DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ANIXTER, INC.,	)	1 CA-CV 12-0176
	)	
Plaintiff/Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
RAYTHEON COMPANY,	)	Rule 28, Arizona Rules
	)	of Civil Appellate
Defendant/Appellee.	)	Procedure)
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-033932

The Honorable Dean M. Fink, Judge

AFFIRMED IN PART; MODIFIED IN PART

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K E S S L E R, Judge

¶1 Plaintiff-Appellant Anixter, Inc. ("Anixter") appeals from the trial court's judgment confirming an arbitration award in favor of Raytheon Company ("Raytheon") and the denial of Anixter's motion to vacate the award. For the following reasons, we affirm in part and modify in part.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 Anixter, a parts distributor, supplies parts to manufacturers including Raytheon. Anixter sold parts to Raytheon pursuant to a contract which included certain warranties and held Anixter liable for and Raytheon "harmless from any loss, damage, or expense whatsoever" that Raytheon suffered from a breach by Anixter. The contract also included an arbitration clause, which provided that any claim arising out of the agreement or a breach would, at Raytheon's discretion, be submitted to binding arbitration under the laws of the state from which the contract was issued in accordance with the

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[1] "This Court on appeal is bound to view the action of the trial court in a light most favorable to upholding the trial court's determination, just as the trial court was required to view the arbitration award in a light most favorable to upholding the said award . . . ." *Park Imperial, Inc. v. E. L. Farmer Constr. Co.*, 9 Ariz. App. 511, 513-14, 454 P.2d 181, 183-84 (1969) (internal citations omitted).

American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures ("AAA Rules").

¶3 Anixter supplied Raytheon with a type of seal, an "O-ring," which Raytheon used in manufacturing certain missiles for the United States Navy. The O-rings, manufactured by a third party, did not meet Raytheon's government-approved specifications. In May 2009, Raytheon initiated arbitration, alleging 500 of the O-rings it received were defective and had caused or would cause fuel leaks in aerospace products.

¶4 A three-member arbitration panel (the "Panel") conducted a twenty-three day hearing. In December 2010, the Panel unanimously held that Anixter breached its contractual obligations and was liable for damages related to fuel leaks. The Panel was divided on the amount of damages, however. The majority of the Panel awarded Raytheon $973,276 in connection with investigating the cause of the leaks, $2,918,558 for repairs made to 78 compromised missiles, and $16,947,660 for future repairs to the remaining 418 missiles.[2] One Panel member dissented in part, concluding that while there was a factual basis for the $16,974,660 award for all 418 missiles, he believed "Raytheon ha[d] failed to meet its burden to support that finding with the requisite 'reasonable certainty,' given

[2] Four of the missiles had been "expended" by the time of the arbitration. We understand that to be a synonym for the missiles having been fired.

the facts (and expert testimony) to the contrary."

¶5 In April 2011, the Panel issued a final award that included $1,440,716 to Raytheon for attorneys' fees. The award also included interest at the statutory rate of ten percent per annum.

¶6 Anixter filed a complaint in opposition to the arbitration award pursuant to Arizona Revised Statutes ("A.R.S.") section 12-1512 (2003). Anixter claimed the award was overbroad in its "approach to claims and damages that [had] not yet arisen and [might] never arise." Anixter asked the court to vacate the award in full, or in the alternative, correct the award to remove the provisions concerning assertedly unfounded damages. Raytheon filed an answer and counterclaim, stating Anixter had no valid basis to vacate the Panel's award and asking the court to affirm the award under A.R.S. § 12-1511 (2003).

¶7 The trial court ruled in favor of Raytheon, stating:

> The basis of [Anixter's] . . . objection . . . is that the arbitrators "unlawfully," "irrationally," and "arbitrarily remaking the parties' contract," awarded damages for missiles that, at the time of the arbitration, had not leaked and conceivably, either because there was no flaw in the missiles or because the missiles would be used destructively before any flaw interfered with their function, might never leak. Yet this goes to the weight of the evidence. . . . The possibility, even if Anixter's assessment of its likelihood is

> correct, that the arbitrators' decision accurately compensated Raytheon for its ultimate damages prevents the Court from finding that they acted unlawfully, irrationally, or beyond the terms of the contract.

The trial court also affirmed the award of attorneys' fees, finding the incorporation of the AAA Rules in the contract to be sufficiently specific to fall under the exception of A.R.S. § 12-1510 (2003) (excluding attorneys' fees in an arbitration award "[u]nless otherwise provided in the agreement to arbitrate").

¶8 Anixter then moved to correct the judgment pursuant to Rules 59 and 60 of the Arizona Rules of Civil Procedure, alleging the post-judgment interest rate of ten percent per annum was contrary to law. Anixter argued that at the time the trial court entered judgment, A.R.S. § 44-1201(B) (Supp. 2012)[3] provided for a rate of 4.25%. The trial court denied the motion:

> This rate was lawful at the time the arbitrators awarded it on April 6, 2011; the enactment of what is now A.R.S. § 44-1201(B), setting a lower ceiling, did not become effective until July 20 of that year. The Court therefore doubts that the ten percent rate constitutes one of the grounds enumerated in the statute. But even if it does, Anixter did not object to the rate at any time before the Court entered judgment upon the arbitration award . . . [and] there

[3] We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

> was no reason Anixter could not have asserted its right prior to entry of judgment confirming the award. Anixter does not cite any of the Rule 60(c) factors behind its failure to object before entry of judgment. Its objection now is therefore untimely.

¶9 Anixter timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-1201(A)(1) and (A)(5)(a) (Supp. 2012).

ISSUES AND STANDARD OF REVIEW

¶10 Anixter argues that: (1) the trial court erred in declining to vacate the final arbitration award, (2) the trial court erred in holding the reference to the AAA Rules was sufficient to authorize an award of attorneys' fees under A.R.S. § 12-1510, and (3) the ten percent post-judgment interest rate is contrary to law and should be stricken.

¶11 "On appeal, we review a superior court's confirmation of an arbitration award for an abuse of discretion. We review matters of statutory construction de novo. Judicial review of arbitration awards is severely restricted." *Nolan v. Kenner*, 226 Ariz. 459, 461, ¶ 4, 250 P.3d 236, 238 (App. 2011) (internal citations omitted). "Just as the superior court reviews an arbitrator's award in the light most favorable to affirming, we review the superior court's decision in the light most favorable to upholding its decision regarding confirming the arbitrator's award and affirm unless we conclude that the superior court abused its discretion." *Atreus Cmtys. Grp. v. Stardust Dev.*,

Inc., 229 Ariz. 503, 506, ¶ 13, 277 P.3d 208, 211 (App. 2012); *see also Hirt v. Hervey*, 118 Ariz. 543, 545, 578 P.2d 624, 626 (App. 1978) ("Arbitration awards are entitled to finality in all but narrowly defined circumstances such as fraud, corruption, or other prejudicial misconduct. . . . Our case law makes it clear that an arbitration award is not subject to attack merely because one party believes that the arbitrators erred with respect to factual determinations or legal interpretations."). A trial court's ruling may be affirmed if legally correct for any reason. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

DISCUSSION

A. POWER OF ARBITRATORS

¶12 Anixter claims that in awarding Raytheon compensation for damages to the remaining 418 missiles that had not yet been repaired, the Panel exceeded its powers by: (1) rewriting the parties' contract, (2) disregarding Arizona law, and (3) imposing an irrational remedy. Anixter argues that because the court "shall" decline to confirm an arbitration award where "[t]he arbitrators exceeded their powers," A.R.S. § 12-1512(A)(3), the trial court erred in holding it was powerless to vacate the award. In response, Raytheon argues that Anixter is asking the court to revisit the evidence heard by the Panel to determine whether the evidence supported the Panel's decision on

the amount of damages, a power courts do not have because the Panel's decision on the facts and law is final and not subject to judicial review. *See Atreus*, 229 Ariz. at 506, ¶ 13, 277 P.3d at 211.

¶13 "A trial court may only refuse to confirm an arbitration award on the grounds set forth in [A.R.S.] § 12-1512(A)," *FIA Card Servs., N.A. v. Levy*, 219 Ariz. 523, 524, ¶ 6, 200 P.3d 1020, 1021 (App. 2008), including when "[t]he arbitrators exceeded their powers," A.R.S. § 12-1512(A)(3). "The boundaries of the arbitrators' powers are defined by the agreement of the parties. Within those boundaries, the arbitrators' decision is final both as to questions of fact and law." *Smitty's Super-Valu, Inc. v. Pasqualetti*, 22 Ariz. App. 178, 180, 525 P.2d 309, 311 (1974) (internal citations omitted); *see also Atreus*, 229 Ariz. at 506, ¶ 13, 277 P.3d at 211; *Transnational Ins. Co. v. Simmons*, 19 Ariz. App. 354, 358, 507 P.2d 693, 697 (1973) ("[A party] cannot ask that a matter be arbitrated and then later complain that the arbitrators exceeded their powers when they considered the same."). Moreover, in a commercial indemnity setting, the scope of indemnity is a factual question based on the parties' intent as to whether an indemnification for liability might include damages the indemnitee may never have to pay. *Flood Control Dist. of Maricopa Cnty. v. Paloma Inv. Ltd. P'ship*, 230 Ariz. 29, 36, ¶

12, 279 P.3d 1191, 1198 (App. 2012). Thus, to determine whether the Panel exceeded its powers, we must examine the language of the agreement. *Id.* at ¶ 13.

1. FUTURE DAMAGES

¶14 Anixter first claims that the Panel exceeded its powers by rewriting the scope of Anixter's indemnity obligations in awarding damages, which Raytheon had not yet incurred, representing the costs of repairing missiles containing the O-rings. Anixter argues that using future damages to determine the loss guarantees Raytheon a windfall because the Navy has not requested immediate repair of each damaged O-ring and reserves the right to fire the missiles without requesting repair.

¶15 The contract provides separate indemnification and liability clauses. The liability clauses provide that:

> [Anixter] shall be *liable for and save [Raytheon] harmless from any loss, damage, or expense whatsoever that [Raytheon] may suffer from breach of any of these warranties.* Remedies shall be at [Raytheon's] election, including repair, replacement or reimbursement of the purchase price of nonconforming materials and, in the case of services either correction of the defective services at no cost or reimbursement of the amounts paid for such services.
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> . . . [Raytheon] may require [Anixter] to repair, replace or reimburse the purchase price of rejected material or [Raytheon] may accept any materials and upon discovery of

> nonconformance, may reject or keep and rework any such materials not so conforming. Cost of repair, rework, replacement, inspection, transportation, repackaging, and/or reinspection by [Raytheon] shall be at [Anixter's] expense.

(Emphasis added.) The relevant indemnity clause provides that:

> [Anixter] shall, without limitation, *indemnify* and save [Raytheon] . . . harmless from and against . . . all claims . . . and *resulting costs, expenses and liability* which arise from personal injury, death, or property loss or damage attributed to, or caused by, the goods, services or other items supplied by [Anixter] . . . .

(Emphasis added.)

¶16 Anixter argues that agreements to "save harmless" or "hold harmless," as used here, "protect against *only actual loss or damage*," so that at most, Anixter was responsible to indemnify Raytheon against actual losses. *See generally MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 302, ¶ 11, 197 P.3d 758, 763 (App. 2008) ("[I]ndemnification against loss or damages applies when the indemnitee has *actually paid the obligation* for which he was found liable." (citation and internal quotation marks omitted) (emphasis added)); *Skousen v. W.C. Olsen Inv. Co.*, 149 Ariz. 251, 253, 717 P.2d 930, 932 (App. 1986) ("The terms 'to save harmless' or 'hold harmless' have been interpreted to protect against only actual loss or damage."); 42 C.J.S. Indemnity § 15 (West 2013) ("An indemnification clause in a contract by which one party agrees

to indemnify and save harmless the other party, entitles the second party to indemnification only against actual loss or damage, and not against mere exposure to liability . . . .”). Raytheon, on the other hand, argues that the provisions in question do not expressly limit damages to those already incurred.

¶17 We cannot agree with Anixter’s position because a reviewing court may disturb the award in this context “only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction.” *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1130 (3d Cir. 1972) (citation omitted). “Courts may not overturn an award because they believe the arbitrator has misconstrued the apparent, or even the obvious, meaning of the contract.” *Local Div. 1179, Amalgamated Transit Union, AFL-CIO v. Green Bus Lines, Inc.*, 409 N.E.2d 1354, 1355 (N.Y. 1980) (citation omitted). “In other words a court may not vacate an award because the arbitrator has exceeded the power the court would have, or would have had if the parties had chosen to litigate, rather than arbitrate the dispute. Those who have chosen arbitration as their forum should recognize that arbitration procedures and awards often differ from what may be expected in courts of law.” *Rochester City Sch. Dist. v. Rochester Teachers Ass’n*, 362 N.E.2d 977, 981 (N.Y. 1977). Here, the contract

specifically addressed breach of warranty, and the Panel addressed and resolved the dispute submitted to them. Because the Panel interpreted the contract in light of what it believed was the parties' intent, we cannot say that it exceeded its powers. *See Green Bus Lines*, 409 N.E.2d at 1354-55; *see also Hirt*, 118 Ariz. at 545, 578 P.2d at 626 ("Our case law makes clear that an arbitration award is not subject to attack merely because one party believes that the arbitrators erred with respect to factual determinations or legal interpretations.").

¶18 We also reject Anixter's argument that the Panel exceeded the terms of the contract because it effectively asks us to review the facts found by the Panel based on disputed evidence. We cannot do that in reviewing an arbitration award. *Smitty's*, 22 Ariz. App. at 180, 525 P.2d at 311. The panel found that based on the testimony by one of Raytheon's witnesses, there was a factual basis on which to conclude that all of the O-rings in the remaining 418 missiles would fail and Raytheon would be liable to replace them. Even the dissenting arbitrator noted that there was evidence to support the damage award based on the remaining missiles, but he was not convinced, given the conflict in evidence, that Raytheon met its burden to show with reasonable certainty that the remaining compromised missiles would leak. In essence, Anixter is asking the court to substitute its judgment for that of the Panel on the fact of

whether the damages for future replacement and repairs are speculative, which we cannot do in reviewing arbitration awards.

¶19 For these same reasons, Anixter's reliance on *Swift*, 466 F.2d at 1132-33, is misplaced. Anixter cites *Swift* to support its argument that the Panel exceeded its powers in awarding damages that had not yet been, and might not be, incurred or suffered. The agreement in *Swift* specifically provided that in the event of a breach of warranty, appellant would pay appellee "in cash an amount equal to all losses, liabilities and expenses *incurred or suffered* . . . by reason of any of the events specified." 466 F.2d at 1132 (internal quotation marks omitted). The primary issue in *Swift* was whether the appellant would have to pay Swift for a potential tax liability which had still not been imposed and might never be imposed. *Id.* at 1132-33 ("The Statutory Notice of Deficiency does not constitute an assessment of liability; it constitutes the assertion of the government's claim. While responsible auditors may deem it necessary to *note* the issuance of the Statutory Notice on a financial statement, what they do is to note it, not list it as a legal liability, which it is not.").

¶20 Here, there is evidence that the remaining missiles will have to be repaired or replaced. In dealing with future damages, it was reasonable for the Panel to calculate how much it would cost if all 418 missiles had to be replaced. *See*

Smitty's, 22 Ariz. App. at 182, 525 P.2d at 313 ("[W]e cannot see any basis for the claim that because the arbitrators considered a damage factor which the lessors do not consider material, the arbitrators have Ipso facto awarded upon a matter not submitted to them. . . . [B]y entering into the arbitration agreement and in order to obtain an inexpensive and speedy final disposition of the matter, the parties have substituted a different tribunal and a different method of determining their controversy in place of the tribunals provided by the ordinary processes of law. Having done so, the lessors cannot now avoid the consequences of their contract, and reinstate judicial tribunals as the forum for the resolution of that controversy."); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1181-82 (D.C. Cir. 1991) (stating the panel had to determine breach and then, "based on inherently imprecise projections of future earnings and future expenses, it had to estimate the amount of damages to which the injured party was entitled. Even if [the expert's] estimates were based on a misreading of the . . . [a]greement, the panel adopted the expert's projections because it believed them to be a reasonable estimate of damages. . . . [T]here is nothing on the face of the panel's lump-sum award which suggests that the panel failed to construe the contract."); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1256 (7th Cir. 1994) ("Mere error in the

interpretation of the law (as opposed to failure to decide in accordance with relevant provisions of law) does not provide grounds for disturbing an arbitration award.").

2. MANIFEST DISREGARD OF LAW

¶21 Anixter also argues that the Panel exceeded its powers when it acted in "manifest disregard of the law," ignoring the principle that injured parties are to be made whole and judgments should avoid windfall damages.

¶22 Although federal courts apply a "manifest disregard" test in awarding or vacating arbitration awards, *see Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997-98 (9th Cir. 2003), Arizona has yet to adopt this doctrine. In Arizona, arbitrators are held to a vastly different standard than judges:

> Judges are in duty bound to apply the applicable rule of law in deciding cases. Because an arbitrator derives his powers from the parties and not from the law of the land and because that power includes that of deciding the law as well as the facts, [h]e may do what no other judge has a right to do; he may intentionally decide contrary to law and still have his judgment stand.
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> . . . [Arbitrators] are . . . expected to frame their decisions on broad views of justice which may sometimes deviate from the strict rules of law.

Snowberger v. Young, 24 Ariz. App. 177, 180, 536 P.2d 1069, 1072 (1975) (citing *Park Constr. Co. v. Indep. Sch. Dist. No. 32*, 11 N.W.2d 649, 652 (Minn. 1943)). If the decisions of arbitrators were subject to ordinary review, then the function of the tribunal would be defeated, and the objectives of a speedy and inexpensive disposition of claims would be illusory. *Smitty's*, 22 Ariz. App. at 181, 525 P.2d at 312.

¶23 However, even if we were to adopt this doctrine, we find that it does not apply. "Manifest disregard of the law" means "more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law. It must be clear from the record that the arbitrators recognized the applicable law and then ignored it." *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995) (internal citation omitted); *cf. Atreus*, 229 Ariz. at 507 n.3, ¶ 15, 277 P.3d at 212 n.3 (noting, without adopting the manifest disregard standard, that at least one court had found that an erroneous interpretation of the law is not reversible unless the arbitrator understood and correctly stated the law and then proceeded to disregard it).

¶24 Here, the Panel found that Anixter was liable for any damage Raytheon may suffer from breach of warranty. After a twenty-three day hearing, the Panel found that "Raytheon established in a manner which is reasonable and by a

preponderance of the evidence, as a matter of fact and law, damages in connection with the 418 Compromised Missiles that will reasonably require repair during the remainder of the warranty period."[4] We see no evidence that the Panel intentionally disregarded the law or the terms of the contract.

3. IRRATIONAL REMEDY

¶25 Anixter further argues that the Panel exceeded its powers when it awarded an irrational remedy. Anixter specifically argues the remedy is irrational because it results in the possibility of overcompensation.

¶26 Just as with "manifest disregard of the law," Arizona courts have yet to adopt the "completely irrational" standard used in federal courts. *See generally Mo. River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 854 (8th Cir. 2001) ("[A]n arbitration award will be set aside where it is completely irrational or evidences a manifest disregard for the law." (citation and internal punctuation omitted)). However, even if we were to adopt this doctrine, it too fails to require vacation of the award.

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[4] Raytheon stated the damages would amount to $18,851,680. Anixter's expert testified that a present value adjustment should be made, and an award based on damages accruing over future time should be reduced by the difference between Raytheon's producer price index (3.29%) and its weighted average cost of capital (6.93%). The difference between these two numbers (6.93% - 3.29% = 3.64%) would reduce the damage claim by $1,904,020. The Panel found Anixter's adjustment analysis to be persuasive and applied it.

¶27 When reviewing an arbitration award on the grounds that it is irrational, the court reviews the form of relief to determine if it can be rationally derived from either the parties' agreement or their submissions to the arbitrators. *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 295 (3d Cir. 2010). "So deferential is the irrationality standard under the [Federal Arbitration Act] that we may not overrule an arbitrator simply because we disagree. There must be absolutely *no support at all in the record* justifying the arbitrator's determinations for a court to deny enforcement of an award." *Id.* at 295-96 (emphasis added) (citation and internal punctuation omitted).

¶28 Here, the contract provided that Anixter would be liable for and save Raytheon harmless from any damage Raytheon might suffer from breach of warranty, and for all claims and resulting liability from property damage. The Panel found that Raytheon established by a preponderance of the evidence "damages in connection with the 418 Compromised Missiles that will reasonably require repair during the remainder of the warranty period." Because there is testimony in the record to support the Panel's conclusion, we do not find the award to be completely irrational.[5]

[5] At least three of Raytheon's witnesses testified that the missiles will leak and need to be repaired.

¶29 Anixter also argues that the arbitration award is irrational because after the award, the Navy fired approximately 191-200 of this type of missile during the Libyan conflict; thus, those missiles cannot be repaired. Anixter claims that based on those news reports, it is one chance in a billion that some of the affected missiles had not been fired after the award. The news reports that Anixter relies on for such claim are all dated after the interim award had been entered, but before the final award was entered. Anixter did not bring this fact to the attention of the panel before it entered its final award and while the dissenting arbitrator indicated the parties stipulated that missiles would continued to be expended, we can find no record that the panel considered additional firings beyond that stipulation and the finding that four missiles had been fired.

¶30 We cannot conclude that such post-hearing facts could authorize the court to vacate the award.[6] Anixter points us to no cases that would permit a court to reopen an arbitration award to consider facts which occurred *after* the award had been entered, nor does Anixter put any limit on how long after the

[6] In the superior court, Anixter also asked the court to hold evidentiary hearings on the firings. The court did not hold those hearings, and Anixter has not raised the lack of further evidentiary hearings on appeal. Thus, we will not address the decision not to hold such hearings. *See New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95, 100, 696 P.2d 185, 190 (1985).

award was entered that a court can consider such new facts. Thus, if a court held hearings on the award six months or a year after the award, a party could argue that the court could consider facts occurring six months or a year after the award to find the award irrational. If a court cannot reweigh evidence presented to overturn the award, it certainly cannot reopen the evidentiary record to consider facts which occurred after the award had been entered and is final so as to vacate that award.[7] Alternatively, to the extent that Anixter argues the issue of new firings was raised before the panel per the stipulation, we

[7] In the superior court, the parties disputed whether Anixter could have sought to reopen the arbitration hearing between the interim and final awards to present the recent alleged firings. Generally an interim award in this context cannot be reopened. *Mandl v. Bailey*, 858 A.2d 508, 527 (Md. App. 2004) ("The plain language of Rule 48 does not permit an arbitrator to re-determine other, already-decided claims, upon a party's filing a motion to modify. These claims are already decided. . . . [E]ven when an arbitral award is incomplete, the remaining authority of the arbitrator is to decide the undecided claim, and thus render a final and complete award. The incompleteness of an award does not revive the arbitrator's authority to re-decide an already-decided claim." (citations omitted)); *cf. Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 644 (9th Cir. 2010) (stating that where a panel had decided compensation but reserved ruling on punitive damages, a court can defer to the panel to see if it wanted to reopen the proceedings). AAA Rule 36 appears to allow a panel to reopen a hearing before an award is made, but AAA Rule 46 limits modification of an award only to correct clerical, typographical, or computational errors. AAA Rule 32(b), however, authorizes the arbitrator to direct the parties to submit post-hearing documents or evidence. If Anixter had wanted the arbitration panel to consider this new evidence, it should have at least asked the panel to reopen the hearing for consideration of this evidence. We do not have any evidence in the record that Anixter made that request.

agree with the superior court that asking it to consider post-award evidence of new firings only goes to the weight of the evidence, and the court cannot find that the panel thus "acted unlawfully, irrationally, or beyond the terms of the contract."

B. ATTORNEYS' FEES

¶31 Anixter claims that the superior court erred in confirming an award of attorneys' fees and costs when the parties did not specifically agree to fee shifting. Anixter claims the arbitrators exceeded their powers under A.R.S. § 12-

1512(A)(3) when it awarded attorneys' fees contrary to A.R.S. § 12-1510.[8]

¶32 "The boundaries of the arbitrators' powers are defined by the agreement of the parties. Within those boundaries, the arbitrators' decision is final both as to questions of fact and law." *Smitty's*, 22 Ariz. App. at 180, 525 P.2d at 311 (internal citations omitted). Here, the arbitration clause stated the following:

> Any controversy or claim arising out of or relating to this agreement or breach thereof may be settled at [Raytheon's] sole discretion either by submitting the claim to: (i) a court of competent jurisdiction or (ii) binding

[8] Section 12-1510 provides that "[u]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, *not including counsel fees*, incurred in the conduct of the arbitration, shall be paid as provided in the award." (Emphasis added.) This language serves "to provide and encourage an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation——attorneys' fees." *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 180 Ariz. 148, 152, 882 P.2d 1274, 1278 (1994) (citation omitted).

Arizona has adopted the Revised Uniform Arbitration Act effective January 1, 2011. A.R.S. §§ 12-3001 to -3029 (Supp. 2012). Section 12-3021(B) provides that "[a]n arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration only if that award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." Arizona's Revised Uniform Arbitration Act, however, "does not affect an action or proceeding commenced or a right accrued before January 1, 2011. . . . [A]n arbitration agreement made before January 1, 2011 is governed by title 12, chapter 9, article 1, [A.R.S.]." 2010 Ariz. Sess. Laws, ch. 139, § 5 (2d Reg. Sess.). Because this action commenced before January 1, 2011, A.R.S. §§ 12-1501 to -1518 applies.

> arbitration, *under the laws of the state from which this Agreement is issued*, . . . *in accordance with the commercial arbitration rules of the [AAA]* . . . .

(Emphasis added.) We agree that because the arbitration provision explicitly refers to the AAA Rules, these rules are incorporated into the agreement by reference and the parties are bound by them. *See A. P. Brown Co. v. Superior Court*, 16 Ariz. App. 38, 40, 490 P.2d 867, 869 (1971). Thus, pursuant to AAA Rule 43(d), the Panel could have awarded attorneys' fees if "all parties [had] *requested such an award* or it [was] authorized by law or their arbitration agreement." (Emphasis added.) Here, the Panel stated in its award that "[a]ll of the parties hereto requested an award of attorneys' fees in their demands for arbitration and answering statements, and those demands remained [throughout] [the] arbitration."[9] As a result, the Panel had authority to award attorneys' fees. *Cf. Coutee v. Barington Capital Grp., L.P.*, 336 F.3d 1128, 1136 (9th Cir. 2003) ("It appears that the district court overlooked an exception to the general rule. An arbitration panel may award attorney's fees,

[9] Anixter argues its only request for fees was contained in its answering pleadings in a boilerplate prayer for relief, which sought all "other and further relief as the Panel deems just and proper." To the contrary, Raytheon claims Anixter prayed for judgment, including costs and attorneys' fees, and never withdrew that request. Without a full record from the arbitration proceedings, we defer to the Panel's finding that both parties asked for attorneys' fees throughout the arbitration.

even if not otherwise authorized by law to do so, if both parties submit the issue to arbitration.").[10]

¶33 Moreover, Anixter may not attack the Panel's ruling by asserting it "exceeded its powers" when Anixter itself affirmatively sought a ruling on attorneys' fees. In reality, Anixter is attacking the Panel's rationale, and not its authority. "Our case law makes it clear that an arbitration award is not subject to attack merely because one party believes that the arbitrators erred with respect to factual determinations or legal interpretations." *Hirt*, 118 Ariz. at 545, 578 P.2d at 626.

C. POST-JUDGMENT INTEREST

¶34 Anixter also argues that the post-judgment interest awarded by the trial court was contrary to law. Although the interest rate was ten percent at the time the Panel issued its award, Anixter claims the trial court should have reduced the rate to 4.25% for the period after the judgment was entered

[10] Anixter relies on *Moore v. Omnicare, Inc.*, 118 P.3d 141, 148-49 (Idaho 2005), to support its argument that the incorporation of the AAA Rules in a contract was insufficient to permit an award of attorneys' fees in arbitration. We find *Moore* to be distinguishable as the agreement in that case explicitly "required that the parties bear their own costs and fees of arbitration, including *specifically* attorney fees." 118 P.3d at 148. No such provision existed in this case.

based on an amendment to A.R.S. § 44-1201(B)[11] effective July 2011.

¶35 Anixter argues that the trial court erred in finding it had waived the issue of post-judgment interest. In its ruling, the trial court found that because "Anixter did not object to the rate at any time before the Court entered judgment," "there was no reason Anixter could not have asserted its rights prior to entry of judgment," and "Anixter [did] not cite any of the Rule 60(c) factors behind its failure to object before entry of judgment," its objection was untimely.[12]

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[11] As amended, A.R.S. § 44-1201(B) states the following:

> Unless specifically provided for in statute or a different rate is contracted for in writing, interest on any judgment shall be at the *lesser of ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate* as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered. The judgment shall state the applicable interest rate and it shall not change after it is entered.

Under the amended statute, the post-judgment rate was 4.25%, based on the prime rate of 3.25% on the date of judgment. *See* Board of Governors of the Federal Reserve System, http://www.federalreserve.gov/releases/h15/20111121/ (last visited March 28, 2013). Prior to the amendment, A.R.S. § 44-1201(A) (2003) stated: "Interest on any loan, indebtedness, judgment or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to."

[12] Although the court uses the word "untimely," the parties focus on waiver in their motions below and briefs on appeal.

¶36 Anixter claims that it had no reason to object to the rate during the proceedings because: (1) Raytheon did not mention the ten percent post-judgment rate for nearly the entire course of the proceedings until it submitted its draft form of judgment; (2) Anixter maintained the award should be vacated in its entirety, resulting in no post-judgment interest at all; and (3) the reduced rate did not go into effect until after Anixter filed its pleadings in support of vacating the award. Anixter further states that the only question raised below was whether the arbitration award should be vacated or confirmed, and if it was confirmed, the court was required to enter a judgment consisted with A.R.S. § 44-1201(B).

¶37 "Waiver generally requires a finding of intentional relinquishment of a known right or of conduct that would warrant such an inference." *Minjares v. State*, 223 Ariz. 54, 58, ¶ 17, 219 P.3d 264, 268 (App. 2009). A claim of waiver based on conduct, i.e., Anixter's failure to challenge the interest rate prior to the entry of judgment, "must include evidence of acts inconsistent with the intent to assert a right." *Id.* "Waiver also generally is a question of fact, and in this case, the superior court's finding binds this court unless we conclude that the finding is clearly erroneous." *Id.*

¶38 The statutory amendment to A.R.S. § 44-1201(B) became effective July 20, 2011,[13] approximately four months prior to the trial court's ruling. Anixter was presumably on notice of the statute and its entitlement to the lower rate before judgment was entered. However, we need not decide if Anixter waived this argument below because a finding of waiver is discretionary with this Court and we exercise our discretion to address the merits of the motion. *See State v. Smith*, 203 Ariz. 75, 79, ¶ 12, 50 P.3d 825, 829 (2002).

¶39 Anixter argues that it is the trial court's judgment, and not the arbitration award, that controls the rate of post-judgment interest. "Generally, post-judgment interest does not represent a portion of the monetary relief granted by the arbitration award." *Aqua Mgmt., Inc. v. Abdeen*, 224 Ariz. 91, 95, ¶ 18, 227 P.3d 498, 502 (App. 2010) (citation and internal punctuation omitted). "Although prejudgment interest is an integral part of the monetary relief granted in either an arbitration award or judgment, a post-judgment interest

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[13] This amendment was signed by the governor on April 13, 2011. *See* 2011 Ariz. Sess. Laws, ch. 99, § 15 (1st Reg. Sess.). The legislative session amending the statute adjourned on April 20, 2011. State Bar of Arizona, 50th Arizona Legislature——2011 First Regular Session, http://www.azbar.org/newsevents/newsreleases/2011/06/2011reglegsession (last visited March 28, 2013). "An act with no specified effective date takes effect on the ninety-first day after the day on which the session of the legislature enacting it adjourns sine die." *True v. Stewart*, 199 Ariz. 396, 397 n.1, ¶ 3, 18 P.3d 707, 708 n.1 (2001).

provision is generally collateral to the underlying judgment or award and is merely an enforcement mechanism designed to encourage timely satisfaction of the judgment." *Id.*

¶40 Although we do not engage in a *de novo* review of an arbitration award, *see Nolan*, 226 Ariz. at 461, ¶ 4, 250 P.3d at 238, and although we may vacate an award only on limited grounds, *see* A.R.S. § 12-1512(A), once the trial court enters judgment, either confirming or vacating the award, it has the same effect as any other civil judgment. *See Parsons & Whittemore Ala. Mach. & Servs. Corp. v. Yeargin Constr. Co.*, 744 F.2d 1482, 1484 (11th Cir. 1984); *cf. United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 310, 681 P.2d 390, 462 (App. 1983) ("We believe that interest upon a judgment is a statutory and not a contractual obligation, and when the interest rate was changed by statute, the rate of interest on the judgment was also changed." (citation omitted)). As a result, we have the power to determine whether a court applied the proper post-judgment interest rate to a judgment affirming an arbitration award.

¶41 There is no question that post-judgment interest is subject to the statutory rate in effect at the time the judgment is entered. *See United Cal. Bank*, 140 Ariz. at 310, 681 P.2d at 462. The question thus becomes whether the trial court applied the proper rate of interest on the judgment. In December 2010,

the Panel awarded Raytheon damages plus interest at a rate of ten percent per annum until paid in full, which was lawful at the time. *See* A.R.S. § 44-1201(A) (2003). When the trial court confirmed the award on November 22, 2011, the statutory rate was 4.25%. We therefore agree that Anixter was entitled to post-judgment interest at the decreased rate from the date of the trial court's judgment. *See Napoleon Steel Contractors, Inc. v. Monarch Constr. Co.*, 445 N.E.2d 743, 745 (Ohio Ct. App. 1982) (allowing the "interest rate in the original award to remain in effect from the date specified in the arbitration award until the date of the lower court's confirmation of the award"). The trial court erred in awarding ten percent post-judgment interest.

D. ATTORNEYS' FEES ON APPEAL

¶42 Raytheon has requested its attorneys' fees incurred on appeal pursuant to A.R.S. §§ 12-341.01(A) (Supp. 2012) and -1514 (2003). Our supreme court has made clear that the latter section authorizes an award of attorneys' fees to the prevailing party in a confirmation action. *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 180 Ariz. 148, 154, 882 P.2d 1274, 1280 (1994). That principle also applies to fees incurred on an appeal from a confirmation action. *Steer v. Eggleston*, 202 Ariz. 523, 528, ¶¶ 23-25, 47 P.3d 1161, 1166 (App. 2002). We determine that Raytheon is the prevailing party on appeal. We

award it attorneys' fees and taxable costs incurred on appeal subject to timely compliance with ARCAP 21(c), except for those fees in relation to its motion pursuant to Rule 60, which were denied by a motions panel of this Court.

CONCLUSION

¶43 Based on the foregoing, the trial court erred in awarding ten percent post-judgment interest. We modify the judgment to read that interest on those awards shall accrue from the date of judgment at 4.25%. We affirm the remainder of the trial court's judgment.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
ANDREW W. GOULD, Acting Presiding Judge

/S/
DIANE M. JOHNSEN, Judge