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FOR DISCUSSION ONLY

REVISION OF UNIFORM ARBITRATION ACT

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REVISION OF UNIFORM ARBITRATION ACT

With Prefatory Note and Comments

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THE REVISED UNIFORM ARBITRATION ACT

PREFATORY NOTE

The Uniform Arbitration Act (UAA), promulgated in 1955, adopted in 35 states, and in some form in 14 other jurisdictions, has been one of the most successful acts of the National Conference of Commissioners on Uniform State Laws. A primary purpose of the 1955 Act was to insure the enforceability of agreements to arbitrate in the face of sometimes 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.

There are a number of principles that the Drafting Committee agreed upon at the outset of their 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. In many instances the Revised Uniform Arbitration Act (RUAA) provides a default mechanism if the parties do not have a specific agreement on a particular issue. Second, the underlying reason many choose arbitration is the relative speed, less cost, and greater efficiency of the process. These factors, where applicable, should be taken into account by the law. For example, section 5 allows consolidation of issues involving multiple parties. Finally, in most instances parties intend the decisions of arbitrators to be final with minimal court involvement unless there is clear unfairness or a denial of justice. For instance the provision to vacate awards in section 18 and to allow court review of pre-award arbitration rulings are limited. Section 9 provides immunity to arbitrators to insure their independence by limiting exposure to unwarranted litigation.

Other new provisions are intended to reflect developments in the arbitration and to insure that the process is a fair one. Section 7 requires arbitrators to make important disclosures to the parties. Section 4 allows courts to grant provisional remedies in certain circumstances to protect the integrity of the arbitration process. Section 12 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[1] 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. 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 give way 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

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1 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 35, 87 S. Ct. 1801 (1967), Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S. Ct. 927 (1983),, Perry, Southland Corp. v. Keating, 465 U.S. 2, 104 S. Ct. 852 (1984), Perry v. Thomas, 482 U.S. 483, 107 S. Ct. 2520 (1987), Allied-BruceTerminix Companies v. Dobson, 115 S. Ct. 834 (1995) and Doctor's Associates v. Cassarotto, 517 U.S.681, 116 S.Ct. 1652 (1996).

for vacatur.

Nevertheless, the Supreme Court's unequivocal stand to date as to the preemptive effect of the FAA provides strong reason to speculate 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, Section 10(a) will have no preemptive effect and states should be free to deal with vacatur-related issues in any manner they see fit (RUAA sections 17, 18, 19).

An important caveat to the general rule of FAA preemption is found in *Volt Information Sciences, Inc.* and *Mastrobuono*. 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. It is in these situations that the RUAA will have most impact.

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 and 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. 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 used for all other contracts.[2] Arbitration agreements may not be invalidated under state laws applicable only to arbitration provisions.[3] The FAA will preempt state law that does not place arbitration agreements on "equal footing with other contracts.

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.,

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2 *Terminix* 115 S. Ct. at 843 (1995)(quoting *Volt*, 489 U.S. at 474, 109 S. Ct. at 1253 (1989)) *quoted in Cassarotto*, 116 S. Ct. at 1655 (1996), *Cassarotto*, 116 S. Ct. at 1657 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, (1974)).

3 *Id.*

discovery [RUAA section 12], consolidation of claims [RUAA section 5], arbitrator immunity [RUAA section 9]) 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 16) and the standards for arbitrator disclosure of potential conflicts of interest (RUAA section 7) 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.

SECTION 1. DEFINITIONS. *In this Act, unless specifically provided otherwise or the context otherwise requires:*

(a) "Arbitration institution" means any neutral, independent organization, association, agency, board or commission that initiates, sponsors or administers arbitration proceedings, including involvement in the appointment of arbitrators.

~~*(a)*~~ *(b) "Court" means any Court of competent jurisdiction of this State. The making of an agreement described in Section 2 providing for arbitration in this State confers jurisdiction on the Court to enforce the agreement under this Act and to enter judgment on an award thereunder.*

~~(b)~~ *(c) "Notice":* The parties are free to agree upon the manner of notice to be given under this Act. Unless otherwise agreed, a person gives a notice to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person receives a notice when (1) the contents thereof comes to the person's attention; or (2) it is delivered at the person's place of residence or place of business ~~through which the arbitration agreement was made~~ or at any other place generally considered as the place for receipt of such communications for the person.

~~(c)~~*(d) "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 COMMENT:

1. At the drafting committee meeting of October 31, 1997, the committee asked the Reporter to define a term for organizations that sponsor arbitrations. In the case law these agencies have been referred to as "arbitration associations, "sponsoring organizations, and "organizations administering arbitrations. Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114 (2nd Cir. 1991) (court refers to arbitration association rule); Rubenstein v. Otterbourg, 78 Misc.2d 376, 35 N.Y.S.2d 62 (1973) (court holds that arbitration association could not be held liable for actions of arbitrator who enjoyed

immunity); Olson v. National Ass'n of Sec. Dealers, 85 F.3d 381, (8th Cir. 1996) (held that NASD, a sponsoring organization, was immune from civil liability for improperly selecting an arbitration panel); Thiele v. RML Realty Partners, 14 Cal.App.4th 1526, 18 Cal. Rptr.2d 416 (1993) (held that the sponsoring organization was immune from tort liability); Richardson v. American Arbitration Ass'n, 888 F.Supp. 604 (S.D. N.Y. 1995) (refers to arbitration institutions as organizations administering arbitrations). Perhaps the longest term referring to these administering institutions is "boards, associations, commissions, and other quasi-judicial bodies that sponsor arbitrations and make arbitration facilities available," in Boraks v. American Arbitration Ass'n, 205 Mich.App. 149, 517 N.W.2d 771 (1994).

The term used here “arbitration institution is that similar to the one used in section 74 of the English Arbitration Act (“arbitral or other institutions) and describes well the functions of agencies such as the American Arbitration Association, the Center for Public Resources, JAMS-Endispute, the National Association of Securities Dealers, the American Stock Exchange, the New York Stock Exchange, the International Chamber of Commerce, and the United Nations Commission on International Trade Law which, usually under specific administrative rules, oversee and administer all aspects of the arbitration process, including the appointment of arbitrators (see RUAA section 6, appointment of arbitrators, and RUAA section 10, the arbitration process). The important hallmarks of such agencies are that they are neutral and independent of the parties involved in the arbitration dispute. *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 terms "arbitration institution is used in RUAA section 7 concerning arbitrator disclosure and RUAA section 9 concerning arbitrator immunity.

2. The definition of "court is presently found in section 17 of the Uniform Arbitration Act.

3.The term "notification is used in present section 5(a) of the UAA in regard to arbitrators giving notification of a hearing "to be served personally or by registered mail at least five days before the hearing. The Drafting Committee determined that "notice could be given and received by the normal means of business communications rather than by just personal service or registered mail. The definitions of giving and receiving notice are based on terminology used in the proposed revised Article 2 of the Uniform Commercial Code. They spell out specific standards for when notice is given and received rather than any particular means of notice. This allows for parties to use systems of notice that become technologically feasible and acceptable, such as by fax or electronic mail. At the October 31, 1997, meeting the Drafting Committee directed the Reporter to allow the parties by agreement to determine the manner of notice could be given.

The concept of notice also occurs in UAA section 8(b) (RUAA § 14(b)) concerning a partying notifying an arbitrator of untimely delivery of an award; section 9

(RUAA § 15) concerning a party's notice of requesting a change in the award by arbitrators; and section 13(a) (RUAA § 19(a)) concerning a party applying to modify or correct an award after receiving notice of it. These sections have been changed to conform to the definition in RUAA section 1(b). Notice also is used in section 16 (RUAA § 22) concerning the filing of actions in court but it is defined in that section to mean "in the manner and upon the notice provided by law or rule of court for the making or hearing of motions. The first paragraph of RUAA section 1 applies so that this specific definition controls section 16 (RUAA § 22) rather than the definition in 1(b).

The Drafting Committee must decide whether notice in a *business* context is sufficient for an *adjudicatory* process such as arbitration. Under the present UAA §5(a) there is evidence that a party has received notification because there must be personal service or registered mail; this is not the case with RUAA §1(b). Statutes such as those in New York allow not only for notice by personal service or registered mail but also by "certified mail, return receipt requested. N.Y. CPLR § 7503(c); *see also* Cal. Civ. Pro. § 1282.2(a)(1) (notice may be "served personally or by registered or certified mail").

4. Section 1(c) is based on the definition of "record in proposed revised Article 2 of the Uniform Commercial Code to include new forms of technology other than a document simply being in writing. It is not intended to mean that a document must be filed in a governmental office. This new term is found in RUAA section 2(a) concerning an agreement to arbitrate. RUAA Section 2(a) is now similar to the definition of an

"agreement in writing in the 1996 English Arbitration Act clause 5(2). In addition section 8(a) (RUAA § 14(a)) requiring that an award be in writing and a copy of a written award be delivered to the parties, section 9 (RUAA § 15) concerning written notice of an application to the arbitrators to change the award, section 13(a) (RUAA § 19(a)) concerning an application to modify or correct an award after receiving notice of a copy of the award, and new RUAA § 16(c) concerning punitive damages have been changed accordingly.

SECTION 2. VALIDITY OF ARBITRATION AGREEMENT.

(a) A*n* ~~written~~ agreement *contained in a record* to submit to arbitration any existing controversy or a provision in a ~~written~~ contract *contained in a record* to submit to arbitration any controversy thereafter arising between the parties is ~~valid,~~ enforceable ~~and irrevocable, save~~ *except* upon ~~such~~ grounds ~~as~~ *that* exist at law or in equity for the revocation of ~~any~~ a contract. This Act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].

(b) Unless otherwise provided in the agreement, (1) a Court will decide whether an agreement to arbitrate exists or whether a dispute is subject to such an agreement and (2) the arbitrators, chosen in accordance with Section 6, will decide whether the conditions precedent to arbitrability have been met and whether the ~~underlying~~ contract of which the arbitration agreement is a part is enforceable. If a party challenges in Court the existence of an agreement to arbitrate or whether a dispute is subject to an agreement to arbitrate, the ~~arbitrators~~ arbitration, unless the Court issues an order to the contrary, may proceed ~~with the arbitration~~ until a final decision of the Court that determines that the arbitrators have no authority to determine the dispute.

REPORTER'S COMMENT

1. Section 2(a) has been changed to reflect new electronic and other means of recording

information of an agreement. The definition of "record is in Section 1(c) of the Revised UAA. Also at the October 31, 1997, meeting it was decided to eliminate "valid and "and irrevocable in section 2(a).

2. RUAA section 2(b) reflects the decision of the Drafting Committee to include language in the Revised Uniform Arbitration Act that incorporates the holdings of the vast majority of courts that 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); 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).

That a court, in the absence of an agreement to the contrary, determines substantive arbitrability is also the approach that the United States Supreme Court endorsed under the Federal Arbitration Act in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). In *Kaplan* the Court concluded that unless there is clear and unmistakable evidence that the parties intended to submit the issue of substantive arbitrability to an arbitrator, the court should decide whether the parties have agreed to arbitrate a matter. *See also* AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418-19, 89 L.Ed.2d 648 (1986). The Supreme Court has also concluded in the field of labor arbitration that issues of procedural arbitrability should be decided by the arbitrators. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). These positions on substantive and procedural arbitrability have been followed by federal appellate courts under the Federal Arbitration Act. Smith Barney Shearson, Inc. v. Boone, 47 F.3d 740, 754 (5th Cir. 1995); Del E. Webb Construction v. Richardson Hospital Auth., 823 F.2d 145, 149 (5th Cir. 1987); *see also* Ian Macneil, Richard Speidel, and Thomas

Stipanowich, FEDERAL ARBITRATION LAW §§15.1.4.2, 21.1.2.1 (1995) [hereinafter "Macneil Treatise].

The rationale as to substantive arbitrability is that because arbitration is a matter of contract a party cannot be required to submit to arbitration a dispute which a person has not agreed to arbitrate. This initial decision of substantive arbitrability, i.e., whether a dispute falls within the scope of a valid arbitration agreement, should be made by a court, unless the parties have explicitly reserved it for the arbitrators to decide. If a court determines that a dispute comes within an agreement to arbitrate, the court should not decide the merits of the dispute because the parties have reserved this decision for the arbitrators. As to issues of procedural arbitrability, i.e., whether the procedural prerequisites for submitting the dispute to arbitration are met, most courts have reasoned that the close relationship between the merits of a dispute and procedural arbitrability requires these issues be left to the arbitrators. At the meeting of October 31, 1997, the members of the Drafting Committee requested that it be made clear that, even if parties raise issues of procedural arbitrability before the arbitrators are appointed under Section 6, those matters will be decided by the arbitrators, rather than a court, after the appointment of the arbitrators. The language in Section 2(b) was changed from "arbitrators to "arbitration to clarify this position.

3. The Drafting Committee at the May 30, 1997, meeting discussed the separability doctrine and the Reporter in RUAA section 2(b) has drafted language to include this precept for consideration at the next meeting. [*the arbitrators, chosen in accordance*

*with Section 6, will decide * * * whether the underlying contract is enforceable*."] At the meeting of October 31, 1997, the Drafting Committee discussed stating the concept of separability more clearly by the following language: "*whether the contract of which the arbitration agreement is a part is enforceable*.

This language in section 2(b) 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 would encompass 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 Macneil Treatise §§ 15.2-15.3.

Virtually all states recognize some form of the separability doctrine under their state arbitration laws. Some have followed the doctrine as developed under the FAA and *Prima Paint*. 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); 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 limited or rejected the federal approach on separability, i.e., have allowed courts to decide the validity of the underlying agreement. Rosenthal v. Great Western Financial Securities Corp., 14 Cal.4th 394, 58 Cal.Rptr.2d 875, 926 P.2d 1061 (1996); Lynch v. Cruttenden & Co., 18 Cal.App.4th 802, 22 Cal.Rptr.2d 636 (1993) (party claims that the contract is void); Goebel v. Blocks and Marbles Brand Toys, Inc., 568 N.E.2d 552 (Ind. 1991) (arbitrability issues where party's assent to the contract is negated by an event occurring prior to the formation of the contract are for court to decide); City of Wamego v. L.R. Foy Constr. Co, 675 P.2d 912 (Kan.App. 1984) (parties must have specific intent that arbitration agreement stand as a separate contract); George

Engine Co. v. Southern Shipbuilding Corp., 376 So.2d 1040 (La.App. 1977) (misrepresentation or error in inducement generally not submitted to arbitration); Holmes v. Coverall North America, Inc., 633 A.2d 932 (Md. 1993) (also holding that arbitrability issues where party's assent to the contract is negated by an event occurring prior to the formation of the contract are for court to decide); Atcas v. Credit Clearing Corp. of America, 197 N.W.2d 448 (Minn. 1972) (rejecting *Prima Paint* separability doctrine for fraud in the inducement of the contract); Shaw v. Kuhnel & Assocs., 698 P.2d 880 (N.M. 1985) (also rejecting *Prima Paint* separability doctrine for fraud in the inducement of the contract); Shaffer v. Jeffery, 915 P.2d 910 (Okla. 1996) (recognizing that majority of states that apply the doctrine of separability but declining to follow the doctrine); Blaine v. John Coleman Hayes & Assocs., Inc., 818 S.W.2d 33 (Tenn.App. 1991) (declining to follow separability doctrine).

4. There are two issues concerning arbitrability to which the Drafting Committee should give special consideration: waiver and statute of limitations.

a. *Waiver*: One area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause is on claims of waiver. 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. 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. Rush v. Oppenheimer & Co., 779 F.2d 885 (2d Cir. 1985); In re Mercury Constr. Co., 656 F.2d 933 (4th Cir. 1981), aff'd sub nom. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); St. Mary's Medical Center v. Disco Aluminum Products, 969 F.2d 585 (7th Cir. 1992); N & D Fashions, Inc. v. DHJ Indus., 548 F.2d 722 (8th Cir. 1976). 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.

b. *Statute of limitations*: The overwhelming majority of cases have held that an arbitrator should decide whether the underlying, substantive claim is time-barred by a statute of limitations because these are matters of procedural arbitrability. Boys Club of San Fernando Valley, Inc. v. Fidelity and Deposit Co. of Maryland, 6 Cal.App.4th 1266, 8 Cal.Rptr.2d 587 (1992) (whether filing of amended demand against surety was barred by statute of limitations contained in performance bond was issue for arbitration and could not be asserted in judicial proceeding to compel arbitration); Thomas v. Farmers Ins. Exchange, 857 P.2d 532 (Colo.Ct.App. 1993) (allegation that demand for arbitration was untimely is affirmative defense which generally rests within the sole responsibility of arbitrator to resolve and does not involve dispute's substantive arbitrability); Pembroke Ind. Park Partnership v. Jazayri Constr., Inc., 682 So.2d 226 (Fla.Ct.App. 1996) (whether demand was time-barred by four-year statute of limitations was matter to be determined by arbitrator, not by court); Stinson-Head, Inc. v. City of Sanibel, 661 So.2d 119

(Fla.Ct.App. 1995) (parties agreed to arbitrate all issues relating to the contract, including defense of statute of limitations); Bel Pre Medical Center, Inc. v. Frederick Contractors, Inc., 21 Md.App. 307, 320 A.2d 558 (1974) (matters of procedural prerequisite of timeliness and demand for arbitration were for the arbitrator); Fenton Area Public Schools v. Sorensen-Gross Constr. Co., 124 Mich.App. 631, 335 N.W.2d 221 (1983) (timeliness of arbitration proceeding is procedural issue to be determined by arbitrators, rather than by the courts); Consolidated Financial Investments, Inc. v. Manion, 948 S.W.2d 222 (Mo.Ct.App. 1997) (issue of whether stock purchasers' demand to arbitrate claims was barred was issue for arbitrator rather than court); Allstate Ins. Co. v. Nodak Mutual Ins. Co., 540 N.W.2d 614 (N.D. 1995) (arbitrators, rather than trial court, have subject matter jurisdiction to decide issue of the statute of limitations); Bd. of Library Trustees, Shaker Hts. Pub. Library v. Ozanne Constr. Co., 100 Ohio App.3d 26, 651 N.E.2d 1356 (1995) (procedural questions, such as whether a party made a timely demand for arbitration, should be left to the arbitrator); Greenwood Int'l, Inc. v. Greenwood Forest Products, Inc., 108 Or.App. 74, 814 P.2d 528 (1991) (arbitrator, not court, had authority to make decision whether letters timely made and submitted claim to arbitration); Goral v. Fox Ridge, Inc., 453 Pa.Super. 316, 683 A.2d 931 (1996) (where underlying dispute is arbitrable, applicability of statute of limitations is also arbitrable).

A minority of cases have held that the court rather than the arbitrator should decide timeliness issues. Capitol Place I Associates L.P. v. George Hyman Constr. Co., 673 A.2d 194 (D.C. Ct.App. 1996) (whether statute of limitations bars enforcement of

arbitration agreement is for court to decide in absence of unambiguous contractual provision to contrary); Pioneer Water and Sewer District v. Civil Engineering Professionals, Inc., 905 P.2d 1245 (Wyo. 1995) (district court was compelled to consider whether applicable statute of limitations barred arbitration proceedings, rather than leaving issue for arbitrators to decide, as arbitration provision in parties' contract specified that arbitration would be barred if applicable statute of limitations had run).

However there is a split of authority on cases which have involved the securities industry where the NASD has a rule that a claim is eligible for submission to an arbitrator within six years of occurrence.[4] Painewebber v. Elahi, 87 F.3d 589 (1st Cir. 1996), concludes that a broad arbitration clause indicates the parties' intent to submit all issues affecting the merits of a claim to arbitration rather than to a court. Edward D. Jones & Co. v. Sorrells, 957 F.2d 509 (7th Cir. 1992), holds to the contrary that the six-year limit is an eligibility requirement, rather than a statute of limitations, that effects subject matter jurisdiction and is for the court to decide. Five circuits (1st, 2nd, 5th, 8th, and 9th) have followed *Elahi* and five (3rd, 6th, 7th, 10th, and 11th) have followed *Sorrells* on this issue involving the NASD. Two state court decisions under state arbitration acts are in accord with *Elahi* that the arbitrators should decide the limitations issue under the NASD provision and two follow the approach in *Sorrells*. Shahen v. Staley, 188 Ariz. 74, 932

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[4]Section 15 of the NASD Code of Arbitration Procedure provides:
"Time Limitation Upon Submission
"Sec. 15. No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

P.2d 1345 (Ariz.Ct. App. 1996) and Kennedy, Cabot & Co. v. Nat'l Ass'n of Sec. Dealers, 41 Cal.App.4th 1167, 49 Cal.Rptr.2d 66 (1996)--in accord with *Elahi*; Sentra Securities Corp v. McKeever, 1997 WL 466502 (Conn.Super.Ct. 1997); Merrill Lynch & Co. Mathes, 1995 WL 534247 (Conn.Super.Ct. 1995); Smith Barney, Inc. v. Hause, 655 N.Y.S.2d 489 (App.Div. 1997) in accord with *Sorrells*. Because the securities industry causes many arbitration claims, this somewhat unique issue of the application of the NASD statute of limitations has been widely litigated with mixed results. However, its somewhat limited applicability in the overall scheme of commercial arbitraion should not detract from the widely held notion that statute of limitations
issues generally are matters of procedural arbitrability for the arbitrator to decide.

The Macneil Treatise, after reviewing the cases involving statutes of limitations in the field of securities arbitration, asserts that these time-bar issues are for the arbitrators rather than the courts. The authors base their conclusion on the rationale that the distinction between a "statute of limitations analysis and an "eligibility requirement as asserted in *Sorrells* is highly artificial. Also arbitrators should decide what are essentially issues of statute of limitations, as they do other procedural issues, because they are often interrelated with the merits (e.g., has a party been misled so that the limitations period should be tolled) and the effect of the application of the statute of limitations would bar enforcement of the entire contract which is normally the type of decision the parties intend the arbitrator to make. II Macneil Treatise §§ 21.1, 21.2; 1996 Supplement pp. 21:3-21:9.

Whatever decision the Drafting Committee makes on the issues of waiver and statute of limitations the Reporter believes can be handled in the Comments.

5. The second sentence of RUAA section 2(b) follows the practice of the American Arbitration Association and most other arbitration institutions 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.

SECTION 3. PROCEEDINGS TO COMPEL OR STAY ARBITRATION.

(a) On application of a party showing an agreement described in Section 2, and the opposing party's refusal to arbitrate, the Court shall order the parties to proceed with arbitration*;* but*,* if the opposing party denies the existence of the agreement to arbitrate, the Court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the *C*ourt may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. ~~Such an~~ *This* issue, when in substantial and bona fide dispute, shall be ~~forthwith~~ *immediately* and summarily tried and ~~the stay ordered if found~~ *the Court shall order the stay if it finds* for the moving party. If ~~found~~ *it finds* for the opposing party, the *C*ourt shall order the parties

to ~~proceed~~ *go* to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a *C*ourt having jurisdiction to hear applications under subdivision (a) of this Section, the application shall be made therein. Otherwise and subject to Section 17, the application may be made in any *C*ourt of competent jurisdiction.

(d) An~~y~~ action or proceeding involving an issue subject to arbitration shall be stayed if an order ~~for arbitration~~ or an application ~~therefor~~ *for arbitration* has been made under this section. ~~or, if~~ *If* the issue is severable, the stay may be with respect ~~thereto~~ *to that specific issue* only. When the application is made in ~~such~~ *this* action or proceeding, the order ~~for~~ *compelling* arbitration shall include ~~such~~ a stay *of the Court action or proceeding*.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit ~~or bona fides~~ or because ~~any fault or~~ grounds for the claim sought to be arbitrated have not been shown.

SECTION 4. ~~PROCEEDINGS FOR~~ PROVISIONAL REMEDIES.

(a) The Court, upon application of a party, may hear ~~a request for~~ and grant a party's request for an available remedy ~~any remedy available~~ for the preservation of property, securing the satisfaction of judgment, or to protect the integrity of the arbitration process to the same extent and under the same conditions as if the

dispute were in litigation rather than arbitration at any time before the arbitrators are appointed in accordance with Section 6 and are authorized and able to act on the requested relief.

(b) After the arbitrators are appointed in accordance with Section 6 and are authorized and able to act, the arbitrators may issue such orders for ~~interim relief~~ provisional remedies, including the issuance of interim awards, as the arbitrators deem necessary for the resolution of the dispute to the same extent and under the same conditions as if the dispute were in litigation rather than arbitration. ~~These orders may include but are not limited to the following:~~

~~*(1) the conservation of property, goods, or other tangible or intangible items that relate to the subject matter of the dispute;*~~

~~*(2) security for costs of the arbitration;*~~

~~*(3) the inspection, custody or preservation of evidence; or*~~

~~*(4) the appointment of experts to report to the arbitrators.*~~

REPORTER'S COMMENT

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

"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 conlcluded 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 draftsmen of the uniform act 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 (Cal. Ct. App. 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); CA Civ. Pro. § 1281.8; NJSA 2A:23A-6(b).

Most federal courts applying the Federal Arbitration Act 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 disctrict 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 of an intervening litigation process, but without such protection an arbitrator's award may be worthless. *See* II Macneil Treatise §25.1.[5] Such relief generally takes the form of either an injunctive order, e.g., requiring that a discontinued franchise or distributorship remain in effect until an arbitration award[6] or that a former employee not solicit customers pending arbitration,[7] or that a party be required to post some form of security by attachment, lien, bond, etc.,[8] to insure payment of an arbitral award. 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, and even in some instances of 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 proposed language in RUAA section 4(a) that limits a court granting prelimary

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[5]Both California and New York in their arbitration statutes limit the issuance of provisional remedies by courts as follow: "only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. Ca. Civ. Pro. § 1281.8(b); NY CPLR § 7502(c).

[6] 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).

[7] 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).

[8]The Anaconda v. American Sugar Ref. Co., 322 U.S. 42, 64 S.Ct. 863 (1944) (attachment); Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049 (2d Cir. 1990) (injunction bond); *see* Macneil Treatise §25.4.3.

relief to "any time before the arbitrators are appointed in accordance with Section 6 or are authorized or able to act on the requested relief 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 arbitrators' 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 that necessary "to protect the integrity of the applicable dispute resolution process); Hughley v. Rocky Mountain Health Maintenance Organization, 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 and where no evidence of appointment of arbitrator); 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).[9]

4. The intent of RUAA section 4(a) is that if a party files a request for a provisional remedy before an arbitrator is appointed but while that 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 must be made initially to the arbitrator.

5. So long as a party is pursuing the arbitration process while requesting the court to provide provisional relief under RUAA section 4(a), such request should not act as a waiver of that party's right to arbitrate a matter. *See* CA Civ. Pro. §1281.8(d).

6. The Drafting Committee at the October 31, 1997, meeting decided to move RUAA section 10(b) of Revised Tentative Draft No. 1 to section 4 because both deal with preliminary relief--section 4(a) with the court issuing such relief *prior* to appointment of

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[9]Section 4(a) is similar to N.J.S.A. 2A:23A-6(b) which provides:
"Where reasonably required by the circumstances, a party may apply to the court where any action to enforce the agreement may have been brought or to any other court of competent jurisdiction for an order granting any of the provisional remedies or other relief set forth in this section, before the arbitrator(s) provided for in the agreement, or designated by the court, is authorized or able to act on the requested for relief.

arbitrators who have the authority to act on requests for such relief and section 4(b) with the arbitrators issuing such relief *after* their appointment. The Drafting Committee also determined to eliminate the listing of certain examples in prior section 10(b)(1)-(4) as unnecessary and to add to RUAA section 4(b) the idea that arbitrators could issue provisional remedies only to the extent allowed by law.

7. The case law, commentators, the rules of arbitration institutions 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 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* 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); Yasuda Fire & Marine Ins. Co. of Europe Ltd. v. Continental Cas. Co., 37 F.3d 345 (7th Cir. 1994) (upholding under FAA arbitrators' interim order requiring insurer to post letter of credit pending final arbitration award); Nordell Int'l Resources, Ltd. v. Triton Indonesia, Inc., 999 F.2d 544 (9th Cir.), cert. denied, 510 U.S. 1119, 114 S.Ct. 1071 (1994) (upholding under FAA interim order to protect status quo pursuant to AAA Rule 34); Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019 (9th Cir. 1991) (upholding under FAA arbitrator's order requiring members of

reinsurance pool to make payments into escrow account); Konkar Maritime Enterprises, S.A. v. Compagnie Belge d'Affretement, 668 F. Supp. 267 (S.D.N.Y. 1987) (upholding under FAA arbitral award requiring payment into an escrow account); Copania Chilena de Navegacion Interocianica v. Norton, Lilly & Co., 652 F.Supp. 1512 (S.D.N.Y. 1987) (upholding under FAA arbtrator requiring party to post bond); Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City, 606 F. Supp. 692 (S.D.N.Y. 1985) (upholding under FAA arbitrator's interim order removing lien on vessel); Meadows Indemnity Co. v. Arkwright Mut. Ins. Co., 1996 WL 557513 (E.D. Pa. 1996) (upholding under FAA arbitration panel order requiring party to obtain letter of credit); 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); Charles Const. Co., Inc. v. Derderian, 412 Mass. 14, 586 N.E.2d 992 (1992) (noting arbitrator's inherent authority to order a party to provide security while arbitration is pending); Fishman v. Streeter, 1992 WL 146830 (Ohio App. 1992) (upholding under UAA arbitrator's interim order dissolving partnership); Bleumer v. Parkway Ins. Co., 649 A.2d 913 (N.J. Superior Ct. 1994) (upholding under FAA an arbitrator's injunction to restrain a violation of an employee statute); Park City Assoc. v. Total Energy Leasing Corp., 58 App. Div.2d 786, 396 N.Y.S.2d 377 (1977) (upholding under New York state arbitration statute a preliminary injunction by an arbitrator); Dickler v. Shearson Lehman Hutton, Inc., 408 Pa.Super. 286, 596 A.2d 860 (1991) (upholding under UAA arbitrator issuing equitable relief); N.J.S.A. 2A:23A-6 (allowing provisional remedies such as "attachment,

replevin, sequestration and other corresponding or equivalent remedies); AAA Commercial Rules 34, 43 (allowing interim awards to safeguard property and to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement, including, but not limited to, specific performance of a contract); AAA Nat'l Rules for the Resolution of Employment Disputes R. 25 (providing that arbitrator may take "whatever interim measures he or she deems necessary with respect to the dispute, including conservation of property, interim awards, and security for costs); 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. L. 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.

8. The Drafting Committee at its October 31, 1997, meeting also suggested that the Reporter consider adding RUAA section 13, Court Review of Pre-Award Rulings by Arbitrators, to RUAA section 4. The Reporter recommends against this because pre-award rulings by arbitrators may be more than ordering provisional remedies. An arbitrator may make a ruling on discovery, e.g., the production of documents under RUAA section 12 with which a party refuses to comply on the grounds of privilege, and that ruling may also trigger a necessary enforcement by a court.

SECTION 5. CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS; PETITION, GROUNDS, PROCEDURE.

(a) A party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when:

(1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and

(2) The disputes arise from the same transactions or series of related transactions; and

(3) There is a common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators,

unless (i) the agreement precludes consolidation, or (ii) it is proven that consolidation would impair a substantial right or obligation of a party opposing consolidation, or would cause undue delay.

(b) Subject to subsection (a), the court ordering consolidation shall appoint arbitrators if necessary. If all of the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court, if it orders consolidation, shall order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the parties. ~~*If the applicable arbitration agreements name separate arbitrators, panels, or tribunals,*~~ *In other cases, the court* ~~*, if it orders consolidation, shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator in accord with the procedures set forth in Section 6.*~~ *shall appoint an*

arbitrator as provided in Section 6, unless to do so would impair a substantial right or obligation of a party opposing consolidation.

(c) In the event that the applicable arbitration agreements ~~in consolidated proceedings~~ contain inconsistent provisions, the court ordering consolidation shall, upon the motion of a party, resolve such conflicts and determine the rights and duties of the various parties.

(d) In ordering consolidated proceedings under this section, the court may exercise its discretion to deny consolidation of separate arbitration proceedings as to certain issues, leaving other issues to be resolved in separate proceedings.

REPORTER'S COMMENT:

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).

2. Neither the Federal Arbitration Act nor most state arbitration statutes specifically authorize courts to order consolidated arbitration proceedings. The lack of statutory authorization has not prevented courts from ordering consolidated hearings where the parties all specifically agreed to consolidate. *See, e.g.,* Slutsky-Peltz Plumbing & Heating Co. v. Vincennes Community Sch. Corp., 556 N.E.2d 344 (Ind. Ct. App. 1990) (Uniform Arbitration Act did not preclude joinder and consolidation of arbitrations, and arbitration provision in construction contract permitted consolidation and joinder); Grover-Dimond Assoc. v. American Arbitration Ass'n, 297 Minn. 324, 211 N.W.2d 787 (1973) (where relevant arbitration agreements provide for joint arbitration, agreements govern). But in the much more 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) (trial court had authority to consolidate arbitration between community college and architect and arbitration between community college and contractor); Vigo S.S. Corp. v. Marship Corp. of Monrovia, 26 N.Y.2d 157, 257 N.E.2d

624, 309 N.Y.S.2d 165 (1970), remittitur den. 27 N.Y.2d 535, 261 N.E.2d 112, 312 N.Y.S.2d 1003, cert. den. sub nom. Frederick Snare Corp. v. Vigo Steamship Corp., 400 U.S. 819, 27 L.Ed. 46, 91 S.Ct. 36 (1970) (trial court properly consolidated arbitrations involving common issues under ship charterage contracts); Chariot Textiles Corp. v. Wannalancit Textile Co., 18 N.Y.2d 793, 221 N.E.2d 913,275 N.Y.S.2d 382 (1966) (holding trial court had power to consolidate three arbitrations); Symphony Fabrics Corp. v. Bernson Silk Mills, Inc., 12 N.Y.2d 409, 190 N.E.2d 418, 240 N.Y.S.2d 23 (1963) (court properly consolidated two arbitration proceedings involving separate contracts in buyer/seller chain) ; Gershen v. Hess, 163 A. D.2d 17, 558 N.Y.S.2d 14 (1990) (trial court erred by denying consolidation of stock purchaser's arbitration against shareholders and corporation and arbitration involving latter parties' action against stock sellers); Materials Int'l, Div. of Synthane Taylor Corp. v. Manning Fabrics, Inc., 46 A. D.2d 627, 359 N.Y.S.2d 812 (1974) (court erred in denying motion to consolidate arbitration proceedings because there was no substantial distinction of issue between the two cases); Bock v. Drexel Burnham Lambert, Inc., 143 Misc.2d 542, 541 N.Y.S.2d 172 (1989) (consolidating arbitration of securities fraud claims brought by separate clients of brokerage firm against firm). Other decisions supporting the power of courts to consolidate arbitration hearings include Litton Bionetics, Inc. v. Glen Constr. Co., 292 Md. 34, 437 A.2d 208 (1981) (court had power to order consolidation of separate arbitration proceedings between owner and building's general contractor where contracts between the parties did not confer a right to arbitrate separately); Grover-Dimond Assoc.

v. American Arbitration Ass'n, 297 Minn. 324, 211 N.W.2d 787 (1973) (consolidation of arbitration involving building owner and contractor and arbitration involving building owner and architect furthered policy of state arbitration statute and was "manifestly in interest of justice); Exber v. Sletten Constr. Co., 558 P.2d 517 (Nev. 1976) (consolidation arbitration involving building owner and general contractor and arbitration involving general contractor and subcontractor proper where same evidence, witnesses and legal issues); Plaza Dev. Serv. v. Joe Harden Builder, Inc., 294 S.C. 430, 365 S.E.2d 231 (S.C. Ct. App. 1988) (consolidation of arbitration involving general contractor and subcontractor and arbitration involving general contractor and developer).

A number of other courts have held that they did 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., 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); William C. Blanchard Co. v. Beach Concrete Co., 121 N.J. Super. 418, 297 A.2d 587 (1972); Balfour, Guthrie & Co. v. Commercial Metals Co., 93 Wash.2d 199, 607 P.2d 856 (1980). Some of these decisions have acknowledged that they regard themselves as powerless to effect consolidation in the absence of contractual or legislated authority, and that "if consolidation is a desirable public policy . . . the legislature should empower the court to so hold. S.K. Barnes, Inc. v. Valiquette, 23 Wash. App. 702, 706, 597 P.2d 941, 943 (1979) (citing authority for this proposition).

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 Federal Arbitration Act, courts have reached conflicting holdings. *See generally* III MACNEIL TREATISE §33.3.

3. A small but 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. CIVIL 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 (199). Unfortunately, approaches such as court-ordered joinder (as in the South Carolina and Utah statutes) raise issues of fairness and practicality, while some consolidation provisions (New Jersey, Massachusetts) provide significantly less direction for courts than others (California, Georgia). *See generally* Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for a Workable Solution*, 473 IOWA L. REV. 519-523 (comparing and critiquing various statutory approaches).

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 mulitparty 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).

4. 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, 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).

The proposed section is an adaptation of consolidation provisions in the California and Georgia statutes. CAL. CIVIL 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 those provisions, the section manifests a strong policy favoring consolidating provisions involving common issues of law and fact, "efficient settling of private disputes, judicial economy, and the avoidance of contrary results. *See* Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co., 140 Cal. App.3d 251, 262, 191 Cal. Rptr. 15 (1983).

The provision also embodies the fundamental principle of judicial respect for the preservation and enforcement of the terms of agreements to arbitrate. Thus, if the respective arbitration provisions all agree upon a common method by which arbitrators or another tribunal would make the decision to consolidate the arbitration proceedings, the court is required to refer the consolidation issue to that tribunal. Similarly, if all the arbitration agreements incorporate a common arbitrator selection method (such as the list selection method commonly employed by the American Arbitration Association), the court should defer to such a method.

There is, however, a tension between the principles of promoting efficiency and other policies supported by consolidation in the multiparty context and the principle of enforcement of contractual arbitration provisions. Thus, courts considering motions to consolidate arbitration proceedings recognize that one, albeit narrow, limit on the exercise of that power is demonstrated prejudice to a "substantial right of a party. Generally, the burden of showing prejudice to a substantial right rests upon the party objecting to the consolidation. *See* Gordon v. G.RO.U.P., Inc., 49 Cal. App.4th 998, 1007, 56 Cal. Rptr.2d 914, 920 (1996) (appellants were unable to show any disadvantage suffered because of the consolidation, therefore, consolidation was proper); Vigo S.S. Corp. v. Marship Corp. of Monrovia, 26 N.Y.2d 157, 257 N.E.2d 624, 309 N.Y.S.2d 165, remittitur den. 27 N.Y.2d 535, 261 N.E.2d 112, 312 N.Y.S.2d 1003, cert. den. sub nom. Frederick Snare Corp. v. Vigo Steamship Corp., 400 U.S. 819, 91 S.Ct. 36, 27 L.Ed. 46 (1970) (voyage charterer failed to sustain its burden of demonstrating that prejudice

would result from consolidation); Symphony Fabrics Corp. v. Bernson Silk Mills, Inc., 12 N.Y.2d 409, 190 N.E.2d 418, 240 N.Y.S.2d 23 (1963) (the burden of showing that some substantial right is in jeopardy rests upon the party objecting to the consolidation); Bock v. Drexel Burnham Lambert, Inc., 143 Misc.2d 542, 541 N.Y.S.2d 172 (1989) (party failed to meet burden of showing prejudice by making an unsubstantiated contention that the arbitrators would be confused and unable to separate the claims); Plaza Dev. Serv. v. Joe Harden Builder, 294 S.C. 430, 365 S.E.2d 231 (Ct.App. 1988) (developer failed to demonstrate sufficiently convincing evidence of prejudice that would entitle it to prevent consolidation of arbitration proceedings). Consistent with this principle, the proposed section limits judicial discretion to consolidate by permitting proof that "consolidation would impair a substantial right or obligation of a party opposing consolidation, or would cause undue delay.

As the cases reveal, the desire to have one's dispute heard in a separate proceeding is not the kind of "substantial right that will prevent consolidation. *See* 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, among other things, 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). Where pertinent arbitration agreements provide for

hearings before totally different tribunals, however, a court may properly deny consolidation on the basis that it is unwilling to impose an arbitral forum other than the contracted-for forum on any objecting party. *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 before AAA and appointee of president of real estate board). The "substantial right limitation might also prevent a court from ordering consolidation when one or more of the separate arbitration proceedings have progressed so far that consolidation would prejudice any party. Finally, consolidation should not be ordered in contravention of asserted provisions prohibiting consolidation of claims without the parties' written consent. *See, e.g.,* Ure v. Wangler Constr. Co., 232 Ill. App.3d 492, 597 N.E.2d 759 (1992). Section 5(a) recognizes the right of the parties to prohibit court-ordered consolidation.

5. Section 5(c) addresses the reality that arbitration agreements applicable to parties in consolidated proceedings may contain certain inconsistencies which do not affect substantial rights or obligations of objecting parties, such as methods for serving of notice. Upon the motion of a party, the court may resolve such inconsistencies as a part of the order to consolidate.

SECTION 6. APPOINTMENT OF ARBITRATORS BY COURT. If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and ~~his~~ *a* successor has not been duly appointed, the ~~C~~court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

SECTION 7. ARBITRATOR DISCLOSURE.

(a) Persons who are requested to serve as arbitrators shall, before accepting appointment, disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration, or

(2) Any existing or past ~~financial, business, professional, family or social~~ relationships with the parties or counsel, ~~including relationships involving members of their families or their current employers, partners or business associates,~~ or

(3) Any other facts

~~which would~~ reasonably likely to affect the impartiality of the arbitrator. ~~Such persons shall make a reasonable effort to inform themselves of the existence of these grounds.~~ Unless the parties have agreed to other procedures for disclosure, disclosure shall be made directly to all parties and to other arbitrators.

(b) The obligation to disclose interests, relationships or facts described in Subdivision (a) of this Section is a continuing one which extends throughout the period of appointment as arbitrator.

(c) Objections based on any undisclosed interests, relationships or facts described in Subdivisions (a) and (b) of this Section, or any unwaived objections of a party based on any interests, relationships or facts disclosed in accordance with Subdivisions (a) and (b) of this Section, may be grounds for vacation of an award. The failure of an arbitrator to disclose a direct personal or financial interest in the outcome of the arbitration shall be conclusive grounds for vacation of an award under Section 18(a)(2). The failure of an arbitrator to disclose a known substantial relationship with a party, a lawyer or a witness which would reasonably affect the impartiality of the arbitrator shall establish a rebuttable presumption of evident partiality in the award under Section 18(a)(2).

(d) If the parties have agreed to the procedures of an administering institution or any other procedures for pre-award challenges to arbitrators on grounds in Subdivision (a) of this Section, reasonable compliance with such procedures shall be a condition precedent to a motion to vacate on such grounds under Section 18(a)(2). In addressing such a motion, the determination of an administering institution or other resolution shall ~~be final and conclusive~~ establish a rebuttable presumption on the issue of evident partiality unless found to be improper on the grounds of evident partiality, misconduct or other grounds provided in this Act for vacation of an award.

REPORTER'S COMMENTS

1. The notion of decision making by independent neutrals is central to the arbitration process. The Uniform Arbitration Act 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, §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.* Federal Arbitration Act § 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 decisionmaker of their own choosing, including an expert with the biases and prejudices inherent in particular worldly experience. *See* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (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); Perl v. General Fire & Cas. Co., 34 A. D.2d 748, 310 N.Y.S.2d 196 (1970). Arbitrating parties frequently choose arbitrators on the basis of prior professional or business associations, or pertinent commercial expertise. 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., 1997 WL 336314, *6 (Tex.) 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. *See* Dowd v. First Omaha Securities Corp., 242 Neb. 347, 495 N.W.2d 36 (1993).

The principle that partiality questions are best consigned to parties after due disclosure by arbitrators was expounded in the seminal case of Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed.2d 301 (1968), a decision under the Federal Arbitration Act. In that case the Supreme Court held that an undisclosed business relationship between an arbitrator and one of the parties constituted "evident partiality" requiring vacation 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. 393 U.S. at 149, 89 S. Ct. at 339, 21 L. Ed.2d at 305. 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."

393 U.S. at 150, 89 S. Ct. at 340, 21 L. Ed.2d at 306. 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"); Weinger v. State Farm Fire & Cas. Co., 620 So.2d 1298, 1299 (Fla. Ct. App. 1993) (arbitrator has affirmative duty to disclose any dealings that might create an impression of possible bias); Northwest Mech., Inc. v. Public Utilities Comm. of City of Virginia, 283 N.W.2d 522, 524 (Minn. 1979) (applying FAA; even if not producing actual prejudice, undisclosed dealings that might create an impression of possible bias mandate vacation of award). *See also* 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) (presumption of evident partiality arises as result of undisclosed dealings that might create an impression of possible bias). A number of 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);

Burlington N. R.R. Co. v. Tuco Inc., 1997 WL 336314 (Tex.) (evident partiality demonstrated where arbitrator does not disclose facts which might create reasonable impression of partiality).

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.*, Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984) (applying Labor Management Relations Act; evident partiality existed where a reasonable person would have to conclude that arbitrator was partial); 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"); Giraldi v. Morrell, 892 P.2d 422 (Colo. Ct. App. 1994) ("evident partiality" standard requires more than impression or appearance of possible 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); DeVore v. IHC Hosp., Inc., 884 P.2d 1246, 1253-56 (Utah 1994) (vacation appropriate if a reasonable person would conclude that arbitrator showed partiality or was guilty of misconduct that prejudiced rights of any party); State of Wyoming Game & Fish Comm. v. Thorncock, 851 P.2d 1300 (Wyo. 1993) (showing of prejudice required). *See also* Parekh Constr., Inc. v. Pitt Constr. Corp., 31 Mass. App. Ct. 354, 360-61, 577 N.E.2d 632, 636-37 (1991) (party challenging award on grounds of facts indicating evident

partiality must show circumstances likely to have impaired arbitrator's impartiality toward challenger).

In California, a number of amendments to the arbitration statute establish stringent disclosure standards for neutral arbitrators. Neutral arbitrators are required to disqualify themselves on grounds specified for disqualification of judges. CAL. CIV. PROC. CODE §1281.9(e)(West. Supp. 1998), referring to CAL. CIV. PROC. CODE § 170.1 (West Supp. 1996). A failure to properly self-disqualify on receipt of a timely demand is a ground for vacation of award. CAL. CIV. PROC. CODE § 1281.9(a)(West. Supp. 1998). Neutral arbitrators are also required to disclose information regarding prior arbitrations involving the same parties or attorneys. CAL. CIV. PROC. CODE § 1281.9 (West Supp. 1996). Yet another provision on judicial appointment of arbitrators requires arbitrators to make a disclosures of information "which might cause their impartiality to be questioned," including a range of specified information. CAL. CIV. PROC. CODE § 1281.6 (West Supp. 1996), referring to CAL. CIV. PROC. CODE § 1297.121 (West Supp. 1996).

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, it is appropriate to set forth affirmative requirements to assure that parties should have access to all information that might reasonably affect the potential arbitrator's neutrality, including familial or social ties. A primary model for this disclosure standard 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). Substantially similar language is contained in disclosure requirements of widely used securities arbitration rules. *See, e.g.,* NASD Code of Arbitration Procedure § 10312 (August 1996). Many arbitrators are already familiar with these standards, which provide for relatively broad disclosure respecting pertinent interests and relationships with parties, legal representatives, and witnesses.

The rule also recognizes that other facts might be likely to affect partiality, such as a relationship between a neutral arbitrator and a non-neutral party-arbitrator (appointed by a single party) on a tripartite panel. *See, e.g.,* Burlington N. R.R. Co., 1997 WL 336314, *11 (Tex.).

3. The fundamental standard of Section 7 is an objective one: disclosure is required if a person aware of the facts. The disclosure requirement is a continuing one which applies to conflicts which arise or become evident during the course of arbitration proceedings.

4. Timely objection to the arbitrator's continued service establishes the groundwork for vacation of award under new RUAA Section 18(a)(6). The rule seeks to accommodate the tensions between concepts of partiality and the need for experienced decisionmakers, as well as the policy of relative finality in arbitral awards. Consistent with the great bulk of decisional law, an arbitrator's failure to disclose direct interests in the outcome requires

a court to vacate the award on grounds of "evident partiality" under Section 18(a)(2). In cases involving an undisclosed substantial relationship, §7(c) establishes a presumption of evident partiality. It is the burden of the party defending the award to rebut the presumption. *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). Other undisclosed interests, relationships or facts that are likely to affect partiality are subject to case law requirements of prejudice or other impact on the decisionmaking process as presently required for vacatur under Section 18(a)(2) (former UAA Section 12(a)(2)).

5. Special problems are presented by tripartite panels involving two "party-arbitrators"--that is, arbitrators appointed directly by each of the arbitrating parties--and a third arbitrator 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. *See, e.g.,* AAA Commercial Arbitration Rule 12 (1996). Nevertheless, 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. Similarly. an undisclosed substantial relationship between a party-arbitrator and the party appointing that arbitrator may be the subject of a motion to vacate under RUAA Section 18(a)(2). *Cf.* 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). On the other hand, the understanding of the parties that a party-arbitrator is non-neutral may overcome the presumption.

6. Parties may agree to higher standards for disclosure and also establish mechanisms for disqualification. *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 nondisclosure that can lead to invalidation of award). In the frequent case where the parties have agreed to a procedure for challenges to arbitrators such as a determination by an administering agency, decisions reached pursuant to that procedure should entitled to a rebuttable presumption of finality in the absence of circumstances which would require the vacation of any arbitration award. *Cf*. CAL. CIV. PROC. CODE § 1297.131 (West Supp. 1996).

SECTION 8. MAJORITY ACTION BY ARBITRATORS. The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this *A*ct.

[SECTION 9. ARBITRATOR IMMUNITY.

(a) An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute, rule or contract.

(b) A neutral arbitration institution mutually selected by the parties to administer the arbitration tribunal shall be immune from liability to the same extent as the arbitrator.

(c) The immunity afforded by this section shall supplement, and not supplant, any otherwise applicable common law or statutory immunity.]

REPORTER'S COMMENT

1. The proposed provision is based on the language of former Section 1280.1[10] of the California Civil Code establishing immunity for arbitrators; the proposal adds such immunity for neutral arbitration institutions mutually selected by the parties to administer the arbitration proceeding.

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[10] Section 1297.119 gives the same protection to arbitrators in international arbitrations; unlike § 1280.1 it had no expiration date and is still in effect. Three states presently provide some form of arbitral immunity. Fla. Stat. Ann. § 44.107 (West 1995); N.C. Gen. Stat. § 7A-37.1 (1995); Utah Code Ann 78-31b-4 (1994). Two states have repealed provisions extending immunity to arbitrators. 1991 Colo. Sess. Laws 13-22-407; Mic. Comp. Laws Ann. § 500.3056 (West 1995).

2. The proposed section makes clear that the statutory grant of immunity is intended to supplement, and not to diminish, the immunity granted arbitrators and neutral arbitration institutions at common law. Common law 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 civil liability, 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 Machine and Chemical Corp., 151 F. Supp. 853 (W.D.S.C. 1957). *Cf.* Carolina-Virginia Fashion Exhibitors Inc. v. Gunter, 291 N.C. 208, 230 S.E.2d 380, 388 (N.C. 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).

Whatever immunity neutral arbitration institutions are entitled to flows from the immunity of the arbitrator. Extension of judicial immunity to those serving in the arbitral capacity is appropriate to the extent that such persons are acting "in certain roles and with certain responsibilities that are functional comparable the to those of a judge. Corey, 691 F.2d at 1209. Consequently, the key to determining whether immunity should be extended to neutral arbitration institutions is ascertaining whether 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 concluding this is true. See, e.g., Cort v. American Arbitration Ass'n, 795 F. Supp. 970 (N.D. Cal. 1992) (holding AAA immune from suit for negligence and breach of contract allegedly transpiring during its administration of an arbitration proceeding); Olson v. NASD, 85 F.3d 381 (8th Cir. 1996) (in a case involving claimed improper failure to disclose by an arbitrator, appointing authority held protected by arbitral immunity); Candor v. American Arbitration Ass'n, 97 Misc.2d 267, 411 N.Y.S.2d 162 (Sup. Ct., Tioga Cty. 1978) (AAA not liable for refusing to stay an arbitration proceeding), Boraks v. American Arbitration Ass'n, 205 Mich.App. 149, 517 N.W.2d 771 (1994) (immunity applies to both the arbitrator and the neutral arbitration association for their actions under a private agreement to arbitrate); Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248 (9th Cir. 1973) (AAA not liable for its choice of hearing locale).

The sole significant exception to the apparent general rule of immunity for commercial arbitrators from civil liability is the California case of Baar v. Tigerman, 140

Cal.App.3d 979, 189 Cal. Rptr. 834 (1983). In *Baar* the California court held that an arbitrator who breaches his contractual obligation (under the parties' arbitration agreement) to render a timely award is not immune from civil liability for that breach. The court observed further that the neutral arbitration institution was not entitled to immunity from civil liability for actions that are administrative, as opposed to discretionary. *Id.* at 838-39. In 1990 the California state legislature effectively overturned *Baar* by its passage of §1280.1 of the California Civil Procedure Code. Section 1280.1 expired in January 1997 and to date has not been reenacted by the California legislature.

That *Baar* was also an outlier with regard to the immunity of neutral arbitration institutions is indicated by a widely cited federal district court opinion—Austern v. The Chicago Board of Options Exchange, Inc., 716 F. Supp. 121, 124 (S.D.N.Y 1989), aff'd, 898 F.2d 882 (2d Cir. 1990). In *Austern* the court in New York held that the Board, as an appointing authority (though not necessarily a neutral appointing authority) could not be held liable for mental anguish and expenses attendant to defending a motion to confirm an arbitration award issued under its auspices. The "outside of the envelope for extension of immunity to neutral arbitration institutions is best represented by U.S. v. City of Hayward, 36 F.3d 832 (9th Cir. 1994). In *Hayward* the Ninth Circuit refused to extend immunity to an arbitrator and the municipal administrative agency that appointed him where the City compelled the party bringing suit to submit to arbitration. The Court held the arbitrator to be an agent of the City to whom the City had delegated authority to enforce and interpret its rent control ordinance. *Id.* at 838.

3. The proposed provision grants full civil immunity to arbitrators and neutral arbitration

institutions. It does not draw a distinction between various types of alleged non-criminal misconduct by either. A few jurisdictions make an exception from the grant of civil immunity for arbitrator misconduct rising to the level of bad faith, bias, fraud, corruption and similar misconduct. *See e.g.*, MD. CODE ANN., §5-352 (1996) (permitting civil liability for malice or bad faith); NL Ind. V. GHR Energy Corp., 940 F.2d 957, 971 (5th Cir. 1991) (permitting liability for fraud or extreme misconduct).

4. The proposed provision does not grant arbitrators or neutral arbitration institutions 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).

5. The proposed provision draws no distinction between neutral arbitrators and advocate arbitrators.

6. At the October 31, 1997, Drafting Committee meeting there were raised substantial questions as to the advisability of including in the Act a provision addressing the immunity of arbitrators and the immunity of neutral arbitration institutions. The primary downside inherent in the proposed provision is the possibility that the states may tinker with the language in a manner that will negatively impact the current, almost uniform rule in the case law that gives arbitrators the same civil immunity accorded judges. One of the strongest arguments in favor of the provision is the prospect of achieving a uniform rule that will serve to underpin the integrity of the arbitration process by informing the parties

that they cannot hope to mount collateral attacks on unfavorable awards by bringing suit against the arbitrator. RUAA Section 18(a)(1), (2) on vacatur provide the more appropriate vehicle for securing relief from awards that result from arbitrator misconduct.

Because of these conflicting policies, the Drafting Committee voted 4-0 with 2 abstentions to bracket the provision on arbitrator immunity (1) to highlight the issue in a way to encourage comment from interested parties on section 9 and (2) to state the present position of the Drafting Committee that section 9 is optional depending on the determination of the individual states whether to adopt it.

Another important determination is whether the process would be furthered by extending the immunity afforded arbitrators to neutral arbitration institutions. The argument in favor of arbitral immunity primarily was because such arbitration agencies are an important adjunct to the arbitration process and often perform duties similar to that of arbitrators and necessary for the proper functioning of the arbitral system. On the other hand, some voiced concern that arbitration institutions perform largely a ministerial role and should not be afforded immunity. It was noted at the meeting that the 1996 English Arbitration Act in clauses 29 and 74 affords immunity to both arbitrators and arbitral institutions. A motion to limit the immunity of arbitration institutions to "discretionary acts was defeated by a vote of 6-2 and the provision to include immunity for arbitration institutions was left in the statute.

There was a unanimous vote by the Drafting Committee to add the word "rule after "statute in section 9(a).

SECTION 10. ~~Hearing~~ *THE ARBITRATION PROCESS.* Unless otherwise provided by the agreement:

(a) The arbitrators have authority to manage all aspects of the arbitration process, including but not limited to the authority to hold conferences with the parties prior to the hearing. Such conference shall allow the parties to consider any matters which may aid in the disposition of the arbitration, such as:

(1) identifying and clarifying the issues;

(2) determining the scope and scheduling of discovery of evidence under section 13;

(3) stipulating to the admission of facts and documents;

(4) providing a list of witnesses, including expert witnesses, the parties intend to call at the arbitration hearing, summaries of the testimony of the witnesses, and copies of all documents they intend to introduce at the arbitration hearing.

~~*(b) The arbitrators may issue such orders for interim relief, including the issuance of interim awards, as the arbitrators deem necessary for the resolution of the dispute. These orders may include but are not limited to the following:*~~

~~*(1) the conservation of property, goods, or other tangible or intangible items that relate to the subject matter of the dispute;*~~

~~*(2) security for costs of the arbitration;*~~

~~*(3) the inspection, custody or preservation of evidence; or*~~

~~*(4) the appointment of experts to report to the arbitrators.*~~

(b) The arbitrators may hear and determine a motion for summary disposition of a particular claim or issue, either by agreement of all interested parties or at the request of one party, provided that other interested parties have reasonable notice and opportunity to respond to the motion.

(c) ~~(a)~~ *If the arbitrators have not made a final decision on a matter under Subdivision (b) of this Section, then* ~~T~~the arbitrators shall appoint a time and place for the hearing and cause *notice of the hearing* ~~notification~~ *to be received by* the parties ~~to be served personally or by registered mail~~ not less than five days before the hearing. Appearance at the hearing waives ~~such~~ notice*, unless a party makes timely objection at the hearing to the lack thereof at the commencement of the hearing*. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion, may postpone the hearing to a time ~~not later than~~ *before* the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. A ~~The~~ *C*ourt, on ~~application~~ *request,* may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(d)~~(b)~~ *If the arbitrators order a hearing under Subdivision (c) of this Section,* ~~T~~the parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e)~~(c)~~ The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing,

an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

A. REPORTER'S COMMENT ON SECTION 10(a): PRE-HEARING CONFERENCES

1. The Study Committee Report was concerned that presently section 5 (RUAA § 10) does not specify that arbitrators may hold pre-hearing conferences. At the first meeting of the Drafting Committee meeting of May 30, 1997, the participants concluded that, as arbitration becomes more widespread, there are many major cases that involve complex issues. In such cases arbitrators are 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 School Jt. Committee v. Upper Bucks Cnty. Vocational Technical School Educ. Ass'n, 91 Pa.Cmnwlth. 463, 497 A.2d 943 (1985).

2. Additionally it should be noted that many administrative organizations whose rules may govern particular arbitration proceedings also provide for pre-hearing conferences and the ruling on preliminary matters. *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; NASD Code of Arb. Proc. §32(d).

3. The Drafting Committee at the May 30, 1997, meeting unanimously voted on revised section 10(a) to allow arbitrators broad powers to manage the arbitration process both before and during the hearing. This will enable arbitrators and the parties the means to clarify issues, schedule discovery, stipulate matters, identify witnesses, provide summaries of testimony and resolve preliminary matters.

7. RUAA § 10(c) was changed to reflect new means of receiving notice (See definitions RUAA section 1(c)) and to allow a party to appear at a hearing without waiving an objection based on the lack of proper notice if such party makes this objection at the outset of the hearing.

B. REPORTER'S COMMENT ON SECTION 10(b): DISPOSITIVE MOTIONS

1. The ABA Co-advisor to the Drafting Committee, Ron Sturtz, requested the Reporter to draft a provision that would allow arbitrators to make a summary disposition of cases in appropriate circumstances. The language in RUAA section 10(b) is based upon Rule 16 of JAMS/Endispute Comprehensive Arbitration Rules and Procedures.[11] In the arbitration context, the use of the language "dispositive motions is preferable to "motions for summary judgment or "motions for failure to state a claim. The latter

[11]"**Rule 16. Summary Disposition of a Claim or Issue**. (a) The Arbitrator(s) may hear and determine a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request.

terms, which are used in civil litigation, usually refer to situations where there are no genuine issues of material facts in dispute and a matter can be determined as a matter of law. In many arbitrations, the arbitrators are not required to make rulings only as a "matter of law. As noted in the Reporter's Comment to Section 18 on vacatur, numerous courts have held that arbitrators are not necessarily bound by rules of law and their awards generally cannot be overturned for errors of law. Because of this, the terms "motions for summary judgment or "motions for failure to state a claim may be misleading and the language used in the JAMS/Endispute rules is more applicable.

2. The Drafting Committee must decide the policy issue of whether a provision such as section 10(b) is advisable in the statute. The Reporter could find no state or federal arbitration statutes that have a section allowing for summary disposition by the arbitrators. Presently the language of UAA section 5(a) [RUAA section 10(c)] states that the arbitrators "shall appoint a time and place for the hearing and UAA section 12(a)(4) [RUAA section 18(a)(4)] makes as a ground of vacatur where an arbitrator "refused to hear evidence material to the controversy. These sections seem to indicate that arbitrators could not dispose of a case in a summary proceeding based upon affidavits, depositions, or other discovery evidence if there was no "hearing.

However, in a number of cases courts have upheld the authority of arbitrators to decide cases or issues on motion without an evidentiary hearing. Intercarbon Bermuda, Ltd. v. Caltex Trading and Transport Corp., 146 F.R.D. 64 (S.D.N.Y. 1993); Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal.App.4th 1096, 47 Cal.Rptr.2d 650 (1995); 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). Although 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.

The *Schlessinger* case is instructive. After the parties had filed summary adjudication motions, encouraged by the arbitrator and desired by only the defendant, the arbitrator ruled against the plaintiff. The California Court of Appeals rejected the plaintiff's action to vacate the award on the ground that the arbitrator had refused to "hear material evidence. The court determined that the duty to "hear evidence does not mean that an oral presentation of evidence or live testimony is required. The court also determined that while the state arbitration statute "entitles a party to cross-examine witnesses if they appear at a hearing, it does not give a party an absolute right to present oral testimony in every case. According to the court, "[l]egally speaking the admission of evidence is to hear it and the arbitrator had considered relevant evidence. However, the court cautioned that the appropriateness of summary motions in the arbitration context depends upon many factors such as the nature of the claims and defenses, the governing rules, the availability of discovery and that the party opposing a summary motion is given a fair opportunity to present its position.

Similarly in *Intercarbon Bermuda*, although the federal district court confirmed a summary adjudicative award based on documentary evidence, it too expressed

reservations. The court pointed out the importance of hearings in most arbitration proceedings, the weakness of affidavits as bases for summary determinations, and the desire for the nonmoving party to present its case.

In Prudential Securities, Inc. v. Dalton, 929 F.Supp. 1411 (N.D. Okla. 1996), the federal district court vacated an award because an arbitration panel refused to hold a hearing on a claim. The panel ruled for Prudential on the basis of its motion to dismiss after both parties filed briefs and attended a pre-hearing conference on the motion. The court determined that the arbitration panel was guilty of misconduct and exceeded its powers in refusing to hear pertinent evidence that the claimant could have presented at a hearing. Likewise, in White v. Preferred Research, Inc., 315 S.C. 209, 432 S.E.2d 506 (Ct. App. 1993), the South Carolina court concluded that a summary judgment proceeding in arbitration is improper but upheld the arbitrator's decision because neither party had moved to set aside the award within the 90-day time limit.

3. Those opposed to summary dispositions in arbitration proceedings point out that arbitration is already considered a speedy alternative to court proceedings and both sides should be given a full opportunity to present their cases at a hearing. Additionally, opponents argue that encouraging summary motions could lead to more appeals on the ground that arbitrators failed to hear material evidence (see section 18(a)(4)). Of course, if this proposed section 10(b) is adopted, it would obviate any claim that section 18(a)(4) precludes summary disposition. If speed is an important concept in arbitration, explicit adoption of a provision which permits now customary summary judgment litigation techniques to be used, is warranted. Those favoring the use of summary adjudication

argue that such procedures lessen the unwarranted delay and expense of holding hearings where information developed prior to the hearing makes an evidentiary hearing unnecessary. This is particularly important as arbitration cases involve more complex matters with significant pre-hearing discovery.

4. If the Drafting Committee decides to adopt section 10(b) or a similar provision, it should consider the prefatory language to sections 10(c) and 10(d). The Committee should also determine whether to modify the language in section 18(a)(4) on vacatur from "refused to hear evidence material to the controversy to "refused to *consider* evidence material to the controversy.

SECTION 11. REPRESENTATION BY ATTORNEY. A party has the right to be represented by an attorney at any proceeding or hearing under this ~~a~~*A*ct. A waiver ~~thereof~~ *of representation* prior to the proceeding or hearing is ineffective.

SECTION 12. WITNESSES, SUBPOENAS, DEPOSITIONS, *DISCOVERY*.

(a) The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon ~~application~~ *request* to the Court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) ~~On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators,~~ *The arbitrators may permit a deposition to be taken, in the manner designated by the arbitrators, on request of a party, for use as evidence,* of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be the same as for a witness in the ..... Court.

(e) Unless otherwise agreed by the parties, the arbitrators shall permit

and facilitate such discovery of information as they shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.

(f) The arbitrators shall have the authority to order the parties to comply with their discovery-related orders and may take such actions against parties who do not comply as provided by law as if the subject matter were pending in a civil action."

(g) The arbitrators shall have the authority to fashion appropriate protective orders to prevent the disclosure of privileged information, confidential information and trade secrets.

REPORTER'S COMMENTS

1. At the meeting of October 31, 1997, the Drafting Committee suggested that UAA section 7 on subpoenas for attendance of witnesses or the production of information at the hearing and on testimonial depositions be folded into a section on discovery. Revised Section 12 of RUAA does this by retaining UAA section 7 (with minor style modifications) in Subsections (a) through (d) and adding Subsections (e) though (g) on discovery.

2. Presently the UAA section 7 provides an arbitrator only with subpoena authority for the attendance of witnesses and production of documents at the hearing or to depose a witness who is unable to attend a hearing. This has caused some courts to determine 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. 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); In re Frenkel, 91 Misc.2d 849, 398 N.Y.S.2d 816 (1977). Most courts have allowed discovery only in the discretion of the arbitrator. Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F.Supp 1241 (S.D. Fla. 1988); Groenevald Co. v. M.V. Nopal Explorer, 587 F.Supp. 140 (S.D.N.Y. 1984); Prime South Homes, Inc. v. Byrd, 102 N.C.App. 255, 401 S.E.2d 822 (1991); 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. California--CA Civ. Pro. § 1283.05(d) (depositions for discovery shall not be taken unless leave to do so is first granted by the arbitrator); Massachusetts--M.G.L.A. c.251, § 7(e) (only the arbitrators can enforce a request for production of documents and entry upon land for inspection and other purposes); Texas--V.T.C.A. Civil Practice & Remedies Code § 171.007(b) (arbitrator may allow deposition of adverse witness for discovery purposes); Utah--U.C.A. § 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 taken in this Section is modeled after the CPR and UNCIRTAL discovery rules. The language follows the majority approach that, unless the contract specifies to the contrary, the discretion rests with the arbitrators whether to allow

discovery. The purpose of the discovery procedure set forth in this Section is to aid the arbitration process and ensure an expeditious, efficient and informed arbitration, while adequately protecting the rights of the parties. Those goals are achieved by encouraging parties to negotiate their own discovery procedures and by establishing the authority of the arbitrator to oversee the process and enforce discovery-related orders in the same manner as would occur in a civil action,[12] thereby minimizing the involvement of (and resort of the parties to) the courts in the discovery process.

4. The simplified, straightforward approach to discovery reflected in Section 12(e)-(g) 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.

[12]Note that this is the approach of present UAA section 7(a) in regard to enforcement of subpoenas for witnesses or documents and section 1283.05(a) of the California arbitration statute for the enforcement of subpoenas for depositions.

SECTION 13. COURT REVIEW OF PRE-AWARD RULINGS BY ARBITRATORS. ~~*(a)*~~ *A party who has received a favorable pre-award ruling from the arbitrators and which ruling another party to the arbitration proceeding refuses to obey may apply to the Court for an expedited summary order to enforce the pre-award ruling. The Court shall issue such an order to enforce the pre-award ruling unless the ruling of the arbitrator is vacated, modified, or corrected under the same standards as provided in Sections 18 and 19.*

~~*(b) In exceptional circumstances, to prevent a manifest denial of justice, a party who is aggrieved by a pre-award ruling of the arbitrators or the failure to rule by the arbitrators may apply to the Court for an expedited summary review. The arbitrators, unless the Court issues an order to the contrary, may proceed with the arbitration until the Court makes a determination on the pre-award ruling of the arbitrators. If the Court determines that the application for summary review is an abuse of the arbitration process or has been made for an improper purpose, such as to cause unnecessary delay or needless cost of litigation, the Court may impose upon the party causing the summary review costs and expenses, including attorney fees, without regard to the ultimate outcome of the arbitration proceedings.*~~

REPORTER'S COMMENT

1. New section 13 is presently 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. 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); Meadows Indemnity Co. v. Arkwright Mut. Ins. Co., 1996 WL 557513 (E.D. Pa. 1996) (enforcing under FAA arbitration panel order requiring party to obtain letter of credit); Konkar Maritime Enterprises, S.A. v. Compagnie Belge d'Affretement, 668 F. Supp. 267 (S.D.N.Y. 1987) (enforcing under FAA arbitral award requiring payment into an escrow account); Copania Chilena de Navegacion Interocianica v. Norton, Lilly & Co., 652 F.Supp. 1512 (S.D.N.Y. 1987) (enforcing under FAA arbtrator requiring party to post bond); 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); 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); Chadesh v. Commonwealth Edison Co., 128 Ill. App.3d 827, 471 N.E.2d 628 (1984) (court determines enforceability of arbitral subpoena under UAA); Hull Municipal Lighting Plant v. Mass. Municipal Wholesale Elec. Co., 414 Mass 609, 609 N.E.2d 460 (1993) (court decides enforceability of arbitral subpoena under UAA); Fishman v. Streeter, 1992 WL 146830 (Ohio App. 1992) (enforcing under UAA arbitrator's interim order dissolving partnership); *see also* III Macneil Treatise § 34.2.1.2.

New section 13 provides for an expedited review procedure which does not presently exist in the case law and may require special statutes or court rules in adopting

states.

2. At the Drafting Committee meeting on October 31, 1997, the Committee voted unanimously 8-0 to strike section 13(b) of Revised Tentative Draft No. 1 because the provision would lead to delay and more litigation without corresponding benefit to the process.

3. The Drafting Committee at the October 31, 1997, meeting requested the Reporter to incorporate language that the standard for court review of an action under RUAA section 13 would be similar to the standards for vacatur in RUAA sections 18 and 19. This language is now the second sentence of section 13 in Tentative Draft No. 2 and is similar to the language in RUAA section 17.

4. The Drafting Committee at the October 31, 1997, also requested the Reporter to research the issue as to what standards a court will utilize in reviewing a claim that a pre-award ruling by the arbitrators are improper because of confidentiality, trade secrets or privileged material.

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 Association, 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 felt 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 Mutual Casualty 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.

On the other hand courts have considered substantive challenges to pre-award ruling of arbitrators on grounds of privilege or confidentiality. In Hull Municipal Lighting Plant v. Massachusetts Municipal 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 Chemicals 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 Service 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 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). A court should review more carefully claims of confidentiality, trade secrets or privilege because of the involvement of important legal rights than other assertions that a pre-award order of an arbitrator is invalid.

5. The Drafting Committee should note that the Reporter has made no provision in RUAA section 25 for an appeal from a court decision on a pre-award ruling by an arbitrator and the intent is that such orders from a lower court would not be appealable.

SECTION 14. AWARD.

(a) ~~The award shall be in writing and~~ *The arbitrators will make a record of the award which shall be* signed by the arbitrators joining in the award. The arbitrators shall *give notice of a record of the award* ~~deliver a copy~~ to each party ~~personally or by registered mail, or as provided in the agreement~~.

(b) An award shall be made within the time fixed ~~therefor~~ by the agreement or, if not ~~so~~ fixed, within ~~such~~ *the* time ~~as~~ the *C*ourt orders on application of a party. The parties may extend the time in ~~writing~~ *a record* either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless ~~he notifies~~ *that party gives notice to* the arbitrators of ~~his~~ *this* objection prior to the delivery of the award to ~~him~~ *that party*.

SECTION 15. CHANGE OF AWARD BY ARBITRATORS.

(*a) Application of Party to Arbitrators. On application of a party to the arbitrators, the arbitrators may modify or correct the award (1) upon the grounds stated in paragraphs (1) and (3) of Subdivision (a) of Section 19; (2) where the arbitrators have not made a final and definite award upon any or all of the issues submitted by the parties or determined by the arbitrators was not made; or (3) for the purpose of clarifying the award. The application shall be made within twenty days after delivery of the award to the applicant. The applicant shall give a record of notice forthwith to the opposing party, stating that the opposing party must serve objections thereto, if any, within ten days following receipt of the notice. The award so modified or corrected is subject to the provisions of Sections 17, 18 and 19.*

(b) Submission by Court. If an application to a Court is pending under Sections 17, 18 or 19, the Court may submit the matter to the arbitrators under such conditions as the Court may order for the arbitrators to consider whether to modify or correct the award (1) upon the grounds stated in paragraphs (1) and (3) of Subdivision (a) of Section 19; (2) where the arbitrators so imperfectly executed their powers that a mutual, final, and definite award upon any or all of the issues submitted was not made; or (3) for the purpose of clarifying the award. The award so modified or corrected is subject to the provisions of Sections 17, 18 and 19.

REPORTER'S COMMENT

1. Section 15 provides a mechanism (1) for the parties to apply to the arbitrators to modify or correct an award or (2) 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 §§17, 18 or 19 files an application 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.

Section 15 serves an important purpose in light of the arbitration doctrine of *functus officio*[13] 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 Bro. 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.

Under present §9 the UAA provides the parties with a limited opportunity to request reconsideration of an arbitration award either (1) when there is an error as

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[13]The term "*functus officio* is a Latin term for "office performed. Glass Workers Intn'l Union Local 182B v. Excelsior Foundry Co., 56 F.3d 844 (7th Cir. 1995).

described in UAA §13(a)(1) for miscalculation or mistakes in descriptions or in UAA §13(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 benefit of a provision such as RUAA §15 is evident from 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 §10(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 reconsider 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 reconsider matters. *See* Macneil Treatise §§37.6.4.4; 42.2.4.3. The mechanism for correction of errors in RUAA §15 enhances the efficiency of the arbitral process.

2. Section 19 seems to overlap and perhaps contradict §15 on timing. A party who files a motion with a court to modify or correct an award under §19 must do so within 90 days; the timing in §15 is 20 days for the party filing the motion to modify or correct and 10 days for the other party to respond. The Study Committee suggested that these different time periods be considered by the Drafting Committee. In fact there is no contradiction on timing because the §15 motion to which the 20-day time limit applies is to the arbitrators and the §19 motion to which the 90-day time limit applies is to the court. These sections allow a party an initial choice of whether to contest an award on grounds

of modification or correction before either the arbitrators or the court. The option of allowing a party to provide the arbitrators with an opportunity to modify or correct errors encourages judicial economy if a matter can be resolved at that level without court proceedings.

3. The revised alternative is based on the Minnesota version of the Uniform Arbitration Act, M.S.A. §572.16, and lessens the ambiguity by making UAA section 9 (RUAA §15) into two subdivisions, one for applications to the arbitrators and the second for the authority of the court to remand to the arbitrators. *See also* S.H.A. 710 ILCS 5/9 (Illinois); KRS 417.130 (Kentucky).

4. The Drafting Committee suggested that an additional ground for clarification be added to section 9 that is based on the Federal Arbitration Act §10(a)(4) where an arbitrators' award is either imperfectly executed or incomplete that it is doubtful that the arbitrators ruled on a submitted issue.

5. The giving notice in a record, i.e., in writing, as used in revised section 15(a) are defined in sections 1(b) and (c) of the Revised UAA.

SECTION 16. *REMEDIES;* FEES AND EXPENSES OF ARBITRATION.

(a) Unless otherwise provided in the agreement to arbitrate, the arbitrators shall have the authority to award such remedies, ~~including attorney fees, punitive damages, and other relief, if such an award is authorized by law as to any recovery in a civil action involving the same subject matter or by the agreement of the~~

~~parties~~ as the arbitrators consider just and appropriate under the circumstances of the case and the fact that the relief was such that it could not or would not be granted by a Court of law or equity is not ground for vacating or refusing to confirm the award under Sections 17 or 18.

(b) Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other *expenses, including attorney fees, ~~not~~* ~~including counsel fees, incurred in the conduct of the arbitration,~~ shall be paid as provided in the award.

(c) If the arbitrators award a remedy of punitive damages under Subdivision (a), they shall state ~~such a remedy~~ the award in a record and ~~include the reasons for the remedy of punitive damages~~ shall specify (1) the facts justifying the award and (2) the amount of the award attributable to punitive damages. This remedy of punitive damages shall be subject to review under Section 18(a)(6).

A. REPORTER'S COMMENT ON REMEDIES, INCLUDING ATTORNEY FEES

1. At its October 31, 1997, meeting the Drafting Committee unanimously voted to allow parties the autonomy under RUAA section 16(a) by agreement to limit the remedies that an arbitrator can award. It was also suggested that the language in UAA section 12 (a) [RUAA section 18(a)] "the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award be moved to this section on remedies. The point was that arbitrators have much creativity fashioning remedies and this is a positive aspect of arbitration. Arbitrators

should not be confined to limitations under principles of law and equity and this was the import of the language previously in UAA section 12(a) [RUAA section 18(a)]. This language also conflicted with that in Revised Tentative Draft No. 1 that limited arbitrators' remedial authority to that where "such an award is authorized by law as to any recovery in a civil action involving the same subject matter and this language has been deleted.

2. At the Drafting Committee meeting of October 31, 1997, it was also suggested to move the language regarding arbitrators' authority to award attorney fees from section 16(a) to section 16(b) which under the UAA section 10 referred to arbitrator authority to award "fees but precluded an award of attorney fees. Canon School Dist. No. 50 v. W.E.S. Const. Co., Inc., 180 Ariz. 148, 882 P.2d 1274 (1994) (terms of Uniform Arbitration Act itself precludes a court from awarding attorney fees for arbitration proceeding). Unless the arbitration agreement provides to the contrary, RUAA section 16(b) would give arbitrators the authority to make an award of attorney fees. *See* statutes in Texas and Vermont that allow recovery for attorney fees when law would allow such, V.T.C.A. CIVIL PRAC. & REM. CODE § 171.010; 12 V.S.A. §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* CA. CIVIL CODE § 1717 (allowing award of attorney fees if contract specifically provides such).

Many 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) (employee who signs broad pre-employment arbitration agreement must submit statutory claim of age discrimination to arbitration under FAA); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (predispute arbitration agreement enforceable under FAA applies to civil RICO claims); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (arbitration clause under FAA is enforceable as to statutory antitrust claim); Eljer Mfg. Inc. v. Kowin Dev. Corp., 14 F.3d 1250 (7th Cir.), cert denied, 512 U.S. 1205, 114 S.Ct. 2675 (1994) (arbitrators empowered to arbitrate claims and award attorney fees under Illinois securities law); Saturn Constr. Co. v. Premier Roofing Co., 238 Conn. 293, 680 A.2d 1274 (1996) (arbitrators could award attorney fees for claim under state unfair trade act); Chrysler Corp. v. Maiocco, 209 Conn. 579, 552 A.2d 1207 (1989) (arbitrators award attorney fees under state "lemon law); Monday v. Cox, *supra* (arbitrator can decide claims and award attorney fees under Texas Deceptive Trade Practices Act); *see also* 42 U.S.C. § 12212 (Americans with Disabilities Act states that "arbitration * * * is encouraged to resolve disputes under the Act); 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).

In arbitration cases where, if the matter had been in litigation, a person would have been entitled to an award of attorney fees, there is doubt whether one of the parties can eliminate the right to attorney fees even though RUAA section 16(b) would allow an

agreement that limits the remedy of attorney fees. 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. Cole v. Burns International Security Services, 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, 116 S.Ct. 275 (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); *see also* Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 838 (8th Cir. 1997) (arbitration forum must effectively vindicate employee's statutory cause of action including "adequate types of relief "); DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP Section C(5) ("The arbitrator should be empowered to award whatever relief would be available in court under the law.)

B. REPORTER'S COMMENT ON PUNITIVE DAMAGES

1. At the meeting of October 31, 1997, the Drafting Committee voted to eliminate any reference to punitive damages in RUAA section 16(a). As discussed Comment (B)(3), most but not all jurisdictions allow arbitrators to award punitive damages under their broad remedial authority. Also, as noted below, there is an issue whether parties can "opt out of punitive damages in all cases. The Committee concluded to acknowledge these factors in the official comments but not in the text of the statute.

2. Within the scope of the arbitration agreement, arbitrators have considerable freedom 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* 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 § 16(a) allows an arbitrator to order broad relief even that beyond the limits of courts circumscribed by principles of law and equity.

The authority of arbitrators to award compensatory damages is well established under state as well as federal law. *See, e.g.,* MSP Collaborative Devels. v. Fidelity & Dep. Co., 596 F.2d 247 (7th Cir. 1979) (state law); City of Lawrence v. Falzarano, 380 Mass. 18, 29, 402 N.E.2d 1017, 1023-24 (1980) (state law); Todd Shipyards Corp. v. Cunard Line Ltd., 943 F.2d 1056, 1062-62 (9th Cir. 1991) (FAA).

3. The question whether arbitrators have power to award punitive damages arises in cases where a court hearing the matter would have such power. The issue has engendered

fierce debate. *See* III MACNEIL TREATISE § 36.3 (citing authorities). Court awards of punitive damages, a civil source of public justice, manifest society's abhorrence of reprehensible conduct by punishing the wrongdoer and discouraging repetition of the offense. *See* JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW & PRACTICE §§ 4.12-13 (1996); Dorsey Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3-10 (1982). Some argue that punitive damages provide an incentive to wronged parties to pursue a cause of action where tangible harm is nominal but where the defendant's behavior carries substantial risks to the public. *See* David Owen, *Punitive Damages in Products Liability Litigation,* 74 MICH. L. REV. 1257, 1278 (1976). As courts have expanded the authority of arbitrators to hear disputes in which punitive damages are available, the authority of arbitrators to consider and to award punitive damages has become an increasingly critical issue.

It is now well established that arbitrators have authority to award punitive damages under the Federal Arbitration Act. 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 Uniform Arbitration Act 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).

4. Moreover, the importance of permitting arbitrators to render whatever relief would be available in court, including punitive damages, has been recognized by recent studies of arbitration in the employment and securities arenas. *See, e.g.,* A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (May 9, 1995); SECURITIES INDUSTRY REFORM, REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS, NATIONAL ASS'N OF SECURITIES DEALERS, INC. 43 (Jan. 1996) (recommending availability of punitive sanctions in NASD arbitration subject to cap, other safeguards). *See also* Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1483 n.11 (D.C. Cir. 1997) (citing Report and Recommendations of Dunlop Commission and other standards); American Arbitration Association, National Rules for the Resolution of Employment Disputes Rule 25 (June 1, 1996).

The trend of opinion supports the proposition that punitive damages can serve as an effective deterrent whether awarded by a court or a panel of arbitrators. Raytheon Co. v. Automated Bus. Sys., 882 F.2d 6, 12 (1st Cir. 1989). On the other hand, to deny

arbitrators the authority to award punitive damages in cases where courts could do so "would be to hamstring arbitrators and to lesson the value and efficiency of arbitration as an alternative method of dispute resolution" and to make arbitration a haven for reprehensible behavior. Willoughby Roofing & Supply Co. v. Kajima Int'l Inc., 598 F. Supp. 353, 362 (N.D. Ala. 1984), aff'd, 776 F.2d 269 (11th Cir. 1985).

5. An alternative of not allowing arbitrators to consider punitive damages as a remedy raises serious legal, practical and policy concerns. Interpreting an agreement to arbitrate as an outright waiver of punitive damages is arguably contrary to reasonable expectations and, in addition, may violate substantive law prohibitions on pre-liability waivers of exemplary damages. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19, 105 S.Ct. 3346, 3359 n.19, 87 L. Ed.2d 444, 461-62 n.19 (1985); *see also* III MACNEIL TREATISE § 36.3.2. Thus, just as discussed in regard to attorney fees in Comment (A)(2), it is questionable whether in certain cases, especially those involving statutory rights, whether a clause under RUAA section 16(a) purporting to eliminate punitive damages would be operative.

Likewise, given the absence of a record, findings of fact, and conclusions of law in arbitration, having courts address punitive damages claims following a compensatory arbitration award in favor of a claimant would probably require a court to re-try the entire case again. A third alternative, requiring judicial determination of entire disputes when punitive damages are requested, would severely undercut public policies favoring arbitration. *See* Appel v. Kidder Peabody & Co., 628 F. Supp. 153, 158 n. 26 (S.D.N.Y. 1986).

6. At the meeting of October 31, 1997, the Drafting Committee requested the Reporter to review whether RUAA section 16(c) should remain. The Reporter has re-drafted this section, along the lines of suggestions by Commissioner Richard Cassidy, for further consideration by the Committee. A serious concern respecting arbitral remedies of punitive damages relates to the absence of guidelines for arbitral awards and the severe limitations on judicial review. 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*, __ NW. L. REV. ___ (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 16(c) that require arbitrators who award a remedy of punitive damages to state in a "record [*See* definition in § 1(3)] the facts that gave rise for and the amounts of the award attributable to the punitive damage remedy. A party can seek to vacate the punitive damage remedy under the standard outlined in RUAA Section 18(a)(6).

SECTION 17. CONFIRMATION OF AN AWARD. ~~Upon application of a party, the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed~~ *After receipt of notice of an award, any party to an arbitration may apply to the Court for an order confirming the award, and thereupon a Court shall issue such an order unless (1) the award is modified or corrected as provided in Section 15 or (2) the award is vacated, modified, or corrected* as provided in Sections 18 and 19.

REPORTER'S COMMENT

1. The problem discussed by members of the Study Committee with present UAA § 11 is that a winning party cannot have a court confirm an award under UAA §11 until after the time limits have run for filing (1) a motion to the court to vacate in UAA §12(b) or to modify or correct in UAA §13(a) both of which are "within ninety days after *delivery* of the award or (2) a motion to the arbitrators to modify or correct in UAA §9 which is made "within twenty days after *delivery"* of the award [and then opposing party has 10 days to respond]. According to members of the Study Committee, some state courts will not take jurisdiction over a proceeding to confirm an award until the 30\90 days have run. Such an interpretation allows a losing party during this 30\90 days to divest itself of assets or to take other actions to avoid obligations under an arbitration award.

The FAA language is more conducive to allowing a court immediately to take jurisdiction and confirm an award because FAA §9 allows a party to apply for an order confirming an award any time within one year after the award is made and "*thereupon* the

court must grant such an order unless the award is vacated, modified or corrected as prescribed in sections 10 and 11. [Emphasis added.] FAA §10 describes the grounds under which a person can seek to vacate an arbitration award and FAA §11 are the grounds to modify or correct an award. Section 12 of the FAA requires motions to vacate, modify or correct be served on the adverse party "within three months after the award is *filed or delivered*, which seems to allow the winning party to immediately file an award in court. Once the prevailing party files the award in court, the federal court has jurisdiction and need not wait the three months before acting to conserve assets or otherwise prevent avoidance of the award by the losing party. *See* The Hartbridge, 57 F.2d 672, 673 (2d Cir. 1932), cert. denied, 288 U.S. 601 (1933) (There is nothing in FAA §12 "to suggest that the winning party must refrain during [the three month] period from exercising the privilege conferred by section 9 to move `at any time' within the year [to confirm the award].)

2. The Reporter could find no appellate state court decisions interpreting UAA §§9, 11, 12(b), and 13(a) to the effect that a court cannot assert jurisdiction over an application to confirm an award until the 30\90-day period has run. In City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515 (Tex. App. 1994), the loser of an arbitration award, Baytown, argued that the trial court was barred from confirming the award during the 90-day period in UAA §12(b). The court rejected this argument because (1) when the winner moved to have the arbitration award confirmed within the 90-day period, it "was entitled to have the motion granted unless a motion to vacate, modify or correct the award was filed and (2) because Baytown had already lost one motion to vacate during the 90-day time limit

and had made no showing how it would be harmed by the trial court then confirming the award prior to the end of 90 days. This case indicates that a court can act on a UAA §11 application to confirm before the running of the 90-day time limit on motions to vacate. *See also* Clearwater v. Skyline Construction Co., 67 Wash.App. 305, 835 P.2d 257 (1992) (Generally when a motion to confirm an arbitration award is filed within the 3-month period, the motion to vacate should also be brought at that time so that the two motions can be heard together.)

However, one appellate court concluded that a trial court erred in confirming an arbitration award during the pendency of the losing party's motion to vacate the award. School Bd. of Palm Beach County v. Roof Structures of Florida, Inc., 359 So.2d 561 (Fla.App. 1978). Such cases and the uncertain language of the UAA in §§9, 11, 12(b), and 13(a) create the potential that some courts will not act on an application on behalf of a winning party prior to the expiration of the 90-day period in UAA §§12(b) and 13(a).

3. The language drafted for revised UAA §17 is similar to that of FAA §9 to indicate that a court has jurisdiction when a party files an application to confirm an award unless a party has applied to the arbitrators for change of an award under UAA § 9 or filed a motion to vacate, modify or correct under UAA §§ 12 or 13. The Drafting Committee considered but rejected the language in FAA §9 that limits an application to confirm an award to a one-year period of time. The consensus of the Drafting Committee was that the general statute of limitations for the filing and execution on a judgment should apply.

SECTION 18. VACATING AN AWARD.

(a) Upon application of a party, the Court shall vacate an award where *any of the following occur*:

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

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption *or misconduct* in any of the arbitrators ~~or misconduct~~ *or failure by any of the arbitrators to properly disclose information under the standards in Section 7* prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to ~~hear~~ *consider* evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 10, as to prejudice substantially the rights of a party;

(5) There was no arbitration agreement*,* ~~and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the hearing without raising the objection~~ *unless the party participated in the arbitration proceeding without having raised the objection; or*

~~*(6) The court determines that the arbitrators failed to properly disclose information under the standards in Section 7; or*~~

(6)~~*(7)*~~ *The arbitrators have included punitive damages under Section 16 in an award and the Court determines that such a remedy of punitive damages*

is clearly erroneous under the facts and circumstances of the arbitration award.

~~*but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.*~~.

(b) In addition to the grounds to vacate an award set forth in Subdivision (a), the parties may contract in the arbitration agreement for judicial review of errors of law in the arbitration award. If they have so contracted, the Court shall vacate the award if the arbitrator has committed an error of law prejudicing the rights of a party.

(c) ~~(b)~~ An application under this Section shall be made within ninety days after delivery of a copy of the award to the applicant except that, if *the application is* predicated upon corruption, fraud or other undue means, it shall be made within ninety days after ~~such~~ *those* grounds are known or should have been known.

(d) ~~(c)~~ In vacating the award on grounds other than stated in clause (5) of Subsection (a) the *C*ourt may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the *C*ourt in accordance with Section 6~~,~~. ~~or~~ ~~i~~*I*f the award is vacated on grounds set forth in clauses (3) and (4) of Subsection (a) the *C*ourt may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 6. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(e) ~~(d)~~ If the application to vacate is denied and no motion to modify or correct the award is pending, the *C*ourt shall confirm the award.

A. REPORTER'S COMMENT ON SECTION 18(a)(5)

1. The purpose of this provision 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 two factors: (1) a court in a section 3 proceeding either to compel or stay arbitration had not previously determined there was no valid arbitration agreement and (2) the party contesting the validity of an arbitration agreement must raise this objection 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 Uniform Arbitration Act 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 School 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 Const. Services, 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 then cannot attack arbitration agreement).

2. The first factor "that the issue was not adversely determined in proceedings under Section 2" seems superfluous. Section 2 (RUAA § 3) involves proceedings to compel or stay arbitration. If a court "adversely determined in either type of proceeding that the arbitration agreement was invalid, then no valid arbitration hearing should be held. The losing party in the court proceeding would be able to appeal under RUAA §25(a)(1) from an order denying an application to compel arbitration under RUAA §3 or under RUAA

§25(a)(2) from an order granting a stay of arbitration under RUAA §3(b). In other words, if ultimately there is a final judicial determination under RUAA §3 that the arbitration agreement is invalid, there would not be an award and the RUAA §18(a)(5) factor of no adverse determination in a proceeding under §3 is irrelevant.

3. There is another ambiguity from this language that the "issue was not adversely determined in proceedings under Section 2 where a court rejects a party's contention that an arbitration agreement is invalid. A party may raise and lose one challenge that a matter is not covered by an arbitration agreement in a UAA Section 2 (RUAA § 3) proceeding but may have another valid objection on the same ground after the arbitration hearing. Under the language of present UAA §12(a)(5) , the party might not be able to raise the second challenge. For example, a seller and a buyer have an arbitration agreement covering the sale of vegetables; seller claims buyer breaches the agreement when buyer refuses to purchase seller's tomatoes and demands arbitration. Buyer claims that neither the purchase agreement nor the arbitration clause covers tomatoes and files an action to stay an arbitration proceeding under UAA §2(b) (RUAA § 3(b)). The court makes a finding adverse to buyer that the arbitration agreement covers the sale of tomatoes. At the arbitration hearing the arbitrators determine that buyer breached the contract in regard to the purchase of seller's tomatoes and also the purchase of seller's apples. As presently written, it would be questionable whether buyer could challenge the arbitration award regarding the purchase of apples on the grounds that the arbitration agreement did not cover this matter because of the previous adverse determination under UAA §2(b) (RUAA § 3(b)).

4. The purpose of the provision that requires the party participating in an arbitration proceeding to raise an objection that no arbitration agreement exists is to insure that this party makes a timely objection during the arbitration rather than going through the time and expense of the arbitration proceeding only to raise the objection for the first time in an application to vacate an award. Note that revised RUAA § 18(a)(5) changes "hearing to "proceeding. Also a person who refuses to participate in or appear at an arbitration proceeding retains the right to challenge the validity of an award in an application to vacate.

5. One might question the propriety of requiring the party participating in an arbitration to raise an objection that no arbitration agreement exists. One could liken the existence of an arbitration agreement to the issue of subject matter jurisdiction. If a court does not have subject matter jurisdiction, then it cannot act and a party can raise an objection on the grounds of a lack of subject matter jurisdiction at any time. Similarly, the existence of an arbitration agreement might be considered essential to an arbitrator rendering a valid award. Under such a theory a party could raise an objection to the award on this ground for the first time in a court action to vacate.

a. The statute as presently written and interpreted by several courts makes it clear that to date the law has not considered the factor in UAA §12(a)(5) that no arbitration agreement exists to be like subject matter jurisdiction. The reason is the inherent difference between arbitration and court proceedings. In arbitration the parties convey jurisdiction on the arbitrators and under ordinary contract principles, a party can be found to have tacitly agreed to arbitration by participation.

RUAA section 18(a)(5) explicitly requires a party to raise the defense before the arbitrator at an early stage of the proceedings to have the matter fully considered from the outset, to avoid surprise, and for the sake of judicial economy. These policies would weigh in favor of continuing this requirement.

b. It might be noted that there is no similar ground to UAA §12(a)(5) in the Federal Arbitration Act §10 on vacatur. One might conclude that the absence of a ground that "[t]here was no arbitration agreement means such a defense is treated like lack of subject matter jurisdiction under federal arbitration law, i.e., it is a defense that can be raised at anytime. This has not been the case. Rather the absence of a ground like §12(a)(5) (RUAA § 18(a)(5)) has caused confusion under the FAA. For example, in Great American Trading Corp. v. I.C.P. Cocoa, Inc., 629 F.2d 1283 (7th Cir. 1980), Great American challenged the existence of an arbitration agreement in a proceeding to stay the arbitration under §4 of the FAA. When it lost this application for a stay, Great American refused to arbitrate on the grounds that there was no valid agreement. I.C.P. won the arbitration and brought an action to enforce the award. Because there was no ground similar to UAA §12(a)(5), the court had to wrestle with whether the case was a "delayed question under FAA §4 or a proceeding to vacate under §10(a)(4) because the arbitrators exceeded their powers. *See* Macneil Treatise §40.1.3.1.

Also courts have held under the FAA that a party who fails to object that there is no arbitration agreement either in a proceeding to stay arbitration or by raising the objection at the hearing but waits until a motion to vacate an award to claim that there is no valid agreement waives this ground. *See* Comprehensive Accounting Corp. v. Rudell,

760 F.2d 138 (7th Cir. 1985); Revere Copper & Brass Inc. v. Overseas Private Inv. Corp., 628 F.2d 81 (D.C. Cir.), cert. denied, 446 U.S. 983 (1980). If this is the law, it would seem best to state it as the UAA does in §12(a)(5).

6. It should be noted that §§31, 67, and 73 of the 1996 English Arbitration Act require that a party who takes part in arbitral proceedings without objection to substantive arbitrability loses this ground of appeal. These provisions are similar to RUAA § 18(a)(5).

7. UAA Section 12(a)(5) has been rewritten to eliminate the double and triple negatives to meet the goal of making this section be more "clearly stated.

B. REPORTER'S COMMENT ON FAILURE TO DISCLOSE AND PUNITIVE DAMAGES

1. At the meeting of October 31, 1997, the Drafting Committee suggested that RUAA Section 18(a)(2) be amended to include a basis for a court to vacate an award if there is a violation of the provision on disclosure under the standards noted in RUAA Section 7 rather than to have a separate section. The Drafting Committee wanted to include the concept that before a court could vacate an award where an arbitrator has failed to disclose information in accordance with RUAA Section 7, the court would also have to conclude that the failure to disclose prejudiced the rights of a party--which is the same requirement for the other grounds of evident partiality, corruption or misconduct that now exists in RUAA Section 18(a)(2). This addition of requiring a prejudicial affect of a failure to disclose makes sense in terms of symmetry with the other grounds in RUAA

Section 18(a)(2) and it also makes clear that vacatur is not warranted for inconsequential omissions to disclose by the arbitrator.

2. RUAA Section 18(a)(6) would be a new provision whereby a court has authority to vacate an award where the arbitrators have imporperly allowed the remedy of punitive damages. *See* REPORTER'S COMMENT ON PUNITIVE DAMAGES §16. Presently courts review punitive damages by much the same standard of vacatur as any decision by an arbitrator. State Farm Fire and Cas. Co. v. Wise, 150 Ariz. 16, 721 P.2d 674 (Ct. App. 1986) (court held that under state arbitration statute arbitrator had authority to award punitive damages when the agreement did not specifically preclude them); Tate v. Saratoga Sav. and Loan Ass'n., 216 Cal.App.3d 843, 265 Cal.Rptr. 440 (1989) (award of punitive damages did not exceed arbitrators' powers because the arbitration provision in joint venture agreement allowed for arbitration in tort claims, with no mention of punitive damages); Kennedy, Matthews, Landis, Healy v. Pecora, Inc., 524 N.W.2d 752 (Ct. App. Minn. 1994) (held that arbitration panel did not exceed its powers in awarding punitive damages, therefore, vacatur under state arbitration statute would be improper); Thomas v. New Visions Remodeling, Inc., 1993 WL 410370 (Ohio Ct. App.) (court upheld the award of punitive damages, in that there was no showing that these damages represented an excess of power by the arbitrator, pursuant to state arbitration statute). In other words, under present UAA Section 12(a) and FAA Section 10(a) a party challenging an award of punitive damages would have to show fraud, evident partiality, misconduct, the arbitrators exceeded their powers or the like. This is a very narrow standard.

The new provision allows a broader review under a "clearly erroneous standard

with the court considering the facts and circumstances that gave rise to the award. Under RUAA section 16 an arbitrator granting a remedy of punitive damages will have to give written reasons for that portion of the award and there will be a record for the court to review. If the parties desire a full review of a punitive damage remedy under applicable legal principles, they can contract for such under RUAA section 18(b).

3. If the Drafting Committee decides to eliminate revised RUAA section 16(c), then this review provision of Section 18(a)(6) should also be removed.

C. REPORTER'S COMMENT ON SECTION 18(a)(4)

1. The words "hear evidence have been changed to "consider evidence. This corresponds to the proposal in Section 10(b) that arbitrators be given the authority to decide cases on the basis of dispositive motions. In such situations arbitrators may not "hear live testimony but decide a case on the basis of depositions or affidavits. If proposed Section 10(b) is approved by the Drafting Committee, then Section 18(a)(4) should not provide a basis for challenging a decision made on dispositive motions because the arbitrators technically did not "hear evidence in the form of oral testimony.

2. Even if the Drafting Committee does not adopt Section 10(b) concerning dispositive motions, the term "consider evidence may be better. In some situations, even without explicit statutory authority, courts have upheld arbitrators' decisions to rule on motions without live testimony. In Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal.App.4th 1096, 47 Cal.Rptr.2d 650 (1995), the court concluded that an arbitrator need not "hear evidence in the audible sense in order to rule on adjudicative motions but that affidavits

would suffice: "Legally speaking the admission of evidence is to hear it. Id. At 1105. The term "consider would alleviate a problem of potential vacatur challenges when arbitrators make rulings on the basis of other than oral testimony.

D. REPORTER'S COMMENT ON "OPT IN" PROVISION FOR ERRORS OF LAW

1. Consistent with the Drafting Committee's discussions at its prior meeting, this provision is drafted in a manner that reflects consideration of the New Jersey Alternate Procedure for Dispute Resolution (NJADR) statute and Clause 69 of the English Arbitration Act. No state other than New Jersey makes provision for review based on errors of law.

2. The Supreme Court or Congress may eventually clarify that the grounds for vacatur are limited to the four statutory grounds set out in §10(a) of the Federal Arbitration Act (FAA).[14] If that were to happen, a legitimate question would arise as to the validity of a

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[14]Section 10(a) provides as follows:

"(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

state law provision sanctioning vacatur for errors of law when the FAA does not permit same.

a. This concern is balanced by the assertion that the principle of Volt Information Sciences, Inc. v. Stanford University, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (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 seems particularly likely to be true given the fact that the proposed new Subsection (b) cannot be characterized as "anti-arbitration. Rather its "opt in feature 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, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (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.

b. A related concern with the "opt in device for securing judicial review of arbitral errors of law is the contention that the parties cannot contractually "create subject matter jurisdiction in the courts when it does not otherwise exist. This is not a problem under either the English Arbitration Act or the NJADR because both affirmatively establish that

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(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

the courts have jurisdiction over appeals seeking vacatur for arbitral errors of law, rather than leaving the creation of jurisdiction to the parties by virtue of an arbitration agreement obliging the courts to review challenged awards for errors of law.

3. If the Drafting Committee were to revise UAA §12(a) by including a provision sanctioning vacatur for errors of law (by whatever standard), the proposed Subsection (b) could be altered to permit the parties to "opt out of that type of judicial review, in a manner consistent with Clause 69 of the English Act. That possibility notwithstanding, the approaches reflected in the English Act and the NJADR are much different than a statutory provision that authorizes the parties to contractually create or expand the jurisdiction of the state or federal courts by effectively obliging them to vacate an arbitration award on a ground they otherwise would be foreclosed from relying upon. Court cases under the federal law show the uncertainty of an "opt in approach. *See* 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), Lapine Technology Corp. v. Kyocera Corp., 909 F. Supp. 697, 703 (N.D. Cal. 1995) (holding that the parties to an arbitration agreement cannot enlarge the jurisdiction of a federal court by providing for review of the arbitrator's findings of fact and conclusions of law.) (*citing* Chicago Typographical Union, 935 F.2d at 1505). *Contra, 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, 115 S. Ct. 1920, 1925 (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 §10(a) of the FAA provide only the default option in circumstances where the parties fail to contractually stipulate some alternate criteria for vacatur), Fils et Cables D'Acier de Lens v. Midland Metals Corp., 584 F. Supp. 240 (S.D.N.Y. 1984) (observing that subject matter jurisdiction already existed for a federal court to decide a petition for vacatur, the court held valid a contractual agreement by the parties increasing the scope of that judicial review to cover errors of fact under a substantial evidence standard and errors of law).

4. This uncertainty of the proposed Subsection (b) would likely cause concern among the state legislatures considering adoption of the Revised UAA. The determination as to whether this tack is permissible lies in a choice between the two positions represented by the cases cited above: (1) if one views the "opt in device as creating subject matter jurisdiction for the state or federal courts that does not otherwise exist under the UAA or the FAA—based on the presumption that courts are not permitted by either statute to vacate awards for errors of law (of any degree—see Comment 2 above)—there is a very serious problem with the proposed Subsection or (2) In contrast, if one views the "opt in device merely as a means for putting before the state or federal courts an additional criteria upon which they can base the vacatur decision over which they are already granted subject matter jurisdiction (in the federal courts by §10(a) of the FAA and in the state courts as a result of §12 of the UAA-based state arbitration act or the general subject

matter jurisdiction of the state courts) there is no problem here.

5. There is a possible middle ground view that avoids the problems caused by resort to the two polar views just discussed, *to wit*: the argument that if a state legislature embraces the "opt-in concept reflected in the proposed Subsection (b), it has established the subject matter jurisdiction of the state courts—that jurisdiction being "activated or triggered in circumstances where the parties to arbitration agreements elect to access it by agreeing to subject their arbitration awards to judicial review for errors of law. Of course, should the Supreme Court or Congress clarify that the exclusive grounds for vacatur under the FAA are those set out in its §10(a), a question would arise as to whether the federal courts, sitting in diversity, would have jurisdiction over a vacatur petition of this nature. It seems they likely would, if the arbitration agreement contains a clear expression of the parties' mutual intent that their arbitrations are to be controlled by the law of a state adopting Subsection 18(b).

6. There is a third, weighty problem inherent in the "opt-in" approach—the absence of a generally accepted standard or threshold for vacatur based on errors of law. First, even among the federal circuit courts of appeals there is substantial variation in the standards used to determine whether a claimed arbitral error of law is of a type and consequence sufficient to trigger vacatur. *See* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 734 (1996). In addition, there is tremendous variation in this regard between the state courts and the federal courts, as well as among the states.

7. None of the federal circuit courts of appeals permit vacatur for mere errors of law.

Instead, the majority of the circuits have sanctioned vacatur only for "manifest disregard of the law and/or for violation of "public policy." There is a widely held perception that these two nonstatutory grounds sanction vacatur for non-routine, big errors of law. Nevertheless, a strong argument can be made that, when properly applied, neither the "manifest disregard of the law nor the "public policy" ground for vacatur actually contemplate judicial oversight of the correctness of challenged arbitration awards on the relevant law. Instead, they go, respectively, to misconduct by the arbitrator in ignoring what the arbitrator knew to be the correct law, or the question of whether confirmation and implementation of a challenged award would compel a party to violate well recognized law. *See* Hayford, 30 GA. L. REV. at 774-85, 810-23.

8. A few of the circuits have approved vacatur of awards that are "clearly erroneous, "completely irrational, "arbitrary and capricious and the like. Although to date they have not been so interpreted, this latter group of standards could be extended to embrace errors of law divined by a court in arbitration awards. These standards are far from clear in their form and application--largely due to the absence of reasoned awards, which prevents courts from applying these criteria for vacatur in any meaningful, cogent manner.

a. The strong majority view in the states does not recognize errors of law as a ground for vacatur. Of the small number of states which appear to recognize the legitimacy of judicial review for arbitral errors of law, the reported case law contains only two references to the "manifest disregard of the law standard. *See* Lotoszinski v. State Farm Mut. Auto. Ins. Co., 94 Mich. App. 164, 288 N.W.2d 369 (1979), aff'd 417 Mich. 1, 331

N.W.2d 467 (1982)(a passing reference only, with no substantive discussion of the standard), and Nicolet High School Dist. v. Nicolet Educ. Ass'n., 118 Wis.2d 707, 348 N.W.2d 175 (1984) (labor arbitration case)(an award may be vacated if the arbitrator disregarded the law or if the award violates public policy.).

b. Scattered opinions (1 each) from the District of Columbia, Illinois, Indiana, Iowa, Maryland, Minnesota, Massachusetts, and Wisconsin speak in one manner or another to the "public policy" ground. *See e.g.*, State Auditor of Minnesota v. Minnesota Ass'n of Professional Employees, 504 N.W.2d 751, 752 (Minn. 1993) (holding that the question presented under the "public policy rubric is whether enforcement of the challenged award would violate the "well defined and "dominant public policy of the State), Koinicki v. Oak Brook Racquet Club, Inc., 110 Ill. App. 3d 217, 441 N.E.2d 1333 (1982) (an award that violates the public policy of the state is subject to vacatur), School City of East Chicago, Ind. v. East Chicago Federation of Teachers, Local 511, 422 N.E.2d 656 (Ind. Ct. App. 1981) (labor arbitration case) (there must be a basis in public policy before an arbitration award is subject to vacatur), School Committee of New Bedford v. New Bedford Educators Ass'n., 9 Mass. App. Ct. 793, 405 N.E.2d 162 (1980) (labor arbitration case) (award subject to vacatur if it directs relief contrary to statute).

9. The standards utilized in the state court cases sanctioning vacatur for errors of law typically employ some variant of a "gross error standard. *See, e.g.,* Carrs Fork Corp. v. Kodak Mining Co., 809 S.W.2d 699, 702 (Ky. 1991) ("[t]he award may always be impeached for a mistake [of law or otherwise] clearly appearing on its face. An award may be so grossly inadequate or excessive as to be in effect a fraud and subject to

vacation by a court although no actual fraud is claimed.); Texas West Oil & Gas Corp. v. Fitzgerald, 726 P.2d 1056, 1061-62 (Wyo. 1986), *reh'g denied*, 749 P.2d 278 (Wyo. 1988) (holding a court has the power to vacate an award for "manifest mistake of law proven by clear and convincing evidence.); Jontig v. Bay Metropolitan Transp. Auth., 178 Mich. App. 499, 444 N.W.2d 178 (1989) (award vacated where the court ascertained on the face of the award that the arbitrator [must have] made an error of law, and concluded that but for that error, the award would have been different); Westmark Properties, Inc. v. McGuire, 53 Wash. App. 400, 766 P.2d 1146 (1989) (an error of law recognizable from the language of the award, on its face, is grounds for vacatur).

10. Because of the wide diversity of standards for vacating awards because of an error of law, if the UAA were to incorporate the "opt-in" approach the Drafting Committee may find it necessary to tackle the problem of identifying the threshold for vacatur (e.g., mere error, big error, "manifest disregard of the law , violation of "public policy") that is consistent with the "no vacatur for a mere error law rule and, having done that, devise an unambiguous, bright line test for application of that standard that would not lead to significant variance across the states. This is a goal that to date has eluded the federal and states courts.

11. The language employed in Clause 69 of the English Act demonstrates the difficult nature of devising a clear and unambiguous standard for vacatur on this ground. Clause 69(c)(3) permits an award to vacated for an error of law if "(i) the decision of the [arbitration] tribunal on the question [of law] is *obviously wrong*, or (ii) the question [of law] is one of *general public importance* and the decision of the [arbitration] tribunal is

open to serious doubt. (Emphasis supplied.) It is not difficult to imagine the potential for disagreement as to what constitutes an award that is "obviously wrong or "open to serious doubt. The virtual impossibility of fashioning a statutory standard for vacatur on the basis of an error of law is a matter for deliberation by the Drafting Committee. Another factor for consideration is the likelihood that codification of any standard that centers upon the degree of the purported arbitral error of law will almost certainly encourage larger numbers of petitions for vacatur and will result in a wide divergence of thresholds for vacatur. Such a result will add significantly to the cost and delay of the arbitration process with little gain in certainty or fairness of outcome.

12. The Drafting Committee should consider whether the proposed Subsection (b), if adopted, should specify at which level of the state court judiciary the petition for vacatur is to be filed and/or specify whether appeals from that initial judicial determination are to be permitted. The NJADR statute stipulates that application for review of an award for an error of law is to be made to the Superior Court (trial court). The statute has been interpreted as not contemplating any appeal from the decision of the Chancery Division of Superior Court. Stanley Schenck v. HJI Associates, 295 N.J. Super. 445, 685 A.2d 481 (App. Div. 1996).

13. The Committee should consider whether the "second bite at the apple, the protection against the occasional "wrong arbitral decision [what has sometimes been referred to as a "screwball award] sought by the advocates of this provision can be satisfactorily and properly secured by the parties contracting for some form of appellate arbitral review. *See* Stephen L. Hayford and Ralph Peeples, *Commercial Arbitration in Evolution: An*

Assessment and Call for Dialogue, 10 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 405-06 (1995). This approach is consistent with the Supreme Court's contractual view of commercial arbitration and would not present the "creating jurisdiction and line drawing problem identified in the paragraph above.

As a matter of policy 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 that they seek and not the legal opinion of a court. Moreover, even judges, who are not selected by the parties for their expertise in a particular type of dispute, make "wrong decision--be it at the trial or appellate level.

14. At the Houston meeting, the Drafting Committee voted 6-4 to retain Section 18(b) in the Second Revised Draft in order to facilitate further discussion of the advisability of its inclusion in the Act. The discussion of the Second Revised Draft in Philadelphia will center on three threshold issues that emerged at the Houston meeting.

15. The first threshold question that must be addressed with regard to Section 18(b) is what, if anything it adds to the existing legal framework for the commercial arbitration process. It is clear that parties are at present free to provide for judicial review of errors of law (or fact) in their arbitration agreement. Section 18(b) would serve only to provide statutory recognition of that state of that reality. It would create no new law.

The value-added dimensions are three. First, there is an "informational element in that §18(b) would clearly inform the parties that they can "opt-in to enhanced judicial review. Second, Section 18(b), if properly framed, can serve a "channeling function by setting out clear 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 in Section 18(b) 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. Section 18(b) would propel large numbers of attorneys to put review provisions in arbitration agreements, as a safe harbor in order to avoid manifold malpractice claims by clients who lose in arbitration. Including in the RUAA legislative sanction of "opt in provisions that also embrace errors of fact would undoubtedly exacerbate this phenomenon. 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 Section 18(b) would virtually ensuring 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. At its core arbitration is supposed to be an alternative to litigation in a court of law, not a prelude to it. Parties unwilling to accept the risk of binding awards because of an inherent mistrust of the process and arbitrators are best off foregoing arbitration in

the first instance and relying instead on traditional litigation.

The final argument raised in opposition to the "opt-in device of Section 18(b) 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.

16. The second threshold question goes to the likely final posture and effect of the developing body of case law in the federal courts concerning the propriety and enforceability of contractual "opt-in provisions that are the subject of Section 18(b). The elements of the current debate as to this issue are fully addressed in the Reporter's Comments (numbers 3-5, pages 94-96) appended to the First Revised Draft. Since the Houston meeting an important additional dimension has been added to the case law—the December 1997 opinion of the Ninth Circuit Court of Appeals in *LaPine Technology 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 Info. Sciences v. Stanford*, 489 U.S. 468, 48-79, 109 S. Ct. 1248, 1255-56 (1989), *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 1806 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 Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995). The court rejected the "jurisdictional view of the FAA set out by the Seventh Circuit in *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991).

After *Kyocera* the tally stands at two U.S. Circuit Courts of Appeals approving contractual "opt-in provisions and one U.S. Circuit Court of Appeals rejecting those provisions. The law is still in a very uncertain state. Caution should be exercised not to over read the significance of *Kyocera*. The opinion of the court, written by Judge Fernandez, sounds in broad sweeping terms that brush aside the concerns pertaining to contractual "creation of jurisdiction for the federal courts. However, the concurring opinion of Judge Kozinski speaks in much more cautious terms, stating "I find the question presented closer than most. Judge Kozinski expressed concern that Congress has not authorized courts to review arbitral awards for errors of fact or law but nevertheless concluded that concern was outweighed by the court's duty to enforce the terms of the arbitration agreement. Judge Mayer's dissenting opinion curtly observed

"[w]hether to arbitrate, what to arbitrate, how to arbitrate, when to arbitrate are matters that parties may specify contractually. But in the absence of "authority explicitly empowering litigants to dictate how an Article III court must review an arbitration decision Judge Mayer insisted the parties may not do so. Citing *Chicago Typographical Union*, Judge Mayer conceded that the parties can contract for some form of appellate arbitral review. He was unwilling to agree they can contract for judicial review.

The three opinions in *Kyocera* crystallize the true nature of the debate as to the "jurisdictional dimension of the Section 19(b) issue. 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? The Drafting Committee's earlier discussions of the "front end and "back end issues as regards FAA preemption of conflicting state law are on point here.

17. The third threshold issue is related to the second just discussed and centers on the dynamic of FAA preemption of conflicting state law. If the FAA is eventually interpreted to bar contractual "opt-in provisions, Section 18(b) would be voided. Thus, the Drafting Committee should address both the nature of the risk of preemption and the likelihood of a rule under the FAA barring contractual "opt-in provisions. Regardless, even if the FAA were deemed not to bar the parties from contracting for judicial review, the question of whether "opt-in provisions are legal will, in the end, be decided as a matter of federal, and not state law. Thus, Section 18(b) will have no incremental effect. It will either be invalidated by FAA preemption or it will be rendered unnecessary by a rule of federal law permitting contractual "opt-in provisions.

The preemption (or mooting) of Section 18(b) could occur in one of two ways. First, the emergence of a majority view among the circuit courts of appeals, or a clear rule of law from the Supreme Court favoring one side of the contemporary *Kyocera/Gateway Technologies--Chicago Typo-graphical Union* debate would surely rest on an interpretation of the FAA. Consequently, whether "opt-in provisions are deemed permissible or impermissible, the rule of law under the FAA would control in all jurisdictions, regardless of whether Section 18(b) is included in the Act.

The second way in which preemption of Section 18(b) could occur is by the establishment of a broader rule of law holding that the Section 10(a) standards are the sole and exclusive grounds for vacatur of commercial arbitration awards. Given the current disarray among the circuit courts of appeals, this rule would almost certainly be established by the Supreme Court. If the "statutory grounds only view were to become

the rule it would be but a short step to the rule that the parties cannot be permitted to contractually override Section 10(a). The reasoning underlying that rule would simple—because courts are not permitted to review awards for errors of law under Section 10(a), they cannot be obliged to do so by a contractual agreement between private parties because such provisions would contrary to the pro-arbitration public policy underpinning the FAA. In this scenario Section 18(b) would be voided and effectively preempted by Section 10(a) of the FAA.

It is impossible to reliably predict the outcome of the present debate regarding the propriety under the FAA of contractual "opt-in provisions. The nature and extent of the risk that Section 18(b) may be preempted by whatever rule of FAA law eventually emerges is a factor to be weighed by the Drafting Committee along with the other risks/downsides and attributes attendant to the proposed provision.

18. The final issue to be addressed is the advisability of expanding the reach of the Section 18(b) "opt-in provision to embrace appeals based on purported arbitral errors of fact. This question was not expressly discussed at the Houston meeting. It arises largely as a result of the Ninth Circuit's approval of an "opt-in provision of this nature. Sanctioning contractual provisions for judicial review of arbitral errors of fact in Section 18(b) is a step the Drafting Committee should take with the utmost caution. All of the Section 18(b) arguments advising reticence with regard to errors of law can be advanced with much greater force here. Statutory sanction of contractual provisions securing judicial review for both arbitral errors of law and fact (under any standard) would virtually ensure adoption of such provisions. Counsel that did not include such a

provision in a commercial contract in the face of such a statutory sanction would invite malpractice claims from parties displeased with arbitration awards. Thus, the threat to the finality of commercial arbitration would be greatly increased.

SECTION 19. MODIFICATION OR CORRECTION OF AWARD.

(a) Upon application made within ninety days after ~~delivery of a copy~~ *the applicant receives record of notice* of the award ~~to the applicant~~, the *C*ourt shall modify or correct the award where *at least one of the following occur*:

(1) There was an evident miscalculation of figures or an evident mistake in the description of ~~any~~ *a* person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the *C*ourt shall modify ~~and~~ *or* correct the award so as to effect its intent and shall confirm the award as so modified ~~and~~ *or* corrected. Otherwise, the *C*ourt shall confirm the award as made.

(c) An application to modify or correct an award may be joined*,* in the alternative*,* with an application to vacate the award.

SECTION 20. JUDGMENT OR DECREE ON AWARD. Upon ~~the~~ granting ~~of~~ an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the *C*ourt.

SECTION 21. JUDGMENT ROLL, DOCKETING.

(a) On entry of judgment or decree, the clerk shall prepare the judgment roll consisting, to the extent filed, of the following:

(1) The agreement and each written extension of the time within which to make the award;

(2) The award;

(3) A copy of the order confirming, modifying or correcting the award; and

(4) A copy of the judgment or decree.

(b) The judgment or decree may be docketed as if rendered in an action.

SECTION 22. APPLICATIONS TO COURT. Except as otherwise provided, an application to the *C*ourt under this *A*ct shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of *C*ourt for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.

SECTION 23. ~~Court,~~ JURISDICTION. ~~The term "court" means any court of competent jurisdiction of this State.~~ The making of an agreement described in Section ~~1~~ 2 providing for arbitration in this State confers jurisdiction on the *C*ourt to enforce the agreement under this Act and to enter judgment on an award thereunder.

REPORTER'S COMMENT

1. The term "court is now in the definitional section--new section 1A.

SECTION 24. VENUE. An initial application shall be made to the *C*ourt of the [county] in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the application shall be made in the [county] where the adverse party resides or has a place of business or, if he has no residence or place of business in this State, to the *C*ourt of any [county]. All subsequent applications shall be made to the *C*ourt hearing the initial application unless the *C*ourt otherwise directs.

SECTION 25. APPEALS.

(a) An appeal may be taken from *any of the following*:

(1) An order denying an application to compel arbitration made under Section 3;

(2) An order granting an application to stay arbitration made under Section 3(b);

(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 judgment or decree entered pursuant to the provisions of this

act.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

SECTION 26. ACT NOT RETROACTIVE. This *A*ct applies only to agreements made subsequent to the taking effect of this act.

Or the following Alternative

SECTION ***26. EFFECTIVE DATE.***

(a) Before January 1, 199_ [20__], the Act governs arbitration agreements entered into:

(1) after the effective date of this Act; and

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

(b) After January 1, 199_ [20__], this Act governs all arbitration agreements.

REPORTER'S COMMENT

1. At the Drafting Committee meeting of October 31, 1997, Chair Fran Pavetti asked the Reporter to draft a provision that would (1) give parties who have entered into arbitration agreements under the UAA the option to elect coverage under the RUAA and (2) at a certain date cause all arbitration agreements, whether entered into before or after the effective date of the RUAA, to be governed by the RUAA rather than the UAA.

2. This alternative provision has many benefits. Under the section 26 approach of the UAA, i.e. the law is only applicable to agreements entered into after the effective date of the Act, two sets of rules 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 for these parties to opt into the provisions of the RUAA without rescinding their initial agreement.

The alternative "Effective Date provision also sets a time certain when all arbitration agreements will be governed by the RUAA.

3. Alternative section 26 is based upon the effective-date provisions in the 1996 Amendments constituting the Uniform Limited Liability Partnership Act of 1994.

SECTION 27. UNIFORMITY OF INTERPRETATION. This *A*ct shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.