THE REVISED UNIFORM ARBITRATION ACT

NEW *§1A. Definitions*

In this Act, unless specifically provided otherwise or the context otherwise requires:

(1) "Court" means any court of competent jurisdiction of this State. The making of an agreement described in Section 1 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.

(2) "Notice": 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) it comes to the person's attention; or (2) it is duly 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.

(3) "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. The Reporter has defined the terms "court, "notice, and "record in a separate section. The Drafting Committee requested definitions of these terms at the first committee meeting. If the Drafting Committee determines that these terms should remain in a separate section this will become section 1 of the Revised Uniform Arbitration Act and the other sections will be renumbered accordingly.

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

3. The term "notice is used in present section 5(a) of the UAA in regard to a person receiving

notice at least five days prior to a hearing and in section 9 concerning the giving of notice by one party to another for an application to change an award by the arbitrators. The Drafting Committee also 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 notice 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.

4. Section 1A(3) is based on the definition of "record in proposed revised Article 2 of the Uniform Commercial Code. These sections also are similar to the definition of an "agreement in writing in the 1996 English Arbitration Act clause 5(2).

§ 1. 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 upon such grounds as exist at law or in equity for the revocation of any 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 3, will decide whether the conditions precedent for arbitrability have been met and whether the underlying contract 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, unless the court issues an order to the contrary, may continue the arbitration proceedings until a final decision that determines that the arbitrators have no authority to determine the dispute.

REPORTER'S COMMENT

1. Section 1(a) has been changed to reflect new electronic and other means of recording information of an agreement. The definition of "record is in Section 1A(3) of the Revised UAA.

2. Section 1(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.

3. The Drafting Committee at the last meeting discussed the separability doctrine and the Reporter in section 1(b) has drafted language to include this precept for consideration at the next meeting. [*the arbitrators, chosen in accordance with Section 3, will decide * * * whether the underlying contract is enforceable*."] This language in section 1(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.

One area where courts often make the decision as to enforceability 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. This 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).

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. The second sentence of section 1(b) follows the practice of the American Arbitration

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

§ 2. Proceedings to Compel or Stay Arbitration.

(a) On application of a party showing an agreement described in Section 1, 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 court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this Section, the application shall be made therein. Otherwise and subject to Section 18, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(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.

NEW *§2A. Proceedings for Provisional Remedies.*

The Court on application of a party may grant 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 3 or are authorized or able to act on the requested relief.

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 (Mass. 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. Such relief generally takes the form of either an injuctive order, e.g., requiring that a discontinued franchise or distributorship remain in effect

until an arbitration award[1] or that a former employee not solicit customers pending arbitration[2], or that a party be required to post some form of security by attachment, lien, bond, etc[3]., 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 2A that limits a court granting prelimary relief to "any time before the arbitrators are appointed in accordance with Section 3 or are authorized or able to act on the requested relief lessens the problems of judicial interference with the arbitration process and in most cases will provide a court with an arbitrator's determination on the propriety of preliminary relief. 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

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[1] 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).

[2] 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).

[3]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.

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). [4]

This language in section 2A relates directly to new section 5(b) of the RUAA which allows arbitrators to issue orders for preliminary relief.

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

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[4]Section 2A 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.

§ 3. 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 successor has not been duly appointed, the 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.

§ 4. Majority Action by Arbitrators.

The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this act.

§ 5. ~~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.

(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.

(c)~~(a)~~ The arbitrators shall appoint a time and place for the hearing and cause notice of the hearing ~~notification to~~ 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 who has not received proper notice objects 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 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~~ court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(d)~~(b)~~ 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.

REPORTER'S COMMENT

1. The Study Committee Report was concerned that presently section 5 does not specify that arbitrators may hold pre-hearing conferences. At the first meeting of the Drafting Committee 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 unanimously voted on revised section 5(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, stipulate matters, identify witnesses, and resolve preliminary matters.

4. The case law, commentators, the rules of appointing organizations and some state statutes are very clear that arbitrators have broad authority to order 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.

5. Section 5(b) is related to new section 2A of RUAA regarding the authority of courts to provide interim relief in support of the arbitration process. The clear intent of the cases in this area and

the best functioning of the system is that when issues of interim relief or awards arise after the appointment of the arbitrators, the preferred procedure is for the parties to bring the issue to the arbitrators first. *See* II Macneil Treatise §§ 25.1.2, 25.3, 36.1. Such a process 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.

6. The Drafting Committee should focus on section 5(b)(4) regarding the appointment of experts for use by the tribunal. This provision is included in the 1996 English Arbitration Act cl. 37; it is an interesting mechanism, used particularly in international commercial arbitration, that allows the arbitral tribunal to call its own expert witnesses for "neutral advice on matters. A number of appointing organizations include in their rules the authority for arbitrators to appoint expert witnesses. AAA Intn'l Arb. Rules Art. 13; CPR R. 11.3 (although CPR Commentary states that this power should "be exercised sparingly, and usually upon consultation with the parties as to the need for a neutral expert); International Chamber of Commerce Arb. Rules Art. 14.2; UNCITRAL Arb. Rules Art. 27. As disputes become more involved with technical issues such as intellectual property rights, this provision allows arbitrators an avenue of insight into such complex issues. *See* Jean de Saugy, "Intellectual Property Rights and International Arbitration, 3 Arter & Hadden Review 8 (1997).

7. Section 5(c) was changed to reflect new means of receiving notice (See definitions section 1A(2)) 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.

§ 6. Representation by Attorney.

A party has the right to be represented by an attorney at any proceeding or hearing under this act. A waiver thereof prior to the proceeding or hearing is ineffective.

§ 7. Witnesses, Subpoenas, Depositions.

(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 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, 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.

§ 8. Award.

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall 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 time as the court orders on application of a party. The parties may extend the time in writing 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 the arbitrators of his objection prior to the delivery of the award to him.

§ 9. 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 13; (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 application shall be made within twenty days after delivery of the award to the applicant. Written notice thereof shall be given 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 11, 12 and 13.*

b. Submission by Court. *If an application to a court is pending under Sections 11, 12 or 13, 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 13; (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 11, 12 and 13.*

REPORTER'S COMMENT

1. Section 9 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 §§11, 12 or 13 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 9 serves an important purpose in light of the arbitration doctrine of *functus officio*[5] 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 a court, in the absence of an authorizing statute, 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 described in §13(a)(1) for miscalculation or mistakes in descriptions or in §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 §9 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

[5]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).

has caused confusing case law under the FAA on whether and when a court can remand or arbitrators can reconsider matters. *See* Macneil Arbitration Treatise §§37.6.4.4; 42.2.4.3. The mechanism for correction of errors in UAA §9 enhances the efficiency of the arbitral process.

2. Section 13 seems to overlap and perhaps contradict §9 on timing. A party who files a motion with a court to modify or correct an award under §13 must do so within 90 days; the timing in §9 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 §9 motion to which the 20-day time limit applies is to the arbitrators and the §13 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 section 9 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 and receiving notice as used in revised section 9(a) are defined in section 1A(2) of the Revised UAA.

§ 10. Fees and Expenses of Arbitration.

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

(b) The arbitrators shall have the authority to award attorney fees 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.

REPORTER'S COMMENT

1. Present section 10 does not allow arbitrators to award attorney fees even though the parties could have recovered such in an action in court. The language in section 10 could be interpreted to preclude attorney fees even if the parties by their agreement allow an arbitrator to make such an award. 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); Loxahatchee River Environmental Control Dist. v. Guy Villa & Sons, Inc., 371 So.2d 111 (Fla. App. 1978), cert. denied, 378 So.2d 346 (Fla. 1979) (arbitration statute excludes attorney fees from subject matter jurisdiction of arbitrators). Revised section 10 would give arbitrators the authority to make an award of attorney fees where allowed by law or agreement. The language is based on arbitration statutes in Texas and Vermont that allow recovery in such instances. See V.T.C.A. CIVIL PRACTICE & REMEDIES 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).

2. Revised section 10(b) provides for attorney fees where allowed by agreement. *See* CA. CIVIL CODE § 1717 (allowing award of attorney fees if contract specifically provides such). Certainly the concept of party autonomy should prevail where parties specifically determine that the arbitrators should have this power. In addition, 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 cliam 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).

Parties who would otherwise be entitled to an award of attorney fees in a civil action should not lose this right because they are bound by an agreement to arbitrate. 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); *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.)

3. On the other hand, if there is no specific statute, rule or law that would allow a court to authorize attorney fees and the parties have not given this authority to the arbitrators in their agreement, then the arbitrators should only be allowed to make such an award under the American rule requiring bad faith or vexatiousness. Alyeska Pipeline Service Co. v. Wilderness Socy., 421 U.S. 240 (1975) (court has authority to assess attorney fees where losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons); AFSCME\IOWA Council 61 v. Iowa Dept. of Personnel, 537 N.W.2d 712 (Iowa 1995) (court could award attorney fees against state employer in action to enforce arbitration award if state acted in bad faith in refusing to comply with award.); City of Scranton v. Local Union No. 669 of International Ass'n of fire Fighters, 122 Pa.Cmwlth. 140, 551 A.2d 643 (1988) (court could assess attorney fees and court costs against city employer for challenging arbitration award where city failed to participate in arbitration proceedings and its complaints to trial court were arbitrary, vexatious, and in bad faith).

§ 11. 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 delivery of an award any party to the arbitration may apply to the court for an order confirming the award, and thereupon a court must issue such an order unless (1) the award is modified or corrected as provided in Section 9 or (2) the award is vacated, modified, or corrected as provided in Sections 12 and 13.

REPORTER'S COMMENT

1. The problem discussed by members of the Study Committee with present § 11 is that a winning party cannot have a court confirm an award under §11 until after the time limits have run for filing (1) a motion to the court to vacate in §12(b) or to modify or correct in §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 §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.] Section 10 describes the grounds under which a person can seek to vacate an arbitration award and §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 §§12(b) and 13(a).

3. The language drafted for revised UAA §11 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 § 9 or filed a motion to vacate, modify or correct under §§ 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.*

§ 12. Vacating an Award.

(a) Upon application of a party, the court shall vacate an award where:

(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 in any of the arbitrators or misconduct 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 evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or

(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*;

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) 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 predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in clause (5) of Subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with Section 3, or if the award is vacated on grounds set forth in clauses (3) and (4) of Subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 3. 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.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

REPORTER'S COMMENT

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 2 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 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 §19(a)(1) from an order denying an application to compel arbitration under §2 or under §19(a)(2) from an order granting a stay of arbitration under §2(b). In other

words, if ultimately there is a final judicial determination under §2 that the arbitration agreement is invalid, there would not be an award and the §12(a)(5) factor of no adverse determination in a proceeding under §2 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 Section 2 proceeding but may have another valid objection on the same ground after the arbitration hearing. Under the language of present §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 §2(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 §2(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 section 12(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 §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.

Revised section 12(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 §12(a)(5) in the Federal Arbitration Act (FAA) §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) 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 §12(a)(5).

7. 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.

§ 13. Modification or Correction of Award.

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any 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 court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court 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.

§ 14. 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 court.

§ 15. 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.

§ 16. Applications to Court.

Except as otherwise provided, an application to the court under this act shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court 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.

§ 17. ~~Court,~~ Jurisdiction.

~~The term "court" means any court of competent jurisdiction of this State.~~ The making of an agreement described in Section 1 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.

REPORTER'S COMMENT

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

§ 18. Venue.

An initial application shall be made to the court 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 court of any [county]. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

§ 19. Appeals.

(a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under Section 2;

(2) An order granting an application to stay arbitration made under Section 2(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.

§ 20. Act Not Retroactive.

This act applies only to agreements made subsequent to the taking effect of this act.

§ 21. Uniformity of Interpretation.

This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.