# Revised Florida Arbitration Act

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**by**

**Gary S. Salzman, Esq.**
**GrayRobinson, P.A.**
***Attorneys and Counselors at Law***
**301 E. Pine Street, Suite 1400**
**Post Office Box 3068**
**Orlando FL 32802-3068**
**Office: (407) 843-8880**
**Fax: (407) 244-5690**

**email: gsalzman@gray-robinson.com**
**website: www.gray-robinson.com**

I. Arbitration

A. Effective July 1, 2013, the Florida Legislature passed the Revised Florida Arbitration Act ("RFLAA") to codify Florida case law and adopt portions of the Uniform Revised Arbitration Code. *See* Chapt. 682, *Fla. Stats.*

B. The RFLAA expressly provides that 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." *Fla. Stat.* § 682.02(1).

C. The RFLAA includes the following definitions:

1. "Arbitration organization" means any business entity, association, agency, or commission that is "neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator."

2. "Arbitrator" means any 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. "Knowledge" means actual knowledge.

5. "Person" means an individual, public or private entity, association, joint venture or governmental agency.

6. "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."

*Fla. Stat.* § 682.011.

D. Whether an arbitration is subject to the RFLAA is dependent upon when the arbitration agreement was entered into and when its enforcement is sought.

1. An agreement made on or after July 1, 2013 is governed by the RFLAA.

2. An agreement made before July 1, 2013 and whose enforcement is sought between July 1, 2013 and July 1, 2016 is subject to the RFLAA if all parties to the agreement or to the arbitration proceeding so agree in a record. Otherwise, the date the arbitration agreement was created governs.

3. Beginning July 1, 2016, all agreements to arbitrate are subject to the RFLAA, regardless of when created.

*Fla. Stat.* § 682.013.

E. The RFLAA prohibits certain provisions from being waived by the parties.

1. *Before a controversy arises*, the parties may not:

a. Waive or agree to vary the effect of:

i. Commencing a petition for judicial relief under *Fla. Stat.* § 682.015(1);

ii. Making arbitration agreements valid, enforceable, and irrevocable under *Fla. Stat.* § 682.02(1);

iii. Permitting provisional remedies under *Fla. Stat.* § 682.031;

iv. Conferring authority on arbitrators to issue subpoenas and permit depositions under *Fla. Stat.* § 682.08(1) or (2);

v. Conferring jurisdiction under *Fla. Stat.* § 682.181; or

vi. Stating the basis for appeal under *Fla. Stat.* § 682.20;

b. Agree to unreasonably restrict the right under *Fla. Stat.* § 682.032 to notice of an arbitration proceeding;

c. Agree to unreasonably restrict the right under *Fla. Stat.* § 682.041 to disclosures by a neutral arbitrator; or

d. Waive the right under *Fla. Stat.* § 682.07 of a party to be represented by an attorney at any proceeding or hearing, but an employer and a labor organization may waive the right to representation by an attorney in a labor arbitration.

2. *At any time*, the parties may not vary the RFLAA as to:

a. The dates of application of the RFLAA;

b. The availability to compel or stay arbitration under *Fla. Stat.* § 682.03;

c. The immunity conferred on arbitrators and arbitration organizations under *Fla. Stat.* § 682.051;

d. A party's right to seek judicial enforcement of an arbitration pre-award ruling under *Fla. Stat.* § 682.081;

e. The authority conferred on an arbitrator to change an award under *Fla. Stat.* § 682.10(4) or (5);

f. The remedies provided under *Fla. Stat.* § 682.12;

g. The grounds for vacating an arbitration award under *Fla. Stat.* § 682.13;

h. The grounds for modifying an arbitration award under *Fla. Stat.* § 682.14;

i. The validity and enforceability of a judgment or decree based on an award under *Fla. Stat.* § 682.15(1) or (2); or

j. The validity of the electronic signatures under *Fla. Stat.* § 682.23.

*Fla. Stat.* § 682.014.

F. Arbitration Agreements

1. Subject to due process considerations, arbitration clauses may expressly provide for:

a. The number of arbitrators;
b. The specific minimum qualifications for the arbitrators;
c. The method of and responsibility for payment for the fees and costs associated with the arbitration;
d. The locale for all hearings: and
e. The use of any discovery tools, including depositions under the Florida Rules of Civil Procedure.

2. While courts are mindful of the "liberal policy favoring arbitration agreements," the U.S. Supreme Court has also made clear that arbitration is only appropriate "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" allowing the statute to serve its purposes. *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 28 (1991), *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 637 (1985).

3. Clauses requiring splitting of arbitration costs, filing fees and arbitrator compensation.

a. The U.S. Supreme Court acknowledged that "the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S.

79, 90 (2000). However, the "possibility" that the plaintiff would "be saddled with prohibitive costs is too speculative," and "[t]o invalidate the agreement on that basis would undermine the 'liberal federal policy favoring arbitration agreements." *Id.* at 91. The party seeking to avoid arbitration due to excessive costs "bears the burden of showing the likelihood of incurring such costs." *Id.* at 92.

b. When considering cost sharing language in an employment agreement, the case-by-case analysis offers little guidance in calculating a numerical figure that would be categorically shielded from attack.

c. In *Morrison v. Circuit City Stores, Inc.,* the former employee's cost splitting rule in her arbitration agreement detailed her exposure to the greater of $500 or 3% of her annual salary. 317 F. 3d 646, 669 (6th Cir. 2003). The court, applying a case-by-case analysis, concluded that this provision was unenforceable with respect to her claims. *Id.* The court supported its decision by emphasizing that an employee's resources can be scarce, and a substantial number of similarly situated persons would be deterred from seeking to vindicate their statutory rights under these circumstances. *Id.* at 670.

d. A cost-splitting provision limited at one week's compensation could also be rendered unconscionable. *See Garrett v. Hooters-Toledo,* 295 F. Supp. 2d 774 (N.D. Ohio 2003). Based on the lack of evidence regarding the plaintiff's income in the record, the court was precluded from rendering the agreement substantively unconscionable in this case. *Id.* at 781. The court noted in dicta that "one week's compensation, therefore, imposes a high burden on a single mother experiencing intermittent periods of unemployment." *Id.*

e. It appears virtually impossible to draft an arbitration clause providing for fee splitting for a consumer or employment dispute that is completely insulated from any challenge.

f. Thus, providing for the non-consumer or employer to bear all filing fees, mediation fees, arbitration costs and arbitrator compensation is advisable until a safe harbor is established by binding case law.

4. The Florida Supreme Court has ruled that Florida's statute of limitations applies to arbitrations because an arbitration proceeding is within the statutory term "civil action or proceeding" found in *Florida Statute* Section 95.011. *Raymond James Financial Services, Inc. v. Barbara J. Phillips, etc., et al*., 126 So. 3d 186, 193 (Fla. 2013).

5. A customized arbitration clause can be drafted with the foregoing in mind. In that regard, the following is a sample arbitration clause tailored for an employment agreement with a high level, managerial employee:

Except for any claim relating to violations of the restrictive covenants contained in paragraphs ___ above, any and all other claims, controversies and disputes between Employee and Employer arising out of or relating to this Agreement, Employee's employment with Employer or the parties' performances due hereunder, including, without limitation, all known and unknown rights, demands, claims and causes of action arising under or in connection with the Americans with Disabilities Act of 1990, as amended, Title VII of the Civil Rights Act of 1964, as amended, the Florida Civil Rights Act of 1992, as amended, the Equal Pay Act of 1963, as amended, the Age Discrimination in Employment Act of 1967, as amended, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974 (ERISA), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the Genetic Information Nondiscrimination Act of 2009, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act (WARN Act) and any other federal, state or local law, including, without limitation, any and all tort claims relating to or arising out of Employee's employment with Employer, and the determination of whether any claim is arbitrable, shall be resolved by binding arbitration administered by and in accordance with the National Employment rules of the American Arbitration Association, and any court of competent jurisdiction shall enter final judgment on any such final arbitration award.

The final arbitration hearing shall be conducted in the county in which Employer's principal place of business is located no sooner than ninety (90) days and no later than one hundred eighty (180) days after any demand for arbitration is served upon the respondent for the proceeding. The arbitration proceeding shall be conducted by a panel of three neutral and impartial arbitrators. The arbitrator panel shall be comprised of arbitrators who shall be members in good standing with the state bar association for the state in which the final arbitration hearing shall be conducted and who [***have at least fifteen (15) years of substantial and continuous experience in employment law and/or are Board Certified in Labor and Employment Law by said bar association***].

The parties to the arbitration proceeding shall be permitted to take no more than three (3) depositions, not to exceed five (5) hours each, without good cause shown and leave of the arbitrators. The parties shall also be entitled to discover documents through the use of requests for production. No other forms of formal discovery shall be permitted by the arbitrators. All permissible discovery shall be governed by the applicable Federal Rules of Civil Procedure.

The arbitrators shall be bound by and shall follow the choice of law provision set forth in this Agreement for the rendering of any final award. All defenses and claims which would otherwise be available to the parties in any court proceeding, **except for class actions**, shall be available in arbitration. Arbitration of class claims under this Agreement shall not be permitted by the Arbitrators, and each arbitration claim encompassed by this Agreement shall be administered and determined in separate proceedings.

Any final award shall reflect the reasoning for the award, but shall not be required to state findings of fact and conclusions of law. The arbitrators shall have the authority to award any and all relief which a court of competent jurisdiction could otherwise award. Employer shall be responsible to pay for all arbitration filing fees and arbitrator compensation. However, such fees and compensation may be awarded to Employer in the event it is determined to be the prevailing party in the arbitration proceeding.

The arbitrators and the parties shall maintain in the strictest confidence the arbitration proceeding, the final arbitration hearing, all papers filed therein and the substance of the underlying dispute for the arbitration proceeding, unless otherwise required to disclose same pursuant to applicable law.

G. Commencement and Submission of Non-AAA Arbitrations under the RFLAA

1. An arbitration proceeding is commenced under the RFLAA by giving notice in a "record" to the other parties to the arbitration agreement in the agreed upon manner 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." *Fla. Stat*. § 682.032(1). "The notice must describe the nature of the controversy and the remedy sought." *Id.*

2. Unless a party objects for "lack or insufficiency of notice" by the beginning of the arbitration hearing, any person appearing at the hearing "waives any objection to lack of or insufficiency of notice." *Fla. Stat*. § 682.032(2).

H. Compelling or Staying Arbitration

1. After a dispute arises and a lawsuit is filed, the threshold issue is whether there is a binding right to arbitration of the dispute. If such a right is present, a motion to compel arbitration is appropriate where a party refuses to participate in the arbitration.

2. The RFLAA states that the Court (not the arbitrator) shall decide "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." *Fla. Stat.* § 682.02(2). This provision of

the RFLAA reflects a significant change in Florida law which previously required the arbitrator to determine these issues, unless the arbitration clause itself was being attacked. *See e.g. Sanchez v. Criden*, 899 So.2d 326 (Fla. 3d DCA 2005).

3. The arbitrator, however, is still to decide "whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." *Fla. Stat.* § 682.02(3).

4. The RFLAA also confers jurisdiction to Florida courts to "enforce an agreement to arbitrate." *Fla. Stat.* § 682.181(1). Florida courts also have "exclusive jurisdiction … to enter judgment on an award under this chapter." *Fla. Stat.* § 682.181(2). As discussed below, however, these provisions will not apply to a transaction involving interstate commerce where the Federal Arbitration Act pre-empts the RFLAA.

5. "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." *Fla. Stat.* § 682.02(4).

6. When a party to an agreement refuses to arbitrate, a party may file a motion with the Court for an order compelling arbitration. *Fla. Stat.* § 682.03(1). If the refusing party opposes the motion, the Court must "proceed summarily to decide the issue and order the parties to arbitrate, unless it finds that there is no enforceable agreement to arbitrate." *Id. See also Bill Heard Chevrolet v. Wilson*, 877 So. 2d 15 (Fla. 5th DCA 2004).

7. Similarly, where an arbitration proceeding has been initiated or threatened, but that there is allegedly no agreement to arbitrate, the Court must " proceed summarily to decide the issue." *Fla. Stat.* § 682.03(3). "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." *Fla. Stat.* § 682.03(4).

8. In the event the Court compels arbitration on a claim, it must stay any judicial proceeding that involves the arbitrable claim, but may limit the stay to that claim. *Fla. Stat.* § 682.03(7).

I. Enforceability of the Arbitration Agreement

1. Under Florida law, to prevail on a defense that an arbitration agreement is unconscionable and therefore unenforceable, a party must establish that the agreement is both procedurally and substantively unconscionable. *See Golden v. Mobil Oil Corp.,* 882 F.2d 490, 493 (11th Cir. 1989); *Murphy v. Courtesy Ford LLC,* 944

So. 2d 1131, 1134 (Fla. 3d DCA 2006); *Voicestream Wireless Corp. v. U.S. Commc'ns., Inc.,* 912 So. 2d 34, 39 (Fla. 4th DCA 2005).

a. Procedural unconscionability "relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms." *Powertel Inc. v. Bexley,* 743 So. 2d 570, 574 (Fla. 1st DCA 1999).

b. A contract is substantively unconscionable if its terms are so "outrageously unfair" as to "shock the judicial conscience." *Gainesville Health Care Ctr., Inc. v. Weston,* 857 So. 2d 278, 285 (Fla. 1st DCA 2003).

2. Under the FAA, if a contract containing an arbitration clause is challenged as void *ab initio*, it is submitted to arbitration, unless the challenged is to the specific arbitration clause. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204 (2006).

J. Arbitration with non-signatories to agreement

1. A party may be bound to arbitrate a dispute even though the party did not physically sign a written contract to arbitrate. *See, e.g.*, *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1074 (5th Cir. 2002) (agency required non-signatory to arbitrate); *Qubty v. Nagda*, 817 So. 2d 952 (Fla. 5th DCA 2002) (investors suing stockbrokers compelled to arbitrate under thirty-party beneficiary theory); *Employers Ins. of Wausau v. Bright Metal Spec., Inc.*, 251 F.3d 1316 (11th Cir. 2001); *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *Gottfried, Inc. v. Paulette Koch Real Estate, Inc.*, 778 So. 2d 1089 (Fla. 4th DCA 2001). *See also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993).

2. An employee was held to be bound by his employer's Dispute Resolution Policy (DRP) implemented for all employees during the particular employee's employment. The DRP stated that arbitration was the sole and exclusive forum and remedy for all covered claims, and that the parties agreed to waive any right to jury trial for a covered claim. The DRP also provided that the continuation of employment by an individual was deemed to be acceptance of the DRP. The employee contested the enforceability of the DRP because he never signed any arbitration agreement and there was no consideration for the change in the terms of his employment. The appellate court disagreed, ruling that the arbitration agreement was valid and enforceable under 9 U.S.C. § 2. The fact that the employee did not sign the DRP did not automatically render the agreement invalid as his continued employment after receipt of the DRP sufficiently demonstrated his assent to its terms. Finally, there was sufficient

consideration to support the DRP because the agreement created a mutual obligation to arbitrate. *Santos v. Gen. Dynamics Aviation Servs. Corp*., 984 So. 2d 658 (Fla. 4th DCA 2008).

3. In the absence of a signature, a party may still be bound by an arbitration clause contained in a contract, if the party's conduct indicates that the party agreed to be bound by the contract in question.[1] *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F. 3d 773, 776 (2d Cir. 1995).

4. On the other hand, courts have refused to require non-signatories to arbitrate in various circumstances. *See, e.g., Benasra v. Marciano*, 112 Cal. Rptr. 2d 358 (2001) (president of corporation who signed contract in corporate capacity could not be compelled to arbitrate individually); *Thomson-CSF, S.A.*, 64 F. 3d 773 (corporate parent not required to arbitrate on claim relating to subsidiary's arbitration agreement).

K. Waiver of Right to Arbitrate and Provisional Remedies

1. The RFLAA provides that a party to an arbitration proceeding may request the Court to grant "provisional remedies to protect the effectiveness of the arbitration proceeding extent and under the same conditions as if the controversy were the subject of a civil action" before an arbitrator is appointed and is authorized and able to act. *Fla. Stat*. § 682.031(1). A party to an arbitration may only do so if "the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy." *Fla. Stat*. § 682.031(2)(b).

2. Once the arbitrator is appointed and is authorized to act, 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." *Fla. Stat*. § 682.031(2)(a).

3. The arbitrator must state factual findings and the legal basis to award any provisional remedy for injunctive or equitable relief. *Fla. Stat*. § 682.031(4). A party may then seek to "confirm or vacate a provisional remedy award for injunctive or equitable relief" under *Fla. Stat*. § 682.081. *Fla. Stat*. § 682.031(5).

[1] This rule of law appears to be an outgrowth of the general principle that one may be deemed to have accepted a written contract, which otherwise requires acceptance by a signature, by performing pursuant to its terms. *See, e.g., Bryan, Keefe & Co. v. Howell*, 109 So. 593 (Fla. 1926).

4. Contrary to the common law prior to the RFLAA, "a party does not waive a right of arbitration by making a motion" under *Fla. Stat*. § 682.031. *Fla. Stat*. § 682.031(3).

5. Except as expressly authorized under Chapter 682, *Florida Statutes*, a party waives the right to arbitration where they actively participate in litigation which is the subject of an arbitration agreement before moving to compel arbitration. *Hansen v. Dean Witter Reynolds, Inc.*, 408 So. 2d 658 (Fla. 3d DCA 1982), *rev. den.*, 417 So. 2d 328 (Fla. 1982); *Ojus Indus., Inc. v. Mann*, 221 So. 2d 780 (Fla. 3d DCA 1969).

6. Such a waiver will be found where the party files an answer or affirmative defenses, takes discovery or files any claim or counterclaim for affirmative relief in a lawsuit before moving to compel arbitration. *Coral 97 Assocs., Ltd. v. Chino Elec., Inc.*, 501 So. 2d 69 (Fla. 3d DCA 1987); *Winter v. Arvida Corp.*, 404 So. 2d 829 (Fla. 3d DCA 1981).

7. Prior to the RFLAA, the Court (not the arbitrator) determined whether a party to an arbitration agreement waived its contractual right to arbitration by its subsequent conduct. *Florida Educ. Assoc. v. Sachs*, 650 So. 2d 29 (Fla. 1995). This point may be in question with the RFLAA.

L. Arbitrator Disclosures under the RFLAA

1. Before accepting any appointment, the potential arbitrator must make a "reasonable inquiry" and "disclose to all parties … and to any other arbitrators any known facts that a reasonable person would consider likely to affect the person's impartiality as an arbitrator in the arbitration proceeding." *Fla. Stat*. § 682.041(1). Such facts include:

   a. Any "financial or personal interest in the outcome" of the proceeding.

   b. An "existing or past relationship with any of the parties … their counsel or representative, a witness, or another arbitrator."

   *Fla. Stat*. § 682.041(1) (a)&(b).

2. An arbitrator has a continuing obligation to disclose to all parties and the other arbitrators "any facts that the arbitrator learns after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator." *Fla. Stat*. § 682.041(2).

3. If an arbitrator discloses a fact required by *Fla. Stat*. § 682.041(1) or (2) 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 Fla. Stat. § 682.13(1)(b) for vacating an award of the arbitrator. *Fla. Stat*. § 682.041(3).

4. If the arbitrator did not disclose a fact required by *Fla. Stat*. § 682.041(1) or (2), the Court may vacate an award under *Fla. Stat*. § 682.13(1)(b) upon "timely objection by a party." *Fla. Stat*. § 682.041(4).

5. An arbitrator appointed as a neutral 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 *Fla. Stat*. § 682.13(1)(b). *Fla. Stat.* § 682.041(5).

6. "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 *Fla. Stat*. § 682.13(1)(b). *Fla. Stat*. § 682.041(6).

M. Selection of Arbitrators for Non-AAA Arbitrations

1. If an agreement for arbitration provides a method for the appointment of arbitrators, that method must be followed, unless the method fails. *Fla. Stat.* § 682.04(1).

2. A method could fail if it is fundamentally unfair, such as providing only one party with the right to select the sole neutral arbitrator. A method could also fail if it is impossible to perform, such as where the agreement requires a particular organization to appoint the arbitrators, but the organization no longer exists at the time of the dispute.

3. The court, on motion of a party to an arbitration agreement, shall appoint one or more arbitrators, if: (a) the parties have not agreed upon a method; (b) the agreed method fails; (c) one or more of the parties failed to respond to the demand for arbitration; or (d) an arbitrator fails to act and a successor has not been appointed. *Fla. Stat.* § 682.04(2).

4. Each of the arbitrators must either: (a) be a member of The Florida Bar, with the chief arbitrator being a member of The Florida Bar for at least five years; or (b) serve on the arbitration panel with the written consent of all parties. *Id.*

5. 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 a neutral arbitrator under the parties' agreement. *Fla. Stat.* § 682.04(4).

N. Arbitrators' Jurisdiction, Scope of Authority and Enforcement Issues

1. Statutory and intentional tort employment claims are arbitrable, such as hostile work environment, defamation, tortious interference with business relationships and intentional infliction of emotional distress, where the parties are subject to a written arbitration contract that provides for binding arbitration of "any and all claims and disputes that are related in any way to my employment or the termination of my employment." *Henderson v. Idowu*, 828 So. 2d 451 (Fla. 4th DCA 2002).

2. The Federal Arbitration Act ("FAA") controls where an arbitration agreement expressly provides that the agreement was made pursuant to a transaction involving interstate commerce and is governed by the FAA. *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228 (Fla. 4th DCA 2002).[2] Where the contract at issue involves interstate commerce, the FAA will control and pre-empt the RFLAA, but only to the extent that the RFLAA may conflict with the FAA. *Hialeah Auto., LLC v. Basulto*, 22 So. 3d 586, 589 (Fla. 3d DCA 2009).

3. Although the FAA governs the applicability of interstate arbitration agreements, state law governs issues "concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas,* 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). Therefore, defenses such as fraud, unconscionability, and duress are governed by state law. *Dale v. Comcast,* 498 F.3d 1216, 1219 (11th Cir. 2007).

O. Consolidation of Arbitration Proceedings

1. Except as otherwise prohibited in the arbitration agreement, a party may move the Court to order consolidation of separate arbitration proceedings as to all or some of the claims, where:

   a. There are separate arbitration agreements or separate arbitration proceedings between the same parties, or one is a party to a separate arbitration agreement or a separate arbitration proceeding with a third person; and

   b. The arbitrable claims arise in "substantial part from the same transaction or series of related transactions"; and

   c. An existing "common issue of law or fact creates the possibility of conflicting decisions" in the arbitration proceedings; and

[2] A detailed discussion of the FAA is outside the scope of these materials.

d. "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."

*Fla. Stat*. § 682.033 (1)(a) – (d).

2. Where an arbitration proceeding is subject to consolidation, the Court may order "consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings." *Fla. Stat*. § 682.033(2).

3. However, the Court may not order consolidation of any claims where the arbitration agreement prohibits consolidation and *Fla. Stat*. § 682.033 may not be construed to affect commencing, maintaining, or certifying a class action claim or defense. *Fla. Stat*. § 682.033(3).

P. Class Arbitration

1. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S. Ct. 1758 (2010).

a. The parties stipulated that their agreement was silent on any agreement for class arbitration. *Id*. at 1768.

b. Since the parties so stipulated, there was no agreement to class arbitration and a party may not be compelled to "submit to class arbitration unless there is a contractual basis for concluding that the parties agreed to do so." *Id*. at 1775.

c. Where the agreement is silent on the subject of class arbitration, the arbitrator exceeds his or her authority by permitting class arbitration where the parties never agreed to class arbitration. *Id.*

2. *Sutter v. Oxford Health Plans, LLC,* 675 F. 3d 215 (3d Cir. 2012).

a. The parties contractually agreed that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration … ." *Id*. at 217.

b. As a result, the arbitrator ruled that the first phrase of the clause encompassed all possible court actions, including class actions, and thus the second phrase permitted class actions to be arbitrated. *Id*. at 218.

c. Oxford attempted to have the arbitrator's ruling vacated based upon *Stolt-Nielsen*'s holding that an arbitrator panel exceeds its authority to allow class arbitration where the parties never agreed to do so. *Id.*

a. The *Sutter* court affirmed the arbitrator's decision and expressly noted that the FAA sets forth the exclusive grounds upon which an arbitration award may be vacated, including where the arbitrators exceed their powers. *Id*. at 219, *citing* 9 U.S.C. § 10(a).

b. An arbitrator exceeds such authority when he or she decides an issue not submitted to arbitration by the parties, "grants relief in a form that cannot be rationally derived from the parties' agreement and submissions, or issues an award that is so completely irrational that it lacks support altogether." *Id.* at 219-20, *citing authorities*.

c. Thus, the court held that an arbitrator may determine that the scope of the arbitration clause reflects the parties' intent to permit class arbitration. *Id.* at 223-24.

d. *Sutter* also discussed at length *Stolt-Nielsen*, but determined that it was distinguishable because the parties in that case had stipulated that the agreement was silent on any agreement for class arbitration. *Id*. at 220-24.

e. In contrast, the parties' intent as to class arbitration in *Sutter* was in question, so the scope of the arbitration agreement was relevant for the arbitrator to resolve the issue. *Id*. at 224. "[T]he arbitrator construed the text of the arbitration agreement to authorize and require class arbitration." *Id.* By doing so, the arbitrator did not exceed his powers to authorize class arbitration. *Id.* at 225.

Q. Discovery in Arbitration

1. Subject to the RFLAA, the parties may provide in the arbitration agreement for certain forms of discovery. The parties may also stipulate to discovery after the arbitration action is filed.

2. The 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. *Fla. Stat.* § 682.08(1). Any such subpoena must be served in the same manner for a civil action and is enforced by the Court the same manner as well. *Id.*

3. The arbitrator may permit a deposition of any witness for use at the final hearing, including a witness who cannot be subpoenaed or is unable to attend the hearing, to make the proceeding "fair, expeditious, and cost effective." *Fla. Stat.* § 682.08(2). The arbitrator may also determine the conditions for the deposition. *Id.*

4. The arbitrator has the discretion to permit discovery as the arbitrator deems appropriate, considering the needs of the parties and other affected persons, as well as the arbitrator's obligation to make the proceeding "fair, expeditious, and cost effective." *Fla. Stat.* § 682.08(3).

5. The arbitrator may control the discovery process with a protective order to prevent the disclosure of privileged or confidential information, trade secrets, and other information protected from disclosure to the same extent as the Court. *Fla. Stat*. § 682.08(4).

R. Motions for Summary Award/Judgment in Arbitration

1. The majority of case law provides that a motion for summary judgment may be granted by the arbitrators, provided they afford the parties fundamental fairness. "Fundamental fairness" has been described as the touchstone for arbitration. *British Ins. Co. of Cayman v. Water Street Ins. Co.*, 93 F. Supp. 2d 506 (S.D. N.Y. 2000).

2. Thus, the arbitration must provide for a fair opportunity to present evidence and argument. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F. 3d 16 (2d Cir. 1997).

3. The RFLAA and the FAA do not expressly mandate oral hearings, unless the parties have agreed to such. *See Federal Deposit Ins. Corp. v. Air Fla. Sys., Inc.*, 822 F. 2d 833 (9th Cir. 1987). Arbitrators are only required to grant the parties a fundamentally fair process and an adequate opportunity to present their evidence and argument. *Tempo Shain*, 120 F. 3d 16; *British Ins. Co. of Cayman*, 93 F. Supp. 2d 506.

4. Under the RFLAA, the arbitrator is expressly authorized to decide a "request for summary disposition of a claim or particular issue" where:

   a. All "interested parties agree"; or

   b. "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."

   *Fla. Stat*. § 682.06(2).

S. Final Arbitration Hearing

1. One of the hallmarks of the arbitration hearing is its informality. In fact, a purpose of an agreement to arbitrate is to avoid the formal requisites of a court proceeding. Nevertheless, each party must be given an equal and fair opportunity to be heard and present evidence.

2. While the order of the proceeding is at the arbitrator's discretion, the hearing generally begins by each party giving an opening statement to clarify the issues. The complaining party presents evidence first, followed by the responding party's presentation of evidence. Each party also has the opportunity to cross-examine opposing witnesses. The parties are then given the option to give closing arguments.

3. The arbitrator has the discretion to conduct the arbitration in a manner that is "fair and expeditious disposition of the proceeding." *Fla. Stat*. § 682.06(1). This discretion includes the power to determine the "admissibility, relevance, materiality, and weight of any evidence." *Fla. Stat*. § 682.06(1).

4. The arbitrator sets the time and place for the final hearing, and must provide notice of the hearing not less than 5 days in advance. *Fla. Stat*. § 682.06(3). Any objection to the lack or insufficiency of notice must be made prior to the beginning of the hearing, otherwise it is deemed waived by the party's appearance at the hearing. *Id.*

5. For good cause shown by a party, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing as necessary. *Id.* However, the arbitrator may not postpone the hearing contrary to any deadline set forth in the arbitration agreement, unless the parties otherwise consent. *Id.*

6. At the final hearing, a party has the right to be "heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing." *Fla. Stat.* § 682.06(4).

7. Nonetheless, the technical rules of evidence generally do not apply to arbitration hearings. Hearsay evidence is admissible, leading questions may be asked, the best evidence rule is irrelevant and witnesses need not be qualified as "experts." *Fla. R. Civ. P.* 1.820(c).

T. The Arbitration Award

1. An arbitrator must make a "record" of his or her award. *Fla. Stat.* § 682.09(1). The record must be signed or otherwise authenticated by any arbitrator who concurs with the award. *Id.*

2. The arbitrator or the arbitration organization must also give notice of the award, including a copy of the award, to each party to the arbitration proceeding. *Id.*

3. The arbitrator is not required to make specific findings of fact and conclusions of law, unless the arbitration agreement expressly requires the arbitrator to do so or a Court remands the matter to the arbitrator for express findings to be made before any confirmation of the award will be entered. *Fla. R. Civ. P.* 1.820(g)(3).

4. An arbitrator may award punitive damages or exemplary relief where "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." *Fla. Stat.* § 682.11(1). Should the arbitrator award punitive damages or other exemplary relief, the arbitrator must also specify 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." *Fla. Stat.* § 682.11(5).

5. An arbitrator may award "reasonable attorney fees and other reasonable expenses of arbitration" where "authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." *Fla. Stat.* § 682.11(2).

6. The arbitrator may award all other remedies which he or she considers "just and appropriate under the circumstances of the arbitration proceeding." *Fla. Stat.* § 682.11(3). Further, it is not a ground to vacate the award where the remedy could not be granted by the Court. *Id.*

U. Post-Arbitration Proceedings

1. Change or Correction of Award.

   a. Upon motion by a party within twenty (20) days after receiving the award, the arbitrator may change or correct an award:

      i. On the grounds set forth in *Fla. Stat*. § 682.14(1)(a) or (c);

      ii. Where the arbitrator has not made a "final and definite award" on a submitted claim; or

      iii. "To clarify the award."

      *Fla. Stat*. § 682.10(1) & (2).

   b. Any objection to such a motion must be made within ten (10) days. *Fla. Stat*. § 682.10(3).

2. Modification. A final award may be modified upon motion made within 90 days after delivery of the award to the applicant, where:

   a. There is an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;

b. The arbitrators have awarded a matter not submitted in the arbitration and the award may be corrected without affecting the merits of the decision upon the issues submitted;

c. The award is imperfect as a matter of form, not affecting the merits of the controversy.

*Fla. Stat.* § 682.14.

3. Vacation.

a. Upon motion of a party, the Court must vacate an arbitration award if:

i. The award was procured by corruption, fraud, or other undue means; or

ii. 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;

iii. An arbitrator refused to postpone the hearing upon showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing contrary to *Fla. Stat*. § 682.06, so as to substantially prejudice the rights of a party;

iv. An arbitrator exceeded the arbitrator's powers;

v. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under *Fla. Stat*. § 682.06(3) not later than the beginning of the arbitration hearing; or

vi. The arbitration was conducted without proper notice of the initiation of an arbitration as required in *Fla. Stat*. § 682.032 so as to substantially prejudice the rights of a party.

*Fla. Stat.* § 682.13(1).

b. A motion to vacate must be filed within 90 days after the movant receives notice of the award or within 90 days after the movant receives notice of a modified or corrected award,

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 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant. *Fla. Stat.* § 682.13(2).

c. If the Court vacates an award on a ground other than that set forth in *Fla. Stat.* § 682.13(1)(e), it may order a rehearing. *Fla. Stat.* § 682.13(3).

d. If the award is vacated on a ground stated in *Fla. Stat.* § 682.13(1)(a) or (b), the rehearing must be before a new arbitrator. *Id.*

e. If the award is vacated on a ground stated in *Fla. Stat.* § 682.13(1)(c), (d) or (f), the rehearing may be before the same arbitrator or the arbitrator's successor. *Id.*

4. Appeal. An appeal may be taken from:

a. An order denying a motion to compel arbitration. *Fla. Stat.* § 682.20(1)(a).

b. An order granting a motion to stay arbitration. *Fla. Stat.* § 682.20(1)(b).

c. An order confirming an award. *Fla. Stat.* § 682.20(1)(c).

d. An order denying confirmation of an award unless the court has entered an order under *Florida Statute* § 682.10(4) or *Florida Statute* § 682.13. All other orders denying confirmation of an award are final orders. *Fla. Stat.* § 682.20(1)(d)

e. An order modifying or correcting an award. *Fla. Stat.* § 682.20(1)(e).

f. An order vacating an award without directing a rehearing. *Fla. Stat.* § 682.20(1)(f).

g. A judgment or decree entered pursuant to *Florida Statute* § 682.20. *Fla. Stat.* § 682.20(1)(g).

5. Confirmation. Upon motion of a party, the Court must enter an order confirming a final award, "unless the award is modified or corrected" or vacated pursuant to *Florida Statutes* Sections 682.10, 682.13 or 682.14. *Fla. Stat.* § 682.12.

6. Post-Confirmation Rights.

a. Once the Court enters an order that confirms, modifies, corrects or vacates an award without directing a rehearing, the Court must enter a "judgment in conformity therewith." *Fla. Stat.* § 682.15(1). Thereafter, the judgment may be "recorded, docketed, and enforced as any other judgment in a civil action." *Id.*

b. The Court may also award "reasonable costs of the motion and subsequent judicial proceedings." *Fla. Stat.* § 682.15(2).

c. Upon motion, the Court may also award a prevailing party to a "contested judicial proceeding" under *Florida Statutes* Sections 682.12, 682.13, or 682.14, "reasonable attorney 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." *Fla. Stat.* § 682.15(3).

II. Liability Immunity and Witness Protection

A. With some exceptions, arbitrators, mediators and TRJs generally enjoy judicial immunity. *Fla. Stat.* § 44.107.

B. "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." *Fla. Stat*. § 682.051(1)

1. Immunity under the RFLAA supplements any immunity under other law. *Fla. Stat*. § 682.051(2)

2. An arbitrator does not lose immunity under the RFLAA should he or she fail to make a disclosure as otherwise required by the RFLAA. *Fla. Stat*. § 682.051(3)

C. An arbitrator or representative of an arbitration organization "is not competent to testify" in any proceeding 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 … acting in a judicial capacity." *Fla. Stat*. § 682.051(4). However, this provision of the RFLAA does not apply:

1. To determine any claim of an arbitrator or arbitration organization against a party to the arbitration proceeding; or

2. To a hearing on a motion to vacate an award.

*Fla. Stat*. § 682.051(4)(a)&(b).

D. Should a person commence any civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from their services or if a person seeks to compel them to testify or produce records in violation of *Fla. Stat*. § 682.051(4), and the Court decides that the arbitrator, arbitration organization, or representative is immune from civil liability or they are not competent to testify, the Court must award them "reasonable attorney fees and other reasonable expenses of litigation." *Fla. Stat*. § 682.051(5).

## DISCLAIMER

**This commentary is for informational purposes only, is not legal advice and does not establish an attorney-client relationship. You should seek appropriate legal advice from a licensed attorney before making any decision based on these comments. The hiring of a lawyer is an important decision that should not be based solely upon advertisements.**

GSALZMAN - # 6884289 v1
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