

Revised Uniform Arbitration Act v. Federal Arbitration Act. Which You Should Prefer In
Nevada Arbitration

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I. Introduction

This article will discuss the differences in Nevada's adopted provisions in the Revised Uniform Arbitration Act (RUAA) as contrasted with the Federal Arbitration Act (FAA). It will argue that because the new provisions in the RUAA, now adopted by the Nevada Legislature, are superior to those in the FAA (the Federal arbitration statutes), a party will favor Nevada's statute over the federal statute. This paper will follow a hypothetical dispute that has led to arbitration, and will view in detail the subtle nuances of the RUAA in contrast with the older, and perhaps outdated, FAA. First, the paper will talk about a brief history of arbitration covering the origins of the FAA, Uniform Arbitration Act (UAA), and the RUAA. Second, the paper will discuss what a party to an arbitral dispute should expect under the new changes in Nevada law. Last, the paper will delve into the intricacies of Nevada law as compared to the FAA. This paper will explore: what abilities parties have in waiving or altering the provisions of the statutes; who decides the issue of substantive arbitrability, courts or arbitrators; the availability and use of interim relief before and after an arbitrator has been selected; what claims, and who decides whether similar claims, may be consolidated; the duty of the arbitrator to disclose facts that may alter the final decision in the arbitration; the effect of civil immunity each statute grants to arbitrators; the use and availability of subpoenas, discovery, and depositions; the ability of courts to vacate awards, and on what grounds; the discretion of appeals before and after a final award has been rendered; and the use and effect of the future of e-arbitration.

II. History

In 1925, Congress enacted the FAA¹ to “promote the use of arbitration to resolve conflicts involving commercial transactions among businesses in different states.”² The FAA has not substantially changed since its passage in 1925 with the exception of a few technical statutory changes.³ In 1955 the National Conference of Commissioners on Uniform State Laws (NCCUSLS) used the FAA as a model to create the UAA. A main purpose of the UAA was to encourage the enforceability of arbitration agreements and finality of awards in the state realm, where state law was often hostile to arbitration.

After using the UAA for over 45 years, the NCCUSLS approved the RUAA after a five year effort to oust the use of the outdated UAA.⁴ Since its approval, eight states have adopted the RUAA either with or without amendments, and there are at least four more states looking to follow the RUAA.⁵ While Nevada is among the states that have adopted the RUAA since its approval, the Nevada legislature did not incorporate the RUAA in its entirety.⁶ When the Nevada Legislature adopted the RUAA, it opted to exclude the provision granting arbitrators the authority to award punitive damages.⁷ The RUAA, as well as the FAA, is designed to be a default rule for contracting parties if they have not altered any of the provisions in the respective statute under which the parties agreed to arbitrate. The RUAA was created to retain basic principles of the UAA while updating the approach to arbitration by allowing the use of current technology, like the internet and video conferencing, and by adapting to more complex

¹ See 9 U.S.C. §§ 1-16 (2003).

² Lucille M. Pointe & Thomas D. Cavenagh, *Alternative Dispute Resolution in Business* 159 (1999).

³ See 9 U.S.C. §§ 1-16.

⁴ RUAA Official Comment (2000).

⁵ Nevada, Oregon, North Dakota, New Jersey, Hawaii, Utah, New Mexico, and North Carolina have all passed the RUAA while, Missouri, Pennsylvania, Alabama, and Alaska are still in the process of considering the RUAA over existing arbitration laws.

⁶ See NEV. REV. STAT. §§ 38.206-38.248 (2003).

⁷ See R.U.A.A. § 21(e) (2000).

arbitration cases. With cost as a portion of the motivation, along with increasing popular use of the internet and video conference phones, the ability to arbitrate without the parties or arbitrators being congregated in the same room is now increasingly popular and appealing in the realm of arbitration.

III. Arbitration Using Nevada's Adopted RUAA

On May 31, 2001, Nevada became the second state to adopt the RUAA after it was approved by the NCCUSLS in 2000.⁸ The RUAA, while trying to maintain its original purpose, added fresh ideas to the rules of arbitration. For example, under Nevada's statute, many provisions of the Revised Act can be waived by the parties allowing for a custom arbitration,⁹ such as the provision allowing courts to consolidate separate arbitration proceedings.¹⁰ The statute grants courts specific powers including the duty to decide substantive arbitrability questions, interim relief before an arbitrator is appointed and allowing arbitrators to provide relief after appointment, and allows the courts to consolidate separate but similar claims brought by different parties against the same defendant, as well as allowing broader grounds for vacating awards by arbitrators.¹¹ Another aspect codified by the Nevada statute is the duty of the arbitrator to disclose any personal relation to the parties involved in the arbitration which a reasonable person would consider to affect impartiality.¹² The RUAA also gives the arbitrator many grants of power, such as civil immunity, to the same extent as a judge of a court.¹³ It also allows arbitrators to order subpoenas, depositions, and discovery.¹⁴ Nevada law may allow for more grants of powers to arbitrators and courts, but Nevada law closely mirrors the FAA for the

⁸ Justin Kelly, Nevada Second State to Adopt Revised Uniform Arbitration Act, ADRWorld.com, at <http://www.adrworld.com> (June 8, 2001).

⁹ NEV. REV. STAT. § 38.217 (2003).

¹⁰ NEV. REV. STAT. § 38.224 (2003).

¹¹ See NEV. REV. STAT. §§ 38.219(3), 38.222, 38.224, 38.241 (2003).

¹² NEV. REV. STAT. § 38.227 (2003).

¹³ NEV. REV. STAT. § 38.229 (2003).

selection of appeals available for unsatisfied parties.¹⁵ Finally, the new RUAA allows for other recent adaptations in technology by allowing the use of electronic signatures, and changes the rule under the UAA and the FAA, mandating that the arbitration agreement be on a tangible document in writing, instead permitting that it be contained in a record.¹⁶

IV. Hypothetically Speaking

Suppose Dan Defendant, while on a trip to Las Vegas, Nevada, entered into an agreement through a computer program with Poker Paul's Plaintiff Casino to accept a marker at the casino for the sum of \$100,000.¹⁷ In the agreement, both parties agree to an arbitration clause providing that, "all disputes arising from or relating to this contract or relationship between the aforesaid parties shall be resolved by binding arbitration by a tri-partite panel of arbitrators consisting of two-party appointed arbitrators and one neutral arbitrator to be agreed on and chosen by the party-appointed arbitrators." The agreement did not state whether the arbitration would be handled under the FAA or under the Nevada Revised Statute, which adopted the RUAA. After losing the value of the marker at the casino but before leaving to return home to Reno, Nevada, Defendant defaulted on his repayment of the marker. On Defendants' default of the marker, Plaintiff sought repayment of the loan, and informed Defendant that, if the loan was not repaid, he would enforce his right to settle the dispute following the arbitration agreement provided in the contract. Defendant argued that there was not an enforceable contract made between the two parties because the agreement was made on a computer, and therefore, neither the contract, nor the arbitration provision was binding or enforceable. Plaintiff then filed a motion compelling

¹⁴ NEV. REV. STAT. § 38.233 (2003).

¹⁵ NEV. REV. STAT. § 38.247 (2003).

¹⁶ *See*, NEV. REV. STAT. § 38.236(1) (2003). The statute allows for, "the arbitrator to sign or otherwise authenticate an award." *Id.* NEV. REV. STAT. § 38.213 (2003). The statute defines a record as, "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." *Id.*

arbitration in the matter. Assuming these facts, this paper will examine Nevada's adopted version of the RUAA and the FAA and will discuss which act a party in this type of arbitration might prefer.

V. Waiver of Provisions

Assume in our hypothetical, that Plaintiff and Defendant did not want to mirror all of the provisions in Nev. Rev. Stat. §§38.206-38.248, or in 9 U.S.C. §§1-16 in their contract, what can the parties do to change the arbitration process? If the parties agree to change provisions in the statute, they are free to alter or waive the statutory provisions at any time before a controversy arises that is subject to an agreement to arbitrate.¹⁸ Under Nevada law, there are some provisions that parties cannot waive or alter.¹⁹ With these exceptions, parties are able to include, or exclude, any provisions they agree to keep, or dispose of, in the contract so long as the provisions are changed prior to a controversy that arises that is subject to arbitration.²⁰

In our hypothetical, Defendant and Plaintiff agreed to arbitrate under a tri-partite panel of arbitrators. Nevada law requires that, if there are two or more arbitrators, the power of an arbitrator must be exercised by a majority of the arbitrators; but all of them shall conduct the

¹⁷ A marker is a loan made by a casino based on the credit worthiness of a gambler that is expected to be paid back in a specified amount of time. For all intensive purposes, we will assume that the agreement was entered into after October 1, 2001 in Las Vegas, Nevada since the RUAA provisions went into effect on October 1, 2001.

¹⁸ NEV. REV. STAT. § 38.217(1) (2003). This section states that, “[e]xcept as otherwise provided in subsections 2 and 3, a party to an agreement to arbitrate or to an arbitral proceeding may waive, or the parties may vary the effect of, the requirements of Nev. Rev. Stat. §§ 38.206-38.248.”

¹⁹ NEV. REV. STAT. § 38.217(2),(3). Subsection 2 states that, “[b]efore a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not: (a) Waive or agree to vary the effect of the requirements of subsection 1 of Nev. Rev. Stat. § 38.218, subsection 1 of Nev. Rev. Stat. § 38.219, Nev. Rev. Stat. § 38.222, subsection 1 or 2 of Nev. Rev. Stat. § 38.233, Nev. Rev. Stat. § 38.244, or Nev. Rev. Stat. § 38.247; (b) Agree to unreasonably restrict the right under Nev. Rev. Stat. § 38.223 to notice of the initiation of an arbitral proceeding; (c) Agree to unreasonably restrict the right under Nev. Rev. Stat. § 38.227 to disclosure of any facts by a neutral arbitrator; or (d) Waive the right under Nev. Rev. Stat. § 38.232 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under sections Nev. Rev. Stat. § 38.206 to § 38.248, inclusive, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.”

²⁰ NEV. REV. STAT. § 38.217(2).

hearing under subsection 3 of Nev. Rev. Stat. §38.231.²¹ When a majority of the arbitrators decides an issue, rather than a unanimous panel, because there may be pressure on the neutral arbitrator from one of the party-appointed arbitrators, the parties can alter the agreement to arbitrate but only if both parties agree to the change.²²

If parties choose to change provisions in the FAA, they are free to alter or waive the statutory provisions in the contract concerning the \$100,000 marker in question.²³ In our hypothetical, since there are no express statutory prohibitions against altering any provision in the FAA, and minimal case law prohibiting the alteration of the FAA, the parties would have more flexibility for a personalized contract under the statutory rules of the FAA than that of Nevada's statute. The advantage Defendant would have in arbitration concerning the Nevada statute is the fact that there are provisions in the statute that cannot be waived or altered, giving him more of a safety net protecting against an unfair arbitration clause made by Plaintiff.²⁴ For example, Nev. Rev. Stat. §38.232 states that a party to an arbitration may be represented by a lawyer. This provision is not allowed to be altered or waived under the Nevada statute.²⁵ If this provision were allowed to be altered or waived Plaintiff may be able to include a provision in the contract that the defaulting party could not be represented by a lawyer at the arbitration. This would be unfair to Defendant, and other parties similarly situated because they are not lawyers, and lacking beneficial legal knowledge would be disadvantaged in the arbitration process.

²¹ NEV. REV. STAT. § 38.228 (2003).

²² NEV. REV. STAT. § 38.217(1).

²³ *See*, 9 U.S.C. §4 (2003). This section notes that, “[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not at issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.” *See also*, *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989), where the Supreme Court held that, “[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate.”

²⁴ *See*, NEV. REV. STAT. §§ 38.218(1), 38.219(1), 38.222, 38. 232, 38.233(1) or (2), 38.244, and 38.247.

²⁵ NEV. REV. STAT. § 38.232.

The FAA does offer some safety for Defendant, but the provisions are not explicated in the statute as they are in the Nevada Statute, and cases are decided differently in each circuit, under different sets of circumstances. In both forums, safeguards are designed to protect a disadvantaged or unpracticed party to an arbitration clause. Under Nevada law, for example, there are a number of provisions parties cannot waive or alter in arbitration agreements.²⁶ Under federal law, courts will not enforce unconscionable arbitration clauses placed in contracts.²⁷ Since the Nevada statute explicitly spells out what provisions can be altered and which cannot be waived a defending party would be more likely to choose the Nevada statute over the FAA. The FAA, however, does not spell out what provisions can and cannot be waived or altered.²⁸ An accusatory party would be more likely to want to use the FAA as their choice of law for arbitration because the FAA is more malleable than the Nevada statute.

VI. Issue of Substantive Arbitrability

In our hypothetical, Defendant argued that, since he agreed to terms of the contract on a computer and since there was not a record of his hand-written signature, the agreement was not enforceable. In the electronic contract, both parties agreed to arbitrate any dispute arising from or related to the contract or relationship between the parties. Under the default rules in the Nevada Statute, issues of substantive arbitrability, such as Defendants' objection to the

²⁶ *See*, n. 25, *Id.*

²⁷ *See*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3rd Cir. 2003); where employees were presented with contractual terms without any real opportunity to negotiate its change. A 30-day time limitation, restrictions on relief available to the employees, and the loser pays provision for arbitrator's fees and expenses unreasonably favored the employer to the employees' detriment, and thus was found to be unconscionable. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003), where the adhesive nature of an employment arbitration agreement and provisions including the coverage of claims, fees, costs, remedies, and the employer's unilateral power to terminate or modify the agreement combined to make it unconscionable.; *Faber v. Menard, Inc.*, 267 F. Supp. 2d 961 (2003), where an employer's motion to compel arbitration was denied in its entirety because the arbitration provision in the employment contract was both procedurally and substantively unconscionable, portions were not severable and the clause was unenforceable.

²⁸ *See*, 9 U.S.C. §§ 1-16 (2003).

agreement, are determined by the courts of Nevada.²⁹ The FAA is bound by the Supreme Court decision made in *Prima Paint Corp. v. Flood & Conklin Mfr. Co.*,³⁰ and the Nevada Statute also codified this Supreme Court ruling incorporating the separability doctrine into the statute.³¹ In *Prima Paint*, the Court held that the arbitration clause in the agreement was separable from the rest of the agreement, and that allegations as to the validity of the agreement in general, as opposed to the arbitration clause in particular, were to be decided by the arbitrator.³²

Under the default rules of the Nevada statute, issues of substantive arbitrability are to be decided by the court, whereas issues of procedural arbitrability issues to the arbitrator.³³ Parties are able to alter the default rule, stating in their arbitration agreement that issues of substantive arbitrability are to be determined by the arbitrator.³⁴ Similarly, the Supreme Court has held that, when a contract is governed by the FAA, arbitrability is a question for the courts, unless the parties clearly and unmistakably provide otherwise.³⁵ Under both Nevada law, and federal law, questions of arbitrability will go to a court unless the parties express their desire to have the arbitrator decide the issue.³⁶ Since the laws mirror each other, in theory, it doesn't matter what court has jurisdiction over Defendant's claim that the contract was unenforceable, because the ruling would be the same in both courts. Neither party is disadvantaged by the default rules in either court regarding issues of substantive arbitrability regardless of which forum is picked in this arbitration case.

²⁹ See, NEV. REV. STAT. § 38.219(2),(3),(4) (2003).

³⁰ 388 U.S. 395 (1967).

³¹ See, NEV. REV. STAT. § 38.219(3).

³² *Prima Paint Corp. v. Flood & Conklin Mfr Co.*, 388 U.S. at 402, 400.

³³ Compare, NEV. REV. STAT. § 38.219(2) against NEV. REV. STAT. §38.219(3). In § 38.219(2) the statute states that "the court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." In other words, issues of substantive arbitrability are to be decided by courts. In § 38.219(3) the statute states the "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." In other words, issues of procedural arbitrability are to be decided by arbitrators.

³⁴ See, NEV. REV. STAT. § 38.217(2) (2003).

³⁵ See, *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986).

VII. The Use of Interim Relief

Assume in our hypothetical the parties have chosen their respective party-appointed arbitrators, but the party-appointed arbitrators have yet to agree on a neutral arbitrator. Assume further, Plaintiff has discovered that Defendant is about to complete a sale of goods and will have the \$100,000 he owes Plaintiff. Plaintiff further discovered that Defendant puts his money into a Swiss bank account, where United States court orders have no authority. If the Plaintiff was so inclined to stop the transfer, he may be able to convince a Nevada court to issue a temporary restraining order (TRO), to stop the transfer of Defendant's money to the Swiss Bank.³⁷ Once an arbitrator is assigned, however, Plaintiff may lose the effect of the TRO, because after the arbitrator is assigned she may decide that a TRO is not necessary after a review of the evidence. Defendant may then transfer the money.³⁸

Alternatively, assuming that the party-appointed arbitrators have selected the neutral arbitrator, Plaintiff (under the Nevada Statute) could seek an injunction from the arbitrator, or if the matter is urgent and the arbitrator is unable to act quickly, or if the arbitrator cannot provide an adequate remedy, Plaintiff may move the court for a provisional remedy.³⁹ Plaintiff must be cautious not to step the bounds of Nev. Rev. Stat. §38.222 while attempting to secure the provisional remedy because the court may have to reach the merits of the case in order to grant

³⁶ NEV. REV. STAT. § 38.219(2); *Id.* at 649.

³⁷ *See*, RUAA official comment § 8(4) (2000); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 47-49 (1st Cir. 1986), where the court held it was appropriate, when arbitration was pending, to issue a preliminary injunction when the court found that Teradyne would have suffered irreparable injury if the injunction was not granted and that such an injury outweighed any harm which granting injunctive relief would inflict. The court also held that a preliminary injunction designed to put assets in an interest bearing account protected Teradyne's pending damages claim was an appropriate form of relief when it was shown that Mostek was likely to be insolvent at the time of judgment.

³⁸ This codified the ruling in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211 (7th Cir. 1993). That court held that a temporary restraining order is valid "only until the arbitration panel is able to address whether the TRO should remain in effect. Once assembled, an arbitration panel can enter whatever temporary injunctive relief it deems necessary to maintain the status quo." *Id.* at 215.

³⁹ NEV. REV. STAT. § 38.222(2)(a)&(b) (2003).

the injunction, and thus may be forced to waive his right to arbitrate.⁴⁰ This section of the Nevada Statute cannot be waived or altered by the parties, because the drafters of the RUA “intended to protect the integrity of the arbitration process.”⁴¹

A majority of federal courts also allow courts to grant interim relief while arbitration is pending under the FAA, with the exception of the Eighth Circuit.⁴² While the majority of federal courts are willing to grant interim relief, parties need to be careful to not reach the merits of the case in asking for interim relief as well as not engage in prior litigation. In *S & R Co. of Kingston v. LaTona Trucking, Inc.*, the Second Circuit held that a “no waiver” clause in an arbitration contract does not prevent a court from finding that a party has waived its right to arbitration.⁴³ Since Nevada’s statute codified the holding in *Salvano* the law in Nevada mirrors the federal court’s ruling concerning the use of interim relief. Since both statutes tend to favor the use of interim relief by courts, a party would not be without relief when in need of a swift decision when an arbitrator is not able to act, or is not yet chosen. In our hypothetical, it shouldn’t matter to the parties which statute governed the arbitration because both courts allow for the use of interim relief, and allow the arbitrator to review the decision of the court after the arbitrator is able to act in their official capacity.

⁴⁰ See, RUA official comment § 8(7) (2000). The official comment states that this section of the RUA/Nevada Statute “is intended to insure that so long as a party is pursuing the arbitration process while requesting the court to provide provisional relief under RUA Section 8(a) or (b)/ NEV. REV. STAT. § 38.222(2)(a)&(b), the motion to the court should not act as a waiver of that party’s right to arbitrate a matter.”

⁴¹ See, NEV. REV. STAT. § 38.217 (2003); RUA §8 Official Comment 5(b).

⁴² See for example, *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 47-51 (1st Cir. 1986), *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1052-53 (2d Cir. 1990), *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124, 125 (2d Cir. 1984), *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985), *Merrill Lynch v. Salvano*, 999 F.2d 211, 216 (7th Cir. 1993), *Merrill Lynch v. Dutton*, 844 F.2d 726, 728 (10th Cir. 1988); See, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984) (held that where the FAA is applicable and no qualifying contractual language has been alleged, the district court errs in granting injunctive relief).

⁴³ 159 F.3d 80 (2d Cir. 1998); A “no waiver” clause allows parties to go to courts for interim relief without waiving their right to arbitration; *S & R Co. of Kingston v. LaTona Trucking, Inc.*, 159 F.3d at 87.

VIII. Consolidation of Similar Claims

In our hypothetical, Defendant took out a marker at the casino he was visiting; and while doing so, he entered into a contract securing the marker via a computer program. The contract contained a provision that stated, “all disputes arising from or relating to this contract or relationship between the aforesaid parties shall be resolved by binding arbitration by a tri-partite panel of arbitrators consisting of two-party appointed arbitrators and one neutral arbitrator to be agreed on and chosen by the party-appointed arbitrators,” but was silent as to whether consolidation would be allowed. Further assume that other guests at the casino entered into similar contracts as Defendant, securing markers for use at the casino using the same computer program. If other guests argue that their contracts are not binding because of the lack of a written signature, Nevada courts could order consolidation of the separate arbitral proceedings because of the existence of common issues of law (the question of whether the contracts are binding), or fact, (that Defendant and other guests took out markers on the same computer agreement), creates the possibility of conflicting decisions in separate arbitral proceedings.⁴⁴ Since this provision is waivable under Nevada law, Plaintiff could arbitrate every claim separately if he so desired by stating in his contracts that consolidation is not allowed for similar claims in his contracts.⁴⁵

Alternatively, the FAA does not explicitly provide for consolidation, and the Supreme Court ruled in *Green Tree Financial Corp. v. Bazzle*, that when arbitration is governed by the FAA the decision to consolidate arbitration when the agreement is silent is left to the arbitrators, not the courts.⁴⁶ Further, in *Pedcor Management Co. Welfare Benefit Plan v. Nations Personne. of Texas, Inc.*, the Fifth Circuit furthered the ruling in *Bazzle*, and held that the decision also

⁴⁴ NEV. REV. STAT. § 38.224(c) (2003).

⁴⁵ NEV. REV. STAT. § 38.217(a) (2003).

affected arbitration governed by state law because “the Court indicated that the question whether the arbitration agreement was silent about class arbitration was a matter of state law.”⁴⁷

Alternatively, federal courts may grant consolidation when the contract explicitly states that the parties have agreed to allow courts to order consolidation.⁴⁸ Under the FAA, Plaintiff could arbitrate every claim separately if he explicitly states in the contract that consolidation is not allowed when disputes arise under his contracts.⁴⁹

Even though Defendant’s claims are essentially the same as the other patrons’ (arguing that the contracts are not valid because they did not sign a tangible agreement), federal courts will not be able to consolidate the claims because the arbitration agreement is silent as to the grant of consolidation.⁵⁰ Under Nevada law, courts are to decide issues of consolidation, unless the Nevada courts were to follow the ruling of *Pedcor*, which incorporated the holding of *Bazzle*.⁵¹ If the Nevada courts continue following Nevada law, similarly situated parties should be able to get one result from similar facts and similar issues of law, and the cost of arbitration should be reduced by resolving the similar conflicts in one arbitration proceeding instead of multiple proceedings, based on the intentions of the NCCUSL’s official comments.⁵² Under the

⁴⁶ See 9 U.S.C. §§ 1-16 (2003), 123 S.Ct. 2402 (2003), *Id.* at 2407.

⁴⁷ 343 F.3d 355 (5th Cir. 2003); *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. at 2405.

⁴⁸ See, e.g., *Conn. Gen. Life Ins. Co. v. Sun Life Assur. Co. of Can.*, 210 F.3d 771, 773 (7th Cir. 2000); *Glencore, Ltd. v. Schnitzer Steel Products Co.*, 189 F.3d 264, 268 (2d Cir. 1999); *Gov’t of U.K. v. Boeing Co.*, 998 F.2d 68, 71-74 (2d Cir. 1993); *American Centennial Ins. Co. v. National Casualty Co.*, *supra*, 951 F.2d at 108 n. 43; *Baessler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat’l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (*per curiam*); *Del E. Webb Construction v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984).

⁴⁹ *Green Tree Financial Corp. v. Bazzle*, 123 S.Ct. at 2407.

⁵⁰ *Id.* at 2407.

⁵¹ NEV. REV. STAT. § 38.219(2) (2003).

⁵² I am assuming, *inter alia*, that because the Fifth Circuit has been the only circuit to rule on a consolidation claim, and Nevada is located in the 9th Circuit, who has yet to rule on the issue of consolidation governed by state law, that Nevada courts will continue following the state law that authorizes courts to order consolidation; RUA §10 Official Comment 3 states:

As in the judicial forum, consolidation effectuates efficiency in conflict resolution and avoidance of conflicting results. By agreeing to include an arbitration clause, parties have indicated that they wish their disputes to be resolved in such a manner. In many cases, moreover, a court may be the only practical forum within which to effect consolidation. By establishing a default provision which permits consolidation

FAA, however, Plaintiff would have to arbitrate each party's claim separately unless an arbitrator allowed for consolidation, or the arbitration agreement in the contract expressly allowed for consolidation of similar claims.

Defendant (as well as all other contract holders) would likely want to have this type of arbitration agreement fall under the Nevada Statutes because it allows for consolidation by the courts, as opposed to arbitrators. The reason Defendant would prefer to have the arbitration fall under Nevada law, is the fact that arbitrators would be less likely to order a consolidation for an arbitration case because arbitrators get paid by the number of cases they arbitrate. Courts, however, are not concerned with, nor are they worried about, consolidating arbitration because they do not depend on arbitration for a paycheck, as judges are salary employees. If the claims between Plaintiff and the other parties that defaulted on the contracts were consolidated it would allow Defendant to show that more than one person thought that the contract was not enforceable. In the alternative, consolidation would allow Plaintiff to consolidate similar claims against his contract, and it would greatly reduce the cost of litigation. However, if the arbitration award was against Plaintiff, all of the contracts would be void, which may cost Plaintiff more money than consolidating saved.

Plaintiff would likely want the contract to fall under the FAA, especially if the contract is silent as to the law governing the contract, and consolidation. The reason Plaintiff should prefer the FAA over Nevada Law is because arbitrators decide the issue of consolidation. Since an arbitrator's bread and butter is arbitrating cases, and they do not want to take work away from

(subject to various limitations) in the absence of a specific contractual provision, Section 10 encourages drafters to address the issue expressly and enhances the possibility that all parties will be on notice regarding the issue.

Like other sections of the RUAA, however, the provision also embodies the fundamental principle of judicial respect for the preservation and enforcement of the terms of agreements to arbitrate. Thus, Section 10(c) recognizes that consolidation of a party's claims should not be ordered in contravention of provisions of arbitration agreements prohibiting consolidation.

fellow arbitrators, one may be more hesitant to consolidate claims, thus allowing Plaintiff different results in similar claims. But he is not stuck with an all-or-nothing ruling.

IX. Disclosure by the Arbitrator

Now assume in our hypothetical that the parties have taken the matter to court, Plaintiff filed a motion asking the court to compel arbitration and the motion to compel arbitration was granted. The arbitration agreement stated that the arbitration process would be umpired by a tripartite panel of arbitrators, consisting of two party-appointed arbitrators and one neutral arbitrator. Assume that both parties have chosen their party-appointed arbitrators, and they, in turn, have agreed on and have chosen the neutral arbitrator, Lucy Professor, who happens to be a law school professor that taught Defendant's attorney. After the appointment of Professor, the parties come together for their first hearing and Professor notices that Defendant's lawyer is a former student of hers.

Under Nevada law, it is required that before accepting appointment, an arbitrator shall disclose to all parties to the arbitration agreement, and to other arbitrators, any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the proceeding.⁵³ Nevada law does not limit disclosure to the start of the arbitration process.⁵⁴ Instead, disclosure continues into the process and imposes on the arbitrator a continuing obligation to disclose to the parties any facts that he or she learns after accepting an appointment.⁵⁵ If a party to an arbitration makes a timely objection to an arbitrator's continued service after a disclosure required under Nev. Rev. Stat. §38.227(1) or (2), and the arbitrator still

⁵³ NEV. REV. STAT. § 38.227(a)(b) (2003). §38.227(a) states; "A financial or personal interest in the outcome of the arbitral proceeding must be disclosed," and §38.227(b) states; "[a]n existing or past relationship with any of the parties to the agreement to arbitrate or the arbitral proceeding, their counsel or representatives, a witness or another arbitrator must be disclosed."

⁵⁴ NEV. REV. STAT. § 38.227(2) (2003).

⁵⁵ NEV. REV. STAT. § 38.227(2).

renders an award, the party making the objection may have grounds to have the award vacated.⁵⁶

An arbitrator who is appointed as a neutral arbitrator and fails to disclose a known, direct and material interest in the outcome of the arbitral proceeding or a known, existing and substantial relationship with a party is presumed to act with evident partiality for purposes of vacatur.⁵⁷

Under Nevada law, the fact that the neutral arbitrator was a law professor for Defendant's lawyer should be disclosed by the law professor because a reasonable person could consider the relationship between a law professor and a former student a likely relationship that could affect the impartiality of the neutral arbitrator.⁵⁸

The pages of the FAA statute however, do not overtly state what duty the arbitrator has to disclose to parties involved in arbitration, but it does state that "evident partiality or corruption in the arbitrators" is a basis for vacating an arbitration award.⁵⁹ The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes tries to remedy this problem by stating in Canon II that an arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.⁶⁰ Also, there has been case law surrounding the matter, but case law is limited to issues of the removal of arbitrators prior to the arbitration proceeding,⁶¹ and issues of evident partiality by an arbitrator.⁶² The federal courts will not

⁵⁶ NEV. REV. STAT. § 38.227(3) (2003). The statute refers to Nev. Rev. Stat. § 38.241(1), which states, "[u]pon motion to the court by a party to an arbitral proceeding, the court shall vacate an award made in the arbitral proceeding if: (b) There was: (1) Evident partiality by an arbitrator appointed as a neutral arbitrator."

⁵⁷ NEV. REV. STAT. § 38.227 (2003).

⁵⁸ ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493 (1999), held that a trivial relationship, even if undisclosed, did not justify vacatur of an arbitration award. The facts demonstrated nothing more than a trivial relationship between the arbitrator and the defendant. The court reversed and remanded

⁵⁹ 9 U.S.C. §§ 1-16 (2003); 9 U.S.C. § 10(a)(2).

⁶⁰ Canon II, AAA Code of Ethics for Arbitrators (2003).

⁶¹ See, *Aviall, Inc. v. Ryder System, Inc.*, 110 F.3d 892 (2d Cir. 1997), where the court held that a contractually appointed arbitrator cannot be removed from service prior to an award when a party claims that the arbitrator is partial to one of the parties because a business relationship exists between the arbitrator and the opposing party; *Gulf Guaranty Life Ins. Co. v. Connecticut General Life Ins. Co.* 304 F.3d 476, 490 (5th Cir. 2002), where the court held that even where arbitrator bias is at issue, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award . . . the FAA appears not to endorse court power to remove an arbitrator for any reason prior to issuance of an arbitral award; *Certain Underwriters at Lloyd's, London v.*

remove a neutral arbitrator when there may be bias, but they will vacate an award if evident partiality can be shown on appeal from the arbitrator's award.⁶³

Perhaps the fact that Defendant's lawyer was a former student of the Professor, the neutral arbitrator, would not be sufficient for a court to find evident partiality if the neutral arbitrator did not disclose because there is not a material interest in the outcome of the case for Professor. For rules covering issues of disclosure, I think that both parties in our hypothetical would favor Nevada law over the FAA because the Nevada statute is not ambiguous, and the arbitrator's duty to disclose, as well as the repercussions of not disclosing, including vacatur of the award, is expressed in the statute. Under the FAA, a party that can show there is bias by an arbitrator will not be able to get a new arbitrator until an award has been given, and even then, the award will only be overturned by showing there was evident partiality.

X. Civil Immunity for Arbitrators

Assume in our hypothetical that the neutral arbitrator awards in favor of the Defendant, and Plaintiff, upset from the award, feels that since the arbitrator found for Defendant, she acted in a biased manner towards him in her award, and Plaintiff decides to sue Professor for the cost of the marker. Under Nevada law, "an arbitrator (both neutral and party appointed arbitrators) or 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."⁶⁴ Nevada law goes on further to protect arbitrators in the judicial forum as well by stating that "in a judicial, administrative or

Argonaut Ins. Co., 264 F. Supp. 2d 926, 936-37 (2003), where the court, reaffirmed the holding in the 2nd and 5th circuits, held that a neutral arbitrator cannot be removed for bias.

⁶² Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), held that an undisclosed business relationship between an arbitrator and a party to the arbitration was enough to constitute evident partiality, and allowed for the award to be vacated; Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983), held that even though the neutral arbitrator was an ex-employee of Merit, there was not evident partiality by the arbitrator because the arbitrator did not have a financial interest in the matter, and the employment had ended over 14 years before the arbitration.

⁶³ See, n.66, n. 67.

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 arbitral proceeding, to the same extent as a judge of a court of this state acting in a judicial capacity.”⁶⁵

Under the FAA, courts have similar results as Nevada law. In *Corey v. New York Stock Exchange*, the court found that to allow collateral attack against arbitrators and their judgments would also emasculate the appeal provisions of the FAA.⁶⁶ The court went on further to state that “arbitral immunity is essential to the maintenance of arbitration by contractual agreement as a viable alternative to the judicial process for the settlement of controversies and must be applied in this case.”⁶⁷ Also, in *Austern v. Chicago Board Options Exchange, Inc.*, a commercial arbitration board was found to have immunity even though they improperly noticed the arbitration hearing, and improperly selected the arbitration board.⁶⁸ There are only a few exceptions to the general rule of immunity for commercial arbitrators from civil liability. One case is *Baar v. Tigerman*, which the California legislature overturned by passing §1280.1 of the California Civil Procedure Code in 1990.⁶⁹ The other is *NL Ind. V. GHR Energy Corp.*, where the court held that an arbitrator can be held civilly liable for fraud or extreme misconduct, and that ruling has not been overturned.⁷⁰

XI. Use of Subpoenas, Discovery, and Depositions

In our hypothetical, the parties agreed to arbitrate because it is a final decision that is swifter than that of the tedious court system which could take up to five years to hear a case. To

⁶⁴ NEV. REV. STAT. § 38.229(1) (2003).

⁶⁵ NEV. REV. STAT. § 38.229(4) (2003).

⁶⁶ 691 F.2d 1205 (6th Cir. 1982).

⁶⁷ *Id.* at 1213.

⁶⁸ 898 F.2d 882 (2d Cir. 1990).

⁶⁹ 140 Cal. App. 3d 979 (1983).

⁷⁰ 940 F.2d 957, 971 (5th Cir. 1991).

expedite the arbitration process both Nevada law and the FAA have allowed arbitrators to issue subpoenas, permit the deposition of a witness, and compel discovery.⁷¹ In our hypothetical, the arbitration would most likely be located in Las Vegas, Nevada, because that is the city in which the contract was entered into, and more than likely, the city where Plaintiff will file the motion to compel arbitration. Since the arbitration has a higher probability of being set in Las Vegas, the need for the arbitrator to issue subpoenas might be necessary to order document delivery from Plaintiff to Defendant. Next, unless there has been an order of consolidation by either a Nevada court, or the arbitrator under the FAA, the arbitrator will more than likely not have to permit the disposition of witnesses. Lastly, the arbitrator may need to compel discovery because Defendant's lawyer may need to examine a printed version of the computer-generated contract.

Nevada law allows for arbitrators to issue subpoenas for the attendance of a witness and for the production of records and other evidence at any hearing as well as administer oaths.⁷² An arbitrator may also permit a deposition of any witness to be taken for use as evidence upon the request of a party, to help make the proceedings fair, expeditious and cost effective.⁷³ Further, an arbitrator may also permit discovery as she sees fit, taking into account the needs of the parties to the arbitral proceeding and other affected persons.⁷⁴ The purpose behind the change from the old UAA statute was that the UAA only provided the arbitrator with subpoena power to require witnesses to attend hearings, and production of documents at the hearing.⁷⁵

⁷¹ NEV. REV. STAT. § 38.233 (2003); 9 U.S.C § 7 (2003).

⁷² NEV. REV. STAT. § 38.233(1) (2003).

⁷³ NEV. REV. STAT. § 38.233(2) (2003).

⁷⁴ NEV. REV. STAT. § 38.233(3) (2003).

⁷⁵ RUAA § 17 Official Comment (1) (2000). The Comment further states that:

Section 17(a) and (b) are not waivable under section 4(b) because they go to the inherent power of an arbitrator to provide a fair hearing by insuring that witnesses and records will be available at an arbitration proceeding. The other subsections of Section 17, including whether to allow prehearing discovery, can be waived or varied by agreement of the parties under Section 4(a).

Under the FAA, arbitrators may order and conduct such discovery as they find necessary under 9 U.S.C. §7.⁷⁶ Some federal courts have held that “implicit in an arbitration panel’s power to subpoena relevant documents for production at hearing is power to order production of relevant documents for review by party prior to hearing.”⁷⁷ The 4th Circuit however, has held in *COMCAST Corp. v. National Science Foundation*, that the FAA does not give the power to arbitrators to issue subpoenas to non-parties to produce materials prior to the arbitration hearing.⁷⁸ The authority of the FAA is backed by the authority of the courts. The FAA states “[i]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.”⁷⁹

Both of the statutory provisions that may govern this arbitration agreement offer the arbitrator a wide discretion for allowing parties a faster, less costly arbitration. Neither provision provides either party an advantage over each other during the arbitration process concerning subpoenas, discovery, and dispositions of witnesses. The only concern either party may have is the holding in the 4th Circuit’s case, *COMCAST*. This holding may be followed in the 9th Circuit under the right circumstances if a non-party objects to a subpoena that has been issued to them to show to an arbitration hearing. Other than that holding, the parties should be content with either statutory provision for this arbitration.

⁷⁶ *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 855 F. Supp. 69 (1995).

⁷⁷ *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865 (2000).

⁷⁸ 190 F.3d 269 (4th Cir. 1999); *Id.* at 274.

⁷⁹ 9 U.S.C. § 7 (2003).

XII. Vacatur of Awards

Suppose in our hypothetical, the arbitrator decided that he will not hear testimony of Monte Manager, the Casino's contracts manager, and the on-duty manager the night the contract was made, because he was unavailable the day he was scheduled to appear in the arbitration hearing. At the hearing, Manager planned on testifying that he had informed Defendant before agreeing to the contract that it was a legally binding document and that within the pages of the contract there was an arbitration clause. Manager was going to further testify that defendant acknowledged the arbitration clause before accepting the marker. Without this testimony, the arbitrator reasonably ruled that the contract was not enforceable because the contract was contained in a computer, and there was no evidence that Defendant knew the repercussions of defaulting on the loan. What can Plaintiff do to vacate the arbitrator's award?

Nevada law and the FAA parallel each other in the grounds of vacatur, with the exception of two court-created grounds that only federal law acknowledges. There are four grounds for vacatur that both statutes recognize. First, where the award was procured by corruption, fraud, or undue means, as seen in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, where the Supreme Court held that an arbitrator's award was procured through the use of undue means when the arbitrator and one of the parties involved in the arbitration failed to disclose to the other party that the arbitrator had received fees from the first party as a result of regular business dealings over a period of several years.⁸⁰ Second, where there is evident partiality or corruption in the arbitrators, or either of them, as the case was in *Gianelli Money Purchase Plan & Trust v. ADM Investor Services, Inc.*, where the court held that an arbitration award may be vacated due to the 'evident partiality' of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to

believe that a potential conflict exists.⁸¹ Third, where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior which the rights of any party may have been prejudiced as the case was in *Castleman v. AFC Enters., Inc.*, where the court held that “arbitration awards will not be set aside due to the arbitrator's refusal to hear evidence unless the exclusion of the contested evidence prevented the parties from receiving a fundamentally fair hearing.”⁸² Finally, where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made as was the case in *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp.*, where the court held that the arbitrator exceeded his powers in determining the obligations of a corporation which was clearly not a party to the arbitration proceeding.⁸³

There are also two grounds for vacatur not expressly included in the FAA; a public policy exception, as seen in *Arizona Electric Power Cooperative, Inc. v. Berkley*, where the court held that in order to vacate an arbitral award on public policy grounds, a court must articulate an explicit, well defined and dominate public policy and it must demonstrate that the policy is one that specifically militates against the relief ordered by the arbitrator; and for manifest disregard of the law, as the case was in *Montes v. Shearson Lehman Bros. Inc.*, where the court held to manifestly disregard the law, one must be conscious of the law and deliberately ignore it.⁸⁴ These

⁸⁰ 393 U.S. 145 (1968); *Id.* at 152.

⁸¹ 146 F.3d 1309 (11th Cir. 1998); *Id.* at 1312.

⁸² 995 F. Supp. 649 (N.D. Tex. 1997); *Id.* at 653.

⁸³ 312 F.2d 299 (2d Cir. 1963); *Id.* at 305.

⁸⁴ 59 F.3d 988 (9th Cir. 1995). *See also*, *United Paperworkers Int'l. Union v. Misco, Inc.*, 484 U.S. 29 (1987), where the Supreme Court held that a court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy; *Id.* at 993. *See also*, *PaineWebber, Inc. v. Argon*, 49 F.3d 347 (8th Cir. 1995); 128 F.3d 1456 (11th Cir. 1997); *Id.* at 1462.

two grounds are recognized by some of the federal courts, but are not recognized under Nevada law.⁸⁵

Since Nevada law and the FAA parallel each other in the four statutory categories, either statutory law should be sufficient to both parties in this case. The only other options the parties may want to examine the two other provisions covered in the FAA; the public policy exception, and the manifest disregard exception. Neither party would have an advantage, or disadvantage over the other in either statutory governance.

XIII. Appeals

Suppose in our hypothetical, Plaintiff's motion to compel arbitration was denied; that Plaintiff is dissatisfied with the final decision Professor has rendered in the arbitration because he feels that Professor had a bias towards Defendant, because she taught Defendant's lawyer; or that Plaintiff appealed the arbitrator's final decision and won, but was not granted a new arbitral hearing. What can he do to remedy the situation? Nevada law and the FAA have many provisions that mirror each other.⁸⁶ Nevada law states that an appeal may be taken from: "an order denying a motion to compel arbitration; an order modifying or correcting an award; or a final judgment entered pursuant to N.R.S. §§38.206-38.248."⁸⁷ The FAA states that an appeal may be taken from an order: "denying an application under section 206 of this title to compel arbitration; modifying, correcting, or vacating an award; or a final decision with respect to an arbitration that is subject to this title."⁸⁸ One of two major difference between the two statutes is that under Nevada law an appeal may be taken from an order granting a motion to stay arbitration, whereas under the FAA an appeal may not be taken from an order granting a stay of

⁸⁵ NEV. REV. STAT. § 38.241 (2003).

⁸⁶ *See*, 9 U.S.C. § 16 (2003) and NEV. REV. STAT. § 38.247(1) (2003).

⁸⁷ NEV. REV. STAT. § 38.247(1) (2003).

⁸⁸ 9 U.S.C. § 16.

arbitration;⁸⁹ and that the FAA allows for an appeal to be taken from an order refusing to stay a motion to compel arbitration, whereas Nevada law does not.⁹⁰

With few differences between the two statutes, parties are going to be similarly situated no matter what body of law the arbitration is governed by, if one should believe that an appeal is necessary. Nevada law allows a party to appeal a granted motion to stay arbitration, thus giving Plaintiff an advantage over Defendant. The FAA however, allows a party to appeal a court's refusal to stay a motion to compel arbitration, giving Defendant a slight advantage over Plaintiff if the FAA is the governing body of law in this arbitration.

XIV. Making Way for E-Arbitration

With the growing use of the internet, can the FAA stay compatible for the future of arbitration? In our hypothetical, Defendant took out a marker totaling \$100,000 by using a computer program, and, thus, there was no written signature by Defendant. Defendant is still bound by his agreement to arbitrate any disputes he has under the contract with Plaintiff pursuant to the Nevada Statute.⁹¹ Under the FAA, an arbitration agreement is only valid and enforceable if it is written, whereas under the Nevada Statute an arbitrator need not sign his award for the parties.⁹² If an arbitrator were to decide an arbitration agreement under the Nevada Statute, the arbitrator would not have to send the parties the award on a tangible medium.⁹³ Somewhat similar to the Nevada Statute, the FAA does not require the arbitrator's award be written and

⁸⁹ NEV. REV. STAT. § 38.247(1)(f) (2003); 9 U.S.C. § 16(b)(1) (2003).

⁹⁰ 9 U.S.C. § 16(c) (2003); NEV. REV. STAT. § 38.247 (2003).

⁹¹ *See*, NEV. REV. STAT. § 38.219(1) (2003) and NEV. REV. STAT. § 38.213 (2003). NEV. REV. STAT. § 38.219 states that, "an agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." NEV. REV. STAT. § 38.213 defines a record as, "information that is inscribed on a tangible medium or that is stored in an electronic medium and is retrievable in perceivable form."

⁹² 9 U.S.C. § 2 (2003); NEV. REV. STAT. § 38.236(1) (2003), states, "an arbitrator shall make a record of an award. The record must be signed or otherwise authenticated by an arbitrator who concurs with the award."

⁹³ NEV. REV. STAT. § 38.236 (2003).

signed.⁹⁴ So, arguably, the arbitrator could send the award notification via e-mail to the parties involved in the arbitration. The FAA and the Nevada Statute allow for this provision to be waived, or altered by the parties in the arbitration thus making either choice of statute equally appealing to a party entering into a contract that requires arbitration.

XV. Conclusion

Parties contracting for the right to arbitrate their claims in Nevada have a great decision to make concerning the choice of laws governing their contract. There are many factors to weigh before one should choose an arbitration statute. Although a party would more likely want to choose Nevada law to govern their dispute, Federal law is also very appealing. Defendant in an arbitration dispute would prefer Nevada law concerning issues of waiver because there are strict provisions that cannot be waived or altered, giving Defendant a safety net that cannot be taken away, whereas Plaintiff would prefer the FAA because it is a more malleable law. Neither Defendant or Plaintiff would probably have a preference pertaining to issues of substantive arbitrability, because both laws allow parties to alter the default rule to allow an arbitrator decide issues of arbitrability instead of courts. The issue of interim relief is also neutral because both laws are substantively similar so neither party would be affected by either statute. Defendant would prefer Nevada law to govern the contract if there were similarly situated people with similar claims because courts decide issues of consolidation. Plaintiff would prefer the FAA because arbitrators decide the issue of consolidation, and are less likely to consolidate. Both parties would prefer Nevada law for issues covering disclosure because the statute explicitly states what the duty of the arbitrator is in disclosing facts pertinent to the outcome of the case. Issues of civil immunity are similar under both laws so neither party would be concerned with this issue. Both statutes also grant arbitrators the authority to issue subpoenas, discover and

⁹⁴ See generally, 9 U.S.C. §§1-16 (2003).

depositions, so this issue is also moot. Both parties would prefer the FAA over Nevada law for issues covering vacatur because the FAA allows for vacatur of an award for manifest disregard of the law, as well as public policy concerns. Defendant would prefer the FAA over Nevada law for grounds of appeal because the FAA offers an appeal for the denial of a stay of arbitration. This may be important because many times a defendant in an arbitration is a first-time party to an arbitration, and would prefer the comforts of the due process of law courts have to offer. Plaintiff however, would prefer Nevada law because it allows him an appeal for a grant of stay of arbitration. This is important because that is the reason Plaintiff included an arbitration clause in the contract. For issues concerning e-arbitration both parties would prefer Nevada law over the FAA because Nevada law is designed for the future of e-arbitration.