in supervising arbitration practice and procedures. *K.L. House Constr. Co. v. City of Albuquerque*, 1978-NMSC-025, 91 N.M. 492, 576 P.2d 752; *Bernalillo Cnty. Med. Ctr. Employees' Ass'n Local 2370 v. Cancelosi*, 1978-NMSC-086, 92 N.M. 307, 587 P.2d 960.

Unlicensed business cannot compel arbitration. — Texas corporations unauthorized to do business in New Mexico were unable to compel two dentists to arbitrate a dispute arising from an alleged breach of architectural and construction contracts for the construction of dental offices because a suit to compel arbitration is essentially a suit for specific performance and the corporations, not licensed to do business in New Mexico, cannot perform. *Shaw v. Kuhnel & Assocs., Inc.*, 1985-NMSC-008, 102 N.M. 607, 698 P.2d 880.

Third-party beneficiary of arbitration agreement. — Where plaintiff entered into a title loan agreement with defendant; a condition of the loan required plaintiff to maintain insurance for the full value of the vehicle; plaintiff purchased the required insurance; the vehicle was subsequently involved in an accident that rendered the vehicle inoperable; and the loan agreement contained an arbitration provision which provided that plaintiff agreed to submit to arbitration all claims or disputes against all persons who may be liable to either plaintiff or the lender, the insurance company was a third-party beneficiary under the arbitration and could compel arbitration of plaintiff’s claim against the insurance company. *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351, *rev'd*, 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803.

Arbitration agreement to be interpreted by rules of contract law. — The terms of the arbitration agreement are to be interpreted by the rules of contract law. *Christmas v. Cimarron Realty Co.*, 1982-NMSC-079, 98 N.M. 330, 648 P.2d 788.

Equitable estoppel is applicable. — A nonparty to a contract may be equitably estopped from refusing to comply with a reasonable arbitration provision contained in the contract where the nonparty attempts to enforce some aspect of the contract. *Damon v. StrucSure Home Warranty, LLC*, 2014-NMCA-116.

Nonparties to an arbitration agreement. — Plaintiffs, as subsequent purchasers of a home and nonparties to a home warranty agreement, are bound by an arbitration provision contained in the warranty agreement if they directly seek the benefits of the warranty agreement. *Damon v. StrucSure Home Warranty, LLC*, 2014-NMCA-116.

Both statutory and common-law arbitration exist without conflict. — Since nothing is said in these provisions that common-law arbitrations are abolished, both methods of arbitration may exist, one under the statute and the other under the common law without conflicting with each other. *Robinson v. Navajo Freight Lines*, 1962-NMSC-043, 70 N.M. 215, 372 P.2d 801 (decision under former law).

Agreement defines scope of jurisdiction of arbitration. — Parties contracting to resolve disputes by arbitration are bound by their agreement. The terms of the agreement define the scope of the jurisdiction, conditions, limitations and restrictions on the matters to be arbitrated. *Christmas v. Cimarron Realty Co.*, 1982-NMSC-079, 98 N.M. 330, 648 P.2d 788.

Terms of arbitration agreement govern disqualification of arbitrator. — Where defendants and contractor, who was hired to do concrete and framing work on defendants' property, entered into a binding arbitration agreement following a dispute regarding money due on construction work at defendants' property, and where contractor subsequently requested that the arbitrator be disqualified for refusing to perform his duties and for non-neutrality, the district court did not abuse its discretion in concluding that the parties' arbitration was subject to all the rules and procedures of the American Arbitration Association (AAA), including the rule regarding disqualification of an arbitrator and that the AAA has the authority to disqualify a designated arbitrator if the AAA determines that such a disqualification is warranted under its rules and procedures, because the natural construction of the parties' arbitration agreement was that the parties intended to arbitrate disputes between them under all the AAA rules, and there was no language of limitation in the arbitration agreement demonstrating an intent to limit the scope of the AAA's rules. *L.D. Miller Construction, Inc. v. Kirschenbaum*, 2017-NMCA-030.

Arbitration agreement will be given broad interpretation. — When the parties agree to arbitrate any potential claims or disputes arising out of their relationships by contract or otherwise, the arbitration agreement will be given broad interpretation, unless the parties themselves limit arbitration to specific areas or matters. Barring such limiting language, the courts only decide the threshold question of whether there is an agreement to arbitrate. *K.L. House Constr. Co. v. City of Albuquerque*, 1978-NMSC-025, 91 N.M. 492, 576 P.2d 752.

Forum for resolution of disputed interpretation. — Where a complaint for declaratory judgment raises questions of law arising from the disputed interpretation of an arbitration contract, the proper forum for resolution of such questions is the trial court. *Guaranty Nat'l Ins. Co. v. Valdez*, 1988-NMSC-090, 107 N.M. 764, 764 P.2d 1322.

Decision of joint committee subject to same standards as arbitrator's award. — Where the parties voluntarily submit a grievance to a joint management union committee for decision, the decision of that committee is subject to and governed by the same standards as an arbitrator's award, and is to be accorded the same finality. *Andrews v. Stearns-Roger, Inc.*, 1979-NMSC-089, 93 N.M. 527, 602 P.2d 624.

When trial court determines force of disputed contract. — When a petition is filed to compel arbitration pursuant to a contract's arbitration clause and the responding party denies the existence or validity of the contract, the trial court must determine whether the contract is still in force to compel the requested arbitration. *Gonzales v. United S.W. Nat'l Bank*, 1979-NMSC-086, 93 N.M. 522, 602 P.2d 619.

Determination of fraud in the inducement. — When a party challenges only an arbitration provision as fraudulently induced, the district court must decide this issue before sending the entire contract containing the arbitration provision to the arbitrator. *Murken v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-080, 140 N.M. 68, 139 P.3d 864.

Law reviews. — For note, "Uninsured Motorist Arbitration," see 3 N.M. L. Rev. 220 (1973).

For article, "The Contract to Arbitrate Future Disputes: A Comparison of the New Mexico Act with the New York and Federal Acts," see 9 N.M.L. Rev. 71 (1978-79).

For article, "Arbitration of Domestic Relations Disputes in New Mexico," see 16 N.M.L. Rev. 321 (1986).

For survey of construction law in New Mexico, see 18 N.M.L. Rev. 331 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution §§ 8 et seq., 70 et seq.

Matters arbitrable under arbitration provisions of collective labor contract, 24 A.L.R.2d 752.

Construction and effect of severance or dismissal pay provisions of employment contract or collective labor agreement, 40 A.L.R.2d 1044.

Contract providing that it is governed by or subject to rules or regulations of a particular trade, business or association as incorporating agreement to arbitrate, 41 A.L.R.2d 872.

Constitutionality of compulsory arbitration statutes, 55 A.L.R.2d 432.

Arbitration of disputes within close corporation, 64 A.L.R.2d 643.

Power of president of corporation to commence or to carry on arbitration proceedings, 65 A.L.R.2d 1321.

Dissolved corporation's power to participate in arbitration proceedings, 71 A.L.R.2d 1121.

Agreement to arbitrate future controversies as binding on infants, 78 A.L.R.2d 1292.

Covenant in lease to arbitrate, or to submit to appraisal, as running with the leasehold so as to bind assignee, 81 A.L.R.2d 804.

Availability and scope of declaratory judgment actions in determining rights of parties, or powers and exercise thereof by arbitrators, under arbitration agreements, 12 A.L.R.3d 854.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction, 12 A.L.R.3d 892.

Validity and construction of provision for arbitration of disputes as to alimony or support payments, or child visitation or custody matters, 38 A.L.R.5th 69.

Municipal corporation's power to submit to arbitration, 20 A.L.R.3d 569.

Validity and enforceability of provision for binding arbitration, and waiver thereof, 24 A.L.R.3d 1325.

Delay in asserting contractual right to arbitration as precluding enforcement thereof, 25 A.L.R.3d 1171.

Breach or repudiation of collective labor contract as subject to, or as affecting right to enforce, arbitration provision in contract, 29 A.L.R.3d 688.

Breach or repudiation of contract as affecting right to enforce arbitration clause therein, 32 A.L.R.3d 377.

Participation in arbitration proceedings as waiver of objections to arbitrability, 33 A.L.R.3d 1242.

Statute of limitations as bar to arbitration under agreement, 94 A.L.R.3d 533.

Conflict of laws as to validity and effect of arbitration provision in contract for purchase or sale of goods, products, or services, 95 A.L.R.3d 1145.

Defendant's participation in action as waiver of right to arbitration of dispute involved therein, 98 A.L.R.3d 767.

Claim of fraud in inducement of contract as subject to compulsory arbitration clause contained in contract, 11 A.L.R.4th 774.

Liability of organization sponsoring or administering arbitration to parties involved in proceeding, 41 A.L.R.4th 1013.

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent, 48 A.L.R.4th 127.

Validity and construction of agreement between attorney and client to arbitrate disputes arising between them, 26 A.L.R.5th 107.

Alternative dispute resolution: sanctions for failure to participate in good faith in, or comply with agreement made in, mediation, 43 A.L.R.5th 545.

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A.L.R.5th 757.

Consolidation by federal court of arbitration proceedings brought under Federal Arbitration Act (9 USCS § 4), 104 A.L.R. Fed. 251.

Enforceability of arbitration clauses in collective bargaining agreements as regards claims under federal civil rights statutes, 152 A.L.R. Fed. 75.

6 C.J.S. Arbitration § 1 et seq.

44-7A-2. Notice.

(a) Except as otherwise provided in the Uniform Arbitration Act [44-7A-1 NMSA 1978], a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

History: Laws 2001, ch. 227, § 2.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The

Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Effect of failure of proper notice. — Because the appellant was prejudiced by the arbitrator's failure to give him proper notice of the third hearing, and because the failure to give notice was sufficient cause to require the arbitrator to postpone the hearing, the trial court erred when it failed to vacate the arbitration award pursuant to 44-7-12A(4) NMSA 1978 (now 44-7A-24 NMSA 1978). *Jaycox v. Ekeson*, 1993-NMSC-036, 115 N.M. 635, 857 P.2d 35.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 183.

Necessity and sufficiency of notice of and hearing in proceedings before appraisers and arbitrators appointed to determine amount of insurance loss, 25 A.L.R.3d 680.

6 C.J.S. Arbitration § 83.

44-7A-3. When the uniform arbitration applies.

(a) The Uniform Arbitration Act [44-7A-1 NMSA 1978] governs an agreement to arbitrate made on or after the effective date of that act.

(b) The Uniform Arbitration Act governs an agreement to arbitrate made before the effective date of that act if all the parties to the agreement or to the arbitration proceeding so agree in a record.

History: Laws 2001, ch. 227, § 3.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

44-7A-4. Effect of agreement to arbitrate; nonwaivable provisions.

(a) Except as otherwise provided in Subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive or the parties may vary the effect of the requirements of the Uniform Arbitration Act [44-7A-1 NMSA 1978] to the extent permitted by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) waive or agree to vary the effect of the requirements of Section 6(a), 7(a), 9, 18(a), 18(b), 27 or 29 [44-7A-6, 44-7A-7, 44-7A-9, 44-7A-18, 44-7A-27 or 44-7A-29 NMSA 1978];

(2) agree to unreasonably restrict the right under Section 10 [44-7A-10 NMSA 1978] to notice of the initiation of an arbitration proceeding;

(3) agree to unreasonably restrict the right under Section 12 [44-7A-12 NMSA 1978] to disclosure of any facts by a neutral arbitrator; or

(4) waive the right under Section 17 [44-7A-17 NMSA 1978] of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under the Uniform Arbitration Act, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or arbitration proceeding may not waive or the parties may not vary the effect of the requirements of this section or Section 3(a), 8, 15, 19, 21(d) or (e), 23, 24, 25, 26(a) or (b), 30, 31, 32 or 33 [44-7A-3, 44-7A-15, 44-7A-19, 44-7A-21, 44-7A-23, 44-7A-24, 44-7A-25, 44-7A-26, 44-7A-30, 44-7A-31, 44-7A-32, or 44-7A-33 NMSA 1978].

History: Laws 2001, ch. 227, § 4.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Waiver by invoking judicial discretion. — Where the union filed an action in district court to enjoin the municipality from closing a drug treatment program and laying off bargaining unit employees on the grounds that the municipality failed to follow the procedures for layoffs contained in the collective bargaining agreement; at the hearing in district court, the union pursued the issue of layoffs within its request for injunctive relief and through the testimony of its witnesses and the district court dealt with the merits of whether the municipality violated the layoff procedures; when the district court refused to enjoin the municipality from laying off bargaining unit members, the union filed a motion to compel arbitration on the issue of layoffs; the union did not assert its right to arbitration during the three months of litigation and for two months thereafter; and the union told the district court that arbitration was not an adequate remedy, because the union invoked the discretion of the district court and the judicial machinery by raising the issue of whether the municipality followed the collective bargaining agreement as to layoffs and caused the municipality to rely on and be prejudiced by the union’s decision to litigate the layoffs, the union waived its right to arbitrate the issue of

layoffs. *AFSCME v. City of Albuquerque*, 2013-NMCA-049, 299 P.3d 441, cert. granted, 2013-NMCERT-004.

Agreement defines scope of jurisdiction of arbitration. — Parties contracting to resolve disputes by arbitration are bound by their agreement. The terms of the agreement define the scope of the jurisdiction, conditions, limitations and restrictions on the matters to be arbitrated. *Christmas v. Cimarron Realty Co.*, 1982-NMSC-079, 98 N.M. 330, 648 P.2d 788.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Enforcement of arbitration agreement contained in construction contract by or against nonsignatory, 100 A.L.R.5th 481.

44-7A-5. Disabling civil dispute clause voidable.

In the arbitration of a dispute between a consumer, borrower, tenant or employee and another party, a disabling civil dispute clause contained in a document relevant to the dispute is unenforceable against and voidable by the consumer, borrower, tenant or employee. If the enforcement of such a clause is at issue as a preliminary matter in connection with arbitration, the consumer, borrower, tenant or employee may seek judicial relief to have the clause declared unenforceable in a court having personal jurisdiction of the parties and subject matter jurisdiction of the issue.

History: Laws 2001, ch. 227, § 5.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Constitutionality of compulsory arbitration statutes, 55 A.L.R.2d 432.

Validity and enforceability of provision for binding arbitration, and waiver thereof, 24 A.L.R.3d 1325.

44-7A-6. Application for judicial relief.

(a) Except as otherwise provided in Section 28 [44-7A-28 NMSA 1978], an application for judicial relief under the Uniform Arbitration Act [44-7A-1 NMSA 1978] must be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under the Uniform Arbitration Act must be served in the

manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion must be given in the manner provided by law or rule of court for serving motions in pending cases.

History: Laws 2001, ch. 227, § 6.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Cross references. — For motions generally, *see* Rules 1-007 to 1-016 NMRA.

For service of summons, *see* Rule 1-004 NMRA.

44-7A-7. Validity of agreement to arbitrate.

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

History: Laws 2001, ch. 227, § 7.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Unconscionability. — Unconscionability is an affirmative defense to contract enforcement. It is an equitable doctrine, rooted in public policy, which allows courts to

render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party. *Peavy v. Skilled Healthcare Group, Inc*., 2020-NMSC-010, *aff'g* No. A-1-CA-35494, mem. op. (N.M. Ct. App. Oct. 22, 2018) (non-precedential).

Procedural and substantive unconscionability. — Procedural unconscionability considers the factual circumstances of a contract's formation. Substantive unconscionability concerns the legality and fairness of the contract terms themselves. *Peavy v. Skilled Healthcare Group, Inc*., 2020-NMSC-010, *aff'g* No. A-1-CA-35494, mem. op. (N.M. Ct. App. Oct. 22, 2018) (non-precedential).

Substantive unconscionability of an arbitration agreement. — Under New Mexico conscionability law, a presumption of unfair and unreasonable one-sidedness arises when a drafting party excludes its likeliest claims from arbitration, while mandating the other party arbitrate its likeliest claims. The presumption may be overcome by an evidentiary showing that justifies the one-sidedness of the arbitration agreement. *Peavy v. Skilled Healthcare Group, Inc*., 2020-NMSC-010, *aff'g* No. A-1-CA-35494, mem. op. (N.M. Ct. App. Oct. 22, 2018) (non-precedential).

Analysis in determining substantive conscionability of an arbitration agreement. — When confronted with the substantive conscionability of an arbitration agreement, a court should first analyze the arbitration agreement on its face to determine the legality and fairness of the contract terms themselves, and second, if the court determines the arbitration agreement is facially one-sided, the court should allow the drafting party to present evidence that justifies the agreement is fair and reasonable, such that enforcement of the agreement would not be substantively unconscionable. *Peavy v. Skilled Healthcare Group, Inc*., 2020-NMSC-010, *aff'g* No. A-1-CA-35494, mem. op. (N.M. Ct. App. Oct. 22, 2018) (non-precedential).

Arbitration agreements are substantively unconscionable when they are unfairly and unreasonably one-sided. — Where the estate of decedent filed a wrongful death lawsuit against defendant, a skilled nursing facility where decedent was a resident, and where, in response, defendant filed a motion to compel arbitration, citing an arbitration agreement that was attendant to decedent's admission agreement to the nursing facility, and where the arbitration agreement provided an exception stating that the agreement did not apply to either the facility or the resident in any disputes pertaining to collections, the district court did not err in denying defendant's motion to compel arbitration because the arbitration agreement was facially one-sided in that it excluded defendant's likeliest claim from mandatory arbitration, but required its residents to arbitrate their likeliest claims, and defendant failed to show that the arbitration agreement's collections exception was reasonable and fair. *Peavy v. Skilled Healthcare Group, Inc*., 2020-NMSC-010, *aff'g* No. A-1-CA-35494, mem. op. (N.M. Ct. App. Oct. 22, 2018) (non-precedential).

Arbitration agreement was substantively unconscionable. — In a breach of contract case where plaintiff argued that the arbitration agreement provision of its subcontract

with defendant should not be enforced because the provision was facially one-sided and thus was substantively unconscionable, and where the district court determined that the provision was not unconscionable and granted defendant's motion to compel arbitration, the district court erred in determining that the arbitration agreement was not substantively unconscionable, because to determine the substantive conscionability of a contract provision, a court must first analyze the arbitration agreement on its face to determine the legality and fairness of the contract terms themselves, and if the court determines the arbitration agreement is facially one-sided, the court should allow the drafting party to present evidence that the agreement is fair and reasonable, such that enforcement of the agreement would not be substantively unconscionable, and in this case, defendant conceded that the arbitration provision was facially one-sided, but failed to identify any legitimate, neutral reasons for it to exercise exclusive control over the manner in which any dispute arising from the subcontract was resolved. Contract provisions that unreasonably benefit one party over another are substantively unconscionable. *Atlas Elec. Constr. Inc. v. Flintco, LLC*, 2024-NMCA-046.

Determination of unconscionability of exceptions in arbitration agreement. — There is no bright-line, fixed, and inflexible rule that excepting from arbitration any claims most likely to be pursued by the defendant drafter will void the arbitration agreement as substantively unconscionable because the exception is unreasonably or unfairly one-sided and against New Mexico public policy. The issue is to be analyzed on a case-by-case basis based on evidence presented on the issues of unreasonableness, unfairness, one-sidedness, and public policy. *Bargman v. Skilled Healthcare Grp., Inc.*, 2013-NMCA-006, 292 P.3d 1, cert. granted, 2012-NMCERT-012.

Where plaintiff, who was a patient in defendant’s inpatient rehabilitation facility, signed an arbitration agreement that excluded disputes pertaining to collections; plaintiff sued defendant for damages arising out of the plaintiff’s care at defendant’s facility; the district court ruled that plaintiff did not have to arbitrate plaintiff’s claims because the arbitration agreement was substantively unconscionable; and defendant argued that the collections exclusion was not unreasonable or unfair because collections disputes are not complex and involve small sums, that it is faster and cheaper for a patient and defendant to litigate collection claims rather than to arbitrate them, that under the arbitration agreement, defendant would have to pay the fees for three arbitrators to arbitrate the sums involved in collections which would not be cost effective and deprive defendant of a remedy when a patient failed to pay for services rendered, defendant should be permitted to present evidence tending to show that the collections exclusion is not unreasonably or unfairly one-sided such that enforcement of the collections exclusion is substantively unconscionable. *Bargman v. Skilled Healthcare Grp., Inc.*, 2013-NMCA-006, 292 P.3d 1, cert. granted, 2012-NMCERT-012.

Arbitration provision not substantively unconscionable. — Where plaintiff purchased two used cars under separate finance contracts which contained provisions that retained self-help remedies for both parties, and that allowed either party to compel arbitration of any claim or dispute arising out of the contracts that exceeded $10,000, the district court erred in determining that the arbitration clause was unenforceable on

the ground that it was substantively unconscionable under New Mexico law, because the arbitration provision and its carve-outs do not unreasonably benefit one party over another, and the carve-out provision's reservation of self-help remedies is irrelevant to the question of substantive unconscionability because they are private and nonadjudicatory by their very nature. *Dalton v. Santander Consumer USA, Inc.*, 2016-NMSC-035, *rev'g* 2015-NMCA-030, 345 P.3d 1086.

Practical effect of agreement a factor in determining unconscionability. — Where an arbitration agreement contains provisions that unreasonably benefit one party over another, whether the one-sidedness is evident on the face of the agreement or whether its practical effect unreasonably favors one side, the arbitration provision is substantively unconscionable and unenforceable. *Dalton v. Santander Consumer USA, Inc.*, 2015-NMCA-030, cert. granted, 2015-NMCERT-003.

Where plaintiff signed vehicle finance contracts that included arbitration agreements which contained facially neutral small claims court exemptions from arbitration, but where the practical effect of the exemptions preserved defendant's access to the courts to assert its most important claims, such as repossession, sale of the vehicle, and civil suits for deficiency judgments, while severely limiting plaintiff's access to the courts for consumer claims such as fraud and misrepresentation, the exemption provisions were unfairly and unreasonably one-sided in favor of defendant, and thus render the agreement to arbitrate substantively unconscionable. *Dalton v. Santander Consumer USA, Inc.*, 2015-NMCA-030, cert. granted, 2015-NMCERT-003.

Contractual prohibition of class actions or arbitration. — Contractual provision which prohibited proceeding on a class-wide basis either in litigation or arbitration, as applied to claims that would be economically inefficient to bring on an individual basis, is contrary to the fundamental public policy of New Mexico to provide a forum for the resolution of all consumer claims and is unenforceable in New Mexico. *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215.

Arbitration agreement was not unconscionable. — Where a title loan agreement contained an arbitration provision which provided that all claims and disputes were subject to arbitration at the request of either party, except the lender's self-help or judicial remedies, including repossession or foreclosure, and that in the event of a default, the lender could exercise its rights in court and the debtor could not require the lender's action be arbitrated, the arbitration provision was substantively unconscionable and unenforceable. *Rivera v. American Gen. Fin. Servs., Inc.*, 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351, *rev'd*, 2011-NMSC-033, 150 N.M. 398, 255 P.3d 803.

Where a title loan agreement contained an arbitration provision which provided that all claims and disputes were subject to arbitration at the request of either party except the lender's self-help or judicial remedies, including repossession or foreclosure with respect to the vehicle that secured the loan, and that in the event of a default, the lender could exercise any other rights it had at law or equity or under the loan note or any instrument securing the loan note, including suing the borrower for amounts owed or

repossessing any property given as security, the arbitration provision was not substantively unconscionable because the arbitration provision allowed the borrower to compel arbitration of disputes about the loan note itself and restored to the lender its statutory protections as a secured creditor or procedurally unconscionable as a contract of adhesion because there was no evidence that the lender had a monopoly on title loans in New Mexico or that the borrower would not be able to get a title loan under different terms through a different lender. *Rivera v. American Gen. Fin. Servs., Inc.*, 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351, *rev'd*, 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803.

Arbitrability to be decided by the district court unless parties agree otherwise. — The general rule is that the arbitrability of a particular dispute is a threshold issue to be decided by the district court unless there is clear and unmistakable evidence that the parties decided otherwise under the terms of their arbitration agreement; a court shall order the parties to arbitrate if it finds that there is an enforceable agreement to do so. *Juarez v. THI of New Mexico at Sunset Villa*, 2022-NMCA-056.

A delegation clause challenge. — A challenge to a delegation clause will receive judicial review when the delegation clause itself is specifically challenged on such grounds as exist at law or in equity for the revocation of any contract. A sufficiently specific challenge is one that discusses the language or the application and enforcement of the delegation clause. *Sanchez v. United Debt Counselors, LLC*, 2024-NMSC-026, *rev'g* A-1-CA-40164, mem. op. (N.M. Ct. App. Aug. 17, 2022) (nonprecedential).

Plaintiff challenged the delegation clause with sufficient specificity. — Where plaintiff filed a class action complaint against defendant for damages for alleged violations of the New Mexico Unfair Practices Act (UPA), 57-12-1 to 57-12-26 NMSA 1978, and where defendant filed a motion to compel arbitration, citing an arbitration clause in its contract with plaintiff, and where the district court granted defendant's motion to compel arbitration, but declined to rule on whether the waiver of attorney's fees renders the arbitration agreement unconscionable on the basis that the delegation clause gives the arbitrator the authority to decide that issue or whether the delegation clause itself is unconscionable, the district court erred in granting defendant's motion to compel arbitration, because plaintiff challenged the delegation clause with sufficient specificity, claiming that the delegation clause stripped her of an award of attorney's fees and costs for successfully litigating threshold issues, in violation of the UPA, and therefore it was for the district court in the first instance to determine whether the delegation clause was valid and enforceable. *Sanchez v. United Debt Counselors, LLC*, 2024-NMSC-026, *rev'g* A-1-CA-40164, mem. op. (N.M. Ct. App. Aug. 17, 2022) (nonprecedential).

Delegation clause presented clear and unmistakable evidence the parties intended to have an arbitrator decide the threshold issue of arbitrability. — Where plaintiff was admitted to a care facility for rehabilitation following knee replacement surgery, and where, as a condition of her admission, signed an arbitration agreement,

and where, approximately seven months after her admission, plaintiff filed a complaint against defendant alleging claims of medical negligence and negligent hiring, training, supervision, and retention of employees, and where defendant moved to compel arbitration, asserting that there was no dispute that plaintiff signed the agreement for dispute resolution, that defendant was entitled to enforce the agreement, that the agreement was a valid, enforceable agreement supported by consideration, and that the delegation clause clearly required any questions about arbitrability be submitted to the arbitrator, the district court erred in denying defendant's motion to compel arbitration, because there was a valid contract, supported by consideration, to arbitrate between the parties, and the delegation clause clearly and unmistakably delegated questions of arbitrability to the arbitrator. *Juarez v. THI of New Mexico at Sunset Villa*, 2022-NMCA-056.

Threshold question of arbitrability. — Where plaintiff, the personal representative of the wrongful death estate of decedent, brought a wrongful death action against defendants, a Rio Rancho skilled nursing facility and the management/employment entities for the nursing facility, following decedent's death while in defendants' care, and where the district court granted partial summary judgment to plaintiff based upon its rejection of defendants' affirmative defense regarding arbitration, which asserted that the district court lacked subject matter jurisdiction as a result of an enforceable arbitration agreement, and denied defendants' motion to compel arbitration, the district court did not err in refusing to delegate the interpretation of the arbitration agreement to the arbitrator, because the arbitration agreement in this case failed to specify that distinct threshold questions of arbitrability should be resolved by an arbitrator. Arbitrability of a particular dispute is a threshold issue to be decided by the district court unless there is clear and unmistakable evidence that the parties decided otherwise under the terms of the arbitration agreement. *Hunt v. Rio at Rust Centre*, 2021-NMCA-043.

Arbitration agreement was procedurally unconscionable. — Where plaintiff, the personal representative of the wrongful death estate of decedent, brought a wrongful death action against defendants, a Rio Rancho skilled nursing facility and the management/employment entities for the nursing facility, following decedent's death while in defendants' care, and where the district court granted partial summary judgment to plaintiff based upon its rejection of defendants' affirmative defense regarding arbitration, which asserted that the district court lacked subject matter jurisdiction as a result of an enforceable arbitration agreement, and denied defendants' motion to compel arbitration, the district court did not err in denying defendants' motion to compel arbitration, because the manner in which arbitration was presented to decedent's attorney in fact was procedurally unconscionable. The record demonstrates that defendants had vastly superior bargaining power compared to decedent's attorney in fact and the arbitration agreement did not give decedent's attorney in fact any authority to negotiate or modify the terms of the agreement; the inequality was so gross that the weaker party's choice was rendered effectively non-existent. *Hunt v. Rio at Rust Centre*, 2021-NMCA-043.

The district court did not err in refusing to submit the issue of arbitrability to arbitration. — In a wrongful death and negligence action arising from resident's stay at a hospital run by defendants, where resident's son signed an agreement on resident's behalf in connection with resident's admission to defendants' hospital, and where, in response to plaintiff's suit for wrongful death and negligence, defendants moved to compel arbitration, and where, after a hearing on the motion, the district court entered an order denying defendants' motion to compel arbitration, the district court did not err in refusing to submit the issue of arbitrability to arbitration, because there was no clear and unmistakable evidence that the parties agreed to delegate the issue of arbitrability. Arbitrability of a particular dispute is a threshold issue to be decided by the district court unless there is clear and unmistakable evidence that the parties decided otherwise under the terms of the arbitration agreement. *Lopez v. Transitional Hospitals of N.M.*, 2023-NMCA-058.

The district court did not err in denying defendants' motion to compel arbitration. — In a wrongful death and negligence action arising from resident's stay at a hospital run by defendants, where resident's son signed an agreement on resident's behalf in connection with resident's admission to defendants' hospital, and where, in response to plaintiff's suit for wrongful death and negligence, defendants moved to compel arbitration, and where, after a hearing on the motion, the district court entered an order denying defendants' motion to compel arbitration, concluding that resident's son lacked authority to sign the agreement on resident's behalf, the district court did not err in denying defendants' motion to compel arbitration, because although resident executed a health-care directive listing her son as resident's health-care agent, the health-care directive stated that it took effect upon resident's incapacity, and defendants failed to meet their burden of showing that resident lacked capacity when her son signed the admission agreement, and thus failed in their burden of showing an agency relationship permitting resident's son to enter into arbitration on behalf of resident. *Lopez v. Transitional Hospitals of N.M.*, 2023-NMCA-058.

Arbitration agreement was supported by consideration. — Where a title loan agreement contained an arbitration provision which provided that all claims and disputes were subject to arbitration at the request of either party except the lender’s judicial and extra-judicial remedies with respect to collateral; and the agreement did not allow the lender to alter the agreement to arbitrate claims that the lender brings against the borrower, the arbitration agreement was supported by consideration. *Rivera v. American Gen. Fin. Servs., Inc.*, 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351, *rev'd*, 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803.

Unconscionable arbitration contract. — The provisions of a small loan company’s arbitration form that limited a borrower to mandatory arbitration as a forum to settle all disputes whatsoever, while reserving for the lender the exclusive option of access to the courts for all remedies the lender was most likely to pursue against a borrower, are substantively unconscionable and unenforceable. *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901.

Arbitration agreement was substantively unconscionable. — Where a nursing home admission agreement contained an arbitration agreement which provided that all disputes between the parties were subject to arbitration, but excepted guardianship proceedings, collection, and eviction actions initiated by the nursing home and disputes involving less than $2,500 from binding arbitration and provided that the excepted proceedings and actions were subject to litigation in court; and the most likely claims a nursing home would have against a resident relate to the collection of fees through guardianship proceedings and collection actions and the termination of services through eviction, the arbitration agreement was substantively unconscionable and unenforceable because the agreement exempted from arbitration the most likely claims that the nursing home would have against a resident, while subjecting the resident's most likely claims to arbitration. *Figueroa v. THI of New Mexico*, 2013-NMCA-077, cert. denied, 2012-NMCERT-010.

Savings clause in unconscionable arbitration agreement could not be applied. — Where a nursing home admission agreement contained an arbitration agreement that was unconscionable because it exempted from arbitration the most likely claims that the nursing home would have against a resident, while subjecting the resident's most likely claims to arbitration, the exemption of certain claims from arbitration was so central to the agreement that, irrespective of the savings clause in the agreement, the exemption clause was incapable of separation from the agreement to arbitrate and severing the exemption clause and requiring the resident to arbitrate a claim that was unlikely to be litigated by the nursing home would perpetuate the unfairness for which the equitable unconscionablity defense is imposed. *Figueroa v. THI of N.M.*, 2013-NMCA-077, cert. denied, 2012-NMCERT-010.

Where the terms of an arbitration agreement that plaintiff signed upon plaintiff's admission to defendants' nursing home required the parties to arbitrate all disputes associated with the agreement and the relationship created by the admission agreement, except disputes pertaining to collections or discharge of residents, the arbitration agreement was substantively unconscionable and unenforceable because the arbitration agreement permitted the nursing home to litigate its most likely and beneficial claims while excluding access to the courts for claims regarding negligent care, the most likely claims to be pursued by a resident. *Ruppelt v. Laurel Healthcare Providers, LLC*, 2013-NMCA-014, 293 P.3d 902, cert. denied, 2012-NMCERT-012.

Federal Artibration Act not applicable to unconscionable arbitration contract. — The court's ruling that the provisions of a small loan company's arbitration form that limited a borrower to mandatory arbitration as a forum to settle all disputes whatsoever, while reserving for the lender the exclusive option of access to the courts for all remedies the lender was most likely to pursue against a borrower are substantively unconscionable and unenforceable is not inconsistent with the dictates of the Federal Arbitration Act, 9 U.S.C. § 2. *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901.

Unconscionability analysis does not violate the Federal Arbitration Act. — The unconscionability analysis of arbitration agreements does not violate the Federal Arbitration Act, 9 U.S.C. §§ 1-6, because under New Mexico law, the unconscionability analysis is applied on an equal basis for all contracts to determine whether the terms of a contract are so unfairly unequal as to prevent enforcement of the contract. *Figueroa v. THI of N.M.*, 2013-NMCA-077, cert. denied, 2012-NMCERT-010.

Where the membership of a member of the National Association of Securities Dealers has lapsed, the lapsed member cannot compel arbitration with a customer under the NASD rules after the lapse of the member's NASD membership. *Medina v. Holguin*, 2008-NMCA-161, 145 N.M. 303, 197 P.3d 1085.

Terms of arbitration agreement delivered with shipment of goods. — A customer who purchases goods over the telephone or the internet; who is informed of the terms and conditions of the sale, including an arbitration agreement when the product is delivered; and who is given a specific number of days in which to return the product, is deemed to have accepted the terms and conditions, including the arbitration agreement, unless the product is returned within the specified time period. *Fiser v. Dell Computer Corp.*, 2007-NMCA-087, 142 N.M. 331 165 P.3d 328, *rev'd on other grounds*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215.

Arbitration agreement was illusory and lacked consideration. — An employer's arbitration agreement which permitted the employer to unilaterally amend or revoke the arbitration agreement at any time after a claim had accrued, but before an arbitration proceeding had been initiated, was invalid because the employer's promise to arbitrate was illusory and lacked consideration. *Flemma v. Halliburton Energy Servs. Inc.*, 2013-NMSC-022, *rev'g* 2012-NMCA-009, 269 P.3d 931.

Arbitration agreement valid under Texas law that is unconscionable under New Mexico law is not enforceable in New Mexico under Texas law. — Where an arbitration agreement between plaintiff and defendant was formed while plaintiff was working for defendant in Texas; the arbitration agreement was enforceable under Texas law; while plaintiff was working for defendant in New Mexico, defendant terminated plaintiff; and the arbitration agreement permitted defendant to unilaterally amend or revoke the agreement at any time after a claim had accrued, but before an arbitration proceeding had been initiated, the arbitration agreement was not enforceable in New Mexico under Texas law because, under New Mexico law, the arbitration agreement was unconscionable and enforcing the arbitration agreement under Texas law would violate New Mexico public policy. *Flemma v. Halliburton Energy Servs. Inc.*, 2013-NMSC-022, *rev'g* 2012-NMCA-009, 269 P.3d 931.

Arbitration agreement was not illusory. — Where the defendant's dispute resolution program included binding arbitration of all employment-related disputes; the program provided that defendant reserved the right to amend or terminate the program at any time by giving at least ten days notice to current employees and that no amendment or termination would apply to a dispute for which a proceeding had been initiated;

defendant fired plaintiff; and plaintiff sued defendant for wrongful retaliatory discharge and claimed that the arbitration agreement was not binding because it was illusory, the arbitration agreement was not illusory because defendant's right to amend any aspect of the dispute resolution program ended the moment plaintiff was fired, because plaintiff's status as a continuing employee was severed at that time. *Flemma v. Halliburton Energy Services, Inc.*, 2012-NMCA-009, 269 P.3d 931, cert. granted, 2012-NMCERT-001.

No procedural unconscionability. — Where the resident was admitted to a resident health care facility; the resident designated an agent to complete the admission paperwork; the admission agreement included a form that required the resident to either reject or accept arbitration as the method of resolving disputes; the director of the facility reviewed the admission agreement with the agent, instructed the agent to read the dispute resolution form, and explained to the agent that if the agent wanted to reject arbitration, the agent had to mark and initial the appropriate box; the dispute resolution form stated that a resident's agreement to arbitrate was not a condition to admission and explained the consequences of choosing arbitration; the agent read the admission agreement at the facility and at the agent's home; and the agent chose arbitration, the circumstances surrounding the formation of the arbitration agreement did not render the agreement void for procedural unconscionable. *Barron v. Evangelical Lutheran Good Samaritan Soc'y*, 2011-NMCA-094, 150 N.M. 669, 265 P.3d 720.

No substantative unconscionability. — An arbitration agreement that requires a buyer to arbitrate its claims against the seller, but does not require the seller to arbitrate its claims against the buyer, is not substantively unconscionable where the parties have provided each other with consideration beyond the promise to arbitrate. *Fiser v. Dell Computer Corp.*, 2007-NMCA-087, 142 N.M. 331 165 P.3d 328, *rev'd on other grounds*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215.

Arbitration provision was substantively unconscionable. — Where an arbitration provision in a loan agreement provided that the arbitrator's decision was final and binding, and that if the claim exceeded $100,000 or granted or denied injunctive relief, either party could appeal the award to a three-arbitrator panel; and the practical effect of the appeals provision was that small claims, over which the lender was unlikely to initiate proceedings, were required to be arbitrated, the lender was more likely to appeal claims that met the threshold for appealable claims, and the borrower's claims are more likely to fall below the threshold and be subject to arbitration only, the appeals provision was substantively unconscionable and unenforceable because it constituted an "escape hatch" clause that benefited the lender more than the borrower. *Clay v. N.M. Title Loans, Inc.*, 2012-NMCA-102, 288 P.3d 888, cert. denied, 2012-NMCERT-009.

Agreement to arbitrate legal malpractice requires client's informed consent. — Where an arbitration provision in an attorney-client contingency fee agreement provided that any dispute be submitted to arbitration, the arbitration provision was unenforceable absent the attorney informing his client that arbitration will constitute a waiver of important rights, including the right to a jury trial, because if an attorney is going to

require his client, within the context of their relationship of trust, to waive the right to a jury trial for a future malpractice dispute, such a waiver should be made knowingly with the client's informed consent. For the purposes of obtaining informed consent, adequate communication will ordinarily include disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. *Castillo v. Arrieta*, 2016-NMCA-040, cert. denied.

An arbitration clause is not unconscionable because it precludes class actions. *Fiser v. Dell Computer Corp.*, 2007-NMCA-087, 142 N.M. 331 165 P.3d 328, cert. granted, 2007-NMCERT-006, *rev'd*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215.

Denial of trial by jury. — A purchaser who is compelled to arbitrate based not on a statute, but on an arbitration agreement that is voluntarily entered into by the parties, is not denied the constitutional right to trial by jury. *Fiser v. Dell Computer Corp.*, 2007-NMCA-087, 142 N.M. 331 165 P.3d 328, rev'd on other grounds, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215.

Legally enforceable contract required. – Under either the Federal Arbitration Act, 9 U.S.C. §§ 1-16, or the New Mexico Uniform Arbitration Act, a legally enforceable contract is a prerequisite to arbitration; without such a contract, parties will not be forced to arbitrate. *Heye v. Am. Golf Corp.*, Inc., 2003-NMCA-138, 134 N.M. 558, 80 P.3d 495.

Authority of agent to agree to arbitration. — Where the resident, who was mentally competent, alert and oriented, was admitted to a resident health care facility; the resident declined to complete the admission paperwork and told the director of the facility that the principal's grandchild would complete the paperwork; the grandchild told the director that the grandchild was assuming responsibility for the resident's care; the paperwork included a form that required the resident to either reject or accept arbitration as the method of resolving disputes; and the grandchild completed the paperwork and accepted arbitration, the grandchild had actual authority, which was not limited by the resident, and apparent authority to decide whether to reject or accept the arbitration clause in the admission agreement that was signed as part of the admission process and the grandchild's decision to accept arbitration was binding on the principal. *Barron v. Evangelical Lutheran Good Samaritan Soc'y*, 2011-NMCA-094, 150 N.M. 669, 265 P.3d 720.

Under Federal Arbitration Act, whether valid contract to arbitrate exists is question of state contract law. *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, 134 N.M. 630, 81 P.3d 573, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Determination of existence of arbitration agreement. — A court may not delegate to the arbitrator the court's obligation to decide the threshold issue of the existence of a binding arbitration agreement. *Edward Family Ltd. P'ship v. Brown*, 2006-NMCA-083,

140 N.M. 104, 140 P.3d 525, cert. denied, 2006-NMCERT-005, 139 N.M. 567, 136 P.3d 568.

Burden of proof of unconscionability. — Unconscionability is an affirmative contract defense and the party alleging unconscionability has the burden to prove that the contract is unenforceable on that basis. *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, *rev'g* 2012-NMCA-006, 269 P.3d 914.

Burdens of proof. — The party seeking to compel arbitration bears the initial burden to prove that a valid contract exists, by generally showing that the contract is factually supported by an offer, an acceptance, consideration and mutual assent. Once the party who seeks to compel arbitration has satisfied the initial burden of proving the formation of a valid contract, the burden shifts to the party opposing arbitration to demonstrate that an affirmative defense, such as unconscionability, renders the contract unenforceable. *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, *rev'g* 2012-NMCA-006, 269 P.3d 914.

Burden of proof of validity. — When a nursing home relies upon an arbitration agreement signed by a patient as a condition for admission to the nursing home, and the patient contends that the arbitration agreement is unconscionable, the nursing home has the burden of proving that the arbitration agreement is not unconscionable. *Strausberg v. Laurel Healthcare Providers, LLC*, 2012-NMCA-006, 269 P.3d 914, cert. granted, 2012-NMCERT-001, *rev'd*, 2013-NMSC-032.

District court did not shift burden of proving unconscionability. — The proponent of the affirmative defense of unconscionability bears the burden of proof, and where a party fails to adequately rebut an argument that an exemption from arbitration provision is unreasonably one-sided, the district court's agreement with the argument does not impermissibly shift the burden of proof. *Dalton v. Santander Consumer USA, Inc.*, 2015-NMCA-030, *rev'd on other grounds*, 2016-NMSA-035.

Rule preempted by the Federal Arbitration Act. — The rule that a nursing home seeking to compel arbitration has the burden of proving that the arbitration agreement is not unconscionable is preempted by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, because the rule singles out arbitration agreements for special treatment by presuming that all nursing home arbitration agreements are unconscionable. *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, *rev'g* 2012-NMCA-006, 269 P.3d 914.

The Federal Arbitration Act does not preempt the application of New Mexico's unconscionability doctrine to arbitration exemptions. — The New Mexico supreme court has consistently upheld the application of New Mexico's generally applicable unconscionability doctrine to one-sided arbitration agreements, consistent with the savings clause of the Federal Arbitration Act, 9 U.S.C. § 2, which permits state courts to invalidate agreements to arbitrate via generally applicable contract defenses, such as fraud, duress or unconscionability, but not by defenses that apply only to arbitration or

that derive their meaning from the fact that an agreement to arbitrate is at issue. *Dalton v. Santander Consumer USA, Inc.*, *rev'd on other grounds*, 2016-NMSA-035.

The employer failed to prove the elements of acceptance and mutual assent to an arbitration agreement contained in materials mailed to the employee's home which provided that continued employment would constitute acceptance of the agreement where there was no evidence that the employee actually read the agreement and the employer did not provide an agreement or acknowledgment form for the employee to sign; the court would not equate presumed receipt with actual knowledge. *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, 134 N.M. 630, 81 P.3d 573, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Arbitration agreement to be interpreted by rules of contract law. — A valid arbitration contract must possess mutuality of obligation; mutuality means both sides must provide consideration. *Heye v. Am. Golf Corp., Inc.*, 2003-NMCA-138, 134 N.M. 558, 80 P.3d 495.

Where an employment arbitration agreement was a preprinted form contract and there was no suggestion that the employer sought or received any input from the employee in connection with the drafting of the language, the agreement would be construed against the employer-drafter where it contained conflicting provisions. *Heye v. Am. Golf Corp., Inc.*, 2003-NMCA-138, 134 N.M. 558, 80 P.3d 495.

An employment arbitration agreement which contained conflicting provisions as to whether it was binding on the employer, construed against the employer, gave the employer unfettered discretion to terminate arbitration at any time; the promise, therefore, was illusory and did not provide the consideration necessary to enforce the arbitration agreement. *Heye v. Am. Golf Corp., Inc.*, 2003-NMCA-138, 134 N.M. 558, 80 P.3d 495.

The terms of the arbitration agreement are to be interpreted by the rules of contract law. *Christmas v. Cimarron Realty Co.*, 1982-NMSC-079, 98 N.M. 330, 648 P.2d 788.

Arbitrator must initially determine scope of arbitration. — Where an employee agreed to arbitrate the employee's grievances; the arbitration agreement provided that the arbitration would resolve all matters raised in the employee's complaint and that the arbitrator had exclusive authority to resolve disputes relating to the scope of the arbitration agreement; there was a dispute between the employer and the employee as to the scope of the arbitration; the employee agreed with the employer to narrow the scope of the arbitration, while unilaterally reserving the right to litigate other issues; the employee did not raise the scope-of-arbitration issues with the arbitrator; the arbitrator ruled in favor of the employee; and the employee subsequently filed a lawsuit in which the employee alleged more expansive claims arising out of the same subject matter as the arbitration agreement, the employee was obligated to obtain a scope-of-arbitration ruling first from the arbitrator, and because the employee never obtained a ruling, the

district court correctly dismissed the lawsuit. *Home v. Los Alamos Nat'l Sec., L.L.C.*, 2013-NMSC-004, 296 P.3d 478.

Unforeseeable conduct is not within the scope of an arbitration provision. — Claims based on conduct that is unforeseeable to the parties at the time of entering into an agreement, including an arbitration provision, are not within the scope of the arbitration provision as a matter of law. *Clay v. N.M. Title Loans, Inc.*, 2012-NMCA-102, 288 P.3d 888, cert. denied, 2012-NMCERT-009.

Tort claim was not within scope of arbitration provision in loan agreement. — Where borrower signed a loan agreement with lender and used borrower's truck to secure the loan; the arbitration clause in the loan agreement required arbitration of any claim between borrower and lender that arose from or related to the agreement or the borrower's truck; borrower failed to repay the loan; when borrower resisted the attempt by employees of a repossession business to repossess the truck for lender, one of the employees shot borrower; and borrower sued lender alleging tort claims arising out of the shooting, borrower's tort claims were not within the scope of the arbitration provision because illegal or negligent conduct during repossession was outside the scope of the loan agreement and the arbitration provision. *Clay v. N.M. Title Loans, Inc.*, 2012-NMCA-102, 288 P.3d 888, cert. denied, 2012-NMCERT-009.

Arbitration agreement valid under Texas contract law was enforceable in New Mexico. — Where, during the course of plaintiff's twenty-six years of employment with defendant, defendant on four separate mailings notified plaintiff that continued employment with defendant constituted plaintiff's acceptance of the terms of defendant's dispute resolution program, which included binding arbitration of all employment-related disputes; when plaintiff was assigned to work for defendant's international organization, plaintiff signed an agreement that plaintiff would remain employed by defendant and the terms of defendant's dispute resolution program would apply to plaintiff; while plaintiff was working for defendant in New Mexico, plaintiff sued defendant for wrongful and retaliatory discharge; under Texas law, plaintiff was presumed to have received the mailings and plaintiff's continued employment with defendant constituted acceptance of defendant's dispute resolution program; under New Mexico law, an employer is required to prove that an employee had actual notice of an offer and actual acknowledgement that continued employment constituted acceptance of the offer; and the only difference between Texas and New Mexico law was the evidentiary requirements of contract formation, the mere difference between Texas and New Mexico in terms of the evidentiary requirements of contract formation were insufficient to overcome the place-of-formation rule on public policy grounds, the arbitration agreement was enforceable under Texas law, and plaintiff was bound to arbitration. *Flemma v. Halliburton Energy Services, Inc.*, 2012-NMCA-009, 269 P.3d 931, cert. granted, 2012-NMCERT-001.

Test to determine whether a court may designate an arbitration provider. — If the parties' designation of a particular arbitration provider was integral to the parties' agreement to arbitrate, then the court cannot appoint a substitute arbitrator if the

designated arbitrator is not available. If the parties' designation of an arbitration provider was an ancillary logistical concern, a court can appoint a substitute provider. An arbitration provider is an ancillary logistical concern where the arbitration provisions do not specifically designate a provider or give the parties a choice of providers. The express designation of a single arbitration provider; the designation of the rules of a specific arbitration provider; and mandatory, as opposed to permissive, contractual language are factors that indicate that a particular provider is integral to the parties' agreement to arbitrate. *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803, *rev'g* 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351.

Arbitration agreement was unenforceable. — Where the arbitration provision in a title loan agreement named the National Arbitration Forum exclusively throughout the provisions of the agreement, provided that the arbitration would be conducted under the rules and procedures of the National Arbitration Forum, required the parties to use the forms prescribed by the National Arbitration Forum, required the National Arbitration Forum to provide a list of potential arbitrators, provided that the National Arbitration Forum would determine the costs each party would pay; and the National Arbitration Forum was precluded from arbitrating consumer disputes, the arbitration provision was unenforceable because arbitration before the National Arbitration Forum was integral to the agreement to arbitrate, precluding a court from appointing a substitute arbitrator. *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803, *rev'g* 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351.

Agreement defines scope of jurisdiction of arbitration. — Parties contracting to resolve disputes by arbitration are bound by their agreement. The terms of the agreement define the scope of the jurisdiction, conditions, limitations and restrictions on the matters to be arbitrated. *Christmas v. Cimarron Realty Co.*, 1982-NMSC-079, 98 N.M. 330, 648 P.2d 788.

Claim not within the scope of arbitration provision. — Where the focus of the arbitration provision contained in a warranty package for new homes was on the warranty against defects and the repair and replacement of covered defects in the new homes, and even though the arbitration provision included claims of breach of contract and negligent or intentional misrepresentation, the arbitration provision did not apply to representations made to prospective purchasers that the land adjacent to the new homes would remain open space. *Campos v. Homes by Joe Boyden, LLC*, 2006-NMCA-086, 140 N.M. 122, 140 P.3d 543, cert. denied, 2006-NMCERT-007, 140 N.M. 279, 142 P.3d 360.

Waiver of exclusive authority of arbitrator to decide arbitrability. — Where the terms of an arbitration agreement that plaintiff signed upon plaintiff's admission to defendants' nursing home required the parties to arbitrate all disputes associated with the agreement and the relationship created by the admission agreement, except disputes pertaining to collections or discharge of residents; plaintiff challenged the enforceability of the entire arbitration agreement; and defendants voluntarily addressed the enforceability of the arbitration agreement in district court and never suggested that

the district court did not have authority to address the issue, defendants waived their argument that the arbitrator had exclusive authority to decide arbitrability. *Ruppelt v. Laurel Healthcare Providers, LLC*, 2013-NMCA-014, 293 P.3d 902, cert. denied, 2012-NMCERT-012.

Where arbitration agreement was not supported by consideration, no contract was formed. *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, 137 N.M. 57, 107 P.3d 11, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 73.

Continued at-will employment is an illusory promise that cannot be consideration for an arbitration agreement. *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, 137 N.M. 57, 107 P.3d 11, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 73.

Arbitration agreement will be given broad interpretation. — When the parties agree to arbitrate any potential claims or disputes arising out of their relationships by contract or otherwise, the arbitration agreement will be given broad interpretation, unless the parties themselves limit arbitration to specific areas or matters. Barring such limiting language, the courts only decide the threshold question of whether there is an agreement to arbitrate. *K.L. House Constr. Co. v. City of Albuquerque*, 1978-NMSC-025, 91 N.M. 492, 576 P.2d 752.

Ability to unilaterally change agreement. — One party's promise to arbitrate is illusory where it retained the ability to unilaterally change the arbitration agreement. *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, 137 N.M. 57, 107 P.3d 11, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 73.

Forum for resolution of disputed interpretation. — Where a complaint for declaratory judgment raises questions of law arising from the disputed interpretation of an arbitration contract, the proper forum for resolution of such questions is the trial court. *Guaranty Nat'l Ins. Co. v. Valdez*, 1988-NMSC-090, 107 N.M. 764, 764 P.2d 1322.

Arbitration not binding. — To the extent that, pursuant to contract, arbitration is not binding, there exists no arbitration agreement to be bound by an arbitrator's award, and, therefore, a party with a contractual right to an appeal de novo, as well as an aggrieved party under Section 66-5-303 NMSA 1978, the de novo trial provision of the uninsured motorist insurance law, has a right to seek a de novo trial in district court. *Allstate Ins. Co. v. Perea*, 2000-NMCA-070, 129 N.M. 364, 8 P.3d 166, *overruled by Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901.

When trial court determines force of disputed contract. — When a petition is filed to compel arbitration pursuant to a contract's arbitration clause and the responding party denies the existence or validity of the contract, the trial court must determine whether the contract is still in force to compel the requested arbitration. *Gonzales v. United S.W. Nat'l Bank*, 1979-NMSC-086, 93 N.M. 522, 602 P.2d 619.

Arbitration provision providing for limited de novo appeal substantively unconscionable. — The limited de novo appeal provision in an insurance contract, providing for mandatory arbitration which would be binding on both parties for any award of damages not exceeding the limits of the Mandatory Financial Responsibility Act but providing for de novo appeal by either party of awards over that amount, violates public policy and is void as substantively unconscionable. *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901.

Question of arbitrability is for the court to decide. — Where plaintiff filed a class action to challenge the validity of an online loan agreement; the loan agreement contained an arbitration provision in which the parties delegated questions of arbitrability to the arbitrator; plaintiff did not specifically challenge the validity of the delegation clause in the complaint; and when defendants filed motions to compel arbitration, plaintiff raised specific challenges to the validity of the delegation clause that were distinct from the challenges to the loan agreement, the court, not the arbitrator, had jurisdiction to determine the question of the validity of the arbitration provision. *Felts v. CLK Mgmt., Inc.*, 2011-NMCA-062, 149 N.M. 681, 254 P.3d 124, cert. granted, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633.

Court had jurisdiction to determine the scope of arbitration provision. — Where an arbitration provision in a loan agreement contained a "delegation provision" which defined an arbitrable "claim" to include disputes about the validity, enforceability, arbitrability, or scope of the arbitration provision, and the borrower specifically challenged the delegation provision by arguing that there was fraud in the inducement based on an alleged misrepresentation by the lender of the neutrality of the two organizations identified to administer the arbitration proceedings, and the fact that both organizations had stopped administrating arbitration of collections and that borrower justifiably relied on the representation of neutrality, the court had jurisdiction to determine the scope of the arbitration provision. *Clay v. N.M. Title Loans, Inc.*, 2012-NMCA-102, 288 P.3d 888, cert. denied, 2012-NMCERT-009.

Ban on class-wide arbitration was unconscionable. — Where a loan agreement contained an arbitration provision that banned class-wide arbitration and substantial evidence showed that the likelihood that plaintiff's costs in bringing an individual claim would exceed plaintiff's damages was reasonably certain and that a meaningful remedy for plaintiff's claims was only available through class action relief, the class action ban in the arbitration provision was substantively unconscionable and unenforceable. *Felts v. CLK Mgmt., Inc.*, 2011-NMCA-062, 149 N.M. 681, 254 P.3d 124, cert. granted, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633.

Ban on class-wide arbitration was not severable from arbitration provision. — Where a loan agreement contained an arbitration provision that banned class-wide arbitration; the class action ban was a key limitation to the means by which the parties could resolve their disputes under the loan agreement; the class action ban was substantively unconscionable and unenforceable; and the class action ban was not severable from the remainder of the arbitration provision, the entire arbitration provision

was unenforceable. *Felts v. CLK Mgmt., Inc.*, 2011-NMCA-062, 149 N.M. 681, 254 P.3d 124, cert. granted, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 70 et seq.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction, 12 A.L.R.3d 892.

Validity and construction of provision for arbitration of disputes as to alimony or support payments, or child visitation or custody matters, 38 A.L.R.5th 69.

Validity and enforceability of provision for binding arbitration, and waiver thereof, 24 A.L.R.3d 1325.

Validity and construction of agreement between attorney and client to arbitrate disputes arising between them, 26 A.L.R.5th 107.

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A.L.R.5th 757.

Validity and effect under state law of arbitration agreement provision for laternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement, 75 A.L.R.5th 595.

Validity and effect under Federal Arbitration Act (9 U.S.C.A. § 1 et seq.) of arbitration agreement provision for alternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement, 159 A.L.R. Fed. 1

6 C.J.S. Arbitration § 14.

44-7A-8. Motion to compel or stay arbitration.

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) if the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) if the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed

summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement, it may not pursuant to Subsection (a) or (b) order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section must be made in that court. Otherwise, a motion under this section may be made in any court as provided in Section 28 [44-7A-28 NMSA 1978].

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

History: Laws 2001, ch. 227, § 8.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

No right to compel arbitration. — Where defendants offered investment packages to the public that consisted of interests in real property; plaintiff invested in three properties; defendants created the third parties to act as the seller of the real property; the purchase agreements contained arbitration clauses; plaintiff sued defendants for violations of the New Mexico Securities Act of 1986, Section 58-13B-1 NMSA 1978 et seq. [repealed]; plaintiff did not assert any claims against the third parties or allege any interdependent or concerted misconduct between defendants and the third parties; defendants filed complaints against the third parties for indemnity on the ground that the third parties sold the real property interests that comprised the alleged securities that plaintiff bought; defendants asserted the affirmative defense that plaintiff's claims were subject to the arbitration clauses in the purchase agreements; and the third parties filed a motion to compel arbitration on all disputes, defendants did not have an independent right to compel arbitration because the alleged violations of the Securities Act did not hinge on the terms of the purchase agreements and the third parties could not assert

the arbitration defense because it could not be independently asserted by defendants. *Frederick v. Sun 1031, LLC*, 2012-NMCA-118, 293 P.3d 934.

An arbitration agreement contrary to public policy will not be enforced. — Where the state of New Mexico filed suit against ITT Technical Institute (ITT) claiming violations of the New Mexico Unfair Practices Act (UPA) arising out of alleged misrepresentations to students about ITT's nursing program and its financial process, and where ITT filed a motion to compel arbitration in accordance with the arbitration provision, and accompanying confidentiality clause, in the students' enrollment agreements with ITT, which provided that any dispute be resolved by binding arbitration, the district court properly declined to enforce the confidentiality clause and properly denied ITT's motion to compel arbitration, because the state, under the UPA, has been given broad statutory authority to investigate violations and enforce the provisions of the UPA demonstrating New Mexico's fundamental public policy in favor of preventing consumer harm and resolving consumer claims, and it would be contrary to public policy to allow ITT to use the confidentiality clause with its students to shield itself from the state's investigation and litigation authorized under the UPA. *State ex rel. Balderas v. ITT Educ. Servs., Inc.*, 2018-NMCA-044.

Arbitration agreement required. — The district court may not compel arbitration absent an arbitration agreement. *Alexander v. Calton & Assocs., Inc.*, 2005-NMCA-034, 137 N.M. 293, 110 P.3d 509.

Waiver. — A mere request for arbitration filed with the NASD cannot by itself be sufficient to waive the right to contest arbitration and require proof of the existence of an arbitration agreement in court. *Alexander v. Calton & Assocs., Inc*., 2005-NMCA-034, 137 N.M. 293, 110 P.3d 509.

Valid arbitration defense does not divest the court of jurisdiction and is not properly raised by a motion to dismiss for lack of subject matter jurisdiction. When parties have agreed to arbitrate, however, a court should order arbitration. *Daniels Ins. Agency, Inc. v. Jordan*, 1982-NMSC-148, 99 N.M. 297, 657 P.2d 624.

Role of court. — Under this section, it is the court's duty to order arbitration where provision for it is clear. Where provision for arbitration is disputed, the court's function is to determine whether there is an agreement to arbitrate and to order arbitration where an agreement to arbitrate is found. *Bernalillo Cnty. Med. Ctr. Employees' Ass'n Local 2370 v. Cancelosi*, 1978-NMSC-086, 92 N.M. 307, 587 P.2d 960.

Issue of whether an arbitration agreement was formed between the parties must always be decided by a court. — The issue of whether a non-signatory can be bound by an arbitration agreement is a matter of contract formation for the district court to decide in the first instance, because the issue of whether an arbitration agreement was formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause or whether one of the parties specifically challenged such a clause. Accordingly, when faced with a motion to compel

arbitration, the court must first determine whether the parties to the litigation have agreed to arbitrate. *Szantho v. THI of N.M. at Sunset Villa*, 2025-NMCA-006, cert. granted.

In a wrongful death lawsuit where the personal representative of decedent's estate filed claims against defendant, a long term care facility, claiming that the decedent died due to a number of injuries he suffered during his stay at the long term care facility, and where defendant filed a motion to compel arbitration, asserting that decedent's son had signed the arbitration agreement both in his individual capacity and on behalf of decedent and that the arbitration agreement could be enforced against decedent's estate because the decedent was a third-party beneficiary of the agreement, the district court did not err in determining that it was for the district court, rather than the arbitrator, to decide in the first instance whether defendant and decedent agreed to arbitrate. *Szantho v. THI of N.M. at Sunset Villa*, 2025-NMCA-006, cert. granted.

Third-party beneficiary doctrine did not provide a basis for binding plaintiff to the arbitration agreement. — In a wrongful death lawsuit where the personal representative of decedent's estate filed claims against defendant, a long term care facility, claiming that the decedent died due to a number of injuries he suffered during his stay at the long term care facility, and where defendant filed a motion to compel arbitration, asserting that decedent's son had signed the arbitration agreement both in his individual capacity and on behalf of decedent and that the arbitration agreement could be enforced against decedent's estate because the decedent was a third-party beneficiary of the agreement, the district court did not err in concluding that the agreement was not enforceable in this case because there was no evidence that decedent accepted the arbitration agreement after it was made. The general rule in New Mexico is that nonparties to an arbitration agreement generally are not bound by the agreement and are not subject to arbitration. *Szantho v. THI of N.M. at Sunset Villa*, 2025-NMCA-006, cert. granted.

Arbitrability to be decided by the district court unless parties agree otherwise. — The general rule is that the arbitrability of a particular dispute is a threshold issue to be decided by the district court unless there is clear and unmistakable evidence that the parties decided otherwise under the terms of their arbitration agreement; a court shall order the parties to arbitrate if it finds that there is an enforceable agreement to do so. *Juarez v. THI of New Mexico at Sunset Villa*, 2022-NMCA-056.

A delegation clause challenge. — A challenge to a delegation clause will receive judicial review when the delegation clause itself is specifically challenged on such grounds as exist at law or in equity for the revocation of any contract. A sufficiently specific challenge is one that discusses the language or the application and enforcement of the delegation clause. *Sanchez v. United Debt Counselors, LLC*, 2024-NMSC-026, *rev'g* A-1-CA-40164, mem. op. (N.M. Ct. App. Aug. 17, 2022) (nonprecedential).

Plaintiff challenged the delegation clause with sufficient specificity. — Where plaintiff filed a class action complaint against defendant for damages for alleged violations of the New Mexico Unfair Practices Act (UPA), 57-12-1 to 57-12-26 NMSA 1978, and where defendant filed a motion to compel arbitration, citing an arbitration clause in its contract with plaintiff, and where the district court granted defendant's motion to compel arbitration, but declined to rule on whether the waiver of attorney's fees renders the arbitration agreement unconscionable on the basis that the delegation clause gives the arbitrator the authority to decide that issue or whether the delegation clause itself is unconscionable, the district court erred in granting defendant's motion to compel arbitration, because plaintiff challenged the delegation clause with sufficient specificity, claiming that the delegation clause stripped her of an award of attorney's fees and costs for successfully litigating threshold issues, in violation of the UPA, and therefore it was for the district court in the first instance to determine whether the delegation clause was valid and enforceable. *Sanchez v. United Debt Counselors, LLC*, 2024-NMSC-026, *rev'g* A-1-CA-40164, mem. op. (N.M. Ct. App. Aug. 17, 2022) (nonprecedential).

Delegation clause presented clear and unmistakable evidence the parties intended to have an arbitrator decide the threshold issue of arbitrability. — Where plaintiff was admitted to a care facility for rehabilitation following knee replacement surgery, and where, as a condition of her admission, signed an arbitration agreement, and where, approximately seven months after her admission, plaintiff filed a complaint against defendant alleging claims of medical negligence and negligent hiring, training, supervision, and retention of employees, and where defendant moved to compel arbitration, asserting that there was no dispute that plaintiff signed the agreement for dispute resolution, that defendant was entitled to enforce the agreement, that the agreement was a valid, enforceable agreement supported by consideration, and that the delegation clause clearly required any questions about arbitrability be submitted to the arbitrator, the district court erred in denying defendant's motion to compel arbitration, because there was a valid contract, supported by consideration, to arbitrate between the parties, and the delegation clause clearly and unmistakably delegated questions of arbitrability to the arbitrator. *Juarez v. THI of New Mexico at Sunset Villa*, 2022-NMCA-056.

Standard for granting motion. — As with a summary judgment motion, a motion to compel arbitration may only be granted as a matter of law when there is no genuine issue of material fact as to the existence of an agreement; only then should the court decide the existence of the agreement as a matter of law. *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, 134 N.M. 630, 81 P.3d 573, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Motion to compel arbitration denied where contract contained conflicting arbitration provisions. — In a class action complaint, where plaintiff alleged that defendant violated New Mexico consumer protection law by charging more than the advertised price for a vehicle that plaintiff purchased from defendant, and where defendant moved to compel arbitration, arguing that although the parties entered into

two contracts with contradictory arbitration provisions, the finance agreement was an integrated contract that superseded and replaced the buyer's agreement, resolving any conflict between the arbitration provisions in the two contracts, the district court did not err in denying defendant's motion to compel arbitration, because the merger clause relied on by defendant did not express the parties' intent that the finance agreement supersede or replace the buyer's agreement or the buyer's agreement arbitration provision; there was therefore no meeting of the minds between the parties as to arbitration, and no enforceable agreement to arbitrate. *Martinez v. Gales Chevrolet Co.*, 2024-NMCA-051, cert. denied.

Equitable estoppel is applicable. — A nonparty to a contract may be equitably estopped from refusing to comply with a reasonable arbitration provision contained in the contract where the nonparty attempts to enforce some aspect of the contract. *Damon v. StrucSure Home Warranty, LLC*, 2014-NMCA-116.

Nonparties to an arbitration agreement. — Plaintiffs, as subsequent purchasers of a home and nonparties to a home warranty agreement, are bound by an arbitration provision contained in the warranty agreement if they directly seek the benefits of the warranty agreement. *Damon v. StrucSure Home Warranty, LLC*, 2014-NMCA-116.

Non-signatory to an arbitration agreement compelling arbitration. — Where plaintiff, a subcontractor that provided roofing labor, materials, and equipment for an apartment construction project, brought an action against the insurance company that issued a payment bond to cover the contractor's obligation to pay for labor, materials, and equipment, in an attempt to collect on a payment bond that provided the right to bring a lawsuit in the event of nonpayment by the contractor, and where the insurance company moved to compel plaintiff to arbitrate its claim pursuant to the arbitration clause in the contract between plaintiff and the contractor, and where plaintiff claimed that the insurance company, as a nonparty to the subcontract, is not entitled to enforce the arbitration agreement, the court held that plaintiff is equitably estopped from disavowing the arbitration agreement, because when a signatory to an arbitration agreement must rely on the terms of the agreement in making a claim against a non-signatory, equitable estoppel may apply to allow a non-signatory to compel arbitration. *Rock Roofing, LLC v. Travelers Cas. & Sur. Co. of America*, 413 F. Supp. 3d 1122 (D. N.M. 2019).

Uninsured motorist claim. — New Mexico law does not require arbitration of an uninsured motorist claim upon the unilateral demand of either the insurer or the insured where the insurance policy states that disputes regarding whether the insured is entitled to receive payment under the policy, or the amount of payment due, will be submitted to arbitration only if both the insurer and insured consent. *McMillian v. Allstate Indem. Co.*, 2004-NMSC-002, 135 N.M. 17, 84 P.3d 65.

No judicial power to compel consolidated arbitration. — Absent express statutory authorization or agreement of all concerned parties, district court had no power to

compel consolidated arbitration. *Pueblo of Laguna v. Cillessen & Son*, 1984-NMSC-060, 101 N.M. 341, 682 P.2d 197.

When trial court determines force of disputed contract. — When a petition is filed to compel arbitration pursuant to a contract's arbitration clause and the responding party denies the existence or validity of the contract, the trial court must determine whether the contract is still in force to compel the requested arbitration. *Gonzales v. United S.W. Nat'l Bank*, 1979-NMSC-086, 93 N.M. 522, 602 P.2d 619.

Right to arbitration not waived. — Where between the date a complaint was filed and the date a motion for arbitration was filed, the only pleadings filed were: (1) a complaint; (2) a motion to dismiss; (3) a first amended complaint; and (4) a motion requesting the trial court to submit the issues to arbitration, the case was not at issue and the right to arbitration had not been waived. *Bernalillo Cnty. Med. Ctr. Employees' Ass'n Local 2370 v. Cancelosi*, 1978-NMSC-086, 92 N.M. 307, 587 P.2d 960.

Right to arbitration not waived by mere filing of complaint. — When the demand for arbitration follows initiation of proceedings in court, going to the merits of the dispute, a question of waiver is sometimes raised, but the mere filing of a complaint does not constitute a waiver of a right to arbitration. *Bernalillo Cnty. Med. Ctr. Employees' Ass'n Local 2370 v. Cancelosi*, 1978-NMSC-086, 92 N.M. 307, 587 P.2d 960.

Unlicensed business cannot compel arbitration. — Texas corporations unauthorized to do business in New Mexico were unable to compel two dentists to arbitrate a dispute arising from an alleged breach of architectural and construction contracts for the construction of dental offices because a suit to compel arbitration is essentially a suit for specific performance and the corporations, not licensed to do business in New Mexico, cannot perform. *Shaw v. Kuhnel & Assocs.*, 1985-NMSC-008, 102 N.M. 607, 698 P.2d 880.

Fraud in the inducement not issue for arbitrator. — It is for a court to determine issues of fraud in the inducement of a contract, not an arbitrator; if no fraud is found, the remaining issues can proceed to arbitration. *Shaw v. Kuhnel & Assocs.*, 1985-NMSC-008, 102 N.M. 607, 698 P.2d 880.

Arbitration agreement was not illusory or unconscionable. — Where employee brought an action against employer, alleging sex and race discrimination under Title VII of the Civil Rights Act of 1964 and the New Mexico Human Rights Act, negligent hiring and supervision, and wrongful discharge, and where employer moved to compel arbitration claiming that the parties had a binding arbitration agreement, and where employee claimed that the arbitration agreement was unenforceable because it was illusory and unconscionable, the court granted the motion to compel arbitration because the employee's claims were within the scope of the arbitration agreement, the arbitration agreement was not illusory because both parties provided adequate consideration, and the arbitration agreement was not unconscionable because employee had the opportunity and capacity to understand the agreement, and the arbitration agreement's

terms were not patently unfair. *Laurich v. Red Lobster Restaurants, LLC*, 295 F.Supp.3d 1186 (D. N.M. 2017).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 126 et seq.

Disqualification of arbitrator by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion or fraud of arbitrators, 65 A.L.R.2d 755.

Statute of limitations as bar to arbitration under agreement, 94 A.L.R.3d 533.

Defendant's participation in action as waiver of right to arbitration of dispute involved therein, 98 A.L.R.3d 767.

Which statute of limitations applies to efforts to compel arbitration of a dispute, 77 A.L.R.4th 1071.

What statute of limitations applies to action to compel arbitration pursuant to § 301 of Labor Management Relations Act (29 USCS § 185), 96 A.L.R. Fed. 378.

6 C.J.S. Arbitration §§ 30 to 32, 39, 45, 46.

44-7A-9. Provisional remedies.

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) the arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) a party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a motion under Subsection (a) or (b).

History: Laws 2001, ch. 227, § 9.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

44-7A-10. Initiation of arbitration.

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under Section 16(c) [44-7A-16 NMSA 1978] not later than the beginning of the arbitration hearing, the person by appearing at the hearing waives any objection to lack of or insufficiency of notice.

History: Laws 2001, ch. 227, § 10.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 177.

6 C.J.S. Arbitration § 76.

44-7A-11. Consolidation of separate arbitration proceedings.

(a) Except as otherwise provided in Subsection (c), upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;

(2) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

History: Laws 2001, ch. 227, § 11.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

No judicial power to compel consolidated arbitration. — Absent express statutory authorization or agreement of all concerned parties, district court had no power to compel consolidated arbitration. *Pueblo of Laguna v. Cillessen & Son*, 1984-NMSC-060, 101 N.M. 341, 682 P.2d 197.

Consolidation may be ordered even if no arbitration proceeding is pending, provided there are agreements to arbitrate. *Lyndoe v. D.R. Horton, Inc.*, 2012-NMCA-103, 287 P.3d 357.

The question of whether to consolidate separate arbitrations is a threshold question for the district court and does not require definitive proof. *Lyndoe v. D.R. Horton, Inc.*, 2012-NMCA-103, 287 P.3d 357.

Elements supporting consolidation were satisfied. — Where the owners of homes asked the district court to compel defendants to litigate their claims in a consolidated arbitration; the dispute was subject to the arbitration clause in the owners' purchase agreements; the owners' claims arose out of their purchase of homes built and sold by defendants in the same subdivision; defendants based the subdivision's site development plan on a geotechnical report prepared by a consultant employed by defendants; and the owners alleged that they experienced similar deficiencies in the homes, many of which were caused by the settlement of subsurface soils, that their claims shared common issues involving the settlement of their homes and similar damages, that multiple separate arbitrations could result in conflicting decisions, that any prejudice to defendants did not outweigh the potential prejudice of conflicting

outcomes that could result from a failure to consolidate, and that a consolidated proceeding would be more efficient than separate proceedings, the owners satisfied all of the elements required for consolidation, and the district court did not abuse its discretion by consolidating the arbitrations between the owners and defendants. *Lyndoe v. D.R. Horton, Inc.*, 2012-NMCA-103, 287 P.3d 357.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 178.

Consolidation by federal court of arbitration proceedings brought under Federal Arbitration Act (9 USCS § 4), 104 A.L.R. Fed. 251.

44-7A-12. Appointment of arbitrator; service as a neutral arbitrator.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed unless the method fails. If the parties have not agreed on a method, the agreed method fails or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

History: Laws 2001, ch. 227, § 12.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Terms of arbitration agreement govern disqualification of arbitrator. — Where defendants and contractor, who was hired to do concrete and framing work on defendants' property, entered into a binding arbitration agreement following a dispute regarding money due on construction work at defendants' property, and where contractor subsequently requested that the arbitrator be disqualified for refusing to perform his duties and for non-neutrality, the district court did not abuse its discretion in concluding that the parties' arbitration was subject to all the rules and procedures of the American Arbitration Association (AAA), including the rule regarding disqualification of an arbitrator and that the AAA has the authority to disqualify a designated arbitrator if the AAA determines that such a disqualification is warranted under its rules and procedures, because the natural construction of the parties' arbitration agreement was

that the parties intended to arbitrate disputes between them under all the AAA rules, and there was no language of limitation in the arbitration agreement demonstrating an intent to limit the scope of the AAA's rules. *L.D. Miller Construction, Inc. v. Kirschenbaum*, 2017-NMCA-030.

Arbitrator's right to appeal district court order vacating arbitration award. — Where husband and wife dissolved their marriage by stipulated judgment, and where, following a dispute over the implementation of the stipulated judgment, husband and wife entered into a settlement agreement that required the parties to submit all disputes or claims to final and binding arbitration, and where the district court vacated the arbitrator's arbitration award and disqualified the arbitrator from serving as arbitrator, finding that the arbitrator demonstrated evident partiality, the arbitrator had the right to appeal the district court's order because the arbitrator was a party under the settlement agreement and the district court's order directly and sufficiently aggrieved the arbitrator such that he had a right to appeal the order. *Rogers v. Red Boots Invs*., 2020-NMCA-028, cert. denied.

No abuse of discretion in prospectively disqualifying arbitrator. — Where husband and wife dissolved their marriage by stipulated judgment, and where, following a dispute over the implementation of the stipulated judgment, husband and wife entered into a settlement agreement that required the parties to submit all disputes or claims to final and binding arbitration, and where the district court vacated the arbitrator's arbitration award and disqualified the arbitrator from serving as arbitrator, finding that the arbitrator demonstrated evident partiality, the district court did not err in prospectively disqualifying the arbitrator under its equitable authority where it was shown by clear and convincing evidence that the arbitrator was partial and had improper motives in favor of husband and against wife. *Rogers v. Red Boots Invs*., 2020-NMCA-028, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 148 et seq.

Liability of organization sponsoring or administering arbitration to parties involved in proceeding, 41 A.L.R.4th 1013.

6 C.J.S. Arbitration § 60 et seq.

44-7A-13. Disclosure by arbitrator.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) a financial or personal interest in the outcome of the arbitration proceeding; and

(2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator. If an arbitrator discloses a fact required by Subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under Section 24(a)(2) [44-7A-24 NMSA 1978] for vacating an award made by the arbitrator.

(c) If the arbitrator did not disclose a fact as required by Subsection (a) or (b), upon timely objection by a party, the court under Section 24(a)(2) may vacate an award.

(d) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party is presumed to act with evident partiality under Section 24(a)(2).

(e) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under Section 24(a)(2).

History: Laws 2001, ch. 227, § 13.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Potential neutral arbitrators need not sever all their ties with the business world. *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140 (10th Cir.), cert. denied, 459 U.S. 838, 103 S. Ct. 84, 74 L. Ed. 2d 79 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 154 et seq.

Disqualification of arbitrator by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion or fraud of arbitrators, 65 A.L.R.2d 755.

6 C.J.S. Arbitration § 63.

44-7A-14. Action by majority.

If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under Section 16(c) [44-7A-16 NMSA 1978].

History: Laws 2001, ch. 227, § 14.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 154 et seq.

6 C.J.S. Arbitration § 90, 91.

44-7A-15. Immunity of arbitrator; competency to testify; attorney's fees and costs.

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by Section 13 [44-7A-13 NMSA 1978] does not cause any loss of immunity under this section.

(d) In a judicial, administrative or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this state acting in a judicial capacity. This subsection does not apply:

(1) to the extent necessary to determine the claim of an arbitrator, arbitration organization or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) to a hearing on a motion to vacate an award under Section 24(a)(1) or (2) [44-7A-24 NMSA 1978] if the movant establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization or representative of an arbitration organization arising from the services of the arbitrator, organization or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of Subsection (d), and the court decides that the arbitrator, arbitration organization or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization or representative reasonable attorney's fees and other reasonable expenses of litigation.

History: Laws 2001, ch. 227, § 15.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of organization sponsoring or administering arbitration to parties involved in proceeding, 41 A.L.R.4th 1013.

44-7A-16. Arbitration process.

(a) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) if all interested parties agree; or

(2) upon request of one party to the arbitration proceeding, if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary, but may not postpone the hearing to a time later than

that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under Subsection (c), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with Section 12 [44-7A-12 NMSA 1978] to continue the proceeding and to resolve the controversy.

History: Laws 2001, ch. 227, § 16.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Effect of failure of proper notice. — Because the appellant was prejudiced by the arbitrator's failure to give him proper notice of the third hearing, and because the failure to give notice was sufficient cause to require the arbitrator to postpone the hearing, the trial court erred when it failed to vacate the arbitration award pursuant to 44-7-12A(4) NMSA 1978 (now 44-7A-24 NMSA 1978). *Jaycox v. Ekeson*, 1993-NMSC-036, 115 N.M. 635, 857 P.2d 35.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 177 et seq.

Necessity and sufficiency of notice of and hearing in proceedings before appraisers and arbitrators appointed to determine amount of insurance loss, 25 A.L.R.3d 680.

6 C.J.S. Arbitration § 76 et seq.

44-7A-17. Representation by lawyer.

A party to an arbitration proceeding may be represented by a lawyer.

History: Laws 2001, ch. 227, § 17.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Malcious abuse of process. — Defendant's initiation of judicial proceedings against the plaintiff is no longer a required element of malicious abuse of process and arbitration proceedings are judicial proceedings for the purpose of the malicious abuse of process tort. Durham v. Guest, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19.

Attorney liability. — An arbitration proceeding is an adversarial proceeding and an attorney who is representing a client in an arbitration proceeding is not liable for aiding and abetting a breach of the client's fiduciary duty unless the attorney acts outside the scope of representation, acts only in his or her self-interest and contrary to the client's interest, or acts in a manner that would fall within the "crime or fraud" exception to the attorney-client privilege. Durham v. Guest, 2007-NMCA-144, 142 N.M. 817, 171 P.3d 756, rev'd on other grounds, 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19.

44-7A-18. Witnesses; subpoenas; depositions; discovery.

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective.

(d) If an arbitrator permits discovery under Subsection (c), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets and other information protected from

disclosure to the extent a court could if the controversy were the subject of a civil action in this state.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this state.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this state and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious and cost effective. A subpoena or discovery-related order issued by an arbitrator in another state must be served in the manner provided by law for service of subpoenas in a civil action in this state and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this state.

History: Laws 2001, ch. 227, § 18.

ANNOTATIONS

Cross references. — For fees for attendance of witnesses generally, *see* 10-8-1 to 10-8-7, 38-6-4 NMSA 1978.

For subpoenas of witnesses and documentary evidence generally, *see* Rule 1-045 NMRA.

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Alternative Dispute Resolution § 187 et seq.

Discovery in aid of arbitration proceedings, 98 A.L.R.2d 1247.

6 C.J.S. Arbitration § 170 et seq.

44-7A-19. Judicial enforcement of pre-award ruling by arbitrator.

If an arbitrator makes a pre-award ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under Section 20 [44-7A-20 NMSA 1978]. A prevailing party may make a motion to the court for an expedited order to confirm the award under Section 23 [44-7A-23 NMSA 1978], in which case the court shall summarily decide the motion. The court shall issue

an order to confirm the award unless the court vacates, modifies or corrects the award under Section 24 or 25 [44-7A-24 or 44-7A-25 NMSA 1978].

History: Laws 2001, ch. 227, § 19.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

44-7A-20. Award.

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.

History: Laws 2001, ch. 227, § 20.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Delivery method important if delivery does not occur within limits. — Where delivery is not accomplished by the method required by this section, the important consideration is whether delivery actually occurs within the required time. The method becomes important if the delivery is not accomplished within the required time, although the statutory method of posting is complied with. *Chaco Energy Co. v. Thercol Energy Co.*, 1981-NMSC-127, 97 N.M. 127, 637 P.2d 558.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 191 et seq.

Death of party to arbitration agreement before award as revocation or termination of submission, 63 A.L.R.2d 754.

Failure of arbitrators to make award within specified time limit, 56 A.L.R.3d 815.

Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 A.L.R.4th 889.

6 C.J.S. Arbitration § 95 et seq.

44-7A-21. Change of award by arbitrator.

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) upon a ground stated in Section 25(a)(1) or (3) [44-7A-25 NMSA 1978];

(2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) to clarify the award.

(b) A motion under Subsection (a) must be made and notice given to all parties within twenty days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the motion within ten days after receipt of the notice.

(d) If a motion to the court is pending under Section 23, 24 or 25 [44-7A-23, 44-7A-24 or 44-7A-25 NMSA 1978], the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) upon a ground stated in Section 25(a)(1) or (3) [44-7A-25 NMSA 1978];

(2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) to clarify the award.

(e) An award modified or corrected pursuant to this section is subject to Sections 20(a), 23, 24 and 25 [44-7A-20, 44-7A-23, 44-7A-24 and 44-7A-25 NMSA 1978].

History: Laws 2001, ch. 227, § 21.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Period for arbitrators' action set by agreement. — Where an arbitration agreement establishes a period beyond which the arbitrators cannot act, it does not prevent them from deciding and disposing of the matter before the expiration of the prescribed period. It does not extend their authority once they make a decision intended to be final and binding on the parties. *Chaco Energy Co. v. Thercol Energy Co.*, 1981-NMSC-127, 97 N.M. 127, 637 P.2d 558.

Findings required as to offset against proceeds already received. — Trial court erred in confirming arbitration award without clarification from arbitrators whether offsets for settlement proceeds already received were included in the award calculations. *Casias v. Dairyland Ins. Co.*, 1999-NMCA-046, 126 N.M. 772, 975 P.2d 385, cert. denied, 127 N.M. 389, 981 P.2d 1207.

Effect of amended award. — An amended award for purposes other than those specified in Section 44-7-13A NMSA 1978 [now Section 44-7A-25 NMSA 1978] is void and of no effect. *Chaco Energy Co. v. Thercol Energy Co.*, 1981-NMSC-127, 97 N.M. 127, 637 P.2d 558.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 210.

Award or decision by arbitrators as precluding return of case to, or its reconsideration by them, 104 A.L.R. 710.

Time and jurisdiction for review, reopening, modification or reinstatement of award or agreement, 165 A.L.R. 9

6 C.J.S. Arbitration § 119.

44-7A-22. Remedies; fees and expenses of arbitration proceeding.

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(c) As to all remedies other than those authorized by Subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under Section 23 [44-7A-23 NMSA 1978] or for vacating an award under Section 24 [44-7A-24 NMSA 1978].

(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under Subsection (a), the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

History: Laws 2001, ch. 227, § 22.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Attorney fees. — The district court has the authority to award attorney fees on appeal even if an arbitration panel lacked the authority to do so. *Aguilera v. Palm Harbor Homes, Inc.*, 2004-NMCA-120, 136 N.M. 422, 99 P.3d 672, cert. denied, 2004-NMCERT-010, 136 N.M. 541, 101 P.3d 807.

Public policy supports punitive damages. — Although former 44-7-1 NMSA 1978 et seq. did not specifically authorize punitive damages awards, the strong public policy in favor of alternative resolution of disputes requires that arbitrators be authorized to award such damages when they are otherwise permitted by law and are supported by the facts. *Aguilera v. Palm Harbor Homes, Inc.*, 2001-NMCA-091, 131 N.M. 228, 34 P.3d 617, *aff'd*, 2002-NMSC-029, 132 N.M. 715, 54 P.3d 993.

Arbitrators authorized to suggest appropriate amount of punitive damages. — The arbitration panel did not exceed its powers where, in a dispute between an insured and the automobile insurance company, it suggested the appropriate amount of punitive damages to be assessed, if the proper court determined that punitive damages should be awarded. *Stewart v. State Farm Mut. Auto. Ins. Co.*, 1986-NMSC-073, 104 N.M. 744, 726 P.2d 1374.

Apportionment of arbitration costs. — The uninsured motorists' insurance statute and the New Mexico Arbitration Act are not in a state of repugnant conflict on the issue of apportionment of arbitration costs. The Arbitration Act merely encompasses the

uninsured motorists' insurance statute; it allows the arbitrator to award costs of arbitration to the prevailing party (as does the uninsured motorists' insurance statute) unless the parties contract to award it in some other way. This distinction is not enough to warrant a repeal by implication and does not make the acts irreconcilable. *Stinbrink v. Farmers Ins. Co.*, 1990-NMSC-108, 111 N.M. 179, 803 P.2d 664.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution §§ 173 et seq., 218 et seq.

6 C.J.S. Arbitration §§ 75, 107, 179 et seq.

44-7A-23. Confirmation of award.

After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 21 or 25 [44-7A-21 or 44-7A-25 NMSA 1978] or is vacated pursuant to Section 24 [44-7A-24 NMSA 1978].

History: Laws 2001, ch. 227, § 23.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Findings required as to offset against proceeds already received. — Trial court erred in confirming arbitration award without clarification from arbitrators whether offsets for settlement proceeds already received were included in the award calculations. *Casias v. Dairyland Ins. Co.*, 1999-NMCA-046, 126 N.M. 772, 975 P.2d 385, cert. denied, 127 N.M. 389, 981 P.2d 1207.

Errors of law and fact. — The district court does not have the authority to review arbitration awards for errors as to the law or the facts; if the award is fairly and honestly made and if it is within the scope of the submission, the award is a final and conclusive resolution of the parties' dispute. *Fernandez v. Farmers Ins. Co.*, 1993-NMSC-035, 115 N.M. 622, 857 P.2d 22.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 218 et seq.

6 C.J.S. § 120 et seq.

44-7A-24. Vacating award.

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) the award was procured by corruption, fraud or other undue means;

(2) there was:

(A) evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) corruption by an arbitrator; or

(C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise conducted the hearing contrary to Section 16 [44-7A-16 NMSA 1978], so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 16(c) not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 10 [44-7A-10 NMSA 1978] so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section must be filed within ninety days after the movant receives notice of the award pursuant to Section 20 [44-7A-20 NMSA 1978] or within ninety days after the movant receives notice of a modified or corrected award pursuant to Section 21 [44-7A-21 NMSA 1978], unless the movant alleges that the award was procured by corruption, fraud or other undue means, in which case the motion must be made within ninety days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(c) If the court vacates an award on a ground other than that set forth in Subsection (a)(5), it may order a rehearing. If the award is vacated on a ground stated in Subsection (a)(1) or (2), the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in Subsection (a)(3), (4) or (6), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in Section 20(b) [44-7A-20 NMSA 1978] for an award. If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

History: Laws 2001, ch. 227, § 24.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act [44-7-1 to 44-7-22 NMSA 1978], enacted by Laws 1971, ch. 168, §23. It was repleced by Sections 44-7A-1 to 44-7A-32 NMSA 1978.The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Cases under prior law. — The pre-2001 cases cited below were decided under the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978.

Provisions exclusive. — Sections 44-7-12 and 44-7-13 NMSA 1978 (now 44-7A-25 NMSA 1978) establish the statutory grounds for vacating, modifying, or correcting an award. In the absence of any of these statutory grounds, the court must confirm an award submitted for review. *Fernandez v. Farmers Ins. Co.*, 1993-NMSC-035, 115 N.M. 622, 857 P.2d 22.

Motion filing limitation. — The time limit contained in Subsection B [(b)] of former section for filing a motion to vacate an award applies in arbitration proceedings, not the one-year limitation period set forth in Rule 1-060(B)(6) NMRA. *Medina v. Foundation Reserve Ins. Co.*, 1997-NMSC-027, 123 N.M. 380, 940 P.2d 1175.

Potential neutral arbitrators need not sever all their ties with the business world. *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140 (10th Cir.), cert. denied, 459 U.S. 838, 103 S. Ct. 84, 74 L. Ed. 2d 79 (1982).

Record not required for appeal. — The fact that a record is permitted in the arbitration proceeding cannot be construed to mean that a record is a prerequisite to the appeal provisions afforded by the Uniform Arbitration Act. *Malibu Pools of N.M., Inc. v. Harvard*, 1981-NMSC-117, 97 N.M. 106, 637 P.2d 537.

Misconduct of arbitrator in public-sector arbitration. — Where a public sector employer and a union reached an impasse in the negotiation of a new collective bargaining agreement, and the impasse was submitted to arbitration pursuant to the Public Employee Bargaining Act; during the arbitration hearing, the arbitrator permitted the union to make a revised offer and to modify the revised offer several times and asked the parties to confer in an effort to narrow the issues; and at the conclusion of the hearing, the arbitrator suggested modifications of the party's offers that would be more to the liking of the arbitrator and directed the parties to submit modified offers, the arbitrator exceeded the arbitrator's authority under the Public Employee Bargaining Act requiring the arbitrator's award to be vacated on the ground of misconduct under the Uniform Arbitration Act. *National Union of Hosp. Employees v. UNM Bd. of Regents*, 2010-NMCA-102, 149 N.M. 107, 245 P.3d 51, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

Arbitrator did not exceed the arbitrator's powers. — Where the state and the unions entered into collectively bargaining agreements that covered salary increases for union employees; the legislature would have to appropriate eight million dollars to fund the salary increases for union employees and sixteen million dollars to fund the same salary increases for all employees; the legislature appropriated thirteen million dollars for salary increases for all employees; the state determined that there were not sufficient funds to cover the full salary increases for union employees and implemented salary increases for all employees that differed from those required by the agreements; the state stipulated to arbitrate whether it had violated the agreements and what the remedy should be for a violation; during the arbitration, the state presented evidence concerning its interpretation of the legislative appropriation bills and whether the legislature had appropriated sufficient funds to cover the union salary increases; and the arbitrator determined that the appropriation bills required only that salary increases for all employees total the average salary increases specified in the appropriation bills, that the legislature had appropriated sufficient funds to cover the salary increases required by the agreements and smaller increases for non-union employees, and that the state's pay package violated the terms of the agreements, the arbitrator did not exceed the arbitrator's authority by directing the state to pay union employees the salary increases required by the agreements. *State v. AFSCME Council 18*, 2012-NMCA-114, 291 P.3d 600, cert. granted, 2012-NMCERT-011.

Grounds for vacation where record unavailable. — Where a record of the arbitration proceeding is unavailable, an aggrieved party is not thereby precluded from asserting and proving any grounds set forth in this section for vacation of an arbitration award. *Malibu Pools of N.M., Inc. v. Harvard*, 1981-NMSC-117, 97 N.M. 106, 637 P.2d 537.

Record on appeal to contain evidence of claims regarding vacation of award. — Where a party claims that the trial court should vacate the award because the arbitrator allegedly evidenced partiality and exceeded his powers, and the trial court judge reviews the record of the arbitration proceedings, but his findings do not indicate whether the record contains substantial evidence supporting or negating such claims, nor is the record of the arbitration proceedings made a part of the record for appeal, the case will be remanded to the district court to determine whether the arbitration record supports confirmation, or, in the alternative, vacation or modification of the award. *Daniels Ins. Agency, Inc. v. Jordan*, 1982-NMSC-148, 99 N.M. 297, 657 P.2d 624.

Appellee may argue any grounds for affirmance. — An appellee who does not claim that the trial court erred in vacating an arbitration award has no duty to preserve that issue on appeal. It may argue any grounds for affirmance on appeal and the appellate court will uphold the trial court's decision if it is legally mandated, regardless of whether the trial court's rationale was wrong. *Bruch v. CNA Ins. Co.*, 1994-NMSC-020, 117 N.M. 211, 870 P.2d 749, *overruled on other grounds by Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901.

Consent to arbitration required. — By incorporating this section, 66-5-303 NMSA 1978 expressly contemplates a district court vacating an arbitration award where the

parties did not consent to arbitration. It would be untenable, therefore, to hold that the legislature, in drafting the current uninsured motorist statute, intended to compel arbitration where the parties had agreed not to arbitrate. *McMillian v. Allstate Indem. Co.*, 2004-NMSC-002, 135 N.M. 17, 84 P.3d 65.

Scope of review. — It is not the function of the court to hear the case de novo and consider the evidence presented to the arbitrators, but rather to conduct an evidentiary hearing and enter findings of fact and conclusions of law upon each issue raised in the application to vacate or modify the award. *Melton v. Lyon*, 1989-NMSC-027, 108 N.M. 420, 773 P.2d 732.

Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances. *Melton v. Lyon*, 1989-NMSC-027, 108 N.M. 420, 773 P.2d 732.

Errors of law and fact. — The district court does not have the authority to review arbitration awards for errors as to the law or the facts; if the award is fairly and honestly made and if it is within the scope of the submission, the award is a final and conclusive resolution of the parties' dispute. *Fernandez v. Farmers Ins. Co.*, 1993-NMSC-035, 115 N.M. 622, 857 P.2d 22.

Under appropriate circumstances the district court may find an arbitration panel's mistake of fact or law so gross as to imply misconduct, fraud, or lack of fair and impartial judgment, each of which is a valid ground for vacating an award. *Fernandez v. Farmers Ins. Co.*, 1993-NMSC-035, 115 N.M. 622, 857 P.2d 22.

Legal and factual mistakes, such as applying the wrong standard of proof, do not comprise an abuse of power under Subsection A(3) (now (a)(4)). *Town of Silver City v. Garcia*, 1993-NMSC-037, 115 N.M. 628, 857 P.2d 28.

Preservation of objections. — Under Subsection (a)(5) of Section 44-7A-24 NMSA 1978, a party may continue to argue that there is no agreement to arbitrate even after arbitration is completed, so long as he preserves his objections before the hearing begins. *Alexander v. Calton & Assocs., Inc.*, 2005-NMCA-034, 137 N.M. 293, 110 P.3d 509.

Alleged misconduct of panel as grounds. — A trial court errs in refusing to hear evidence of an arbitration panel's alleged misconduct for its failure to hear evidence material to the controversy. *Malibu Pools of N.M., Inc. v. Harvard*, 1981-NMSC-117, 97 N.M. 106, 637 P.2d 537.

Material evidence not excluded. — "Material" evidence is evidence that relates to the matter in dispute or has a reasonable bearing on the issue to be decided in a given case. In the instant case, the stipulated issue to be decided by the arbitrator was whether the policeman had sex with a minor while on duty. Evidence that the policeman had sex with women other than the minor while on duty is not material to the specific

issue presented to the arbitrator for decision and thus does not provide a basis for vacating the arbitration award under Subsection A(4) (now (a)(3)). *Town of Silver City v. Garcia*, 1993-NMSC-037, 115 N.M. 628, 857 P.2d 28.

Arbitrator partiality. — To vacate an arbitration award under Subsection A(2) (now (a)(2)(A)), evidence of arbitrator partiality must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative. Partiality cannot be imputed from the methods by which an arbitrator considers and evaluates evidence. Partiality cannot be inferred from adverse evidentiary rulings or from the enforcement of procedural rules. *Town of Silver City v. Garcia*, 1993-NMSC-037, 115 N.M. 628, 857 P.2d 28.

The arbitrator's predisposition to discredit testimony not yet given suggests that the arbitration award could be vacated due to the arbitrator's apparent lack of impartiality. *Jaycox v. Ekeson*, 1993-NMSC-036, 115 N.M. 635, 857 P.2d 35.

Arbitrator's right to appeal district court order vacating arbitration award. — Where husband and wife dissolved their marriage by stipulated judgment, and where, following a dispute over the implementation of the stipulated judgment, husband and wife entered into a settlement agreement that required the parties to submit all disputes or claims to final and binding arbitration, and where the district court vacated the arbitrator's arbitration award and disqualified the arbitrator from serving as arbitrator, finding that the arbitrator demonstrated evident partiality, the arbitrator had the right to appeal the district court's order because the arbitrator was a party under the settlement agreement and the district court's order directly and sufficiently aggrieved the arbitrator such that he had a right to appeal the order. *Rogers v. Red Boots Invs*., 2020-NMCA-028, cert. denied.

Standard to evaluate claims of evident partiality. — To demonstrate evident partiality, the party seeking vacatur has the burden of proving that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration. Furthermore, the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator. A party need not prove that the arbitrator, in fact, had improper motives, but a party seeking vacatur must put forward facts that objectively demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives. The party challenging the award must prove the existence of evident partiality by clear and convincing evidence, which is evidence that instantly tilts the scales in the affirmative when weighed against the evidence in opposition and the fact-finder's mind is left with an abiding conviction that the evidence is true. *Rogers v. Red Boots Invs*., 2020-NMCA-028, cert. denied.

No abuse of discretion in vacating arbitration award. — Where husband and wife dissolved their marriage by stipulated judgment, and where, following a dispute over the implementation of the stipulated judgment, husband and wife entered into a settlement agreement that required the parties to submit all disputes or claims to final and binding arbitration, and where the district court vacated the arbitrator's arbitration award and

disqualified the arbitrator from serving as arbitrator, finding that the arbitrator demonstrated evident partiality, the district court did not abuse its discretion in vacating the arbitration award because the arbitrator intentionally disregarded the district court's limitation on the arbitrability of a provision in the settlement agreement related to costs and fees and disregarded the district court's warning not to proceed to arbitration while a motion to appoint a new arbitrator was pending. The arbitrator's repeated disregard for the district court's ruling, in favor of husband and against wife, is direct, definite, and demonstrative evidence from which a reasonable person would have to conclude that the arbitrator was partial and had improper motives in favor of husband and against wife. *Rogers v. Red Boots Invs*., 2020-NMCA-028, cert. denied.

Requesting trial if award exceeds statutory minimum. — The limited de novo appeal provision in an insurance contract, providing for mandatory arbitration which would be binding on both parties for any award of damages not exceeding the limits of the Mandatory Financial Responsibility Act but providing for de novo appeal by either party of awards over that amount, violates public policy and is void as substantively unconscionable. *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901, *overruling Bruch v. CNA Ins. Co.*, 1994-NMSC-020, 117 N.M. 211, 870 P.2d 749.

Burden of establishing fraud. — The party asserting fraud must establish it by clear and convincing evidence and must show that due diligence could not have resulted in discovery of the fraud prior to arbitration. *Foster v. Turley*, 808 F.2d 38 (10th Cir. 1986).

Fraud, corruption and undue means established. — In a proceeding to vacate an arbitration award of uninsured motorist benefits, there was substantial evidence to support findings of fact and conclusions of law that the insured obtained the award through fraud, corruption, and undue means. *Medina v. Found. Reserve Ins. Co.*, 1997-NMSC-027, 123 N.M. 380, 940 P.2d 1175.

Failure to postpone. — Because the appellant was prejudiced by the arbitrator's failure to give him proper notice of the third hearing, and because the failure to give notice was sufficient cause to require the arbitrator to postpone the hearing, the trial court erred when it failed to vacate the arbitration award pursuant to Subsection A(4) (now (a)(3)). *Jaycox v. Ekeson*, 1993-NMSC-036, 115 N.M. 635, 857 P.2d 35.

Arbitrators authorized to suggest appropriate amount of punitive damages. — The arbitration panel did not exceed its powers where, in a dispute between an insured and the automobile insurance company, it suggested the appropriate amount of punitive damages to be assessed, if the proper court determined that punitive damages should be awarded. *Stewart v. State Farm Mut. Auto. Ins. Co.*, 1986-NMSC-073, 104 N.M. 744, 726 P.2d 1374.

Improper licensure defense waived. — Where both parties agreed to have all their disputes settled by arbitration and participated fully in the process without objection or reservation, failure to raise the issue of proper licensure under 60-13-30A NMSA 1978,

when the merits of the dispute were heard before the arbitration board, waived the issue as a defense. *Spaw-Glass Constr. Servs., Inc. v. Vista De Santa Fe, Inc.*, 1992-NMSC-067, 114 N.M. 557, 844 P.2d 807.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 234 et seq.

Perjury as ground of attack on judgment entered upon award in arbitration, 99 A.L.R. 1202.

Right of arbitrator to consider or to base his decision upon matters other than those involved in the legal principles applicable to the questions at issue between the parties, 112 A.L.R. 873.

Right of arbitrators to act on their own knowledge of facts, or factors relevant to questions submitted to them, in absence of evidence in that regard, 154 A.L.R. 1210.

Time and jurisdiction for review, reopening, modification or reinstatement of award or agreement, 165 A.L.R. 9

Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award, 27 A.L.R.2d 1160.

Arbitrator's consultation with outsider or outsiders as misconduct justifying vacation of award, 47 A.L.R.2d 1362.

Disqualification of arbitrator by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion or fraud of arbitrators, 65 A.L.R.2d 755.

Time for impeaching arbitration award, 85 A.L.R.2d 779.

Construction and effect of contractual or statutory provisions fixing time within which arbitration award must be made, 56 A.L.R.3d 815.

What constitutes corruption, fraud, or undue means in obtaining arbitration award justifying avoidance of award under state law, 22 A.L.R.4th 366.

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A.L.R.5th 757.

Setting aside arbitration award on ground of interest or bias of arbitrators - insurance appraisals or arbitrations, 63 A.L.R.5th 675.

Setting aside arbitration award on ground of interest or bias of arbitrators - torts, 64 A.L.R.5th 475.

Setting aside arbitration award on ground of interest or bias of arbitrator - labor disputes, 66 A.L.R.5th 611.

Setting aside arbitration award on ground of interest or bias of arbitrators - commercial, business, or real estate transactions, 67 A.L.R.5th 179.

Vacating on public policy grounds arbitration awards reinstating discharged employees – state cases, 112 A.L.R.5th 263, §§ 17-36.

Construction and application of § 10(a)(4) of Federal Arbitration Act (9 USCS § 10(a)(4)) providing for vacating of arbitration awards where arbitrators exceed or imperfectly execute powers, 136 A.L.R. Fed. 183.

Construction and application of § 10 (a)(1)-(3) of Federal Arbitration Act (9 USCS § 10 (a)(1)-(3)) providing for vacating of arbitration awards where award procured by fraud, corruption, or undue means, where arbitrators evidence partiality or corruption and where arbitrators engage in particular acts of misbehavior, 141 A.L.R. Fed. 1

Vacating on public policy grounds arbitration awards reinstating discharged employees, 142 A.L.R. Fed. 387.

Refusal to enforce foreign arbitration awards on public policy grounds, 144 A.L.R. Fed. 481.

Vacating arbitration awards as contrary to National Labor Relations Act, 147 A.L.R. Fed. 77.

6 C.J.S. Arbitration § 150 et seq.

44-7A-25. Modification or correction of award.

(a) Upon motion made within ninety days after the movant receives notice of the award pursuant to Section 20 [44-7A-20 NMSA 1978] or within ninety days after the movant receives notice of a modified or corrected award pursuant to Section 21 [44-7A-21 NMSA 1978], the court shall modify or correct the award if:

(1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award;

(2) the arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under Subsection (a) is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award. A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

History: Laws 2001, ch. 227, § 25.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Provisions exclusive. — Section 44-7-12 NMSA 1978 (now Section 44-7A-24 NMSA 1978) and this section of the act establish the statutory grounds for vacating, modifying, or correcting an award. In the absence of any of these statutory grounds, the court must confirm an award submitted for review. *Fernandez v. Farmers Ins. Co.*, 1993-NMSC-035, 115 N.M. 622, 857 P.2d 22.

Findings required as to offset against proceeds already received. — Trial court erred in confirming arbitration award without clarification from arbitrators whether offsets for settlement proceeds already received were included in the award calculations. *Casias v. Dairyland Ins. Co.*, 1999-NMCA-046, 126 N.M. 772, 975 P.2d 385, cert. denied, 127 N.M. 389, 981 P.2d 1207.

Award amended for other purposes void. — An amended award for purposes other than those specified in Subsection A (now Subsection (a)) is void and of no effect. *Chaco Energy Co. v. Thercol Energy Co.*, 1981-NMSC-127, 97 N.M. 127, 637 P.2d 558.

Scope of review. — It is not the function of the court to hear the case de novo and consider the evidence presented to the arbitrators, but rather to conduct an evidentiary hearing and enter findings of fact and conclusions of law upon each issue raised in the application to vacate or modify the award. *Melton v. Lyon*, 1989-NMSC-027, 108 N.M. 420, 773 P.2d 732.

Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances. *Melton v. Lyon*, 1989-NMSC-027, 108 N.M. 420, 773 P.2d 732.

District courts should exercise caution in modifying an arbitration award. — In the interest of finality, district courts should exercise great caution when asked to set aside an arbitration award, so where an arbitrator’s award, in a termination of employment case, was consistent with the terms of the bylaws specified in the arbitration order, the district court erred in modifying the arbitration award on grounds not supported by the evidence. *Shah v. Devasthali*, 2016-NMCA-053, cert. denied.

Errors of law and fact. — The district court does not have the authority to review arbitration awards for errors as to the law or the facts; if the award is fairly and honestly made and if it is within the scope of the submission, the award is a final and conclusive resolution of the parties' dispute. *Fernandez v. Farmers Ins. Co.*, 1993-NMSC-035, 115 N.M. 622, 857 P.2d 22.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 234 et seq.

Time and jurisdiction for review, reopening, modification or reinstatement of award or agreement, 165 A.L.R. 9

6 C.J.S. Arbitration § 168.

44-7A-26. Judgment on award; attorney's fees and litigation expenses.

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On application of a prevailing party to a contested judicial proceeding under Section 23, 24 or 25 [44-7A-23, 44-7A-24, or 44-7A-25 NMSA 1978], the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying or correcting an award.

History: Laws 2001, ch. 227, § 26.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution § 227 et seq.

Enforcement of award upon submission of subject-matter of pending action, to arbitration, by judgment in same action, 42 A.L.R. 736.

Extraterritorial enforcement of arbitral award, 73 A.L.R. 1460.

6 C.J.S. Arbitration § 145 et seq.

44-7A-27. Jurisdiction.

(a) A court of this state having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award under the Uniform Arbitration Act [44-7A-1 to 44-7A-32 NMSA 1978].

History: Laws 2001, ch. 227, § 27.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

No power to consolidate arbitration. — While this section gives New Mexico courts jurisdiction to enforce contracts to arbitrate, no express provision in the act confers on courts the power to consolidate arbitration. *Pueblo of Laguna v. Cillessen & Son*, 1984-NMSC-060, 101 N.M. 341, 682 P.2d 197.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution §§ 91, 118, 252.

6 C.J.S. Arbitration § 40.

44-7A-28. Venue.

A motion pursuant to Section 6 [44-7A-6 NMSA 1978] must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this state, in the court of any county in this state. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

History: Laws 2001, ch. 227, § 28.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d. Alternative Dispute Resolution §§ 118, 252.

44-7A-29. Appeals.

(a) An appeal may be taken from:

(1) an order denying a motion to compel arbitration;

(2) an order granting a motion to stay arbitration;

(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 final judgment entered pursuant to the Uniform Arbitration Act [44-7A-1 NMSA 1978].

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

History: Laws 2001, ch. 227, § 29.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Cross references. — For appeals generally, *see* Rules 12-201 to 12-216 NMRA.

Untimely appeal. — Where, in an arbitration between a construction company and a hotel owner, the arbitrator determined an award in favor of the construction company which the hotel owner paid in full, including the award of attorney fees; almost one year later, in response to the district court’s inquiry about the status of the arbitration, the construction company asked the district court to confirm the award and the hotel owner asked the district court to review the award of attorney fees; the district court confirmed the arbitration award, with the exception of the award of attorney fees, and remanded

the question of attorney fees to the arbitrator for review; and the hotel owner never contested the arbitrator's award within the statutory deadlines for doing so, the hotel owner forfeited any right it might have had to contest the award in district court because, although the order of remand was appealable, as both an order confirming the award and denying the construction company's motion to confirm the award of attorney fees, the hotel owner failed to use the statutory remedies to challenge the award of attorney fees for almost a year. *Journeyman Constr., LP v. Premier Hospitality II*, 2013-NMCA-019, 293 P.3d 950.

Section does not provide an exclusive list of orders that may be appealed. — By statute, the New Mexico court of appeals has jurisdiction over appeals from district courts in civil actions from any final judgment or decision, any interlocutory order or decision which practically disposes of the merits of the action, or any final order after entry of judgment which affects substantial rights. The question of whether an order concerning arbitration is appealable as of right depends on whether the order is final, and finality must be determined by applying the general law concerning finality of judgments in civil cases. *N.M. Dep't of Health v. Maestas*, 2023-NMCA-075.

Order denying motion to compel back pay was a final, appealable order. — Where the department of health (DOH) terminated petitioner from her employment, and where petitioner appealed her termination through arbitration as provided for under the collective bargaining agreement between the state of New Mexico and state employees, and where the arbitrator sustained petitioner's grievance and ordered DOH to reinstate petitioner and awarded petitioner back pay as of the date of her termination until the date of reinstatement, and where petitioner filed a motion to confirm the award as provided for under NMSA 1978, § 44-7A-23, and where the district court entered an order confirming the arbitration award and ordered DOH to reinstate petitioner and ordered back pay in accordance with the arbitration award, and where DOH provided petitioner with back pay but in doing so deducted the amount of disability and unemployment compensation payments petitioner had received during her period of unemployment, and where petitioner filed a motion in the district court seeking an order compelling DOH to pay her the full amount of back pay without the deductions, and where the district court denied the motion to compel, finding that DOH was entitled to offset petitioner's earnings as permitted by regulation, the order to compel was a final, appealable order because the district court was exercising its original jurisdiction when it denied petitioner's motion to compel full back pay and the order fully resolved the parties' dispute over the back pay deductions, and having disposed of the back pay dispute, there was nothing further to litigate in the district court. *N.M. Dep't of Health v. Maestas*, 2023-NMCA-075.

Record on appeal to contain evidence of claims regarding vacation of award. — Where a party claims that the trial court should vacate the award because the arbitrator allegedly evidenced partiality and exceeded his powers, and the trial court judge reviews the record of the arbitration proceedings, but his findings do not indicate whether the record contains substantial evidence supporting or negating such claims, nor is the record of the arbitration proceedings made a part of the record for appeal, the

case will be remanded to the district court to determine whether the arbitration record supports confirmation, or, in the alternative, vacation or modification of the award. *Daniels Ins. Agency, Inc. v. Jordan*, 1982-NMSC-148, 99 N.M. 297, 657 P.2d 624.

Appellee may argue any grounds for affirmance. — An appellee who does not claim that the trial court erred in vacating an arbitration award has no duty to preserve that issue on appeal. It may argue any grounds for affirmance on appeal and the appellate court will uphold the trial court's decision if it is legally mandated, regardless of whether the trial court's rationale was wrong. *Bruch v. CNA Ins. Co.*, 1994-NMSC-020, 117 N.M. 211, 870 P.2d 749, *overruled on other grounds by Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901.

Standard of review. — When reviewing whether the district court correctly confirmed an arbitration award, the appellate court determines whether substantial evidence in the record supports the district court's findings of fact and whether the court correctly applied the law to the facts when making its conclusions of law. Substantial evidence is relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. When determining whether a finding of fact is supported by substantial evidence, the appellate court reviews the evidence in the light most favorable to uphold the finding and indulge all reasonable inferences in support of the district court's decision. *Town of Silver City v. Garcia*, 1993-NMSC-037, 115 N.M. 628, 857 P.2d 28.

Waiver of right to compel arbitration. — Three principles govern appellate review of a district court’s waiver finding in the context of a motion to compel arbitration: (1) the strong public policy preference in favor of arbitration, (2) relief should only be granted upon a showing of prejudice to the party opposing arbitration, and (3) the extent to which the party now urging arbitration has previously invoked the machinery of the judicial system. *Tennyson v. Santa Fe Dealership Acquisition II, Inc*., 2016-NMCA-017, cert. denied, 2016-NMCERT-001.

Where defendants were alleged to have sold used cars to plaintiffs and others without disclosing the cars’ accident history, plaintiffs filed a putative class-action lawsuit against defendants, and after nearly three years of extensive litigation, discovery, and an order certifying the action did defendants file a motion to compel arbitration. There was no error in the district court’s finding that defendants’ use of the judicial process, moving for dismissal of plaintiffs’ complaint, engaging in extensive discovery, filing multiple motions for summary judgment, opposing class certification and appealing the district court’s certification order, all while omitting any mention of an intent to compel arbitration, invoked the machinery of litigation in a manner inconsistent with their right to arbitrate and manifested an intent to waive their right to compel arbitration against absent class members to a degree that plaintiffs and the district court could properly rely. *Tennyson v. Santa Fe Dealership Acquisition II, Inc.*, 2016-NMCA-017, cert. denied, 2016-NMCERT-001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Appealability of order or decree compelling or refusing to compel arbitration, 94 A.L.R.2d 1071, 6 A.L.R.4th 652.

Appealability of judgment confirming or setting aside arbitration award, 7 A.L.R.3d 608.

Appealability of state court's order of decree compelling or refusing to compel arbitration, 6 A.L.R.4th 652.

Uninsured and underinsured motorist coverage: enforceability of policy provision limiting appeals from arbitration, 23 A.L.R.5th 801.

44-7A-30. Uniformity of application and construction.

In applying and construing the Uniform Arbitration Act [44-7A-1 to 44-7A-32 NMSA 1978], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History: Laws 2001, ch. 227, § 30.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

44-7A-31. Relationship to electronic signatures in global and national commerce act.

The provisions of the Uniform Arbitration Act [44-7A-1 NMSA 1978] governing the legal effect, validity and enforceability of electronic records or electronic signatures and of contracts performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act.

History: Laws 2001, ch. 227, § 31.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.

Cross references. — For Section 102 of the Electronic Signatures in Global and National Commerce Act, *see* 15 USCS § 7002.

44-7A-32. Saving clause.

The Uniform Arbitration Act [44-7A-1 NMSA 1978] does not affect an action or proceeding commenced or right accrued before that act takes effect, subject to Section 3 [44-7A-3 NMSA 1978] of that act.

History: Laws 2001, ch. 227, § 32.

ANNOTATIONS

Compiler's note. — Laws 2002, ch. 227, § 33 repealed the former Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978, enacted by Laws 1971, ch. 168, §23. The Uniform Arbitration Act compiled as 44-7A-1 to 44-7A-32 NMSA 1978 was enacted effective July 1, 2001.