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FOR APPROVAL

# PROPOSED REVISIONS OF THE UNIFORM ARBITRATION ACT

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NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-NINTH YEAR
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# PROPOSED REVISIONS OF THE UNIFORM ARBITRATION ACT

*WITH PREFATORY NOTE AND REPORTER'S NOTES*



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*The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting*

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## DRAFTING COMMITTEE TO REVISE THE UNIFORM ARBITRATION ACT

FRANCIS J. PAVETTI, 83 Huntington Street, New London, CT 06320, *Chair*
FRANCISCO L. ACEVEDO, P.O. Box 190998, 16th Floor, Banco Popular Center, Hato Rey, PR 00919
RICHARD T. CASSIDY, 100 Main Street, P.O. Box 1124, Burlington, VT 05402
M. MICHAEL CRAMER, 216 N. Adams Street, Rockville, MD 20850
BARRY C. HAWKINS, One Landmark Square, 17th Floor, Stamford, CT 06901
TIMOTHY J. HEINSZ, University of Missouri-Columbia, School of Law, 203 Hulston Hall, Columbia, MO 65211, *National Conference Reporter*
ROGER C. HENDERSON, University of Arizona, James E. Rogers College of Law, Mountain and Speedway Streets, Tucson, AZ 85721, *Committee on Style Liaison*
JEREMIAH MARSH, Suite 4300, Three First National Plaza, Chicago, IL 60602
RODNEY W. SATTERWHITE, P.O. Box 1540, Midland, TX 79702
JAMES A. WYNN, JR., Court of Appeals, One W. Morgan Street, P.O. Box 888, Raleigh, NC 27602
JOAN ZELDON, Superior Court, 500 Indiana Avenue, N.W., Room 1640, Washington, DC 20001

### EX OFFICIO

JOHN L. McCLAUGHERTY, P.O. Box 553, Charleston, WV 25322, *President*
STANLEY M. FISHER, 1100 Huntington Building, 925 Euclid Avenue, Cleveland, OH 44115-1475, *Division Chair*

### AMERICAN BAR ASSOCIATION ADVISORS

RICHARD CHERNICK, 3055 Wilshire Boulevard, 7th Floor, Los Angeles, CA 90010-1108, Co-Advisor
JAMES L. KNOLL, 1500 S.W. Taylor Street, Portland, OR 97205, *Tort and Insurance Practice Section Advisor*
JOHN K. NOTZ, JR., 3300 Quaker Tower, 321 N. Clark Street, Chicago, IL 60610-4795, *Senior Lawyers Division Advisor*
YARKO SOCHYNSKY, 350 The Embarcadero, 6th Floor, San Francisco, CA 94105-1250, *Real Property, Probate and Trust Law Section Advisor*
RONALD M. STURTZ, 27 Badger Drive, Livingston, NJ 07039, *Co-Advisor*
MAX ZIMNY, Floor 3, 1710 Broadway, New York, NY 10019-5254, *Labor and Employment Law Section Advisor*

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WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

312/915-0195
www.nccusl.org

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# PROPOSED REVISIONS OF THE UNIFORM ARBITRATION ACT

## PREFATORY NOTE

The Uniform Arbitration Act (UAA), promulgated in 1955, has been one of the most successful Acts of the National Conference of Commissioners on Uniform State Laws. Forty-nine jurisdictions have arbitration statutes; 35 of these have adopted the UAA and 14 have adopted substantially similar legislation. A primary purpose of the 1955 Act was to insure the enforceability of agreements to arbitrate in the face of oftentimes hostile state law. That goal has been accomplished. Today arbitration is a primary mechanism favored by courts and parties to resolve disputes in many areas of the law. This growth in arbitration caused the Conference to appoint a Drafting Committee to consider revising the Act in light of increasing use of arbitration, the greater complexity of many disputes resolved by arbitration, and the developments of the law in this area.

The UAA did not address many issues which arise in modern arbitration cases. The statute provided no guidance as to (1) who decides the arbitrability of a dispute and by what criteria; (2) whether a court or arbitrators may issue provisional remedies; (3) how a party can initiate an arbitration proceeding; (4) whether arbitration proceedings may be consolidated; (5) whether arbitrators are required to disclose facts reasonably likely to affect impartiality; (6) what extent arbitrators or an arbitration organization are immune from civil actions; (7) whether arbitrators or representative of arbitration organizations may be required to testify in another proceeding; (8) whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold pre-hearing conferences and otherwise manage the arbitration process; (9) when a court may enforce a pre-award ruling by an arbitrator; (10) what remedies an arbitrator may award, especially in regard to attorney's fees, punitive damages or other exemplary relief; (11) when a court can award attorney's fees and costs to arbitrators and arbitration organizations; (12) when a court can award attorney's fees and costs to a prevailing party in an appeal of an arbitrator's award; and (13) which sections of the Revised Uniform Arbitration Act (RUAA) would not be waivable, a provision intended to insure that the sections of the RUAA which provide fundamental fairness to the parties will be preserved, particularly in those instances where one party may have significantly less bargaining power than another. The RUAA examines all of these issues and provides state legislatures with a more up-to-date statute to resolve disputes through arbitration.

There are a number of principles that the Drafting Committee agreed upon at the outset of its consideration of a revision to the UAA. First, that arbitration is a

consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs. In most instances the RUAA provides a default mechanism if the parties do not have a specific agreement on a particular issue. Second, the underlying reason many parties choose arbitration is the relative speed, lower cost, and greater efficiency of the process. The law should take these factors, where applicable, into account. For example, Section 10 allows consolidation of issues involving multiple parties. Such a provision can be of special importance in adhesion situations where there are numerous persons with essentially the same claims against a party to the arbitration agreement. Finally, in most cases parties intend the decisions of arbitrators to be final with minimal court involvement unless there is clear unfairness or a denial of justice. This contractual nature of arbitration means that the provision to vacate awards in Section 23 is limited. This is so even where an arbitrator may award attorney fees, punitive damages or other exemplary relief under Section 21. Section 14 insulates arbitrators from unwarranted litigation to insure their independence by providing them with immunity.

Other new provisions are intended to reflect developments in arbitration law and to insure that the process is a fair one. Section 12 requires arbitrators to make important disclosures to the parties. Section 8 allows courts to grant provisional remedies in certain circumstances to protect the integrity of the arbitration process. Section 17 includes limited rights to discovery while recognizing the importance of expeditious arbitration proceedings.

In light of a number of decisions by the United States Supreme Court concerning the Federal Arbitration Act (FAA), any revision of the UAA must take into account the doctrine of preemption. The rule of preemption, whereby FAA standards and the emphatically pro-arbitration perspective of the FAA control, applies in both the federal courts and the state courts. To date, the preemption-related opinions of the Supreme Court have centered in large part on the two key issues that arise at the front end of the arbitration process – enforcement of the agreement to arbitrate and issues of substantive arbitrability. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 35 (1967); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 2 (1984); *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520 (1987); *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995); *Doctor's Associates v. Cassarotto*, 517 U.S. 681 (1996). That body of case law establishes that state law of any ilk, including adaptations of the RUAA, mooting or limiting contractual agreements to arbitrate must yield to the pro-arbitration public policy voiced in Sections 2, 3, and 4 of the FAA.

The other group of issues to which the FAA speaks definitively lie at the back end of the arbitration process. The standards and procedure for vacatur, confirmation and modification of arbitration awards are the subject of Sections 9, 10, 11, and 12 of the FAA. In contrast to the "front end" issues of enforceability and substantive arbitrability, there is no definitive Supreme Court case law speaking to the preemptive effect, if any, of the FAA with regard to these "back end" issues. This dimension of FAA preemption of state arbitration law is further complicated by the strong majority view among the U.S. Circuit Courts of Appeals that the Section 10(a) standards are not the exclusive grounds for vacatur.

Nevertheless, the Supreme Court's unequivocal stand to date as to the preemptive effect of the FAA provides strong reason to believe that a similar result will obtain with regard to Section 10(a) grounds for vacatur. If it does, and if the Supreme Court eventually determines that the Section 10(a) standards are the sole grounds for vacatur of commercial arbitration awards, FAA preemption of conflicting state law with regard to the "back end" issues of vacatur (and confirmation and modification) would be certain. If the Court takes the opposite tack and holds that the Section 10(a) grounds are not the exclusive criteria for vacatur, the preemptive effect of Section 10(a) would be limited, most likely to the rule that state arbitration acts cannot eliminate, limit or modify any of the four grounds of party and arbitrator misconduct set out in Section 10(a). Any definitive federal "common law," pertaining to the nonstatutory grounds for vacatur other than those set out in Section10(a), articulated by the Supreme Court or established as a clear majority rule by the U.S. Courts of Appeals, likely would preempt contrary state law. A holding by the Supreme Court that the Section 10(a) grounds are not exclusive would also free the States to codify other grounds for vacatur beyond those set out in Section 10(a). These various, currently nonstatutory grounds for vacatur are discussed at length in the Reporter's Note C to Section 23.

An important caveat to the general rule of FAA preemption is found in *Volt Information Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468 (1989) and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The focus in these cases is on the effect of FAA preemption on choice-of-law provisions routinely included in commercial contracts. *Volt* and *Mastrobuono* establish that a clearly expressed contractual agreement by the parties to an arbitration contract to conduct their arbitration under state law rules effectively trumps the preemptive effect of the FAA. If the parties elect to govern their contractual arbitration mechanism by the law of a particular State and thereby limit the issues that they will arbitrate or the procedures under which the arbitration will be conducted, their bargain will be honored – as long as the state law principles invoked by the choice-of-law provision do not conflict with the FAA's prime directive that agreements to arbitrate be enforced. *See, e.g., ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. 1999); *Russ Berrie & Co. v. Gantt*,

988 S.W.2d 713 (Tex. App. 1999). It is in these situations that the RUAA will have most impact. Section 4(a) of the RUAA also explicitly provides that the parties to an arbitration agreement may waive or vary the terms of the Act, to the extent otherwise permitted by law. Thus, when parties choose to contractually specify the procedures to be followed under their arbitration agreement, the RUAA contemplates that the contractually-established procedures will control over contrary state law, except with regard to issues designated as "nonwaivable" in Section 4(b) of the RUAA.

The contractual election to proceed under state law instead of the FAA will be honored presuming that the state law is not antithetical to the pro-arbitration public policy of the FAA. Southland and Terminix leave no doubt that anti-arbitration state law provisions will be struck down because preempted by the federal arbitration statute.

Besides arbitration contracts where the parties choose to be governed by state law, there are other areas of arbitration law where the FAA does not preempt state law, in the absence of definitive federal law, set out in the FAA or determined by the federal courts. First, the Supreme Court has made clear its belief that ascertaining when a particular contractual agreement to arbitrate is enforceable is a matter to be decided under the general contract law principles of each State. The sole limitation on state law in that regard is the Court's assertion that the enforceability of arbitration agreements must be determined by the same standards as are used for all other contracts. Terminix, 513 U.S. at 281 (1995)(quoting Volt, 489 U.S. at 474 (1989)) and quoted in Cassarotto, 517 U.S. 681, 685 (1996); and Cassarotto, 517 U.S. at 688 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Arbitration agreements may not be invalidated under state laws applicable only to arbitration provisions. *Id*. The FAA will preempt state law that does not place arbitration agreements on an "equal footing" with other contracts.

During the course of its deliberations the Drafting Committee considered at length another issue with strong preemption undertones – the question of whether the RUAA should explicitly sanction contractual provisions for "opt-in" review of challenged arbitration awards beyond that presently contemplated by the FAA and current state arbitration acts. "Opt-in" provisions of two types are in limited use today. The first variant permits a party dissatisfied with the arbitral result to petition directly to a designated state court and stipulates that the court may vacate challenged awards, typically for errors of law or fact. The second type of "opt-in" contractual provision establishes an appellate arbitral mechanism to which challenged arbitration awards can be submitted for review, again most typically for errors of law or fact.

As explained in detail in Section B of the Reporter's Notes pertaining to Section 23, the current uncertainty as to the legality of a state statutory sanction of the "opt-in" device, coupled with the "disconnect" between the Act's purpose of fostering the use of arbitration as a final and binding alternative to traditional litigation in a court of law and a statutory provision that would permit the parties to contractually render arbitration decidedly non-final and non-binding, resulted in the decision not to include statutory sanction of the "opt-in" device for expanded judicial review in the RUAA. Simply stated, the potential gain to be realized by codifying a right to opt-into expanded judicial review that has not yet been definitively confirmed to exist does not outweigh the potential threat adoption of an opt-in statutory provision would create for the integrity and viability of the RUAA as a template for state arbitration acts.

Unlike the "opt-in" judicial review mechanims, there are few, if any, legal concerns raised by statutory sanction of "opt-in" provisions for appellate arbitral review. Nevertheless, as explained in the Section B of the Reporter's Comments to Section 23, because the current, contract-based view of arbitration establishes that the parties are free to design the inner workings of their arbitration procedures in any manner they see fit, the Drafting Committee determined that codification of that right in the RUAA would add nothing of substance to the existing law of arbitration.

The decision not to statutorily sanction either form of the "opt-in" device in the RUAA leaves the issue of the legal propriety of this means for securing review of awards to the developing case law under the FAA and state arbitration statutes. Parties remain free, within the constraints imposed by the existing and developing law, to agree to contractual provisions for arbitral or judicial review of challenged awards.

It is likely that matters not addressed in the FAA are also open to regulation by the States. State law provisions regulating purely procedural dimensions of the arbitration process (e.g., discovery [RUAA Section 17], consolidation of claims [RUAA Section 10], arbitrator immunity [RUAA Section 14]) likely will not be subject to preemption. Less certain is the effect of FAA preemption with regard to substantive issues like the authority of arbitrators to award punitive damages (RUAA Section 21) and the standards for arbitrator disclosure of potential conflicts of interest (RUAA Section 12) that have a significant impact on the integrity and/or the adequacy of the arbitration process. These "borderline" issues are not purely procedural in nature but unlike the "front end" and "back end" issues they do not go to the essence of the agreement to arbitrate or effectuation of the arbitral result. Although there is no concrete guidance in the case law, preemption of state law dealing with such matters seems unlikely as long as it cannot be characterized as anti-arbitration or as intended to limit the enforceability or viability of agreements to arbitrate.

The subject of international arbitration is not specifically addressed in the RUAA. Twelve States have passed arbitration statutes directed to international arbitration. Seven States have based their statutes on the Model Arbitration Law proposed in 1985 by the United Nations Commission on International Trade Law (UNCITRAL). Other States have approached international arbitration in a variety of ways, such as adopting parts of the UNCITRAL Model Law together with provisions taken directly from the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the New York Convention) or by devising their own international arbitration provisions.

Any provisions of these state international arbitration statutes that are inconsistent with the New York Convention, to which the United States adhered in 1970 (for the terms of the New York Convention, *see* 9 U.S.C. § 201), or with the federal legislation in Chapter 2 of Title 9 of the United States Code are preempted. Chapter 2 creates federal-question jurisdiction in the federal district courts for any case "falling under the [New York] Convention" and permits removal of any such case from a state court to the federal court "at any time prior to trial." 9 U.S.C. §§ 203, 205. The statute covers any commercial agreement to arbitrate and arbitral award unless the matter involves only American citizens and has no reasonable relationship to any foreign country and the courts have broadly applied the statute. Therefore, it is unlikely that state arbitration law will have major application to an international case. There are two instances where state arbitration law might apply in the international context: (1) where the parties designate a specific state arbitration law to govern the international arbitration and (2) where all parties to an arbitration proceeding involving an international transaction decide to proceed on a matter in state court and do not exercise their rights of removal under Chapter 2 of Title 9 and the relevant provision of state arbitration law is not preempted by federal arbitration law or the New York Convention. In these relatively rare cases, the state courts will refer to the RUAA unless the State has enacted a special international arbitration law.

Because few international cases are likely to be dealt with in state courts and because of the diversity of state law already enacted for international cases, the Drafting Committee decided not to address international arbitration as a specific subject in the revision of the UAA; however, the Committee utilized provisions of the UNCITRAL Model Law, the New York Convention, and the 1996 English Arbitration Act as sources of statutory language for the RUAA.

The members of the Drafting Committee to revise the Uniform Arbitration Act wish to acknowledge our deep indebtedness and appreciation to Professor Stephen Hayford and Professor Thomas Stipanowich who devoted extensive amounts of time by providing invaluable advice throughout the entire drafting process.

# PROPOSED REVISIONS OF THE UNIFORM ARBITRATION ACT

**SECTION 1. DEFINITIONS.** In this [Act]:

(1) "Arbitration organization" means a neutral association, agency, board, commission, or other entity that initiates, sponsors, or administers arbitration proceedings or is involved in the appointment of arbitrators.

(2) "Arbitrator" means an individual appointed to render an award in a controversy between persons who are parties to an agreement to arbitrate.

(3) "Authenticate" means:

(A) to sign; or

(B) to execute or adopt a symbol, or encrypt or similarly process a record in whole or in part, with present intent to identify the authenticating person or to adopt or accept a record or term.

(4) "Court" means [a court of competent jurisdiction in this State].

(5) "Knowledge" means actual knowledge.

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

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

**Reporter's Notes**

1. The term "arbitration organization" is similar to the one used in section 74 of the 1996 English Arbitration Act and describes well the functions of agencies such as the American Arbitration Association (AAA), the Center for Public Resources, JAMS, the National Arbitration Forum, NASD Regulation, Inc., the American Stock Exchange, the New York Stock Exchange, and the International Chamber of Commerce. The arbitration organizations under their specific administrative rules oversee and administer all aspects of the arbitration process. The important hallmarks of such agencies are that they are neutral and unbiased. *See, e.g.*, *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 938 P.2d 903, 64 Cal. Rptr.2d 843 (Cal. 1997) (defendants' self-administered arbitration program between insurer and customers that did not impartially administer arbitration system and made representations about timeliness of the proceedings contrary to what defendant knew would occur was improper). The term "arbitration organization" is used in Section 12 concerning arbitrator disclosure and Section 14 concerning arbitrator immunity.

2. Commissioner Hill of Maryland suggested that the term "arbitrator" be defined. It was not under the UAA. In Section 1(2), the Reporter suggests using the term "individual" rather than "person" because business entities or organizations do not function as "arbitrators." The definition of "arbitrator" is based on that used most often in the case law. *See Black's Law Dictionary* 105 (1990); *West's Legal Thesaurus/Dictionary* 60 (1985); *Hoteles Condado Beach v. Union de Tronquistas Local 901*, 763 F.2d 34 (1st Cir. 1985).

3. "Authenticate" is used in Section 19 of the RUAA to define how an arbitrator executes an award. The definition which is intended to include both written and electronic means is based upon that being considered for adoption in the March 2000 draft of Revised Article 2 of the Uniform Commercial Code; a similar definition also is in Article 9 of the UCC.

4. The definition of "court" is presently found in Section 17 of the UAA. The court must have appropriate subject matter and personal jurisdiction. Different States determine which court in its system has jurisdiction over arbitration matters in the first instance. Most give authority to the court of general jurisdiction.

5. The term "knowledge" is used in Section 2 regarding notice under the RUAA. It is based on the definition used in Article 1-201 of the Uniform Commercial Code.

6. Section 1(7) is based on the definition of "record" in Sec. 5-102(a)(14) of the Uniform Commercial Code and in proposed revised Article 2 of the Uniform Commercial Code and is intended to carry forward established policy of the Conference to accommodate the use of electronic evidence in business and

governmental transactions. It is not intended to mean that a document must be filed in a governmental office nor is it meant to imply that the term "written" or like phrases in other statutes of an enacting State may not be given equally broad interpretation as the term "record."

**SECTION 2. NOTICE.** Unless the parties to an agreement to arbitrate otherwise agree or except as otherwise provided in this [Act], a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice. A person has notice if the person has knowledge of the notice or has received notice. A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

**Reporter's Notes**

1. The conditions of giving and receiving notice are based on terminology used in Article 1-201(25) of the Uniform Commercial Code. Section 2 spells out standards for when notice is given and received rather than any particular means of notice. This allows parties to use systems of notice that become technologically feasible and acceptable, such as by fax or electronic mail.

The Committee on Style requested that the Drafting Committee adopt the lengthy definition in Article 1-202 almost verbatim. The Drafting Committee considered this suggestion and voted 9-1 at its February 2000 meeting to reject this suggestion because the conditions for business notice did not apply to the same extent in an arbitration proceeding as in a commercial contract situation. Notice in a business context often involves the formation of a contract; whereas, in this Act notice typically involves matters connected to an arbitration proceeding. The Drafting Committee determined that a modified section on notice was more appropriate.

2. The concept of giving, having, or receiving notice occurs in Section 15(b) and (c) concerning parties giving notice of a request for summary disposition and

arbitrators giving notice of an arbitration hearing; Section 19(a) regarding an arbitrator or an arbitration organization giving notice of an award and Section 19(b) concerning a party notifying an arbitrator of untimely delivery of an award; Section 20(b) concerning a party's notice of requesting a change in the award by arbitrators; Section 22 concerning a party applying to a court to confirm an award after receiving notice of it; Section 23(b) concerning a party filing a motion to vacate an award, and Section 24(a) concerning a party applying to modify or correct an award after receiving notice of it.

3. "Notice" is also used in Section 9 regarding initiation of an arbitration proceeding; Section 9(b) requires that, unless the parties otherwise agree as per Section 4, notice must be given either by mail, registered or certified, return receipt requested and obtained, or by service as authorized by law for the initiation of a civil action. Because of the language in Section 2 "unless otherwise provided by this [Act]," the manner of notice provided in Section 9(b) takes precedence as to notice of initiation of an arbitration proceeding.

**SECTION 3. WHEN [ACT] APPLIES.**

(a) Before [date], this [Act] governs agreements to arbitrate and arbitration proceedings entered into:

(1) on or after [the effective date of this [Act]]; and

(2) before [the effective date of this [Act]], if all parties to the agreement to arbitrate or to arbitration proceedings agree in a record to be governed by this [Act].

(b) On or after [date], this [Act] governs agreements to arbitrate and arbitration proceedings.

**Reporter's Notes**

1. Section 3 is based upon the effective-date provisions in the Revised Uniform Partnership Act (Section 1206) and 1996 Amendments constituting the Uniform Limited Liability Partnership Act of 1994 (Section 1210). Section 3(a)(2) allows parties who have entered into arbitration agreements under the UAA the option to elect coverage under the RUAA. Section 3(b) establishes a certain date

when all arbitration agreements, whether entered into before or after the effective date of the RUAA, will be governed by the RUAA rather than the UAA.

2. Section 20 of the UAA provided that the law was only applicable to agreements entered into after the effective date of the Act. The Drafting Committee rejected this approach. If it were followed, such a section would cause two sets of rules to develop for arbitration agreements under state arbitration law: one for agreements under the UAA and one for agreements under the RUAA. This is especially troublesome in situations where parties have a continuing relationship that is governed by a contract with an arbitration clause. There would be no mechanism, such as Section 3(a)(2) for these parties to opt into the provisions of the RUAA without rescinding their initial agreement. Section 3(b) also sets a time certain when all arbitration agreements will be governed by the RUAA. The time between when parties may opt into coverage under the RUAA and when parties' agreements must be governed by the RUAA will give parties a reasonable amount of time in which to learn of and adapt their arbitration agreements to the changes made by the RUAA.

3. By adopting Section 3(b) a legislature will express a specific intent that the RUAA, on the date which the legislature selects, will have retroactive application as to arbitration agreements entered into prior to the effective date of the legislation and where the parties have not opted into coverage under the RUAA during the interim period under Section 3(a)(2). Courts generally require legislatures to express such an intent as to retroactive application. *Millenium Solutions, Inc. v. Davis*, 258 Neb. 293, 603 N.W.2d 406 (1999) (because legislature did not clearly express an intention that Uniform Arbitration Act was to be applied retroactively, it only applies prospectively); *see also Koch v. S.E.C.*, 177 F.3d 784 (9th Cir. 1999); *Phillips v. Curiale*, 128 N.J. 608, 608 A.2d 895 (1992). Retroactive application of statutes to preexisting contracts is acceptable when the legislation has a legitimate purpose and the measures are reasonable and appropriate to that end. 2 Sutherland Stat. Const. § 41.07 (5th ed. 1993). The need for uniform application of arbitration laws and to avoid two sets of rules for arbitration agreements that are of a long-term duration are legitimate rationales for retroactive application, especially because parties will be given a time period in which to determine whether to opt for coverage under the UAA or the RUAA and during which to adjust any provisions in their arbitration agreements for eventual application of the RUAA. These same rationales were used for similar provisions in the Revised Uniform Partnership Act and the Uniform Limited Liability Partnership Act.

**SECTION 4. EFFECT OF AGREEMENT TO ARBITRATE; NONWAIVABLE PROVISIONS.**

(a) Except as otherwise provided in subsection (b) and (c), the parties to an agreement to arbitrate or to an arbitration proceeding may waive or vary the requirements of this [Act] to the extent permitted by law.

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

(1) waive or vary the requirements of this section or Section 3(b), 5(a), 6(a), 8, 17(a), 17(b), 26, or 28;

(2) unreasonably restrict the right under Section 9 to notice of the initiation of an arbitration proceeding;

(3) unreasonably restrict the right under Section 12 to disclosure of any facts by a neutral arbitrator; or

(4) waive the right under Section 16 of a party to an agreement to arbitrate to be represented by an attorney at any proceeding or hearing under this [Act], except that an employer and a labor organization may waive the right to representation by an attorney in a labor arbitration.

(c) The parties to an agreement to arbitrate may not waive or vary the requirements of Section 7, 14, 18, 20(c), 20(d), 22, 23, 24, 25(a), 25(b), 29, 30, 31, or 32.

**Reporter's Notes**

1. Section 4 is similar to provisions in the Uniform Partnership Act (Section 103) and in the proposed Revised Uniform Limited Partnership Act (Section 101B).

The intent of Section 4 is to indicate that, although the RUAA is primarily a default statute and the parties' autonomy, as expressed in their agreements concerning an arbitration, normally should control the arbitration, there are provisions that parties cannot waive prior to a dispute arising under an arbitration agreement or cannot waive at all.

2. Section 4(a) embodies the notion of party autonomy in shaping their arbitration agreement or arbitration process. It should be noted that, subject to Section 4(b) and (c) and in accordance with Reporter Note 1 to Section 6, although the parties' arbitration agreement must be in a record, they subsequently may vary that agreement orally, for instance, during the arbitration proceeding.

3. The phrase "to the extent permitted by law" is included in Section 4(a) to inform the parties and reviewing courts that the parties cannot vary the terms of an arbitration agreement from the statute if the result would violate applicable law. This situation occurs most often when a party includes unconscionable provisions in an arbitration agreement. *See* Reporter Note 6 to Section 6. The remedies of attorney's fees and punitive or other exemplary damages are another instance where the law in certain circumstances may disallow parties from limiting this remedy. For example, although parties might limit remedies, such as recovery of attorney's fees or punitive damages in Section 21, a court might deem such a limitation inapplicable where an arbitration involves statutory rights which would require these remedies. *See* Reporter Note 2 to Section 21.

4. Section 4(b) is a listing of those provisions that the Drafting Committee determined cannot be waived in a pre-dispute context. The Drafting Committee decided that after a dispute subject to arbitration arises, then the parties should have more autonomy to agree to provisions different from those required under the RUAA and that the sections noted in 4(b) would be waivable.

Special mention should be made of the following sections:

a. Section 9 allows the parties to shape what goes into a notice to initiate an arbitration proceeding or the means of giving the notice but Section 4(b)(2) insures that reasonable notice must be given.

b. Section 4(b)(3) recognizes that many parties are governed by disclosure requirements through an arbitration organization or a professional association. Such requirements would be controlling instead of those in Section 12 so long as they are reasonable in what they require a neutral arbitrator to disclose. Also parties can waive the requirement that non-neutral, party arbitrators make any disclosures under Section 12. *See, e.g.*, AAA, Commercial Disp. Resolution Pro. R-12(b), 19

(disclosure requirements do not apply to party-appointed arbitrator, unless parties agree to the contrary).

c. The Drafting Committee considered that Section 16 which gives the parties a right to be represented by an attorney and which cannot be waived prior to the initiation of an arbitration proceeding under Section 9, is an important one especially in the context of an arbitration agreement between parties of unequal bargaining power. However, in labor-management arbitration many parties agree to expedited provisions where, prior to any hearing on a particular matter, they knowingly waive the right to have attorneys present their cases (and also prohibit transcripts and briefs) in order to have a quick, informal, and inexpensive arbitration mechanism. Because of this longstanding practice and because the parties are of relatively equal bargaining power, the Drafting Committee decided to make an exception for labor-management arbitration in Section 4(b)(4).

d. Although prior to an arbitration dispute, parties should not be able to waive Section 26, jurisdiction, and Section 28, appeals, because these deal with authority of courts to hear cases, after the dispute arises if parties want to limit the jurisdictional provisions of Section 26 that an agreement to arbitrate confers jurisdiction on a court or to decide that there will be no appeal from lower court rulings, they should be free to do so.

5. Section 4(c) includes those provisions that involve the judicial process or the inherent rights of an arbitrator and should not be within the control of the parties either before or after the arbitration dispute arises.

a. Section 7 concerns the court's authority either to compel or stay arbitration proceedings. Parties should not be able to interfere with this power of the court to initiate or deny the right to arbitrate.

b. Section 14 provides arbitrators and arbitration organizations with immunity for acting in their respective capacities. Similarly arbitrators and representatives of arbitration organizations are protected from being required to testify in certain instances and if arbitrators or arbitration organizations are the subject of unwarranted litigation, they can recover attorney fees. This section is intended to protect the integrity of the arbitration process and should not be waivable by the parties.

c. Likewise Section 18, dealing with court enforcement of pre-award rulings, should be an inherent right; otherwise parties would be unable to insure a fair hearing and there would be no mechanism to carry out a pre-award order.

d. Section 20(a) and (b) gives the parties the right to apply to the arbitrators to correct or clarify an award; presumably this should be waivable. But the right of a court in Section 20(c) to order an arbitrator to correct or clarify an award and the applicability of Sections 22, 23, and 24 to Section 20 as provided in Section 20(d) should not.

e. The judicial confirmation, vacatur, and modification provisions of Sections 22, 23, and 24 are not waivable.

f. Section 25(a) and (b) provides the mechanisms for a court to enter judgment and to award costs. Because these powers are within the province of a court they should not be waivable. Section 25(c) concerns remedies of attorney's fees and litigation expenses which, similar to other remedies in Section 21, parties can determine by agreement.

g. Parties should not be able to vary the nonwaivability provision of this section, the uniformity of interpretation in Section 29, or the effective date in Section 30, Section 31 regarding repeal of the UAA, or Section 32, savings clause.

**SECTION 5. APPLICATION TO COURT.**

(a) Except as otherwise provided in Section 28, an application for judicial relief under this [Act] must be made by motion to the court and heard in the manner and upon the notice provided by law or rule of court for making and hearing motions.

(b) Notice of an initial motion to the court under this [Act] must be served in the manner provided by law for the service of a summons in a civil action unless a civil action is already pending involving the agreement to arbitrate.

**Reporter's Notes**

1. Section 5(a) and (b) is based on Section 16 of the UAA. Its purpose is twofold: (1) that legal actions to a court involving an arbitration matter under the RUAA will be by motion and not by trial and (2) unless the parties otherwise agree, the initial motion filed with a court will be served in the same manner as the initiation of a civil action.

2. The UAA uses the term "application" rather than "motion" throughout the statute but the Style Committee suggested that this term was outmoded and should be replaced by the term "motion." Legal actions under both the UAA and the FAA generally are by motion practice and not subject to the delays of a civil trial. This system has worked well and the Drafting Committee concluded to retain it. In some States there may be different means of initiating arbitration actions, such as filing a petition or a complaint, instead of or along with a motion, and this section is not intended to alter established practice in any particular State.

3. Section 5(b) provides for the mechanism by which an initial motion is served upon another party. However, it makes an exception where an action is already pending. For instance, if an action for damages in a construction contract dispute has been filed by one party and the other party desires to file a motion to compel arbitration of the matter under an arbitration agreement, such motion need not be formally served because the parties already have received formal notice of the lawsuit.

**SECTION 6. VALIDITY OF AGREEMENT TO ARBITRATE.**

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

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

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

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration

proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

**Reporter's Notes**

1. The language in Section 6(a) is the same as UAA Section 1 and almost the same as the language of FAA Section 2 "shall be valid irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Because of the significant body of case law that has developed over the interpretation of this language in both the UAA and the FAA, the Drafting Committee decided, for the most part, to leave this section intact.

Section 6 (a) provides that any terms in the arbitration agreement must be in a "record." This too follows both the UAA and FAA requirements that arbitration agreements be in writing. However a subsequent, oral agreement about terms of an arbitration contract is valid. This position is in accordance with the unanimous holding of courts that a written contract can be modified by a subsequent, oral arrangement provided that the latter is supported by valid consideration. *Premier Technical Sales, Inc. v. Digital Equipment Corp.*, 11 F.Supp.2d 1156 (N.D. Cal. 1998); *Cambridgeport Savings Bank v. Boersner*, 413 Mass. 432, 597 N.E.2d 1017 (1992); *Pellegrene v. Luther*, 403 Pa. 212, 169 A.2d 298 (1961); *Pacific Development, L.C. v. Orton*, 982 P.2d 94 (Utah App. 1999). Indeed it is typical in the arbitration context, that many parties have only a short statement in their contracts concerning the resolution of disputes by arbitration and perhaps a reference to the rules of an arbitration organization. It is oftentimes only after the initial arbitration agreement is written and when a dispute arises that the parties enter into more detailed agreements as to how their arbitration process will work. Such subsequent understandings, whether oral or written, are part of the arbitration agreement.

2. Section 6(b) and (c) reflect the decision of the Drafting Committee to include language in the RUAA that incorporates the holdings of the vast majority of state courts and the law that has developed under the FAA that, in the absence of an agreement to the contrary, issues of substantive arbitrability, i.e., whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide. *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 877 P.2d 234, 292 (1994); *Thomas v. Farmers Ins. Exchange*, 857 P.2d 532, 534 (Colo.Ct.App. 1993); *Executive Life Ins. Co. v. John Hammer & Assoc., Inc.*, 569 So.2d 855, 857 (Fla.Dist.Ct.App. 1990); *Amalgamated Transit Union Local 900 v. Suburban Bus Div.*, 262 Ill.App.3d 334, 199 Ill.Dec. 630, 635, 634 N.E.2d 469, 474 (1994); *Des Moines Asphalt & Paving Co. v. Colcon*

*Industries Corp.*, 500 N.W.2d 70, 72 (Iowa 1993); *City of Lenexa v. C.L. Fairley Const. Co.*, 15 Kan.App.2d 207, 805 P.2d 507, 510 (1991); *The Beyt, Rish, Robbins Group v. Appalachian Regional Healthcare, Inc.*, 854 S.W.2d 784, 786 (Ky.Ct.App. 1993); *City of Dearborn v. Freeman-Darling, Inc.*, 119 Mich.App. 439, 326 N.W.2d 831 (1982); *City of Morris v. Duininck Bros. Inc.*, 531 N.W.2D 208, 210 (Minn.Ct.App. 1995); *Gaines v. Financial Planning Consultants, Inc.*, 857 S.W.2d 430, 433 (Mo.Ct.App. 1993); *Exber v. Sletten*, 92 Nev.. 721, 558 P.2d 517 (1976); *State v. Stremick Const. Co.*, 370 N.W.2D 730, 735 (N.D. 1985); *Messa v. State Farm Ins. Co.*, 433 Pa.Super. 594, 641 A.2d 1167, 1170 (1994); *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576 (Tex. App. 1999); *City of Lubbock v. Hancock*, 940 S.W.2d 123 (Tex. App. 1996), *but see Smith Barney, Harris Upham & Co. v. Luckie*, 58 N.Y.2d 193, 647 N.E.2d 1308, 623 N.Y.S.2d 800 (1995) (a court rather than an arbitrator under New York arbitration law should decide whether a statute of limitations time bars an arbitration).

In particular it should be noted that Section 6(b) which provides for courts to decide substantive arbitrability is subject to waiver under Section 4(a). This approach is not only the law in most States, as noted above, but also follows Supreme Court precedent under the FAA that if there is no agreement to the contrary, questions of substantive arbitrability are for the courts to decide. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Some arbitration organizations, such as the American Arbitration Association in its rules on commercial arbitration disputes, provide that arbitrators, rather than courts, make the initial determination as to substantive arbitrability. AAA, Commercial Disp. Resolution Pro. R-8(b); *see also Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989) (when parties agreed that all disputes arising out of or in connection with distributorship agreement would be settled by binding arbitration in accordance with the rules of arbitration of the International Chamber of Commerce, they agreed to submit issues of arbitrability to arbitrator); *Daiei v. United States Shoe Corp.*, 755 F. Supp. 299 (D.Haw. 1991) (parties agreed to submit issues of arbitrability to arbitrator, when they incorporated by reference in their arbitration agreement the rules of the International Chamber of Commerce providing that "any decision as to the arbitrator's jurisdiction shall lie with the arbitrator").

3. The language in Section 6(c) "whether a contract containing the agreement to arbitrate is enforceable" is intended to follow the "separability" doctrine outlined in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). There the plaintiff filed a diversity suit in federal court to rescind an agreement for fraud in the inducement and to enjoin arbitration. The alleged fraud was in inducing assent to the underlying agreement and not to the arbitration clause itself. The Supreme Court, applying the FAA to the case, determined that the arbitration clause is separable from the contract in which it is made. So long as no party claimed that only the arbitration clause was induced by

fraud, a broad arbitration clause encompasses arbitration of a claim that the underlying contract was induced by fraud. Thus, if a disputed issue is within the scope of the arbitration clause, challenges to the enforceability of the underlying contract on grounds such as fraud, illegality, mutual mistake, duress, unconscionability, ultra vires and the like are to be decided by the arbitrator and not the court. *See* II Ian Macneil, Richard Speidel, and Thomas Stipanowich, *Federal Arbitration Law* §§15.2-15.3 (1995) [hereinafter "*Macneil Treatise*"]. A majority of States recognize some form of the separability doctrine under their state arbitration laws. *Old Republic Ins. Co. v. Lanier*, 644 So.2d 1258 (Ala. 1994); U.S. *Insulation, Inc. v. Hilro Constr. Co.*, 705 P.2d 490 (Ariz. App. 1985); *Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 35 Cal.3d 312, 197 Cal.Rptr. 581, 673 P.2d 251 (1983); *Hercules & Co. v. Shama Restaurant Corp.*, 613 A.2d 916 (D.C. App. 1992); *Brown v. KFC Nat'l Mgmt. Co.*, 82 Hawaii 226, 921 P.2d 146 (1996); *Quirk v. Data Terminal Systems, Inc.*, 739 Mass. 762, 400 N.E.2d 858 (Mass. 1980); *Weinrott v. Carp*, 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973); *Weiss v. Voice/Fax Corp.*, 94 Ohio App.3d 309, 640 N.E.2d 875 (Ohio 1994); *Jackson Mills, Inc. v. BT Capital Corp.*, 440 S.E.2d 877 (S.C. 1994); *South Carolina Public Service authority v. Great Western Coal*, 437 S.E.2d 22 (S.C. 1993); *Gerwell v. Moran*, 10 S.W.3d 28 (Tex. App. 1999); *Schneider, Inc. v. Research-Cottrell, Inc.*, 474 F.Supp 1179 (W.D. Pa. 1979) (applying Pennsylvania law); *New Process Steel Corp. v. Titan Indus. Corp.*, 555 F.Supp. 1018 (S.D. Tex. 1983) (applying Texas law); *Pinkis v. Network Cinema Corp.*, 512 P.2d 751 (Wash. 1973).

Other States have either limited or declined to follow the *Prima Paint* doctrine on separability. *Rosenthal v. Great Western Financial Securities Corp.*, 14 Cal.4th 394, 58 Cal.Rptr.2d 875, 926 P.2d 1061 (1996); *Goebel v. Blocks and Marbles Brand Toys, Inc.*, 568 N.E.2d 552 (Ind. 1991); *City of Wamego v. L.R. Foy Constr. Co*, 675 P.2d 912 (Kan.App. 1984); *George Engine Co. v. Southern Shipbuilding Corp.*, 376 So.2d 1040 (La.App. 1977); *Holmes v. Coverall North America, Inc.*, 633 A.2d 932 (Md. 1993); *Atcas v. Credit Clearing Corp. of America*, 197 N.W.2d 448 (Minn. 1972); *Shaw v. Kuhnel & Assocs.*, 698 P.2d 880 (N.M. 1985); *Shaffer v. Jeffery*, 915 P.2d 910 (Okla. 1996) (recognizing that majority of States apply the doctrine of separability but declining to follow the doctrine); *Frizzell Const. Co. v. Gatlinburg. L.L.C.*, 9 S.W.3d 79 (Tenn. 1999).

4. Waiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause. However, because of the public policy favoring arbitration, a court normally will only find a waiver of a right to arbitrate where a party claiming waiver meets the burden of proving that the waiver has caused prejudice. *Sedillo v. Campbell*, 5 S.W.3d 824 (Tex. App. 1999). For instance, where a plaintiff brings an action against a defendant in court, engages in extensive discovery and then attempts to dismiss the lawsuit on the grounds of an

arbitration clause, a defendant might challenge the dismissal on the grounds that the plaintiff has waived any right to use of the arbitration clause. *S&R Company of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80 (2d Cir. 1998). Allowing the court to decide this issue of arbitrability comports with the separability doctrine because in most instances waiver concerns only the arbitration clause itself and not an attack on the underlying contract. It is also a matter of judicial economy to require that a party, who pursues an action in a court proceeding but later claims arbitrability, be held to a decision of the court on waiver.

5. Section 6(d) follows the practice of the American Arbitration Association and most other arbitration organizations that if arbitrators are appointed and either party challenges the substantive arbitrability of a dispute in a court proceeding, the arbitrators in their discretion may continue the arbitration hearings unless a court issues an order to stay the arbitration or makes a final determination that the matter is not arbitrable.

6. The Drafting Committee unanimously determined to recommend an Official Comment regarding contracts of adhesion and unconscionability. The Comment would be as follows:

> "Unequal bargaining power often affects contracts containing arbitration provisions involving employers and employees, sellers and consumers, health maintenance organizations and patients, franchisors and franchisees, and others.
>
> "Despite some recent developments to the contrary, courts do not often find contracts unenforceable for unconscionability. To determine whether to void a contract on this ground, courts examine a number of factors. These factors include: unequal bargaining power, whether the weaker party may opt out of arbitration, the arbitration clause's clarity and conspicuousness, whether an unfair advantage is obtained, whether the arbitration clause is negotiable, whether the arbitration provision is boilerplate, whether the aggrieved party had a meaningful choice or was compelled to accept arbitration, whether the arbitration agreement is within the reasonable expectations of the weaker party, and whether the stronger party used deceptive tactics. *See, e.g., We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838 (7th Cir. 1999); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173 (3d Cir. 1999); *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013 (1992); *Chor v. Piper, Jaffray & Hopwood, Inc.*, 261 Mont. 143, 862 P.2d 26 (1993); *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Powers v. Dickson, Carlson & Campillo*, 54 Cal. App. 4th 1102, 63 Cal. Rptr.2d 261 (1997); *Beldon Roofing & Remodeling Co. v. Tanner*, 1997 WL 280482 (Tex.Ct.App.).

"Despite these many factors, courts have been reluctant to find arbitration agreements unconscionable. II *Macneil Treatise* § 19.3; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 Wis. L. Rev. 33 (1997); Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Cassarotto,* 31 Wake Forest L. Rev. 1001 (1996). However, in the last few years, some cases have gone the other way and courts have begun to scrutinize more closely the enforceability of arbitration agreements. *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (one-sided arbitration agreement that takes away numerous substantive rights and remedies of employee under Title VII is so egregious as to constitute a complete default of employer's contractual obligation to draft arbitration rules in good faith); *Shankle v. B-G Maintenance Mgt., Inc.*, 163 F.3d 1230 (10th Cir. 1999) (arbitration clause does not apply to employee's discrimination claims where employee is required to pay portion of arbitrator's fee that is a prohibitive cost for him so as to substantially limit his use of arbitral forum); *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149 (11th Cir. 1999) (consumer not required to arbitrate where arbitration clause is silent on subject of arbitration fees and costs due to risk that imposition of large fees and costs on consumer may defeat remedial purposes of Truth in Lending Act); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998) (employee not required to arbitrate Title VII claim where the contract limits damages below that allowed by the statute) [*but cf. Dobbins v. Hawk's Enterprises*, 198 F.3d 715 (8th Cir. 1999) (before court can determine if administrative costs make arbitration clause unconscionable, purchasers must explore whether arbitration organization will waive or diminish its fees or whether seller will offer to pay the fees)]; *Broemmer v. Abortion Serv. of Phoenix, Ltd., supra* (arbitration agreement unenforceable because it required a patient to arbitrate a malpractice claim and to waive the right to jury trial and was beyond the patient's reasonable expectations where drafter inserted potentially advantageous term requiring arbitrator of malpractice claims to be a licensed medical doctor); *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 988 P.2d 67, 90 Cal. Rptr.2d 334 (1999); (although consumer's claim for damages under consumer protection statute is arbitrable, claim for injunctive relief is not because of the public benefit for the injunctive remedy and the advantages of a judicial forum for such relief); *Engalla v. Permanente Med. Grp.*, 15 Cal. 4th 951, 938 P.2d 903, 64 Cal. Rptr. 2d 843 (1997) (health maintenance organization may not compel arbitration where it fraudulently induced participant to agree to the arbitration of disputes, fraudulently misrepresented speed of arbitration selection process and forced delays so as to waive the right of arbitration); *Maciejewski v. Alpha Systems Lab., Inc.*, 73 Cal. App. 4th 1372, 87 Cal. Rptr.2d 390 (1999) (contract requiring employee to pay costs of arbitrators, limits on discovery, and forfeiture of statutory right to attorney's fees renders arbitration provision

unconscionable); *Gonzalez v. Hughes Aircraft Employees Federal Credit Union*, 70 Cal. App.4th 468, 82 Cal. Rptr.2d 526 (1999) (arbitration agreement which has unfair time limits for employees to file claims, requires employees to arbitrate virtually all claims but allows employer to obtain judicial relief in virtually all employment matters, and severely limits employees' discovery rights is both procedurally and substantively unconscionable); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 68 Cal. App. 4th 374, 80 Cal. Rptr.2d 255 (1998) (clause in arbitration agreement limiting employee's remedies in state anti-discrimination claims severed from the agreement and held void on grounds of unconscionability); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997) (one-sided compulsory arbitration clause which reserved litigation rights to the employer only and denied employees rights to exemplary damages, equitable relief, attorney fees, costs, and a shorter statute of limitations unconscionable); *Rembert v. Ryan's Family Steak House*, 235 Mich.App. 118, 596 N.W.2d 208 (1999) (predispute agreement to arbitrate statutory employment discrimination claims was valid only as long as employee did not waive any rights or remedies under the statute and arbitral process was fair); *Alamo Rent A Car, Inc. v. Galarza*, 306 N.J. Super. 384, 703 A.2d 961 (1997) (arbitration clause that does not clearly and unmistakably include claims of employment discrimination fails to waive employee's statutory rights and remedies); *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854 (W.Va. 1998) (arbitration clause in consumer loan transaction that contained waiver of the consumer's rights to access to the courts, while reserving practically all of the lender's right to a judicial forum found unconscionable).

"As a result of concerns over fairness in arbitration involving those with unequal bargaining power, organizations and individuals involved in employment, consumer and health-care arbitration have determined common standards for arbitration in these fields. In 1995, a broad-based coalition representing interests of employers, employees, arbitrators and arbitration organizations agreed upon a DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP; *see also* National Academy of Arbitrators, GUIDELINES ON ARBITRATION OF STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS (May 21, 1997). In 1998, a similar group representing the views of consumers, industry, arbitrators, and arbitration organizations formed the National Consumer Disputes Advisory Committee under the auspices of the American Arbitration Association and adopted a DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES. Also in 1998 the Commission on Health Care Dispute Resolution, comprised of representatives from the American Arbitration Association, the American Bar Association and the American Medical Association endorsed a DUE PROCESS PROTOCOL FOR

MEDIATION AND ARBITRATION OF HEALTH CARE DISPUTES. The purpose of these protocols is to ensure both procedural and substantive fairness in arbitrations involving employees, consumers and patients. The arbitration of employment, consumer and health-care disputes in accordance with these standards will be a legitimate and meaningful alternative to litigation. *See, e.g.*, *Cole v. Burns Int'l Security Serv.*, 105 F.3d 1465 (D.C. Cir. 1997) (referring specifically to the due process protocol in the employment relationship in a case involving the arbitration of an employee's rights under Title VII).

"The Drafting Committee determined to leave the issue of adhesion contracts and unconscionability to developing law because (1) the issue of unconscionability reflects so much the substantive law of the States and not just arbitration, (2) the case law, statutes, and arbitration standards are rapidly changing, and (3) treating arbitration clauses differently from other contract provisions would raise significant preemption issues under the Federal Arbitration Act. However, it should be pointed out that a primary purpose of Section 4 which provides that some sections of the RUAA are not waivable is to address the problem of contracts of adhesion in the statute while taking into account the limitations caused by federal preemption.

"Because an arbitration agreement effectively waives a party's right to a jury trial, courts should ensure the fairness of an agreement to arbitrate, particularly in instances involving statutory rights which provide claimants with important remedies. Courts should determine that an arbitration process is adequate to protect important rights. Without these safeguards, arbitration loses credibility as an appropriate alternative to litigation."

**SECTION 7. MOTION TO COMPEL OR STAY ARBITRATION.**

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no

enforceable agreement, it may not order the parties to arbitrate but may take appropriate action.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate but may take appropriate action.

(c) 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.

(d) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section must be filed in that court. Otherwise a motion under this section may be filed in any court as required by Section 27.

(e) If a party files a motion with the court to order arbitration under this section, the court shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(f) If the court orders arbitration, the court shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may sever it and limit the stay to that claim.

**Reporter's Notes**

1. The term "summarily" in Section 7(a) and (b) is presently in the UAA Section 2(a) and (b). It has been defined to mean that a trial court should act

expeditiously and without a jury trial to determine whether a valid arbitration agreement exists. *Grad v. Wetherholt Galleries*, 660 A.2d 903 (D.C. 1995); *Wallace v. Wiedenbeck*, 251 A.D.2d 1091, 674 N.Y.S.2d 230, 231 (N.Y. App. Div. 1998); *Burke v. Wilkins*, 507 S.E.2d 913 (N.C. Ct. App. 1998); *In re MHI Partnership, Ltd.*, 7 S.W.3d 918 (Tex. App. 1999). The term is also used in Section 4 of the FAA.

2. In Section 7(a) and (b) if a court determines that there is no enforceable agreement to arbitrate, it would not order arbitration and would usually dismiss the motion. However, in certain circumstances a court may want to stay the motion or dispose of the matter is some other fashion. This is the reason that the language allows the court to "take appropriate action."

**SECTION 8. PROVISIONAL REMEDIES.**

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

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

(c) A motion to a court for a provisional remedy under subsection (a) or (b) does not waive any right of arbitration.

**Reporter's Notes**

1. This language is similar to that considered by the Drafting Committee of the UAA in 1954 and 1955; the following was included in Section 4 of the 1954 draft but was omitted in the 1955 UAA:

> "At any time prior to judgment on the award, the court on application of a party may grant any remedy available for the preservation of property or securing the satisfaction of the judgment to the same extent and under the same conditions as if the dispute were in litigation rather than arbitration."

In *Salvucci v. Sheehan*, 349 Mass. 659, 212 N.E.2d 243 (1965), the court allowed the issuance of a temporary restraining order to prevent the defendant from conveying or encumbering property that was the subject of a pending arbitration. The Massachusetts Supreme Court noted the 1954 language and determined that it was not adopted by the National Conference because the section would be rarely needed and raised concerns about the possibility of unwarranted labor injunctions. The court concluded that the drafters of the UAA assumed that courts' jurisdiction for granting such provisional remedies was not inconsistent with the purposes and terms of the Act. Many States have allowed courts to grant provisional relief for disputes that will ultimately be resolved by arbitration. *BancAmerica Commercial Corp. v. Brown*, 806 P.2d 897 (Ariz. Ct. App. 1991) (writ of attachment in order to secure a settlement agreement between debtor and creditor); *Lambert v. Superior Court*, 228 Cal. App.3d 383, 279 Cal. Rptr. 32 (1991) (mechanic's lien); *Ross v. Blanchard*, 251 Cal. App.2d 739, 59 Cal. Rptr. 783 (1967) (discharge of attachment); *Hughley v. Rocky Mountain Health Maintenance Organization, Inc.*, 927 P.2d 1325 (Colo. 1996) (preliminary injunction to continue status quo that health maintenance organization must provide chemotherapy treatment until arbitration decision); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court*, 672 P.2d 1015 (Colo. 1983) (preliminary injunctive relief to preserve status quo); *Langston v. National Media Corp.*, 420 Pa.Super. 611, 617 A.2d 354 (1992) (preliminary injunction requiring party to place money in an escrow account); Cal. Civ. Proc. Code § 1281.8; N.J. Stat. Ann. § 2A:23A-6(b); N.Y. C.P.L.R. § 7502(c).

Most federal courts applying the FAA agree with the *Salvucci* court. In *Merrill Lynch v. Salvano*, 999 F.2d 211 (7th Cir. 1993), the Seventh Circuit allowed a temporary restraining order to prevent employees from soliciting clients or disclosing client information in anticipation of a securities arbitration. The court held that the temporary injunctive relief would continue in force until the arbitration panel itself could consider the order. The court noted that "the weight of federal

appellate authority recognizes some equitable power on the part of the district court to issue preliminary injunctive relief in disputes that are ultimately to be resolved by an arbitration panel." *Id.* at 214. The First, Second, Fourth, Seventh and Tenth Circuits have followed this approach. *See* II *Macneil Treatise* §25.4.

The exception under the FAA is the Eighth Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984), which concluded that preliminary injunctive relief under the FAA is simply unavailable, because the "judicial inquiry requisite to determine the propriety of injunctive relief necessarily would inject the court into the merits of issues more appropriately left to the arbitrator." *Id.* at 1292; *see also Peabody Coalsales Co. v. Tampa Elec. Co.*, 36 F.3d 46 (8th Cir. 1994).

2. The *Hovey* case underscores the difficult conflict raised by interim judicial remedies: they can preempt the arbitrator's authority to decide a case and cause delay, cost, complexity, and formality through intervening litigation process, but without such protection an arbitrator's award may be worthless. *See* II *Macneil Treatise* §25.1. Such relief generally takes the form of an injunctive order, e.g., requiring that a discontinued franchise or distributorship remain in effect until an arbitration award, *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984); *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468 (2d Cir. 1980), or that a former employee not solicit customers pending arbitration, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211 (7th Cir. 1993); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton*, 844 F.2d 726 (10th Cir. 1988); or that a party be required to post some form of security by attachment, lien, or bond, *The Anaconda v. American Sugar Ref. Co.*, 322 U.S. 42, 64 S.Ct. 863 (1944) (attachment – *see also* 9 U.S.C. § 8); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990) (injunction bond); *see* II *Macneil Treatise* §25.4.3. In a judicial proceeding for preliminary relief, the court does not have the benefit of the arbitrator's determination of disputed issues or interpretation of the contract. Another problem for a court is that in determining the propriety of an injunction, order, writ for attachment or other security, the court must make an assessment of hardships upon the parties and the probability of success on the merits. Such determinations fly in the face of the underlying philosophy of arbitration that the parties have chosen arbitrators to decide the merits of their disputes.

3. The approach in RUAA Section 8 that limits a court granting preliminary relief to any time "[b]efore an arbitrator is appointed or is authorized or able to act * * * upon motion of a party" and provides that after the appointment, the arbitrator initially must decide the propriety of a provisional remedy, avoids the delay of intervening court proceedings, does not cause courts to become involved in the merits of the dispute, defers to parties' choice of arbitration to resolve their

disputes, and allows courts that may have to review an arbitrator's preliminary order the benefit of the arbitrator's judgment on that matter. *See* II *Macneil Treatise* §§ 25.1.2, 25.3, 36.1. This language incorporates the notions of the *Salvano* case which upheld the district court's granting of a temporary restraining order to prevent defendant from soliciting clients or disclosing client information but "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." 999 F.2d at 215. The preliminary remedy of the court in *Salvano* was necessary to prevent actions that could undermine an arbitration award but was accomplished in a fashion that protected the integrity of the arbitration process. *See also Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 882 F.2d 806, 814, appeal after remand, 887 F.2d 460 (3d Cir. 1989) (court order to protect the status quo is necessary "to protect the integrity of the applicable dispute resolution process"); *Hughley v. Rocky Mountain Health Maintenance Org., Inc.*, 927 P.2d 1325 (Colo. 1996) (court grants preliminary injunction to continue status quo that health maintenance organization must provide chemotherapy treatment when denial of the relief would make the arbitration process a futile endeavor); *King County v. Boeing Co.*, 18 Wash. App. 595, 570 P.2d 712 (1977) (court denies request for declaratory judgment because the issue was for determination by the arbitrators rather than the court); N.J. Stat. Ann. § 2A:23A-6(b).

After the arbitrator is appointed and authorized and able to act, the only instance in which a party may seek relief from a court rather than the arbitrator is when the matter is an urgent one and the arbitrator could not provide an effective provisional remedy. The notion of "urgency" is from the 1996 English Arbitration Act § 44(1), (3), (4), (6). These circumstances of a party seeking provisional relief from a court rather than an arbitrator after the appointment process should be limited for the policy reasons previously discussed.

4. The case law, commentators, the rules of arbitration organizations and some state statutes are very clear that arbitrators have broad authority to order provisional remedies and interim relief, including interim awards, in order to make a fair determination of an arbitral matter. This authority has included the issuance of measures equivalent to civil remedies of attachment, replevin, and sequestration to preserve assets or to make preliminary ruling ordering parties to undertake certain acts that affect the subject matter of the arbitration proceeding. *See, e.g., Island Creek Coal Sales Co. v. City of Gainesville, Fla.*, 729 F.2d 1046 (6th Cir. 1984) (upholding under FAA arbitrator's interim award requiring city to continue performance of coal purchase contract until further order of arbitration panel); *Fraulo v. Gabelli*, 37 Conn. App. 708, 657 A.2d 704 (1995) (upholding under UAA arbitrator issuing preliminary orders regarding sale and proceeds of property); *Fishman v. Streeter*, 1992 WL 146830 (Ohio App. 1992) (upholding under UAA

arbitrator's interim order dissolving partnership); *Park City Assoc. v. Total Energy Leasing Corp.*, 58 A. D.2d 786, 396 N.Y.S.2d 377 (1977) (upholding under New York state arbitration statute a preliminary injunction by an arbitrator); N.J. Stat. Ann. § 2A:23A-6 (allowing provisional remedies such as "attachment, replevin, sequestration and other corresponding or equivalent remedies"); AAA, Commercial Disp. Resolution Pro. R-36, 45 (allowing arbitrator to take "whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods. Such interim measures may take the form of an interim award, and the arbitrator may require security for costs of such measures."); CPR Rules 12.1, 13.1 (allowing interim measures including those "for preservation of assets, the conservation of goods or the sale of perishable goods," requiring "security for the costs of these measures," and permitting "interim, interlocutory and partial awards"); UNCITRAL Commer. Arb. Rules, Art. 17 (providing that arbitrators can take "such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute," including security for costs); II *Macneil Treatise* §§ 25.1.2, 25.3, 36.1.

If an arbitrator orders a provisional remedy under Section 8(b), a party can seek court enforcement of that pre-award ruling under Section 18.

5. The intent of RUAA Section 8(a) is that if a party files a request for a provisional remedy before an arbitrator is appointed but, while the court action is pending an arbitrator is appointed, the court would have the discretion to proceed. For example, if a court has issued a temporary restraining order and an order to show cause but, before the order to show cause comes to a hearing to the court, an arbitrator is appointed, the court could continue with the show-cause proceeding and issue appropriate relief or could defer the matter to the arbitrator. It is only where a party initiates an action after an arbitrator is appointed that the request for a provisional remedy usually should be made to the arbitrator.

6. If a court makes a ruling under Section 8(a), an arbitrator is allowed to review the ruling in appropriate circumstances under Section 8(b). For example, a court, on the basis of affidavits or other summary material, may grant a temporary restraining order to prohibit a party from transferring property. After an arbitrator is appointed, the arbitrator upon a fuller review of the evidence may decide that the party should be allowed to transfer the property. This would be a proper decision because the arbitrator, rather than the court, may have access to more evidence and it is the arbitrator who makes the final decision on the merits.

7. Section 8(c) is intended to insure that so long as a party is pursuing the arbitration process while requesting the court to provide provisional relief under

RUAA Section 8(a) or (b), the motion to the court should not act as a waiver of that party's right to arbitrate a matter. *See* Cal. Civ. Proc. Code §1281.8(d).

**SECTION 9. INITIATION OF ARBITRATION.**

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

(b) Unless a person interposes an objection as to lack or insufficiency of notice under Section 15(c) not later than the commencement of the arbitration hearing, the person's appearance at the hearing waives any objection to lack of or insufficiency of notice.

**Reporter's Notes**

1. The Drafting Committee decided to include a new provision in the RUAA regarding initiation of an arbitration proceeding which is more formal than the notice requirements in Section 2. Section 9(a) includes both the means of bringing the notice to the attention of the other parties and the contents of the notice of a claim. The language in new Section 9 is based upon the Florida arbitration statute and, to some extent, the Indiana arbitration act, both of which include provisions regarding the commencement of an arbitration. Fla. Stat. Ann. §648.08 (1990); Ind. Code §34-57-2-2 (1998).

2. Both the means of giving the notice and the content of the notice are subject to the parties' agreement under Sections 4(b)(2) and 9(a) so long as any restrictions on the means or content are reasonable. Not only does this approach comport with the concept of party autonomy in arbitration but it also recognizes that many parties utilize arbitration organizations that require greater or lesser specificity of notice and service.

3. The introductory language to Section 9(a) is the means of informing other parties of the arbitration proceeding. Many arbitration organizations allow parties to initiate arbitration through the use of regular mail and do not require registered mail or service as in a civil action. *See, e.g.*, American Arb. Ass'n, National Rules for the Resolution of Employment Disputes, R. 4(b)(i)(2); Center for Public Resources, Rules for Non-Administered Arbitration of Business Disputes, R. 2.1; National Arb. Forum Code of Pro. R. 6(B); National Ass'n of Securities Dealers Code of Arb. Procedure, Part I, sec. 25(a); New York Stock Exchange Arb. Rules, R. 612(b). This more informal means of giving notice without evidence of receipt would be allowed under Section 9 because Section 4(b)(2) allows the parties to agree to the means of giving notice so long as there are no unreasonable restrictions.

Likewise parties, particularly in light of the increase in electronic commerce, may decide to arbitrate disputes arising between them and to provide notice of the initiation or other proceedings of the arbitration process through electronic means. *See, e.g.*, National Arb. Forum Code of Pro. R. 6(B).

However, if the parties do not provide for a reasonable means of notice, then Section 9(a) requires that they utilize either registered mail with a return-receipt request and that such receipt is obtained or the same type of service as authorized as in a civil action. The Drafting Committee intends the term "obtained" to mean that the receipt was returned regardless of whether the recipient signed it.

4. Section 9(a) explicitly requires that notice of initiation of an arbitration proceeding be given to all parties to the arbitration agreement and not just to the party against whom a person files an arbitration claim. For instance, in a construction contract with a single arbitration agreement between multiple contractors and subcontractors, if one contractor commenced an arbitration proceeding against one subcontractor, Section 9(a) requires that the contractor give notice to all persons signatory to the arbitration agreement. This is appropriate because a different contractor or subcontractor may have an interest in the arbitration proceeding so as to initiate its own arbitration proceeding or to request consolidation under Section 10 or to take other action.

5. Section 9(a) also includes a content requirement that the initiating party inform the other parties of "the nature of the controversy and the remedy sought." Similar requirements are found in the Florida and Indiana statutes and in the arbitration rules of organizations such as the American Arbitration Association, the Center for Public Resources, JAMS, NASD Regulation, Inc., and the New York Stock Exchange (although slightly different language may be used in the organizations' rules). This language in Section 9(a) is intended to insure that parties provide sufficient information in the notice to inform opposing parties of the

arbitration claims while recognizing that this notice is not a formal pleading and that it is often drafted by persons who are not attorneys.

6. Section 23(a)(6) allows a court to vacate an award if there is not proper notice under Section 9 and the rights of the other party were substantially prejudiced. Section 9(b) requires that the complaining party make a timely objection to the lack or insufficiency of notice of initiation of the arbitration; this requirement is similar to that found in Section 15(c) regarding notice of the arbitration hearing. Section 9(b) requires the party to object "no later than the commencement of the hearing under Section 15(c)," which is a time certain in the arbitration process.

If the appearance at the arbitration hearing is for the purpose of raising the objection as to notice and the objection has otherwise not been waived, the party's appearance for that purpose of raising the objection should not be construed as untimely.

**SECTION 10. CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS.**

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

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

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

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

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

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

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

**Reporter's Notes**

1. Multiparty disputes have long been a source of controversy in the enforcement of agreements to arbitrate. When conflict erupts in complex transactions involving multiple contracts, it is rare for all parties to be signatories to a single arbitration agreement. In such cases, some parties may be bound to arbitrate while others are not; in other situations, there may be multiple arbitration agreements. Such realities raise the possibility that common issues of law or fact will be resolved in multiple fora, enhancing the overall expense of conflict resolution and leading to potentially inconsistent results. *See* III *Macneil Treatise* § 33.3.2. Such scenarios are particularly common in construction, insurance, maritime and sales transactions, but are not limited to those settings. *See* Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 Iowa L. Rev. 473, 481-82 (1987).

Most state arbitration statutes, the FAA, and most arbitration agreements do not specifically address consolidated arbitration proceedings. In the common case where the parties have failed to address the issue in their arbitration agreements, some courts have ordered consolidated hearings while others have denied consolidation. In the interest of adjudicative efficiency and the avoidance of potentially conflicting results, courts in New York and a number of other States concluded that they have the power to direct consolidated arbitration proceedings involving common legal or factual issues. *See County of Sullivan v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 366 N.E.2d 72, 397 N.Y.S.2d 371 (1977) ; *see also New England Energy v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988), cert denied, 489 U.S. 1077 (1989); *Litton Bionetics, Inc. v. Glen Constr. Co.*, 292 Md. 34, 437 A.2d 208 (1981); *Grover-Diamond Assoc. v. American Arbitration Ass'n*, 297 Minn. 324, 211 N.W.2d 787 (1973); *Polshek v. Bergen Cty. Iron Works*, 142

N.J. Super. 516, 362 A.2d 63 (Ch. Div. 1976); *Exber v. Sletten Constr. Co.*, 558 P.2d 517 (Nev. 1976); *Plaza Dev. Serv. v. Joe Harden Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (S.C. Ct. App. 1988).

A number of other courts have held that they do not have the power to order consolidation of arbitrations despite the presence of common legal or factual issues in the absence of an agreement by all parties to multiparty arbitration. *See, e.g.*, *Stop & Shop Co. v. Gilbane Bldg. Co.*, 364 Mass. 325, 304 N.E.2d 429 (1973); *J. Brodie & Son, Inc. v. George A. Fuller Co.*, 16 Mich. App. 137, 167 N.W.2d 886 (1969); *Balfour, Guthrie & Co. v. Commercial Metals Co.*, 93 Wash.2d 199, 607 P.2d 856 (1980).

The split of authority regarding the power of courts to consolidate arbitration proceedings in the absence of contractual consolidation provisions extends to the federal sphere. In the absence of clear direction in the FAA, courts have reached conflicting holdings. The current trend under the FAA disfavors court-ordered consolidation absent express agreement. *See generally* III *Macneil Treatise* §33.3; *Glencore, Ltd. v. Schnitzer Steel Products Co.*, 189 F.3d 264 (2nd Cir. 1999). However, a recent California appellate decision held that state law regarding consolidated arbitration was not preempted by federal arbitration law under the FAA. *Blue Cross of Calif. v. Superior Ct.*, 67 Cal. App. 4th 42, 78 Cal. Rptr.2d 779 (1998).

2. A growing number of jurisdictions have enacted statutes empowering courts to address multiparty conflict through consolidation of proceedings or joinder of parties even in the absence of specific contractual provisions authorizing such procedures. *See* Cal. Civ. Proc. Code §1281.3 (West 1997) (consolidation); Ga. Code Ann. § 9-9-6 (1996) (consolidation); Mass. Gen. Laws Ann. ch. 251, § 2A (West 1997) (consolidation); N.J. Stat. Ann. § 2A-23A-3 (West 1997) (consolidation); S.C. Code Ann. § 15-48-60 (1996) (joinder); Utah Code Ann. § 78-31a-9 (1996) (joinder).

Also some recent empirical studies support court-ordered consolidation. In a survey of arbitrators in construction cases, 83% favored consolidated arbitrations involving all affected parties. *See* Dean B. Thomson, *Arbitration Theory and Practice: A Survey of Construction Arbitrators*, 23 Hofstra L. Rev. 137, 165-67 (1994). A similar survey of members of the ABA Forum on the Construction Industry found that 83% of nearly 1,000 responding practitioners also favored consolidation of arbitrations involving multiparty disputes. *See* Dean B. Thomson, *The Forum's Survey on the Current and Proposed AIA A201 Dispute Resolution Provisions*, 16 Constr. Law. 3, 5 (No. 3, 1996).

3. A provision in the RUAA specifically empowering courts to order consolidation in appropriate cases makes sense for several reasons. 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. *See Schenectady v. Schenectady Patrolmen's Benev. Ass'n*, 138 A. D.2d 882, 883, 526 N.Y.S.2d 259, 260 (1988). Furthermore, it is likely that in many cases one or more parties, often non-drafting parties, will not have considered the impact of the arbitration clause on multiparty disputes. By establishing a default provision which permits consolidation (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.

Section 10 is an adaptation of consolidation provisions in the California and Georgia statutes. Cal. Civ. Proc. Code §1281.3 (West 1997); Ga. Code Ann. § 9-9-6 (1996). It gives courts discretion to consolidate separate arbitration proceedings in the presence of multiparty disputes involving common issues of fact or law.

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.

At the same time, in appropriate circumstances, courts might scrutinize anti-consolidation provisions in adhesion contracts. There is evidence that a growing number of arbitration provisions in standardized consumer services agreements purport to prohibit class actions or consolidation. *See* Christopher R. Drahozal, *Unfair Arbitration Clauses*, 2001 U. Ill. L. Rev. (manuscript at p. 41). In some cases, such provisions may effectively undermine consumers' rights by making the relative cost of arbitrating or of securing effective legal representation cost-prohibitive. In such cases, it may be appropriate for a court to refuse to enforce the term prohibiting class actions or consolidation under Sections 4(a) and 6(a) of this Act. *See, e.g.*, *Johnson v. Tele-Cash, Inc.*, 82 F.Supp2d 264 (D.Del. 1999) (court refuses to require arbitration of claims because it would deprive plaintiffs of right to use class actions in contravention of congressional intent under Truth in Lending Act and Electronic Funds Transfer Act); *Ramirez v. Circuit City Stores*, 90 Cal.Rptr.2d 916 (Cal. App.1999) (arbitration clause voided as unconscionable, in part, because it deprives arbitrator of authority to hear classwide claim); *Powertel v. Bexley*, 743 So.2d 570 (Fla.App.1999) (court refuses to enforce arbitration clause

because of its retroactive application to claim and because it was unconscionable to deprive plaintiff of opportunity to proceed by way of class action); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 William & Mary L. Rev., issue #1 (due out in October, 2000).

Even in the absence of express prohibitions on consolidation, the legitimate expectations of contracting parties may limit the ability of courts to consolidate arbitration proceedings. Thus, a number of decisions have recognized the right of parties opposing consolidation to prove that consolidation would undermine their stated expectations, especially regarding arbitrator selection procedures. *See*, *Continental Energy Assoc. v. Asea Brown Boveri, Inc.*, 192 A. D.2d 467, 596 N.Y.S.2d 416 (1993) (denial of consolidation not an abuse of discretion where parties' two arbitration agreements differed substantially with respect to procedures for selecting arbitrators and manner in which award was to be rendered); *Stewart Tenants Corp. v. Diesel Constr. Co.*, 16 A. D.2d 895, 229 N.Y.S.2d 204 (1962) (refusing to consolidate arbitrations where one agreement required AAA tribunal, other called for arbitrator to be appointee of president of real estate board). Therefore, Section 10(a)(4) requires courts to consider proof that the potential prejudice resulting from a failure to consolidate is not outweighed by prejudice to the rights of parties to the arbitration proceeding opposing consolidation. Such rights would normally be deemed to include arbitrator selection procedures, standards for the admission of evidence and rendition of the award, and other express terms of the arbitration agreement. In some circumstances, however, the imposition on contractual expectations will be slight, and no impediment to consolidation: for example, if one agreement provides for arbitration in St. Paul and the other in adjoining Minneapolis, consolidated hearings in either city should not normally be deemed to violate a substantial right of a party.

Section 10(a)(4) also requires courts to consider whether the potential prejudice resulting from a failure to consolidate is outweighed by "undue delay" or "hardship to the parties opposing consolidation." Such undue delay or hardship might result where, for example, one or more separate arbitration proceedings have already progressed to the hearing stage by the time the motion for consolidation is made.

As the cases reveal, the mere desire to have one's dispute heard in a separate proceeding is not in and of itself the kind of proof sufficient to prevent consolidation. *Vigo S.S. Corp. v. Marship Corp. of Monrovia*, 26 N.Y.2d 157, 162, 257 N.E.2d 624, 626, 309 N.Y.S.2d 165, 168 (1970), remittitur den. 27 N.Y.2d 535, 261 N.E.2d 112, 312 N.Y.S.2d 1003, cert. den. 400 U.S. 819, 27 L.Ed. 46, 91 S.Ct. 36 (197 ); *see also* III *Macneil Treatise* § 33.3.2 (citing cases in which consolidation was ordered despite allegations that arbitrators might be confused

because of the increased complexity of consolidated arbitration or that consolidation would impose additional economic burdens on the party opposing it).

4. The language in Section 10(a)(1) regarding "separate agreement to arbitrate" and "separate arbitration proceedings" are intended to cover arbitration among both principals and third-party beneficiaries of either the same agreement to arbitrate or separate agreements, such as guarantees, which incorporate by reference the arbitration provisions in the underlying contract. *See, e.g., Compania Espanola de Petroleos v. Nereus Shipping Co.*, 527 F.2d 966 (2d Cir. 1975), cert. denied, 426 U.S. 936 (1976); *but see United Kingdom v. Boeing Co.*, 988 F.2d 68 (2d Cir. 1993).

5. A party cannot appeal a lower court decision of an order granting or denying consolidation under Section 28, Appeals, because the policy behind Section 28(a)(1) and (2) is not to allow appeals of orders that result in delaying arbitration. Whether consolidation is ordered or denied, the arbitrations likely will continue – either separately or in a consolidated proceeding – and to allow appeals would delay the arbitration process.

**SECTION 11. APPOINTMENT OF ARBITRATOR.** If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. The arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

**SECTION 12. DISCLOSURE BY ARBITRATOR.**

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the

agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

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

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

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceedings and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the disclosure, the objection may be a ground to vacate the award under Section 23(a)(2).

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b), upon timely objection of a party, an award may be vacated under Section 23(a)(2).

(e) 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 Section 23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under Section 23(a)(2).

**Reporter's Notes**

1. The notion of decision making by independent neutrals is central to the arbitration process. The UAA and other legal and ethical norms reflect the principle that arbitrating parties have the right to be judged impartially and independently. III *Macneil Treatise* § 28.2.1. Thus, Section 12(a)(4) of the UAA provides that an award may be vacated where "there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." *Cf*. RUAA Section 23(a)(2); FAA § 10(a)(2). This basic tenet of procedural fairness assumes even greater significance in light of the strict limits on judicial review of arbitration awards. *See Drinane v. State Farm Mut. Auto Ins. Co.*, 153 Ill.2d 207, 212, 606 N.E.2d 1181, 1183, 180 Ill. Dec. 104, 106 (1992) ("Because courts have given arbitration such a presumption of validity once the proceeding has begun, it is essential that the process by which the arbitrator is selected be certain as to the impartiality of the arbitrator.").

The problem of arbitrator partiality is a difficult one because consensual arbitration involves a tension between abstract concepts of impartial justice and the notion that parties are entitled to a decision maker of their own choosing, including an expert with the biases and prejudices inherent in particular worldly experience. Arbitrating parties frequently choose arbitrators on the basis of prior professional or business associations, or pertinent commercial expertise. *See, e.g., Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir.1984); *National Union Fire Ins. Co. v. Holt Cargo Systems, Inc.*, ____ F.Supp. ____, 2000 WL 328802 (S.D.N.Y. 2000). The competing goals of party choice, desired expertise and impartiality must be balanced by giving parties "access to all information which might reasonably affect the arbitrator's partiality." *Burlington N. R.R. Co. v. TUCO, Inc.*, 960 S.W.2d 629, 637 (Tex. 1997). Other factors favoring early resolution of the partiality issues by informed parties are legal and practical limitations on post-award judicial policing of such matters.

Much of the law on the issue of arbitrator partiality stems from the seminal case of *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), a decision under the FAA. In that case the Supreme Court held that an undisclosed business relationship between an arbitrator and one of the parties constituted "evident partiality" requiring vacating of the award. Members of the Court differed, however, on the standards for disclosure. Justice Black, writing for a four-judge plurality, concluded that disclosure of "any dealings that might create an impression of possible bias" or creating "even an appearance of bias" would amount to evident partiality. *Id.* at 149. Justice White, in a concurrence joined by Justice Marshall, supported a more limited test which would require disclosure of "a substantial interest in a firm which has done more than trivial business with a party." *Id.* at 150. Three dissenting justices favored an approach under which an arbitrator's failure to disclose certain relationships established a rebuttable presumption of partiality.

The split of opinion in *Commonwealth Coatings* is reflected in many subsequent decisions addressing motions to vacate awards on grounds of "evident partiality" under federal and state law. A number of decisions have applied tests akin to Justice Black's "appearance of bias" test. *See, e.g., S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1263 (2d Cir. 1973) (applying FAA; failure to disclose relationships that "might create an impression of possible bias"). Some courts have introduced an objective element into the standard – that is, viewing the facts from the standpoint of a reasonable person apprised of all the circumstances. *See, e.g., Ceriale v. AMCO Ins. Co.*, 48 Cal. App.4th 500, 55 Cal. Rptr. 2d 685 (1996) (question is whether record reveals facts which might create an impression of possible bias in eyes of hypothetical, reasonable person).

A greater number of other courts, mindful of the tradeoff between impartiality and expertise inherent in arbitration, have placed a higher burden on those seeking to vacate awards on grounds of arbitrator interests or relationships. *See, e.g., Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983), cert. denied, 464 U.S. 1009, 104 S. Ct. 529, 78 L. Ed.2d 711, modified, 728 F.2d 943 (7th Cir. 1984) (applying FAA; circumstances must be "powerfully suggestive of bias"); *Artists & Craftsmen Builders, Ltd. v. Schapiro*, 232 A.D.2d 265, 648 N.Y.S.2d 550 (1996) (though award may be overturned on proof of appearance of bias or partiality, party seeking to vacate has heavy burden and must show prejudice).

2. In view of the critical importance of arbitrator disclosure to party choice and perceptions of fairness and the need for more consistent standards to ensure expectations in this vital area, the Drafting Committee determined that the RUAA should set forth affirmative requirements to assure that parties should have access to all information that might reasonably affect the potential arbitrator's neutrality. A

primary model for the disclosure standard in Section 9 is the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (1977), which embodies the principle that "arbitrators should disclose the existence of any interests or relationships which are likely to affect their impartiality or which might reasonably create the appearance of partiality or bias." Canon II, p.6. These disclosure provisions are often cited by courts addressing disclosure issues, *e.g.*, *William C. Vick Constr. Co. v. North Carolina Farm Bureau Fed.*, 123 N.C. App. 97, 100-01, 472 S.E.2d 346, 348 (1996), and have been formally adopted by at least one state court. *See Safeco Ins. Co. of Am. v. Stariha*, 346 N.W.2d 663, 666 (Minn. Ct. App. 1984); *see also* Tex. Civ. Prac. & Rem. Code § 172.056; for a more stringent arbitration disclosure statute, *see* Cal. Civ. Proc. Code §§ 1281.6, 1281.9, 1281.95, 1297.121, 1297.122 (West. Supp. 1998). Substantially similar language is contained in disclosure requirements of widely used securities arbitration rules. *See, e.g.*, NASD Code of Arbitration Procedure § 10312 (1996). Many arbitrators are already familiar with these standards, which provide for disclosure of pertinent interests in the outcome of an arbitration and of relationships with parties, representatives, witnesses, and other arbitrators.

The Drafting Committee decided to delete the requirement of disclosing "any" financial or personal interest in the outcome or "any" existing or past relationship and substituted the terms "a" financial or personal interest in the outcome or "an" existing or past relationship. The intent was not to include *de minimis* interests or relationships. For example, if an arbitrator owned a mutual fund which as part of a large portfolio of investments held some shares of stock in a corporation involved as a party in an arbitration, it might not be reasonable to expect the arbitrator to know of such investment and in any event the investment might be of such an insubstantial nature so as not to reasonably affect the impartiality of the arbitrator.

3. The fundamental standard of Section 12(a) is an objective one: disclosure is required of facts which a reasonable person would consider likely to affect the arbitrator's impartiality in the arbitration proceeding. *See ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493 (4th Cir. 1999) (relationship between arbitrator and a party is too insubstantial for "reasonable person" to conclude that there was improper partiality so as to vacate award under FAA). The Drafting Committee adopted the "reasonable person" test with the intent of making clear that the subjective views of the arbitrator or the parties are not controlling. However, parties may agree to higher or lower standards for disclosure under Section 4(b)(3) so long as they do not "unreasonably restrict" the right to disclosure and also may establish mechanisms for disqualification. For instance, in labor arbitration under a collective-bargaining agreement because the parties interact often with each other and arbitrators and have personal relationships with each other and arbitrators, the Code of Professional Responsibility of Arbitrators of Labor-

Management Disputes provides: "There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality." Section 2.B.3.a. Thus a reasonable person in the field of labor arbitration may not expect personal, professional, or other past relationships to be disclosed. In other fields where parties do not have ongoing relationships, an arbitrator may be required to disclose such relationships.

Section 12(a) requires an arbitrator to make a "reasonable inquiry" prior to accepting an appointment as to any potential conflict of interests. The extent of this inquiry may depend upon the circumstances of the situation and the custom in a particular industry. For instance, an attorney in a law firm may be required to check with other attorneys in the firm to determine if acceptance of an appointment as an arbitrator would result in a conflict of interest on the part of that attorney because of representation by an attorney in the same law firm of one of the parties in another matter.

Once an arbitrator has made a "reasonable inquiry" as required by Section 12(a), the arbitrator will be required to disclose only "known facts" that might affect impartiality. The term "knowledge" (which is intended to include "known") is defined in Section 1(5) to mean "actual knowledge."

Section 12(b) is intended to make the disclosure requirement a continuing one and applies to conflicts which arise or become evident during the course of arbitration proceedings. Section 12(a) and (b) also provides to whom the arbitrator must make disclosure. The arbitrator must disclose facts required under Section 12(a) and (b) to the parties to the arbitration agreement and to the arbitration proceeding and to any other arbitrators. If the parties are represented by counsel or other authorized persons, the arbitrators can make such representations to those individuals.

4. Sections 12(c), (d), and (e) seek to accommodate the tensions between concepts of partiality and the need for experienced decision makers, as well as the policy of relative finality in arbitral awards. Therefore, in Section 12(e) a neutral arbitrator's failure to disclose "a known, direct, and material interest in the outcome" or "a known, existing, and substantial relationship with a party," gives rise to a presumption of "evident partiality" under Section 23(a)(2). *Cf.* Minn. Stat. Ann. § 572.10(2) (1998) (failure to disclose conflict of interest or material relationship is grounds for vacatur of award). In such cases, it is then the burden of the party defending the award to rebut the presumption by showing that the award was not tainted by the non-disclosure or there in fact was no prejudice. *See, e.g.*, *Drinane v. State Farm Mut. Auto Ins. Co.*, 153 Ill.2d 207, 214-16, 606 N.E.2d 1181, 1184-85, 180 Ill. Dec. 104, 107-08 (1992). The failure to disclose by a party

arbitrator would be covered under the corruption and misconduct provisions of Section 23(a)(2) because in most cases it is presumed that a party arbitrator is intended to be partial to the side which appointed that person.

Section 12(d) involves other instances of an arbitrator's failure to disclose and Section 12(c) covers instances where the arbitrator makes a required disclosure, a party objects to that arbitrator's service, but the arbitrator overrules the objection and continues to serve. Challenges based upon a lack of impartiality, including disclosed or undisclosed facts, interests, or relationships are subject to the developing case law under Section 23(a)(2). Also courts are given wider latitude in deciding whether to vacate an award under Section 12(c) and (d) which is permissive in nature (an award "may" be vacated) rather than Section 23(a) which is mandatory (a court "shall" vacate an award).

Section 12(c) also requires a party to make a timely objection to the arbitrator's continued service in order to preserve grounds to vacate an award under Section 23(a)(2). *Bossley v. Mariner Fin. Grp., Inc.*, 11 S.W.3d 349 (Tex.App. 2000) ("A party who does not object to the selection of the arbitrator or to any alleged bias on the part of the arbitrator at the time of the hearing waives the right to complain." *Id.* at 351.)

5. Special problems are presented by tripartite panels involving "party-arbitrators" – that is, in situations such as where each of the arbitrating parties selects an arbitrator and a third, neutral arbitrator is jointly selected by the party-arbitrators. *See generally* III *Macneil Treatise* § 28.4. In some such cases, it may be agreed that the party-arbitrators are not regarded as "neutral" arbitrators, but are deemed to be predisposed toward the party which appointed them. *See, e.g.*, AAA, Commercial Disp. Resolution Pro. R-12(b), 19. However, in other situations even the party arbitrators may have a duty of neutrality on some or all issues. The integrity of the process demands that party-arbitrators, like other arbitrators, disclose pertinent interests and relationships to all parties as well as other members of the arbitration panel. It is particularly important for the neutral arbitrator to know the interest of the party arbitrator, for example, if the party arbitrator is being paid on a contingent-fee basis. Thus, Section 12(a) and (b) apply to party arbitrators but under a "reasonable person" standard for someone in the position of a party and not a neutral arbitrator.

Section 12(c) and (d) also apply to party arbitrators but with a somewhat different effect than to a neutral arbitrator. For example, an undisclosed substantial relationship between a party-arbitrator and the party appointing that arbitrator may be the subject of a motion to vacate under Section 23(a)(2). *See Donegal Ins. Co. v. Longo*, 415 Pa. Super. 628, 632-34, 610 A.2d 466, 468-69 (1992) (in view of attorney-client relationship between insured and its party-arbitrator, arbitration

proceeding did not comport with procedural due process). However, an award would be vacated only where a party arbitrator fails to disclose information that amounts to "corruption" or to "misconduct prejudicing the rights of a party" under Section 23(a)(2). The ground of "evident partiality" in Section 23(a)(2) by its terms only applies to a "neutral arbitrator" and it would not make sense to apply this ground to a non-neutral arbitrator whose function in many arbitration settings is to be an advocate for one of the parties.

It is also important to note that the disclosure requirements of Section 12 are waivable as to party arbitrators. In regard to neutral arbitrators, the parties can vary the requirements of Section 12 so long as they do not "unreasonably restrict" the right to disclosure.

6. Often parties agree to a procedure for challenges to arbitrators such as a determination by an arbitration organization. Section 12(f) conditions post-award resort to the courts under Section 23(a)(2) upon compliance with such agreed-upon procedures. *See, e.g.*, *Bernstein v. Gramercy Mills, Inc.*, 16 Mass. App. Ct. 403, 414, 452 N.E.2d 231, 238 (1983) (AAA rule incorporated by arbitration agreement helps to describe level of non-disclosure that can lead to invalidation of award).

**SECTION 13. ACTION BY MAJORITY.** If there is more than one arbitrator, the powers of the arbitrators must be exercised by a majority of them.

**Reporter's Notes**

1. Because this section is not included in Section 4(b), it may be changed by the parties in their agreement to arbitrate. However, in the absence of an agreement to the contrary, a majority will determine claims and issues when there is a panel of arbitrators deciding a case.

**SECTION 14. IMMUNITY OF ARBITRATOR; COMPETENCY TO TESTIFY; ATTORNEY'S FEES AND COSTS.**

(a) An arbitrator or an arbitration organization acting in their respective capacities are immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

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

(c) If an arbitrator does not make a disclosure required by Section 12, the nondisclosure does not cause a loss of immunity under this section.

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

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

(2) if a party to the arbitration proceeding files a motion to vacate an award under Section 23(a)(1) or (2) and establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, an arbitration organization, or a representative of an arbitration organization arising from the services of the arbitrator, organization, or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify in violation of subsection (d), and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is incompetent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees and other reasonable expenses of litigation.

**Reporter's Notes**

1. Section 14(a) in regard to immunity for an arbitrator is based on the language of former Section 1280.1 of the California Code of Civil Procedure establishing immunity for arbitrators. Section 1280.1 was enacted with an expiration date and was not renewed. See also Cal. Civ. Proc. Code § 1297.119 which gives the same protection to arbitrators in international arbitrations and unlike § 1280.1 had no expiration date and is still in effect. Three other States presently provide some form of arbitral immunity in their arbitration statutes. Fla. Stat. Ann. § 44.107 (West 1995); N.C. Gen. Stat. § 7A-37.1 (1995); Utah Code Ann. § 78-31b-4 (1994).

Arbitral immunity has its origins in common law judicial immunity and in most jurisdictions tracks it directly. The key to this identity is the "functional comparability" of the role of arbitrators and judges. *See Butz v. Economou*, 438 U.S. 478, 511-12 (1978) (establishing the principle that the extension of judicial-like immunity to non-judicial officials is properly based on the "functional comparability" of the individual's acts and judgments to the acts and judgments of judges); *see also Corey v. New York Stock Exchange*, 691 F.2d 1205, 1209 (6th Cir. 1982) (applying the "functional comparability" standard for immunity); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993) (holding that the key to the extension of judicial immunity to non-judicial officials is the "performance of the function of resolving disputes between parties or of authoritatively adjudicating private rights").

In addition to the grant of immunity from a civil action, arbitrators are also generally accorded immunity from process when subpoenaed or summoned to testify in a judicial proceeding in a case arising from their service as arbitrator. *See, e.g., Andros Compania Maritima v. Marc Rich*, 579 F.2d 691 (2d Cir. 1978); *Gramling v. Food Mach. and Chem. Corp.*, 151 F. Supp. 853 (W.D.S.C. 1957). This full immunity from any civil proceedings is what is intended by the language in Section 14(a).

2. Section 14(a) also provides to an entity acting as an arbitration organization the same immunity as is provided to an individual acting as an arbitrator. Extension of judicial immunity to those arbitration organizations is appropriate to the extent that they are acting "in certain roles and with certain responsibilities" that are functionally comparable to those of a judge. *Corey v. New York Stock Exchange*, 691 F.2d at 1209. This immunity to neutral arbitration organizations is because the duties that they perform in administering the arbitration process are the functional equivalent of the comparable role and responsibility of judges in administering the adjudication process in a court of law. There is substantial precedent for this conclusion. *See, e.g., New England Cleaning Services, Inc. v. American Arbitration Ass'n*, 199 F.3d 542 (1st Cir. 1999); *Honn v. National Ass'n of Sec. Dealers, Inc.*, 182 F.3d 1014 (8th Cir. 1999); *Hawkins v.*

*National Ass'n of Sec. Dealers, Inc.*, 149 F.3d 330 (5th Cir. 1998); *Olson v. National Ass'n of Sec. Dealers, Inc.*, 85 F.3d 381 (8th Cir. 1996); *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973); *Cort v. American Arbitration Ass'n*, 795 F. Supp. 970 (N.D. Cal. 1992); *Boraks v. American Arbitration Ass'n*, 205 Mich.App. 149, 517 N.W.2d 771 (1994); *Candor v. American Arbitration Ass'n*, 97 Misc.2d 267, 411 N.Y.S.2d 162 (Sup. Ct., Tioga Cty. 1978).

3. Section 14(b) makes clear that the statutory grant of immunity is intended to supplement, and not diminish, the immunity granted arbitrators and neutral arbitration organizations at common law.

4. The Drafting Committee included Section 14(c) to insure that if an arbitrator fails to make a disclosure required by Section 12 then the typical remedy is vacatur under Section 23 and not loss of arbitral immunity under Section 14. Such a result is similar to the effect of judicial immunity.

5. Section 14(d) is based on the California Evidence Code which provides that arbitrators shall not be "competent to testify * * * as to any statement, conduct, decision, or ruling occurring at or in conjunction with the prior proceeding." Cal. Evid. Code § 703.5. There are similar provisions that prohibit anyone from calling an arbitrator as a witness in a subsequent proceeding in New Jersey and New York. N.J.R. Super. Ct. R. 4:21A-4; N.Y. Ct. R. §28.12. The section is intended to protect an arbitrator or a representative of an arbitration organization from being required to testify or produce records from an arbitration proceeding in any civil action, administrative proceeding, or related matter to the same extent as a judge. However, if the law of a given State would require a judge for strong public-policy reasons, such as involvement in a criminal matter, to testify in a proceeding an arbitrator or representative of an arbitration organization would likewise be required to testify.

An exception is made in Section 14(d)(1) for situations such as when an arbitrator, arbitration organization, or representative of an arbitration organization asserts a claim against a party to the arbitration proceeding. For instance, an arbitrator may bring an action against one of the parties for nonpayment of fees to the arbitrator and may have to give testimony in order to recover. If, in an action by the arbitrator to recover a fee, the other party files a counterclaim against the arbitrator attacking the award, the intent of this section is that the arbitrator can testify as to the arbitrator's claim, but the arbitrator cannot be required to testify or produce records as to the party's counterclaim attacking the merits of the award. Otherwise the party can circumvent the general rule against requiring an arbitrator to provide testimony by forcing an action by the arbitrator, for instance, by the party not paying a contractually required fee for the arbitrator's services.

Section 14(d)(2) recognizes that arbitrators who have engaged in corruption, fraud, partiality or other misconduct which are grounds to vacate an award under Sections 23(a)(1) and (2) may be required to give testimony so that a party will have evidence to prove such grounds. Such testimony or records from an arbitrator are only required after the objecting party makes a sufficient initial showing that such grounds exist. *See Carolina-Virginia Fashion Exhibitors Inc. v. Gunter*, 291 N.C. 208, 230 S.E.2d 380, 388 (1976) (holding that where there is objective basis to believe that arbitrator misconduct has occurred, deposition of the arbitrator may be permitted and the deposition admitted in action for vacatur). A party's bare allegation of these grounds should be insufficient to require an arbitrator to testify or produce records from the arbitration proceeding.

6. Section 14(e) is intended to promote arbitral immunity. By definition, almost all suits against arbitrators, arbitration organizations, or representatives of an arbitration organization arising out of the good-faith discharge of arbitral powers are frivolous because of the breadth of their respective immunity. Spurious lawsuits against arbitrators, arbitration organizations, and representatives of an arbitration organization deter individuals and entities from serving in such capacities and thereby harm the arbitration process because of the costs involved in defending even frivolous actions. Potential plaintiffs in such litigation should be discouraged by the prospect of paying the litigation expenses of the arbitrator, arbitration organizations, or representatives of an arbitration organization. When they are not, the statute enables the arbitrators, arbitration organizations, or representatives of an arbitration organization to recover their litigation expenses and not to lose their fee and more to the defense of a frivolous lawsuit. The terms "other reasonable expenses of litigation" are intended to include both actions at the trial-court level and on appeal.

7. In Section 14(d) only a "party"to the arbitration proceeding would file a motion to vacate under Section 23. However, the term "person" is used in Section 14(e) because a third party, i.e., a person who is not party to the arbitration agreement or the arbitration proceeding, might bring an action against an arbitrator. For instance, in multiple arbitration proceedings with subcontractors filing separate arbitration claims against general contractor X, Arbitrator A may make an award in a case between general contractor X and subcontractor Y. In a later arbitration proceeding between general contractor X and subcontractor Z before Arbitrator B, Z may attempt to subpoena or bring an action against Arbitrator A. Another scenario is where Arbitrator A issues a subpoena to T, a third party, and T decides to bring an action against Arbitrator A. In these instances, Arbitrator A should be able to assert arbitral immunity and recover costs and attorney's fees under Section 14(e) against Z or T who would be "persons" but not necessarily "parties" to the arbitration proceeding between X and Y.

8. Section 14 does not grant arbitrators or arbitration organizations immunity from criminal liability arising from their conduct in their arbitral or administrative roles. This comports with the sparse common law addressing arbitral immunity from criminal liability. *See, e.g., Cahn v. ILGWU*, 311 F.2d 113, 114-15 (3d Cir. 1962); *Babylon Milk & Cream Co. v. Horowitz*, 151 N.Y.S.2d 221 (N.Y. Sup. Ct. 1956).

Also the provision draws no distinction between neutral arbitrators and advocate arbitrators. Both types of arbitrators are covered by this provision.

**SECTION 15. ARBITRATION PROCESS.**

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

(b) The arbitrator may decide a request for summary disposition of a claim or particular issue by agreement of all interested parties or upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the arbitration proceeding and the other parties have a reasonable opportunity to respond.

(c) The arbitrator shall set a time and place for a hearing and give notice of the hearing not less than five days before the hearing. Unless a party to the arbitration proceeding interposes an objection to lack of or insufficiency of notice not later than the commencement of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding

and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to promptly conduct the hearing and render a decision.

(d) If an arbitrator orders a hearing under subsection (c), the parties to the arbitration proceeding are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If there is more than one arbitrator, all of them shall conduct the hearing under subsection (c); however, a majority may decide any issue and make a final award.

(f) If an arbitrator ceases, or is unable, to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with Section 11 to continue the hearing and to decide the controversy.

**Reporter's Notes**

1. Section 15 is a default provision and under Section 4(a) is subject to the agreement of the parties. Section 15(a) is intended to give an arbitrator wide latitude in conducting an arbitration subject to the parties' agreement and to determine what evidence should be considered. It should be noted that the rules of evidence are inapplicable in an arbitration proceeding except that an arbitrator's refusal to consider evidence material to the controversy which substantially prejudices the rights of a party are grounds for vacatur under Section 23(a)(3). *See* Reporter Note 4 to this section.

2. As the use of arbitration increases, there are more cases that involve complex issues. In such cases arbitrators are often involved in numerous pre-hearing matters involving conferences, motions, subpoenas, and other preliminary issues. Although the present UAA makes no specific provision for arbitrators to hold pre-hearing conferences or to rule on preliminary matters, arbitrators likely have the inherent authority to do such. Numerous cases have concluded that in arbitration proceedings, procedural matters are within the province of the arbitrators. *Stop & Shop Cos. v. Gilbane Bldg. Co.*, 364 Mass. 325, 304 N.E.2d 429 (1973); *Gozdor v. Detroit Auto. Inter-Insurance Exchange*, 52 Mich. App. 49, 214 N.W.2d 436 (1974); *Upper Bucks Cnty. Area Vocational-Technical Sch. Joint Comm. v. Upper Bucks Cnty. Vocational Technical Sch. Educ. Ass'n*, 91 Pa.Cmnwlth. 463, 497 A.2d 943 (1985).

Additionally many arbitration organizations whose rules may govern particular arbitration proceedings provide for pre-hearing conferences and the ruling on preliminary matters by arbitrators. *See, e.g.*, AAA Commercial Arb. R.-10; AAA Securities Arb. R. 10; AAA Construction Indus. Arb. R. 10; AAA Ntn'l Rules for Resolution of Employment Disputes R. 8; National Arb. Forum Code of Pro. R. 24, 31; NASD Code of Arb. Proc. §32(d).

Section 15(a) is intended to allow arbitrators broad powers to manage the arbitration process both before and during the hearing. This section makes the authority of arbitrators to hold prehearing conferences explicit and is meant to provide arbitrators with the authority in appropriate cases to require parties to clarify issues, stipulate matters, identify witnesses, provide summaries of testimony, to allow discovery, and to resolve preliminary matters. However, it is also the intent of Section 15(a) not to encourage either extensive discovery or a form of motion practice. While such methods as discovery or prehearing conferences may be appropriate in some cases, these should only be used where they "aid in the fair and expeditious disposition of the arbitration proceeding." The arbitrator should keep in mind the goals of an expeditious, less costly, and efficient procedure. *See also* RUAA Section 17.

3. Presently the UAA has no provision on whether to allow an arbitrator to grant a request for summary disposition. A number of courts have upheld the authority of arbitrators to decide cases or issues on such requests without an evidentiary hearing but have been cautious in their support of such holdings. *Intercarbon Bermuda, Ltd. v. Caltex Trading and Transp. Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993) (court confirmed a summary adjudication by an arbitrator based on documentary evidence but expressed reservations about deciding arbitration cases without an evidentiary hearing); *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App.4th 1096, 47 Cal. Rptr.2d 650 (1995) (court upheld arbitrator's award based on a summary adjudication but cautioned that the appropriateness of such

summary action depends upon whether the party opposing a summary motion is given a fair opportunity to present its position); *Stifler v. Seymour Weiner*, 62 Md. App. 19, 488 A.2d 192 (1985) (dispositive motion appropriate on issue of statute of limitations); *Pegasus Constr. Corp. v. Turner Constr. Co.*, 84 Wash. App. 744, 929 P.2d 1200 (1997) (full hearing of all evidence regarding merits of a claim is unnecessary where decision can be made on basis of motion to dismiss); *but see Prudential Securities, Inc. v. Dalton*, 929 F.Supp. 1411 (N.D. Okla. 1996) (court vacates arbitration award and finds that the arbitration panel was guilty of misconduct and exceeded its powers in refusing to hear pertinent evidence by deciding case without a hearing). Thus, although some courts have affirmed arbitrators who have made a summary disposition of a case, the opinions indicate both a hesitancy to endorse such an approach on a broad basis and a closer judicial scrutiny of the arbitrator's rulings.

Section 15(b) is intended to allow arbitrators to decide a request for summary disposition but only after a party requesting summary disposition gives appropriate notice and opposing parties have a reasonable opportunity to respond. The language in Section 15(b) is based upon Rule 16 of JAMS/Endispute Comprehensive Arbitration Rules and Procedures. In the arbitration context, the Drafting Committee decided that the use of the terms "request for summary disposition" is preferable to "motions for summary judgment" or "motions to strike or dismiss for failure to state a claim." The latter terms, which are used in civil litigation, usually refer to situations where there are no genuine issues of material facts in dispute and a case can be determined as a matter of law. In most arbitrations, the arbitrators are not required to make rulings only as a "matter of law." As discussed in the Reporter's Notes to Section 23 on vacatur, numerous courts have held that arbitrators are not bound by rules of law and their awards generally cannot be overturned for errors of law. Because of this, the terms "summary judgment" or "failure to state a claim" are misleading and the language "summary disposition" used in the JAMS/Endispute rules is more applicable.

4. Section 15(c) allows an arbitrator to "hear and decide the controversy upon the evidence produced." The general rule in arbitration is that the rules of evidence need not be observed. III *Macneil Treatise* § 35.1.2.1; Cal. Civ. Proc. Code § 1282.2(d); AAA Commercial Arb. R-33; Center for Public Resources, Rules for Non-Administered Arb. Of Business Disp. R. 11. It is the intent of Drafting Committee that this general rule be continued in the RUAA. It should be noted that one of the grounds on which a court may vacate an arbitration award under Section 23(a)(3) is where "an arbitrator refused to consider evidence material to the controversy." However, courts have determined that arbitrators have broad discretion as to what evidence they will consider. *Cold Mountain Builders v. Lewis*, ____ A.2d ____, 2000 WL 236393 (Me. S.C. 3/3/00).

**SECTION 16. REPRESENTATION BY ATTORNEY.** A party to an arbitration proceeding may be represented by an attorney.

**Reporter's Notes**

1. The Drafting Committee considered but rejected a proposal to add "or any other person" after "an attorney." A concern was expressed about incompetent and unscrupulous individuals, especially in securities arbitration, who hold themselves out as advocates.

2. This section is not intended to preclude, where authorized by law, representation in an arbitration proceeding by individuals who are not licensed to practice law either generally or in the jurisdiction in which the arbitration is held.

3. Section 4(b)(4) provides that a waiver of the right to be represented by an attorney under Section 16 prior to the initiation of an arbitration proceeding under Section 9 is ineffective except that an employer and a labor organization may waive the right to representation by an attorney in a labor arbitration.

**SECTION 17. WITNESSES; SUBPOENAS; DEPOSITIONS; DISCOVERY.**

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

(b) On request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness, including a witness who cannot be subpoenaed for or is unable to attend a hearing, to be taken under conditions

determined by the arbitrator for use as evidence in order to make the proceeding fair, expeditious, and cost effective.

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

(d) If an arbitrator permits discovery under subsection (c), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, including the issuance of a subpoena for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and may take action against a party to the arbitration proceeding who does not comply to the extent permitted by law as if the controversy were the subject of a civil action.

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

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

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in

another State upon conditions determined by the court in order to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

**Reporter's Notes**

1. Presently, UAA Section 7 provides an arbitrator only with subpoena authority for the attendance of witnesses and production of documents at the hearing (RUAA Section 17(a)) or to depose a witness who is unable to attend a hearing (RUAA Section 17(b)). Section 17(b) allows an arbitrator to permit a hearing deposition only where it will insure that the proceeding is "fair, expeditious, and cost effective." This standard is also required in Section 17(c) concerning prehearing discovery and in Section 17(g) regarding the enforcement of subpoenas or discovery orders by out-of-state arbitrators. Note 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.

2. The authority in UAA Section 7 which is limited only to subpoenas and depositions for an arbitration hearing has caused some courts to conclude that "pretrial discovery is not available under our present statutes for arbitration." *Rippe v. West American Ins. Co.*, 1993 WL 512547 (Conn. Super. Ct.); *see also Burton v. Bush*, 614 F.2d 389 (4th Cir. 1980) (party to arbitration contract had no right to pre-hearing discovery). Others require a showing of extraordinary circumstances before allowing discovery. *See, e.g., In re Deiulemar di Navigazione*, 153 F.R.D. 592 (E.D.La. 1994); *Oriental Commercial & Shipping Co. v. Rosseel*, 125 F.R.D. 398 (S.D.N.Y. 1989). Most courts have allowed discovery only at the discretion of the arbitrator. *See, e.g., Stanton v. PaineWebber Jackson & Curtis, Inc.*, 685 F.Supp 1241 (S.D. Fla. 1988); *Transwestern Pipeline Co. v. J.E. Blackburn*, 831 S.W.2d 72 (Tex.Ct.App. 1992). The few state arbitration statutes that have addressed the matter of discovery also leave these issues to the discretion of the arbitrator. Massachusetts – Mass. Gen. Laws. Ann. ch.251, § 7(e) (only the arbitrators can enforce a request for production of documents and entry upon land for inspection and other purposes); Texas – Tex. Civ. Prac. & Rem. Code Ann.

§ 171.007(b) (arbitrator may allow deposition of adverse witness for discovery purposes); Utah – Utah Code Ann. § 78-31a-8 (arbitrators may order discovery in their discretion). Most commentators and courts conclude that extensive discovery, as allowed in civil litigation, eliminates the main advantages of arbitration in terms of cost, speed and efficiency.

3. The approach to discovery in Section 17(c) is modeled after the Center for Public Resources (CPR) Rules for Non-Administered Arbitration of Business Disputes, R. 10 and United Nations Commission on International Trade Law (UNCIRTAL) Arbitration Rules, Arts. 24(2), 26. The language follows the majority approach under the case law of the UAA and FAA that, unless the contract specifies to the contrary, the discretion rests with the arbitrators whether to allow discovery. The purpose of the discovery procedure in Section 17(c) is to aid the arbitration process and ensure an expeditious, efficient and informed arbitration, while adequately protecting the rights of the parties. Because Section 17(c) is waivable under Section 4, the provision is intended to encourage parties to negotiate their own discovery procedures. Section 17(d) establishes the authority of the arbitrator to oversee the prehearing process and enforce discovery-related orders in the same manner as would occur in a civil action, thereby minimizing the involvement of (and resort of the parties to) the courts during the arbitral discovery process.

At the same time, it should be clear that in many arbitrations discovery is unnecessary and that the discovery contemplated by Section 17(c) and (d) is not coextensive with that which occurs in the course of civil litigation under federal or state rules of civil procedure. Thus, the parties could decide to eliminate or limit discovery in their arbitration agreement.

4. At the first reading at the 1999 Annual Meeting, Commissioner Hill of Maryland raised the issue as to whether in instances where an arbitrator allows discovery, the state rules of civil procedure on discovery should apply. The Committee has decided this issue in the negative because then arbitration proceedings becomes too much like litigation. The standard in Section 17(c) that the arbitrator can allow"such discovery as the arbitrator determines is appropriate in the circumstances, taking into account the needs of both the parties to the arbitration proceeding and other affected persons and the desirability of making the arbitration fair, expeditious, and cost-effective" is much different than the standards under most rules for discovery under state laws. Moreover, an arbitrator who decides to allow discovery may well want to abbreviate the scheduling, number of witnesses who can be deposed, timing, etc., of discovery. In other words, the elaborate system of discovery developed for the litigation setting might very well be inappropriate in all arbitration matters.

5. The simplified, straightforward approach to discovery reflected in Section 17(c)-(e) is premised on the affirmative duty of the parties to cooperate in the prompt and efficient completion of discovery. The standard for decision in particular cases is left to the arbitrator. The intent of Section 17, similar to Section 8(b) which allows arbitrators to issue provisional remedies, is to grant arbitrators the power and flexibility to ensure that the discovery process is fair and expeditious.

6. In Section 17 most of the references involve "parties to the arbitration proceeding." However, sometimes arbitrations involve outside, third parties who may be required to give testimony or produce documents. Section 17(c) has been changed so that the arbitrator should take the interests of such "affected persons" into account in determining whether and to what extent discovery is appropriate and Section 17(b) has been broadened so that a "witness" who is not a party can request the arbitrator to allow that person's testimony to be presented at the hearing by deposition if that person is unable to attend the hearing.

7. The Drafting Committee has made clear in Section 17(d) that if an arbitrator allows discovery, the arbitrator has the authority to issue subpoenas for a discovery proceeding such as a deposition. This issue was raised during the first reading of the RUAA at the 1999 Annual Meeting. It has become a more important matter as a result of the recent holding in *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999), in which the court found that under similar language in the FAA as that in the UAA arbitrators did not have power to issue subpoenas to non-parties to produce materials prior to the arbitration hearing. This holding is contrary to that of three federal district court opinions under the FAA which have enforced arbitral subpoenas for prehearing discovery so that arbitrators could make a full and fair determination. *Amgen, Inc. v. Kidney Center of Delaware County*, 879 F. Supp. 878 (N.D. Ill. 1995); *Meadows Indemnity Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fl. 1988). However, in *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69 (S.D.N.Y. 1995), the court enforced a subpoena for documents of a nonparty but refused enforcement of a subpoena to depose that person because that would require the person to appear twice – once for the hearing and once for the deposition. Because of the unclear case law, the Drafting Committee clarified its intent that arbitrators have subpoena authority for discovery matters under the RUAA.

8. Section 17(f) has been broadened to include witness fees for attending non-hearing depositions or discovery proceedings and has clarified this section to indicate that the same rules in civil actions apply to arbitration proceedings for compelling a person under subpoena to testify and the payment of witness fees.

9. Third parties. At the first reading of the RUAA at the 1999 Annual Meeting Commissioner Blackburn of Idaho raised a question as to whether a third party, e.g., a non-party witness, can challenge an arbitrator's order, such as a subpoena to disclose information that the witness believes is privileged. It is clear from the case law that arbitrators have the power under the UAA (Section 7) and the FAA (Section 7) to issue orders, such as subpoenas, to non-parties whose information may be necessary for a full and fair hearing. *Amgen, Inc. v. v. Kidney Center of Delaware County, Ltd.*, 879 F.Supp. 878 (N.D. Ill. 1995) (arbitrator had the power under FAA to subpoena a third party to produce documents and to testify at a deposition); *Meadows Indemnity Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994) (court held that because the burden was minimal, the nonparty would have to produce documents pursuant to arbitrator's subpoena under FAA); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F.Supp. 1241 (S.D. Fla. 1988) (court upholds subpoena issued by arbitrator under FAA that nonparties must appear at prehearing conference and arbitration hearing); *Drivers Local Union No. 639 v. Seagram Sales Corp.*, 531 F.Supp. 364, 366 (D.D.C. 1981) ("the Uniform Arbitration Act provides for the issuance of subpoenas by an arbitrator to non-party witnesses at an arbitration proceeding, to compel their testimony or the production of documents"); *United Elec. Workers Local 893 v. Schmitz*, 576 N.W.2d 357 (Iowa 1998) (court held that Iowa Arbitration Act confers on arbitrators the power to subpoena nonparty witnesses); *but see COMSAT Corp. v. National Science Foundations, supra*; *Integrity Ins. Co. v. American Centennial Ins. Co., supra*. Some state arbitration laws broadly allow arbitrators to issue subpoenas for discovery purposes the same as in a civil proceeding which can be interpreted to include third parties. Kan. Sta. Ann. § 5-407; Cal. Civ. Proc. Code § 1283.05(d); Tex. Civ. Prac. & Rem. Code Ann. § 171.007(b); Utah Code Ann. § 78-31a-8.

Presently under the UAA and the FAA the courts have allowed non-parties to challenge the propriety of such subpoenas or other discovery-related orders of arbitrators. *See, e.g., Integrity Ins. Co. v. American Centennial Ins. Co., supra*. It must be remembered that such orders by arbitrators, like those issued by administrative agencies and unlike those issued by courts, are not self-enforcing. Thus, a nonparty who disagrees with a subpoena or other order issued by an arbitrator simply need not comply. At that point the party to the arbitration proceeding who wants the nonparty to testify or produce information must proceed in court to enforce the arbitral order or the nonparty against whom the order has been issued or the other party on behalf of the nonparty can file a motion to quash the subpoena or arbitral order.

In determining whether to enforce an arbitral subpoena, the courts have been very solicitous of the nonparty status of a person challenging such an order. For example, in *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 662 N.Y.S.2d 450 (N.Y. App. Div. 1997), an arbitrator attempted to subpoena

documents from a nonparty competitor. The court held that, although arbitrators do have authority to issue subpoenas, this subpoena was inappropriate because it required the nonparty to divulge certain information which may put it at a competitive disadvantage and was not sufficiently relevant to the arbitration case.

The Drafting Committee decided that the present approach of courts to safeguard the rights of third parties while insuring that there is sufficient disclosure of information for a full and fair hearing is adequate. Further development in this area should be left to case law because (1) it would be very difficult to draft a provision to include all the competing interests when an arbitrator issues a subpoena or discovery order against a nonparty [e.g., courts seem to give lesser weight to nonparty's claims that an issue lacks relevancy as opposed to nonparty's claims a matter is protected by privilege]; (2) state and federal administrative laws allowing subpoenas or discovery orders do not make special provisions for nonparties; and (3) the courts have protected well the interests of nonparties in arbitration cases.

10. Section 17(g) is intended to allow a court in State A (the State adopting the RUAA) to give effect to a subpoena or any discovery-related order issued by an arbitrator in an arbitration proceeding in State B without the need for the party who has received the subpoena first to go to a court in State B to receive an enforceable order. This procedure would eliminate duplicative court proceedings in both State A and State B before a witness or record or other evidence can be produced for the arbitration proceeding in State B. The court in State A would have the authority to determine whether and, if so, under what appropriate conditions the subpoena or discovery-related orders should be enforced against a resident in State A. The statute directs the court, similar to the language in 17(b) and (c), to allow enforce subpoenas and discovery-related orders to "make the arbitration proceeding fair, expeditious, and cost effective." The last sentence of 17(g) requires that the subpoena be served and enforced under the laws of a civil action in State A where the request to enforce the subpoena is being made.

Because the procedure outlined in 17(g) is new a party attempting to use this process in another State should reference Section 17(g) in the subpoena or discovery-related order so that the parties, persons served, and the court knows of this authority.

**SECTION 18. COURT ENFORCEMENT OF PRE-AWARD RULING BY ARBITRATOR.** If an arbitrator makes a pre-award ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the

ruling into an award under Section 19. The successful party may file a motion for an expedited order to confirm the award under Section 22, in which case the court shall proceed summarily to decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award of the arbitrator pursuant to Sections 23 and 24.

**Reporter's Notes**

1. Section 18 is currently the law in almost all jurisdictions to enforce pre-award arbitral determinations. Because the orders of arbitrators are not self-enforcing, a party, who receives a favorable ruling with which another of the parties refuses to comply, must apply to a court to have the ruling made an enforceable order. *See*, *e.g.*, *Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City*, 606 F. Supp. 692 (S.D.N.Y. 1985) (enforcing under FAA arbitrator's interim order removing lien on vessel); *Island Creek Coal Sales Co. v. City of Gainesville, Fla.*, 729 F.2d 1046 (6th Cir. 1984) (enforcing under FAA arbitrator's interim award requiring city to continue performance of coal purchase contract until further order of arbitration panel); *Fraulo v. Gabelli*, 37 Conn. App. 708, 657 A.2d 704 (1995) (enforcing under UAA arbitrator issuing preliminary orders regarding sale and proceeds of property); *see also* III *Macneil Treatise* § 34.2.1.2.

As a general proposition, courts are very hesitant to review interlocutory orders of an arbitrator. The Ninth Circuit in *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973) stated that "judicial review prior to the rendition of a final arbitration award should be indulged, if at all, only in the most extreme cases." The court concluded that a more lax rule would frustrate a basic purpose of arbitration for a speedy disposition without the expense and delay of a court proceeding. In *Harleyville Mut. Cas. Co. v. Adair*, 421 Pa. 141, 145, 218 A.2d 791, 794 (Pa. 1966), the Pennsylvania Supreme Court held that to allow challenges to an arbitrator's interlocutory rulings would be "unthinkable." Massachusetts also rejected the appeal of an interlocutory order in *Cavanaugh v. McDonnell & Co.*, 357 Mass. 452, 457, 258 N.E.2d 561, 564 (Mass. 1970), noting that to allow a court to review an arbitrator's interlocutory order "would tend to render the proceedings neither one thing nor the other, but transform them into a hybrid, part judicial and part arbitrational." Thus Section 18 requires a court to enforce the pre-award ruling unless the ruling should be vacated under the standards for confirming, modifying, or vacating awards under Sections 23 and 24.

Courts have considered more closely substantive challenges to pre-award ruling of arbitrators on grounds of privilege or confidentiality. In *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 414 Mass. 609, 609 N.E.2d 460 (1993), the defendant refused to turn over to the plaintiff certain documents, despite an arbitral subpoena requiring such, because the defendant claimed that portions of the documents contained attorney-client and work-product privileges. The court concluded that because the matters fell under Massachusetts public records law, the question of privilege was within the discretion of the judge and not the arbitrator after the supervisor of public records had decided issues arising under the public records law. *See also World Commerce Corp. v. Minerals and Chem. Philipp Corp.*, 15 A.D. 432, 224 N.Y.S.2d 763 (1962) (court and not arbitrator decides whether documents of non-party to arbitration are protected as confidential); *Civil Serv. Employees Ass'n v. Soper*, 105 Misc.2d 230, 431 N.Y.S.2d 909 (1980) (court vacates award of arbitrator who incorrectly determined privilege of patient's confidential records); *DiMania v. New York State Dept. of Mental Hygiene*, 87 Misc.2d 736, 386 N.Y.S.2d 590 (1976) (court overrules decision of arbitrator regarding client's privilege of confidentiality); *compare Great Scott Supermarkets, Inc. v. Teamsters Local 337*, 363 F.Supp. 1351 (E.D. Mich. 1973) (arbitrator does not exceed powers in contract under FAA §10 by ordering production of documents, with deletions, that party claims are subject to attorney-client privilege). Because of the involvement of important legal rights, a court should review more carefully claims of confidentiality, trade secrets, or privilege than other assertions that a pre-award order of an arbitrator is invalid.

2. Section 18 uses the terms "an expedited order to confirm the award under Section 22, in which case the court shall proceed summarily to decide the motion" which is language similar to that in Section 7 that a court in a proceeding to compel or stay arbitration should act "summarily." The term "expedited" has been used in other statutes and court rules. 8 U.S.C. § 1252(e)(4) (an immigration statute which provides that when a person is deported and files an appeal, "it shall be the duty of the court to advance on the docket and to expedite to the greatest possible extent the disposition of any case" under the statute); Fed. R. Civ. P. 65 (if an adverse party contests a court's granting of a temporary restraining order the court must proceed as expeditiously as "the ends of justice require" and the hearing for a preliminary injunction "shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character."); Cal. St. Bar P. R. 203 (in cases involving the state bar in California, "a motion to set aside or vacate a default judgment shall be decided on an expedited basis."). The intent of the term "expedited" is that a court should advance on the docket to the extent possible a matter involving the enforcement of a pre-award ruling by an arbitrator in order to preserve the integrity of the arbitration proceeding which is underway.

The term "summarily" has the same meaning as in Section 7 that a trial court should expeditiously and without a jury trial determine whether an arbitrator's pre-award ruling should be enforced. *Grad v. Wetherholt Galleries*, 660 A.2d 903 (D.C. 1995); *Wallace v. Wiedenbeck*, 251 A.D.2d 1091, 674 N.Y.S.2d 230, 231 (N.Y. App. Div. 1998); *Burke v. Wilkins*, 131 N.C.App. 687, 507 S.E.2d 913 (1998); *In re MHI Partnership, Ltd.*, 7 S.W.3d 918 (Tex. App. 1999).

3. There is no provision in RUAA Section 28 for an appeal from a court decision on a pre-award ruling by an arbitrator and the intent of the statute is that such orders from a lower court are not appealable.

4. The Drafting Committee unanimously concluded that an arbitrator's order denying a request for a pre-award ruling should not be subject to an action under Section 18 because (1) such a provision would lead to delay and more litigation without corresponding benefit to the process and (2) the primary reason to allow a court to consider a favorable pre-award ruling is because such arbitral orders are not self-enforcing. The parties whose pre-award requests for relief are denied by an arbitrator can seek review of such denial after the final award is issued under Section 20, vacatur, or Section 21, modification or correction of an award.

5. Section 18 requires an arbitrator's ruling be incorporated into an "award under Section 19" because for procedural purposes there must be an award under Section 19 for a court to confirm under Section 22 or to vacate, modify or correct under Sections 23 or 24.

**SECTION 19. AWARD.**

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

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time

specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.

**Reporter's Notes**

1. The term "authenticate" is defined in Section 1(3).

**SECTION 20. CHANGE OF AWARD BY ARBITRATOR.**

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

(1) upon the grounds stated in Section 24(a)(1) or (3);

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

(3) to clarify the award.

(b) A motion under subsection (a) must be made and served on all parties within 20 days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must serve any objections to the motion within 10 days after receipt of the notice.

(d) If a motion to the court is pending under Section 22, 23, or 24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) upon the grounds stated in Section 24(a)(1) or (3);

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

(3) to clarify the award.

(e) An award modified or corrected pursuant to this section is subject to Sections 22, 23, and 24.

**Reporter's Notes**

1. Section 20 provides a mechanism in subsections (a), (b), and (c) for the parties to apply directly to the arbitrators to modify or correct an award and in subsection (d) for a court to submit an award back to the arbitrators for a determination whether to modify or correct an award. The latter situation would occur if either party under Section 22, 23, or 24 files a motion with a court within 90 days to confirm, vacate, modify or correct an award and the court decides to remand the matter back to the arbitrators. The revised alternative is based on the Minnesota version of the UAA. Minn. Stat. Ann. §572.16; *see also* 710 Ill. Comp. Stat. Ann. 5/9; Ky. Rev. Stat. 417.130.

2. Section 20 serves an important purpose in light of the arbitration doctrine of *functus officio* which is "a general rule in common law arbitration that when arbitrators have executed their awards and declared their decision they are *functus officio* and have no power to proceed further." *Mercury Oil Ref. Co. v. Oil Workers*, 187 F.2d 980, 983 (10th Cir. 1951); *see also International Bhd. of Elec. Workers, Local Union 1547 v. City of Ketchikan, Alaska*, 805 P.2d 340 (Alaska 1991); *Chaco Energy Co. v. Thercol Energy Co.*, 97 N.M. 127, 637 P.2d 558 (1981). Under this doctrine when arbitrators finalize an award and deliver it to the parties, they can no longer act on the matter. *See* 1 Domke on Commercial Arbitration §§22:01, 32:01 (Gabriel M. Wilner, ed. 1996) [hereinafter Domke]. Indeed there is some question whether, in the absence of an authorizing statute, a court because of the *functus officio* doctrine can remand an arbitration decision to the arbitrators who initially heard the matter. 1 Domke §35:03.

3. The grounds in Section 20(a) and (d) are essentially the same as those in UAA Section 9 which provides the parties with a limited opportunity to request modification or corrections of an arbitration award either (1) when there is an error as described in Section 24(a)(1) for miscalculation or mistakes in descriptions or in Section 24(a)(3) for awards imperfect in form or (2) "for the purpose of clarifying the award." *Chaco Energy Co. v. Thercol Energy Co.*, 97 N.M. 127, 637 P.2d 558 (1981) (an amended arbitration award for purposes other than those enumerated in statute is void).

The Drafting Committee concluded an additional ground for modification or correction be added in Section 20(a)(2) and (d)(2) which is based on FAA Section 10(a)(4) where an arbitrator's award is either so imperfectly executed or incomplete

that it is questionable whether the arbitrators ruled on a submitted issue. *See, e.g., Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp.*, 86 F.3d 96 (7th Cir. 1996); *Americas Ins. Co. v. Seagull Compania Naviera*, S.A., 774 F.2d 64 (2nd Cir. 1986).

The benefit of a provision such as Section 20 is evident in a comparison with the FAA which has no similar provision. Under the FAA, there is no statutory authority for parties to request arbitrators to correct or modify evident errors and only a limited exception in FAA Section10(a)(5) for a court to order a rehearing before the arbitrators when an award is vacated and the time within which the agreement required the award has not expired. This lack of a statutory basis both for arbitrators to clarify a matter and, in most instances, for a court to remand cases to arbitrators has caused confusing case law under the FAA on whether and when a court can remand or arbitrators can clarify matters. *See* III *Macneil Treatise* §§37.6.4.4; 42.2.4.3; *Legion Ins. Co. v. VCW, Inc.*, 193 F.3d 972 (8th Cir. 1999). The mechanism for correction of errors in RUAA Section 20 enhances the efficiency of the arbitral process.

**SECTION 21. REMEDIES; FEES AND EXPENSES OF ARBITRATION PROCEEDING.**

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim.

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

(c) As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for

refusing to confirm an award under Section 22 or for vacating an award under Section 23.

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

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

**Reporter's Notes**

1. Section 21(a) provides arbitrators the authority to make an award of punitive damages or other exemplary relief; however, the parties by agreement cannot confer such authority on an arbitrator where the arbitrator by law could not otherwise award such relief. Section 21(b) also authorizes arbitrators to award attorney's fees where such would be allowed by law in a civil action; in addition, parties by their agreement may provide for the remedy of attorney's fees even if not otherwise authorized by law.

In regard to punitive damages, it is now well established that arbitrators have authority to award punitive damages under the FAA. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L.Ed.2d 76 (1995). Federal authority is in accord with the preponderance of decisions applying the UAA and state arbitration statutes. *See, e.g.*, *Baker v. Sadick*, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984); *Eychner v. Van Vleet*, 870 P.2d 486 (Colo. Ct. App. 1993); *Richardson Greenshields Sec., Inc. v. McFadden*, 509 So.2d 1212 (Fla. Dist. Ct. App. 1987); *Bishop v. Holy Cross Hosp.*, 44 Md. App. 688, 410 A.2d 630 (1980); *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985), review denied, 315 N.C. 590, 341 N.E.2d 29 (1986); *Kline v. O'Quinn*, 874 S.W.2d 776 (Tex. Ct. App. 1994), cert. denied, 515 U.S. 1142, 115 S. Ct. 2579, 132 L. Ed.2d 829 (1995); *Grissom v. Greener & Sumner Constr., Inc.*, 676 S.W.2d 709 (Tex. Ct. App. 1984); *Anderson v. Nichols*, 178 W. Va. 284, 359 S.E.2d 117 (1987); *but see Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976); *Leroy v. Waller*, 21 Ark. App. 292, 731 S.W.2d 2d 789 (1987); *School City of E. Chicago, Ind. v. East Chicago Fed. of Teachers*, 422 N.E.2d 656 (Ind. Ct. App. 1981); *Shaw v. Kuhnel & Assocs.*, 102 N.M. 607, 698 P.2d 880, 882 (1985).

As to attorney's fees, statutes in Texas and Vermont allow recovery for attorney's fees in arbitration when law or parties' agreement would allow for such a recovery in a civil action, Tex Civ. Prac. & Rem. Code Ann. § 171.010; 12 Vt. Stat. Ann. §5665; *Monday v. Cox*, 881 S.W.2d 381 (Tex. App. 1994) (Texas arbitration act provides that arbitrator shall award attorney fees when parties' agreement so specifies or state's law would allow such an award); *see also* Cal. Civil Code § 1717 (allowing award of attorney fees if contract specifically provides such). Also, statutes, such as those involving civil rights, employment discrimination, antitrust, and others, specifically allow courts to order attorney fees in appropriate cases. Today many of these types of causes of action are subject to arbitration clauses. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (age discrimination); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (civil RICO claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust claim); Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991 Civil Rights Act that states "arbitration * * * is encouraged to resolve disputes" under the Americans with Disabilities Act, Title VII of the 1964 Civil Rights Act, the Civil Rights Act of 1866, and the Age Discrimination in Employment Act).

2. Because Section 21 is a waivable provision under Section 4, the parties can agree to limit or eliminate certain remedies. However, it should be noted that in arbitration cases where, if the matter had been in litigation, a person would have been entitled to an award of attorneys fees or punitive damages or other exemplary relief, there is doubt whether one of the parties by contract can eliminate the right to attorney's fees or punitive damages or other exemplary relief. Some courts have held that they will defer to an arbitration award involving statutory rights only if a party has the right to obtain the same relief in arbitration as is available in a court. *See, e.g., Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997) (employee with race discrimination claim under Title VII is bound by pre-dispute arbitration agreement under FAA if the employee has the right to the same relief as if he had proceeded in court); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244 (9th Cir.), cert. denied, 516 U.S. 907 (1995) (arbitration clause compelling franchisee to surrender important rights, including right of attorney fees, guaranteed by the Petroleum Marketing Practices Act, contravenes this statute); *DeGaetano v. Smith Barney, Inc.*, 75 FEP Cases 579 (S.D.N.Y. 1997) (award under arbitration clause, requiring each side to pay own attorney fees, in Title VII claim on which plaintiff prevailed but where arbitrators refused to award attorney fees set aside as a manifest disregard of the law; the arbitration of statutory claims as a condition of employment are enforceable only to the extent that the arbitration preserves protections and remedies afforded by the statute); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 68 Cal. App.4th 374 (1998) (limitation in arbitration agreement on remedies to only backpay and not allowing employee in anti-discrimination claim to attempt recovery of punitive damages is unconscionable and court severs remedy limitation from the arbitration agreement); *Due Process Protocol for Mediation and*

*Arbitration of Statutory Disputes Arising out of the Employment Relationship* Section C(5) (May 9, 1995) ("The arbitrator should be empowered to award whatever relief would be available in court under the law."); National Academy of Arbitrators, *Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems* Art. 4(D) (May 21, 1997) ("Remedies should be consistent with the statute or statutes being applied, and with the remedies a party would have received had the case been tried in Court. These remedies may well exceed the traditional arbitral remedies of reinstatement and back pay, and may include witnesses' and attorneys' fees, costs, interest, punitive damages, injunctive relief, etc.").

3. Section 21(c) preserves the traditional, broad right of arbitrators to fashion remedies. *See* III *Macneil Treatise* Ch. 36; Michael Hoellering, *Remedies in Arbitration*, Arbitration and the Law (1984) (annotating federal and state decisions). Generally their authority to structure relief is defined and circumscribed not by legal principle or precedent but by broad concepts of equity and justice. *See, e.g.*, *David Co. v. Jim Miller Constr., Inc.*, 444 N.W.2d 836, 842 (Minn. 1989); *SCM Corp. v. Fisher Park Lane Co.*, 40 N.Y.2d 788, 793, 358 N.E.2d 1024, 1028, 390 N.Y.S.2d 398, 402 (1976). This is why Section 21(b) allows an arbitrator to order broad relief even that beyond the limits of courts circumscribed by principles of law and equity. The language in UAA Section 12(a) [RUAA Section 23(a)] that "the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm [an] award" has been moved to this section on remedies. The purposes of this language in the UAA was to insure that arbitrators have much creativity in fashioning remedies because broad remedial discretion is a positive aspect of arbitration. Just as in UAA Section 12(a), this language in Section 21(c) means that arbitrators in issuing remedies will not be confined to limitations under principles of law and equity (unless the law or the parties' agreement specifically confines them).

4. Section 21(d) is based upon UAA Section 10 that allows arbitrators, unless the agreement provides to the contrary, to determine in the award payment of expenses, including the arbitrator's expenses and fees. The most significant change is that UAA Section 10 does not allow an arbitrator to award attorney's fees which is now provided for in Section 21(b).

5. Section 21(e) addresses concerns respecting arbitral remedies of punitive or exemplary damages because of the absence, under present law, of guidelines for arbitral punitive awards and of the severe limitations on judicial review arbitration awards. Recent data from the securities industry provides some evidence that arbitrators do not abuse the power to punish through excessive awards. *See generally* Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 Nw. L. Rev. 1 (1997); Richard Ryder, *Punitive Award Survey*, 8

Sec. Arb. Commentator, Nov. 1996, at 4. Because legitimate concerns remain, however, specific provisions have been included in Section 21(e) that require arbitrators who award a remedy of punitive damages to specify in the award the law authorizing and the amounts of the award attributable to the punitive damage remedy. A party can seek to vacate the punitive damage remedy under Section 23 – especially Section 23(a)(4) which prohibits arbitrators from exceeding their power. For instance, a party may claim that the arbitrators exceeded their powers by awarding any punitive damages or an excessive amount of punitive damages and that the award of punitive damages or the excessive amount should be vacated under Section 23(a)(4).

The language of Section 23(a)(4) has been interpreted by courts essentially to mean that the arbitrators' award will only be set aside when the arbitrators go beyond the powers contractually delegated to them by the parties. Courts do not use Section 23(a)(4) as a means to review the merits of the award. *See Eljer Mfg. v. Kowin Dev. Corp.*, 14 F.3d 1250 (7th Cir.), cert. denied, 512 U.S. 1205 (1994); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 752 (1996). Thus, even if the arbitrators incorrectly apply the law or erroneously find facts, these mistakes will be insufficient to set aside an award of punitive damages by a reviewing court so long as the arbitrators were expressly or impliedly authorized by the contract to award such relief.

The Drafting Committee decided to emphasize this contractual nature of arbitration and resulting limited review of punitive damages by the following illustration to be included in the Official Comment to this section:

> "**Illustration**: The parties to an employment contract agree that all disputes will be decided by arbitration. A panel of arbitrators decides to award a claimant punitive damages on her claim that the employer had defamed her in an employee evaluation. The arbitrators state the award in a record, refer to the law authorizing punitive damages for defamation and state the amount attributable to punitive damages in compliance with Section 21(d). However, the arbitrators erroneously determined facts that the respondent intentionally or maliciously defamed the claimant and inaccurately applied the law for awarding punitive damages in a defamation case. A court reviewing the arbitrators' award of punitive damages should uphold the award because an award of punitive damages in a defamation case is "authorized by law" in accordance with Section 21(a) and thus impliedly authorized by the parties' arbitration agreement. The arbitrators have not "exceeded their powers" under Section 23(a)(4)."

**SECTION 22. CONFIRMATION OF AWARD.** After a party to the arbitration proceeding receives of notice of an award, the party may file a motion with the court for an order confirming the award, at which time the court shall issue such an order unless the award is modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23.

**Reporter's Notes**

1. The language in Section 22 has been changed to be similar to that in FAA Section 9 to indicate that a court has jurisdiction when a party files a motion to confirm an award unless a party has applied to the arbitrators for change of an award under Section 20 or filed a motion to vacate, modify or correct under Section 23 or 24.

2. The Drafting Committee considered but rejected the language in FAA Section 9 that limits a motion to confirm an award to a one-year period of time. The consensus of the Drafting Committee was that the general statute of limitations in a State for the filing and execution on a judgment should apply.

**SECTION 23. VACATING AWARD.**

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

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

(2) there was:

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

(B) corruption by an arbitrator; or

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

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding;

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

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the commencement of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section must be filed within 90 days after the movant receives notice of the award in record a pursuant to Section 19 or within 90 days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award pursuant to Section 20, unless the motion is predicated upon the ground that the award was procured by corruption, fraud, or other undue means, in which case it must be filed within 90 days after such a ground is known or by the exercise of reasonable care should have been known by the movant.

(c) In vacating an award on a ground other than that set forth in subsection (a)(5), the court may order a rehearing before a new arbitrator. If the award is vacated on a ground stated in subsection (a)(3), (4), or (6), the court may order a

rehearing before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in Section 19(b) for an award.

(d) If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

## Reporter's Notes

### A. Reporter's Notes on Section 23(a)(2), (5), and (6):

1. Section 23(a)(2) is based primarily on UAA Section 12(a)(2). The reason "evident partiality" is a grounds for vacatur only for a neutral arbitrator is because party arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them. As such, party arbitrators are not expected to be impartial in the same sense as neutral arbitrators. *Macneil Treatise* §28.4. However, corruption or misconduct are grounds to vacate an award by both neutral arbitrators and party arbitrators. As to misconduct, before courts will vacate an award on this ground, objecting parties must demonstrate that the misconduct actually prejudiced their rights. *Creative Homes and Millwork, Inc. v. Hinkle*, 426 S.E.2d 480 (N.C. App. 1993). Courts have not required a showing of prejudice when parties challenge an arbitration award on grounds of evident partiality of the neutral arbitrator or corruption in any of the arbitrators. *Gaines Constr. Co. v. Carol City Utilities, Inc.*, 164 So.2d 270 (Fl. Dist. Ct. 1964); *Northwest Mechanical, Inc. v. Public Utilities Comm'n*, 283 N.W.2d 522 (Minn. 1979); *Egan & Sons Co. v. Mears Park Dev. Co.*, 414 N.W.2d 785 (Minn. App. 1987). Corruption is also a ground for vacatur in Section 23(a)(1) which does not require any showing of prejudice.

The Drafting Committee voted unanimously to divide Section 23(a)(2) into subsection (A), (B), and (C) to clarify that only the ground of misconduct also requires a showing of prejudice.

2. The purpose of Section 23(a)(5) is to establish that if there is no valid arbitration agreement, then the award can be vacated; however, the right to contest an award on this ground is conditioned upon the party contesting the validity of an arbitration agreement raising this objection not later than the commencement of the arbitration hearing under Section 15(c) if the party participates in the arbitration proceeding. *See, e.g.*, *Hwang v. Tyler*, 253 Ill. App.3d 43, 625 N.E.2d 243, appeal denied, 153 Ill.2d 559, 624 N.E.2d 807 (1993) (if issue not adversely determined under § 2 of UAA and if party raised objection in arbitration hearing, party can raise

challenge to agreement to arbitrate in proceeding to vacate award); *Borg, Inc. v. Morris Middle Sch. Dist. No. 54*, 3 Ill.App.3d 913, 278 N.E.2d 818 (1972) (issue of whether there is an agreement to arbitrate cannot be raised for first time after the arbitration award); *Spaw-Glass Constr. Serv., Inc. v. Vista De Santa Fe, Inc.*, 114 N.M. 557, 844 P.2d 807 (1992) (party who compels arbitration and participates in hearing without raising objection to the validity of arbitration agreement cannot afterwards attack arbitration agreement).

3. The purpose of the language requiring a party participating in an arbitration proceeding to raise an objection that no arbitration agreement exists "not later than the beginning of the arbitration hearing under Section 15(c)" is to insure that the party makes a timely objection at the start of the arbitration hearing rather than causing the other parties to go through the time and expense of the arbitration hearing only to raise the objection for the first time later in the arbitration process or in a motion to vacate an award. A person who refuses to participate in or appear at an arbitration proceeding retains the right to challenge the validity of an award on the ground that there was no arbitration agreement in a motion to vacate.

4. Section 23(a)(6) is a new ground of vacatur related to improper notice as to the initiation of the arbitration proceeding under Section 9. The notice requirement in Section 9 is a minimal one intended to meet due process concerns by informing a person as to the controversy and remedy sought. The notice of initiation of the arbitration proceeding is also subject to variation by the parties' agreement. *See* Section 4(b)(2).

5. The notice of initiation of arbitration is not intended to be a formal pleading requirement. Thus, a party may waive the objection in Section 9(b) by not interposing a timely objection. The court should not vacate an award on the basis of this notice requirement unless the court determines that there was substantial prejudice to the other party.

**B. Reporter's Notes on the Concept of Contractual Provisions for "Opt-In" Review of Awards**

1. During the course of the Drafting Committee's deliberations, no issue has produced more discussion and debate than the question of whether Section 23 of the RUAA should include a provision that the parties could "opt in" to either judicial or appellate arbitral review of arbitration awards for errors of law or fact or any other grounds not prohibited by applicable law. At the first reading of the RUAA in July 1999 Commissioner Getty of Illinois made a sense-of-the-house motion not to include in the RUAA a provision allowing parties to contract for expanded judicial review under the "opt in" approach. This motion passed by a wide majority. At its October 1999 meeting the Drafting Committee voted 5-3 not to include in Section

23 a provision allowing parties to contract for review of awards by appellate arbitral panels.

There are certain policy reasons both for and against the adoption of a provision in the RUAA for expanded judicial review of an arbitrator's decision for errors of law or fact. The value-added dimensions are three. First, there is an "informational" element in that such a provision would clearly inform the parties that they can "opt-in" to enhanced judicial review. Second, an opt-in provision, if properly framed, can serve a "channeling" function by setting out standards for the types and extent of judicial review permitted. Such standards would ensure substantial uniformity in these "opt-in" provisions and facilitate the development of a consistent body of case law pertaining to those contract provisions. Finally, it can be argued that provision of the "opt-in" safety net will encourage parties whose fear of the "bonehead" award previously prevented them from trying arbitration to do so.

Any value-added dimensions must then be weighed against the risks/downsides of adding this provision to the Act. The risks/downsides inherent are several. Paramount is the assertion that permitting parties a "second bite at the apple" on the merits effectively eviscerates arbitration as a true alternative to traditional litigation. An opt-in section in the RUAA might lead to the routine inclusion of review provisions in arbitration agreements in order to assuage the concerns of parties uncomfortable with the risk of being stuck with disagreeable arbitration awards that are immune from judicial review. The inevitable post-award petition for vacatur would in many cases result in the negotiated settlement of many disputes due to the specter of vacatur litigation the parties had agreed would be resolved in arbitration.

This line of argument asserts further that an opt-in provision would virtually ensure that, in cases of consequence, losers will petition for vacatur, thereby robbing commercial arbitration of its finality and making the process more complicated, time consuming and expensive. Arbitrators would be effectively obliged to provide detailed findings of fact and conclusions of law and if the parties agree to judicial review for errors of fact, findings of fact in order to facilitate review. In order to lay the predicate for the appeal of unfavorable awards, transcripts would become the norm and counsel would be required to expend substantial time and energy making sure the record would support an appeal. Finally, the time to resolution in many cases would be greatly lengthened, as well as increasing the prospect of reopened proceedings on remand following judicial review.

At its core, arbitration is supposed to be an alternative to litigation in a court of law, not a prelude to it. It can be argued that parties unwilling to accept the risk of binding awards because of an inherent mistrust of the process and arbitrators are

best off contracting for advisory arbitration or foregoing arbitration entirely and relying instead on traditional litigation.

The third argument raised in opposition to an opt-in provision is the prospect of a backlash of sorts from the courts. The courts have blessed arbitration as an acceptable alternative to traditional litigation, characterizing it as an exercise in freedom of contract that has created a significant collateral benefit of making civil court dockets more manageable. They are not likely to view with favor parties exercising the freedom of contract to gut the finality of the arbitration process and throw disputes back into the courts for decision. It is maintained that courts faced with that prospect may well lose their recently acquired enthusiasm for commercial arbitration.

These negative policy implications were a substantial reason why the Committee of the Whole adopted a sense-of-the-house resolution at the July, 1999, meeting not to include expanded judicial review but rather to consider an internal arbitral appeals mechanism. The decision not to include in the RUAA a statutory sanction of either expanded judicial review or of internal, arbitral review of the "opt-in" device effectively leaves the issue of the legal propriety of this means for securing review of awards to the developing case law under the FAA and state arbitration statutes. Consequently, parties remain free to agree to contractual provisions for internal arbitral or judicial review of challenged awards, on whatever grounds and based on whatever standards they deem appropriate. The Comments below are intended to set out, in summary fashion, the essential elements of the debate underlying the issue of "opt-in" review.

2. An explicit statutory sanction permitting parties to contract for a mode and standard(s) of review not presently provided for by the FAA, state arbitration acts or the definitive case law raises several problems beyond the finality-related matters noted above. Those problems and the current diversity of opinion as to the legal propriety of the "opt-in" device reflected in the developing case law were the core reasons why the Committee of the Whole and the Drafting Committee elected not to include provisions for "opt-in" review in the RUAA. The several concerns presented by "opt-in" provisions for judicial review of errors of law or fact are addressed first.

3. The first concern with the "opt-in" devices providing for judicial review of challenged arbitration awards is the specter of FAA preemption. The Supreme Court has made clear its belief that the FAA preempts conflicting state arbitration law. Neither FAA Section 10(a) nor the federal common law developed by the U.S. Courts of Appeal permit vacatur for errors of law. Consequently, there is a legitimate question of federal preemption concerning the validity of a state law provision sanctioning vacatur for errors of law when the FAA does not permit it.

However, the specter of FAA preemption is balanced by the assertion that the principle of Volt Info. *Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468 (1989) – that a clear expression of intent by the parties to conduct their arbitration under a state law rule that conflicts with the FAA effectively trumps the rule of FAA preemption – should serve to legitimize a state arbitration statute with different standards of review. This assertion is particularly persuasive if one believes that an arbitration agreement by the parties whereby they provide for judicial review of an arbitrator's decisions for errors of law or fact cannot be characterized as "anti-arbitration." By this view, such an "opt in" feature of judicial review of arbitral awards for errors of law or fact is intended to further and to stabilize commercial arbitration and therefore is in harmony with the pro-arbitration public policy of the FAA. Of course, in order to fully track the preemption caveat articulated in Volt and further refined in Mastrobuono v, Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995), the parties' arbitration agreement would need to specifically and unequivocally invoke the law of the adopting State in order to override any contrary FAA law.

4. The second major impediment to inclusion of an "opt-in" provision for judicial review in the RUAA (and contractual provisions to the same effect) is the contention that the parties cannot contractually "create" subject matter jurisdiction in the courts when it does not otherwise exist. The "creation" of jurisdiction transpires because a statutory provision that authorizes the parties to contractually create or expand the jurisdiction of the state or federal courts can result in courts being obliged to vacate arbitration awards on grounds they otherwise would be foreclosed from relying upon. Court cases under the federal law show the uncertainty of an "opt in" approach. *See, e.g.*, *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991) ("If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for judicial review of that award; federal [court] jurisdiction cannot be created by contract.") (labor arbitration case); *but see Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir. 1995) (The court, relying on the Supreme Court's contractual view of the commercial arbitration process reflected in Volt , *Mastrobuono and First Options of Chicago v. Kaplan*, 514 U.S. 938, 947 (1995), held valid a contractual provision providing for judicial review of arbitral errors of law. The court concluded that the vacatur standards set out in Section10(a) of the FAA provide only the default option in circumstances where the parties fail to contractually stipulate some alternate criteria for vacatur).

The continuing uncertainty as to the legal propriety and enforceability of contractual "opt-in" provisions for judicial review is best demonstrated by the opinion of the Ninth Circuit Court of Appeals in *LaPine Tech. Corp. v. Kyocera*, 130 F.3d 884 (9th Cir. 1997). The majority opinion in Kyocera framed the issue

before the court to be: "[i]s federal court review of an arbitration agreement necessarily limited to the grounds set forth in the FAA or can the court apply greater scrutiny, if the parties have so agreed?" The court held that it was obliged to honor the parties' agreement that the arbitrator's award would be subject to judicial review for errors of fact or law. It based that holding on the contractual view of arbitration articulated in *Volt* and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) and their progeny. In doing so it observed that body of case law "makes it clear that the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in accordance with the agreement's terms." The Ninth Circuit relied squarely on the opinion of the Fifth Circuit in Gateway. The court rejected the "jurisdictional" view of the FAA set out by the Seventh Circuit in Chicago Typographical Union.

Caution should be exercised not to over-read the significance of Kyocera. Judge Fernandez, who wrote the opinion of the court, merely brushed aside any concerns pertaining to contractual "creation" of jurisdiction for the federal courts. Judge Kozinski, while concurring with Judge Fernandez, expressed concern that Congress has not authorized review of arbitral awards for errors of law or fact, but felt it necessary to enforce this agreement. Judge Mayer, in a dissent, cautioned that the Circuit Court had no authority to review the award in just any manner in which the parties contracted. The three opinions in Kyocera crystallize the true nature of the debate as to the "jurisdictional" dimension of the issue of expanded judicial review.

A final significant, recent opinion in the federal Circuit Court of Appeals is *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998). In UHC, the Eighth Circuit determined whether the contract language clearly established the parties' intent to contract for expanded judicial review. The portion of the analysis relevant here is that which concerns the propriety of contractual agreements providing for expanded judicial review beyond that contemplated by Sections 10 and 11 of the FAA. The court observed that although parties may elect to be governed by any rules they wish regarding the arbitration itself, it is not clear whether the court can review an arbitration award beyond the limitations of FAA Sections 10 and 11. Congress never authorized a *de novo* review of an award on its merits, and therefore, the Court concluded that it had no choice but to confirm the award when there are no grounds to vacate based on the FAA.

The court reviewed Kyocera and Gateway and observed: "Notwithstanding those cases, we do not believe it is a foregone conclusion that parties may effectively agree to compel a federal court to cast aside Sections 9, 10, and 11 of the FAA." It then quoted at length from Judge Mayer's dissent in Kyocera and concluded by emphasizing its view of the differing role of the courts in reviewing arbitration awards and judgments from a court of law. Because the holding of UHC

was based on the parties' intent, the thoughts of the Eighth Circuit regarding this matter can be accurately characterized as dictum. However, there is no doubt that it, like the Seventh Circuit in Chicago Typographical Union, finds contractual provisions requiring the courts to apply contractually-created standards for judicial review of arbitration awards to be dubious.

After Kyocera and UHC the tally stands at two U.S. Circuit Courts of Appeals approving contractual "opt-in" provisions and two U.S. Circuit Court of Appeals effectively rejecting those provisions. Given this diversity of judicial opinion in the federal circuit courts of appeals, it is fair to say that law remains in an uncertain state.

5. The few state courts that have addressed the "creating jurisdiction" issue are similarly split. In *Dick v. Dick*, 534 N.W.2d 185, 191 (Mich. App. 1994), the Michigan Court of Appeals characterized the contractual opt-in provision before it (which permitted appeal to the courts of "substantive issues" pertaining to the arbitrator's award) as an attempt to create "a hybrid form of arbitration" that ["did] not comport with the requirements of the [Michigan] arbitration statute." The Michigan court refused to approve the broadened judicial review and held that the parties were instead "required to proceed according to the [Michigan arbitration statute]." The appellate court observed further that "[t]he parties' agreement to appellate review in this case is reminiscent of a mechanism under which the initial ruling is by a private judge, not an arbitrator. * * * What the parties agreed to is binding arbitration. Thus, they are not entitled to the type of review [of the merits of the award] they agreed to."

In a similar manner, the Illinois Court of Appeals, in Chicago, *Southshore and South Bend R.R. v. N. Indiana Commuter Transp. Dist.*, 682 N.E.2d 156, 159 (Ill. App. 3d 1997), rev'd on other grounds, 184 Ill. 151 (1998), refused to give effect to the provision of an arbitration agreement permitting a party claiming that the arbitrator's award is based upon an error of law "to initiate an action at law * * * to determine such legal issue." In so holding the Illinois Court stated: "The subject matter jurisdiction of the trial court to review an arbitration award is limited and circumscribed by statute. The parties may not, by agreement or otherwise, expand that limited jurisdiction. Judicial review is limited because the parties have chosen the forum and must therefore be content with the informalities and possible eccentricities of their choice" (citing *Konicki v. Oak Brook Racquet Club, Inc.*, 441 N.E.2d 1333 (Ill. App. 1982)).

In *NAB Constr. Corp. v. Metro. Transp. Auth.*, 180 A.D. 436, 579 N.Y.S.2d 375 (1992) the Appellate Division of the New York Supreme Court, without engaging in any substantive analysis, approved application of a contractual provision permitting judicial review of an arbitration award "limited to the question of whether

or not the [designated decision maker under an alternative dispute resolution procedure] is arbitrary, capricious or so grossly erroneous to evidence bad faith" (citing *NAB Constr. Corp. v. Metro. Transp. Auth.*, 167 A.D.2d 301, 562 N.Y.S.2d 44 (1990)). This sparse state court case law is not a sufficient basis for identifying a trend in either direction with regard to the legitimacy of contractual opt-in provisions for expanded judicial review.

6. The obvious tension here is between the enforcement of the parties' agreement to arbitrate and the need to ensure the finality of the arbitral result. The less obvious question upon which this tension turns is the proper reach of the parties' freedom to contract and whether it extends to an arbitration agreement that effectively moots the key dimension of the process – its finality. Whatever perspective one takes on this matter, in the end it reduces to a question of the propriety of private parties contractually instructing a court to decide a matter that in the absence of that contractual instruction the court would be without authority to decide. Stated another way the question becomes: "Is the standard for judicial review of commercial arbitration awards a matter of law properly determined by Congress, state legislatures and the courts, or can the parties properly instruct the courts as to the standards for vacatur – even if they conflict with the standards set down in Section 10(a) FAA?"

7. There also is a clear analogy between the question of whether Section 23 should include a provision allowing parties to provide in their arbitration agreements for judicial review of arbitration decisions for errors of law or fact and the question of whether the RUAA should codify the "manifest disregard" of the law and "public policy" nonstatutory grounds for vacatur. The manner in which the Drafting Committee decided to deal with that issue is explained in the Comment below.

8. Statutory sanction of "opt-in" provisions for internal appellate arbitral review are significantly less troubling than the sanction of "opt-in" provisions for judicial review – because they do not entangle the courts in reviewing the merits of challenged arbitration awards. Instead, appellate arbitral review mechanisms merely add a second level to the contractual arbitration procedure that permits parties disappointed with the initial arbitral result to secure a degree of protection from the occasional "wrong" arbitration decision. *See* Stephen L. Hayford and Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 Ohio St. J. on Disp. Res. 405-06 (1995). This approach would not present the FAA preemption, "creating jurisdiction," and line-drawing problems identified with the expanded judicial review through the "opt in" approach. It is also consistent with the Supreme Court's contractual view of commercial arbitration in that it preserves the parties' agreement to resolve the merits of the controversy between them through arbitration, without resort to the courts. When parties agree that the decision of an arbitrator will be "final and binding," it is implicit that it is the

arbitrator's interpretation of the contract and the law that they seek, and not the legal opinion of a court. In addition, an internal, arbitral appeal mechanism is more likely to keep arbitration decisions out of the courts and maintain the overall goals of speed, lower cost, and greater efficiency.

An internal, appellate review within the arbitration system is already established by some arbitration organizations. *See, e.g.*, CPR Arbitration Appeal Procedure; Jams/Endispute Comprehensive Arbitration Rules and Procedures, R. 23, Optional Appeal Procedure. In addition, there are numerous examples of parties creating such internal appeals mechanisms. The Drafting Committee concluded that because the authority to contract for such a review mechanism is inherent and such provisions can differ significantly depending upon the needs of the parties, there was no need to include a specific provision within the statute.

**C. Reporter's Notes on the Possible Codification of the "Manifest Disregard of the Law" and the "Public Policy" Grounds For Vacatur:**

1. A question has arisen as to the advisability of adding two new subsections to Section 23(a) sanctioning vacatur of awards that result from a "manifest disregard of the law" or for an award that violates "public policy." Neither of these two standards is presently codified in the FAA or in any of the state arbitration acts. However, all of the federal circuit courts of appeals have embraced one or both of these standards in commercial arbitration cases. *See* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 734 (1996).

2. "Manifest disregard of the law" is the seminal nonstatutory ground for vacatur of commercial arbitration awards. The relevant case law from the federal circuit courts of appeals establishes that "a party seeking to vacate an arbitration award on the ground of 'manifest disregard of the law' may not proceed by merely objecting to the results of the arbitration." *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 747 (11th Cir. 1988). "Manifest disregard of the law" "clearly means more than [an arbitral] error or misunderstanding with respect to the law." *Carte Blanche (Singapore) PTE Ltd. v. Carte Blanche Int'l.*, 888 F.2d 260, 265 (2d Cir. 1989) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986)).

The numerous other articulations of the "manifest disregard of law" standard reflected in the circuit appeals court case law reveal its two constituent elements. One element looks to the result reached in arbitration and evaluates whether it is clearly consistent or inconsistent with controlling law. For this element to be satisfied, a reviewing court must conclude that the arbitrator misapplied the relevant

law touching upon the dispute before her in a manner that constitutes something akin to a blatant, gross error of law that is apparent on the face of the award.

The other element of the "manifest disregard of the law" standard requires a reviewing court to evaluate the arbitrator's knowledge of the relevant law. Even if a reviewing court finds a clear error of law, vacatur is warranted under the "manifest disregard of the law" ground only if the court is able to conclude that the arbitrator knew the correct law but nevertheless "made a conscious decision" to ignore it in fashioning the award. *See M&C Corp. v. Erwin Behr & Co.*, 87 F.3d 844, 851 (6th Cir. 1996). For a full discussion of the "manifest disregard of the law" standard, *see* Stephen L. Hayford, *Reining in the Manifest Disregard of the Law Standard: The Key to Stabilizing the Law of Commercial Arbitration*, 1999 J. Disp. Resol. 117.

3. The origin and essence of the "public policy" ground for vacatur is well captured in the Tenth Circuit's opinion in *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020,1023 (10th Cir. 1993). *Seymour* observed: "[I]n determining whether an arbitration award violates public policy, a court must assess whether 'the specific terms contained in [the contract] violate public policy, by creating an 'explicit conflict with other 'laws and legal precedents.'" *Id*. at 1024 (citing *United Paperworkers Int'l Union v. Misco*, 484 U.S.29, 43, 108 S. Ct. 364, 373 (1987)).

Like the "manifest disregard of the law" nonstatutory ground, vacatur under the "public policy" ground requires something more than a mere error or misunderstanding of the relevant law by the arbitrator. Under all of the articulations of this nonstatutory ground, the public policy at issue must be a clearly defined, dominant, undisputed rule of law. However, the language employed by the various circuits to describe and apply this ground in the commercial arbitration milieu reflects two distinct, different thresholds for vacatur being used by those courts. First, the Tenth Circuit in *Seymour* and the Eighth Circuit in *PaineWebber, Inc. v. Argon*, 49 F.3d 347 (8th Cir. 1995) contemplate that an award can be vacated when it "explicitly" conflicts with, violates, or is contrary to the subject public policy. The judicial inquiry under this variant of the "public policy" ground obliges the court to delve into the merits of the arbitration award in order to ascertain whether the arbitrator's analysis and application of the parties' contract or relevant law "violates" or "conflicts" with the subject public policy.

Second, the Eleventh Circuit in *Brown v. Rauscher Pierce Refnses, Inc.*, 994 F.2d 775 (11th Cir. 1994) and the Second Circuit in *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108 (2d Cir. 1980) trigger vacatur only when a court concludes that implementation of the arbitral result (typically, effectuation of the remedy directed by the arbitrator) compels one of the parties to violate a well-defined and dominant public policy, a determination which does not require a reviewing court to evaluate the merits of the arbitration award. Instead, the court

need only ascertain whether confirmation of, or refusal to vacate an arbitration award, and a judicial order directing compliance with its terms, will place one or both of the parties to the award in violation of the subject public policy. If it would, the award must be vacated. If it does not, vacatur is not warranted. For a full discussion of the evolution and application of the public policy exception in the labor arbitration sphere, *see Stephen L. Hayford and Anthony V. Sinicropi, The Labor Contract and External Law: Revisiting the Arbitrator's Scope of Authority,* 1993 J. Disp. Resol. 249.

4. States have rarely addressed "manifest disregard of the law" or "public policy" as grounds for vacatur. *See, e.g., Schoonmacher v. Cummings and Lockwood of Connecticut*, 252 Conn. 416, 747 A.2d 1017 (2000) (court determines that public policy of facilitating clients' access to an attorney of their choice requires a court to conduct de novo review of arbitration decisions involving non-competition agreements among attorneys); *State of Connecticut v. AFSCME,* Council 4, 252 Conn. 467, 747 A.2d 480 (2000) (court determines that arbitration award reinstating employee for admittedly making harassing phone calls to a legislator which conduct violated state law should be overturned as violative of clearly expressed public policy).

One area state courts have considered appropriate to review the awards of arbitrators on public-policy grounds is involving family law and, in particular, statutes or case law requiring consideration of the "best interest" of children. *Faherty v. Faherty*, 97 N.J. 99, 477 A.2d 1257 (1984) (court refuses to defer to arbitrator's award affecting child support because of the court's "non-delegable, special supervisory function in [the] area of child support" that warrants de novo review whenever an arbitrator's award of child support could adversely affect the substantial best interests of the child); *Rakoszynski v. Rakoszynski*, 663 N.Y.S.2d 957 (App. Div. 1997) (child support is subject to arbitration but child custody and visitation is not); *Miller v. Miller*, 423 Pa.Super. 162, 172, 620 A.2d 1161 (1993) (court not bound by arbitrator's child custody determination but court must ascertain whether arbitral award is "adverse to the best interests of the children").

5. There are reasons for the RUAA not to embrace these two standards. The first is presented by the omission from the FAA of either standard. Given that omission, there is a very significant question of possible FAA preemption of a such a provision in the RUAA, should the Supreme Court or Congress eventually confirm that the four narrow grounds for vacatur set out in Section 10(a) of the federal act are the exclusive grounds for vacatur. The second reason for not including these vacatur grounds is the dilemma in attempting to fashion unambiguous, "bright line" tests for these two standards. The case law on both vacatur grounds is not just unsettled but also is conflicting and indicates further evolution in the courts.

**SECTION 24. MODIFICATION OR CORRECTION OF AWARD.**

(a) Upon motion filed within 90 days after the movant receives notice of the award in a record pursuant to Section 19 or within 90 days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award pursuant to Section 20, the court shall modify or correct the award if:

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

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

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

(b) If a motion filed under subsection (a) is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, the court shall confirm the award.

(c) A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

**SECTION 25. JUDGMENT ON AWARD; ATTORNEY'S FEES AND LITIGATION EXPENSES.**

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in

conformity therewith. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

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

(c) On application of a prevailing party to a contested judicial proceeding under Section 22, 23, or 24, the court may add to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award, attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made.

**Reporter's Notes**

1. The same sections in the UAA (Sections 14, 15) and similar section in the FAA (Section 13 regarding judgments and docketing) also included court orders confirming, modifying or correcting awards but not vacating awards. In researching this issue, there is no explanation in the legislative history or the case law under the UAA or the FAA for the omission of the inclusion of vacatur in reference to judgments and recording judgments. The indication from the cases is that courts which vacate arbitration awards refer to the vacatur orders as judgments. Arizona in its version of the UAA states that courts which vacate awards should enter a "judgment." Ariz. Rev. Stat. § 12-1512 (1994). There are other state appellate decisions which refer to vacatur orders as "judgments." *Judith v. Graphic Communicats. Intn'l Union*, 727 A.2d 890, 891 (D.C. Ct. App. 1999); *Guider v. McIntosh*, 293 Ill.App.3d 935, 689 N.E.2d 231, 233, 228 Ill.Dec. 359 (1997); FCR *Greensboro, Inc. v. C & M Investments of High Point, Inc.*, 119 N.C.App. 575, 459 S.E.2d 292, 295, cert. denied, 341 N.C. 648, 462 S.E.2d 510 (1995); *Rademaker v. Atlas Assur Co.*, 98 Ohio App. 15, 120 N.E.2d 592, 596 (1954). The Reporter concludes that the term "vacating without directing a rehearing" should be included in Section 25(a) and (c). The terms "without directing a rehearing" were added because an order of vacatur is a final one and subject to appeal under Section 28(a)(5) if the court does not order a rehearing under Section 23(c).

2. The Drafting Committee decided to incorporate UAA Section 15 on judgment rolls and docketing into the language of Section 25(a) that the judgment may be "recorded, docketed, and enforced as any other judgment in a civil action" both to delete what in some States would be considered archaic procedure and to

allow States more flexibility in recording judgments according to the procedures in their States.

3. Section 25(c) promotes the statutory policy of finality of arbitration awards. Potential liability for the opposing parties post-award litigation expenditures will tend to discourage all but the most meritorious challenges or stubborn parties. If a party prevails in a contested judicial proceeding over an arbitration award, Section 25(c) allows the court discretion to award attorney's fees and litigation expenses. *Blitz v. Bath Isaac Adas Israel Congregation*, 352 Md. 31 (1998) (court under UAA permits award of attorney's fees in both the trial and appeal of an action to confirm and enforce an arbitration award against party who refused to comply with it).

4. The right to recover post-award litigation expenses does not apply if a party's resistance to the award is entirely passive but only where there is "a contested judicial proceeding." The situation of an uncontested judicial proceeding, e.g., to confirm an arbitration award, will most often occur when a party simply cannot pay an amount awarded. If a party lacks the ability to comply with the award and does not resist a motion to confirm the award, the subsection does not impose further liability for the prevailing party's fees and expenses. These expenditures should be nominal in a situation in which a motion to confirm is made but not opposed. This is consistent with the general policy of most States, which do not allow a prevailing party to recover legal fees and most expenses associated with executing a judgment.

5. A court has discretion under Section 25(c) to award fees. Courts acting under similar language in fee-shifting statutes have not been reluctant to exercise their discretion to take equitable considerations into account.

6. Section 25(c) is a default rule only because it is waivable under Section 4(a). If the parties wish to contract for a different rule, they remain free to do so.

**SECTION 26. JURISDICTION.**

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

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this [Act].

**Reporter's Notes**

1. The term "court" is now in the definition section at Section 1(4).

2. The Drafting Committee determined that in Section 26(a) a person may seek to enforce an agreement to arbitrate in accordance with Sections 6 and 7 in a State which has personal and subject matter jurisdiction in regard to whether an arbitration agreement is enforceable. For example, if a manufacturer which is a New York corporation, and a consumer who resides in Missouri have an arbitration agreement that provides for arbitration in the State of New York, if the consumer challenges the enforceability of the arbitration clause the consumer could do so in a Missouri court that would otherwise have subject matter and personal jurisdiction over the New York corporation.

3. Section 26(b) follows the almost unanimous holdings of courts under the present, same language of Section 17 of the UAA that if the parties in their agreement designate a place for the arbitration proceeding, then that State has exclusive jurisdiction to determine the validity of an arbitrator's award in accordance with Section 25. The rationale of these courts has been to prevent forum-shopping in confirmation proceedings and to allow party autonomy in the choice of the location of the arbitration and its subsequent confirmation proceeding. *State ex rel. Tri-County Constr. Co. v. Marsh*, 668 S.W.2d 148 (Mo. App. 1984) ("[E]very state that has considered the question of jurisdiction to confirm the award has focused on the place of arbitration and not the locus of the contract. * * * [T]he place of contracting is not always, or even frequently, the convenient location for arbitration. Modern business operates in a multi-state environment, and the parties should be permitted to choose the place of arbitration and confirmation upon consideration of convenience, and not upon artificial concepts of the place of contracting" (668 S.W.2d at 152); *see also General Elec. Co. v. Star Technologies*, Inc. 1996 WL 377028 (Del.Ch. 1996); *Stephanie's v. Ultracashmere House LTD*, 98 Ill.App.3d 654, 424 N.E.2d 979, 54 Ill.Dec. 229 (1981); *Tru Green Corp. v. Sampson*, 802 S.W.2d 951 (Ky. App. 1991); *Kearsarge Metallurgical Corp. v. Peerless Ins. Co.*, 383 Mass. 162, 418 N.E.2d 580 (1981).

4. It should be noted that in accordance with Section 4(b)(1) parties can waive the requirements of Section 26 after a dispute arises under an arbitration agreement.

**SECTION 27. VENUE.** A motion pursuant to Section 5 must be filed in the court of the [county] in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the [county] in

which it was held. Otherwise, the motion must be filed in any [county] in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any [county] in this State. All subsequent motions must be filed in the court hearing the initial motion unless the court otherwise directs.

**Reporter Notes**

1. At the first reading of the RUAA at the 1999 Annual Meeting, Commissioner Ossen raised a number of issues about the problem of venue and location of arbitration hearings, especially in arbitration proceedings involving consumers. He subsequently forwarded suggestions to the Drafting Committee with provisions that would favor consumers as to the location of the hearing (it would be held where the consumer resides) and venue (it would be in the county in which the consumer resides).

Section 15 of the RUAA allows the arbitrator to set the location of the hearing if the parties have not agreed to one. In many arbitration agreements the parties determine the location of the hearing. The venue provisions in Section 27 give priority to the county in which the arbitration hearing was held.

The Drafting Committee is concerned with the issues raised by Commissioner Ossen and others about adhesion situations involving not only consumers but also others with unequal bargaining power, such as employees, franchisees, patients, etc. However, the Drafting Committee concluded that special provisions for consumers or other groups would run a substantial preemption risk because the RUAA would be treating agreements to arbitrate, for instance for those involving consumers, by standards different from those used for all other contracts. In these instance the Supreme Court consistently has invalidated such state laws under the federal preemption doctrine of the FAA. *See Doctor's Associates v. Cassarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995); *Erickson v. Aetna Health Plans of California, Inc.*, 71 Cal.App.4th 646, 84 Cal.Rptr.2d 76 (Cal. App. 1999); *Mueller v. Hopkins & Howard, P.C.*, 5 S.W.3d 182, 187 (Mo.App. 1999). In the recent case of *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42 (1st Cir. 1999), the federal court of appeals held that a state statute that could be construed to override a provision in a franchise agreement which required arbitration and designated an arbitration forum in a different State was preempted under the FAA because of the principle of differential treatment.

Although the Drafting Committee has been frustrated in a number of areas that the federal preemption doctrine limits its choices, the Committee decided that it did not want to risk having the RUAA voided on preemption grounds by giving special recognition to certain groups. Rather the Drafting Committee has attempted to address the adhesion situation in Section 4 regarding provisions of this Act which cannot be waived and in Section 6 on the validity of an agreement to arbitrate, especially Reporter Note 6. It should be noted that courts, in determining the enforceability of arbitration agreements under provisions such as Section 6(a) of the RUAA, have voided as unconscionable provisions in arbitration agreements that require persons to arbitrate in distant locations. *See, e.g.*, *Brower v. Gateway 2000, Inc.*, 246 A.D. 246, 676 N.Y.S.2d 569 (1998) (holding unconscionable on ground of cost a clause which both required computer purchasers to arbitrate disputes in Chicago, Illinois, and also required arbitration according to rules of the International Chamber of Commerce which impose high administrative costs); *Patterson v. ITT Consumer Fin. Corp.*, 14 Cal.App. 4th 1659, 18 Cal. Rptr. 2d 563 (1999) (refusing to enforce arbitration clause imposed by financing corporation on state's consumers that required arbitration to be heard in Minneapolis, Minnesota, and required payment of substantial filing fees).

The Drafting Committee concluded that special protection for certain groups involving the situation of contracts of adhesion must be achieved by provisions in substantive laws such as consumer protection statutes or the Uniform Commercial Code or through federal legislation.

**SECTION 28. APPEALS.**

(a) An appeal may be taken from:

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

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

(3) an order confirming or denying confirmation of an award;

(4) an order modifying or correcting an award;

(5) an order vacating an award without directing a rehearing; or

(6) a final judgment entered pursuant to this [Act].

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

**SECTION 29. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

**SECTION 30. EFFECTIVE DATE.** This [Act] takes effect on [effective date].

**Reporter Notes**

1. Section 30 concerning effective date should be read in conjunction with Section 3 about when the Act applies. Section 3 provides for a transition period during which both the UAA and the RUAA apply and also a date after the effective date on which the RUAA will apply to all arbitration agreements no matter when parties entered into them.

**SECTION 31. REPEAL.** Effective on [date], the [Uniform Arbitration Act] is repealed.

**Reporter Notes**

1. This section repeals the adopting State's present uniform arbitration act. The effective date of the repealer should not be any earlier than the date selected by that State in Section 3(b) for the application of the RUAA to all arbitration agreements and proceedings.

2. This repeal section is based on Section 1205 of the Revised Uniform Partnership Act and Section 1209 of the 1996 Amendments constituting the Uniform Limited Liability Partnership Act. Both of these statutes have transition provisions similar to Section 3 of the RUAA.

**SECTION 32. SAVINGS CLAUSE.** This [Act] does not affect an action or proceeding commenced or right accrued before this [Act] takes effect.

**Reporter Notes**

1. This section continues the prior law under the UAA with respect to a pending action or proceeding or right accrued until that UAA is repealed in accordance with Sections 31 and 3(b). Since courts generally apply the law that exists at the time an action is commenced, in many circumstances the new law would displace the old law, but for this section.

2. While most States have general savings statutes, these are often quite broad. Rule 19 of the NCCUSL Procedural and Drafting Manual states that a specific savings clause should be included in a statute "to preserve a law that the Act supersedes and which otherwise would apply with respect to described transactions and events that occur before the Act takes effect to minimize disruption inherent in change from the old to the new law." The Comment to Rule 19 uses as an example statutes where there is a transition period like the Uniform Partnership Act upon which both Sections 3 and 32 are based.