

DRAFT

FOR DISCUSSION ONLY

REVISION OF UNIFORM ARBITRATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

FEBRUARY 19, 1999

REVISION OF UNIFORM ARBITRATION ACT

With Prefatory Note and Reporter's Notes

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PREFATORY NOTE

The Uniform Arbitration Act (UAA), promulgated in 1955, *which is the basis for arbitration statutes in 49 jurisdictions, having been adopted in 35 states, and in some substantially similar 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 oftentimes hostile state law. That goal has been accomplished. Today arbitration is a primary mechanism favored by courts and parties to resolve disputes in many areas of the law. This growth in arbitration caused the Conference to appoint a Drafting Committee to consider revising the Act in light of increasing use of arbitration, the

greater complexity of many disputes resolved by arbitration, and the developments of the law in this area.

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

There are a number of principles that the Drafting Committee agreed upon at the outset of 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 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 6 allows consolidation of issues involving multiple parties. *Such a provision can be of special importance in adhesion situations where there are numerous persons with essentially the same claims against a party to the arbitration agreement.* Finally, in most instances parties intend the decisions of arbitrators to be final with minimal court involvement unless there is clear unfairness or a denial of justice. *This contractual nature of arbitration means that the provision to vacate awards in section 19 is limited. This is so even where an arbitrator may award attorney fees, punitive damages or other exemplary relief under Section 17.* Section 10 insulates arbitrators from unwarranted litigation to insure their independence by providing them with immunity.

Other new provisions are intended to reflect developments in arbitration law and to insure that the process is a fair one. Section 8 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 13 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 Court¹ 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, mooted 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

¹ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 35 (1967); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Perry, Southland Corp. v. Keating*, 465 U.S. 2 (1984); *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520 (1987); *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995); *Doctor’s Associates v. Cassarotto*, 517 U.S. 681 (1996).

the FAA with regard to these “back end” issues. This dimension of FAA preemption of state arbitration law is further complicated by the strong majority view among the U.S. Circuit Courts of Appeals that the Section 10(a) standards are not the exclusive grounds for vacatur.

Nevertheless, the Supreme Court’s unequivocal stand to date as to the preemptive effect of the FAA provides strong reason to believe that a similar result will obtain with regard to Section 10(a) grounds for vacatur. If it does, and if the Supreme Court eventually determines that the Section 10(a) standards are the sole grounds for vacatur of commercial arbitration awards, FAA preemption of conflicting state law with regard to the “back end” issues of vacatur (and confirmation and modification) would be certain. If the Court takes the opposite tack and holds that the Section 10(a) grounds are not the exclusive criteria for vacatur, the preemptive effect of §10(a) would be limited, most likely to the rule that state arbitration acts cannot eliminate, limit or modify any of the four party and arbitrator misconduct grounds set out in Section 10(a). A holding by the Supreme Court that the Section 10(a) grounds are not exclusive would also free the states to codify other grounds for vacatur beyond those set out in Section 10(a). These various, currently nonstatutory grounds for vacatur are discussed at length in the Reporter’s Comments appended to Section 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

² *Terminix* 513 U.S. at 281 (1995)(quoting *Volt*, 489 U.S. at 474 (1989)) and quoted in *Cassarotto*, 517 U.S. 681, 685 (1996); and *Cassarotto*, 517 U.S. at 688 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

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., discovery [RUAA section 13], consolidation of claims [RUAA section 6], arbitrator immunity [RUAA section 10]) 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 17) and the standards for arbitrator disclosure of potential conflicts of interest (RUAA section 8) 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.

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

3 (a) “Arbitration institution” means any neutral organization, association,

3 *Id.*

1 agency, board, or commission that initiates, sponsors, or administers arbitration
2 proceedings, or is involved in the appointment of arbitrators.

3 (b) “Court means a court of competent jurisdiction of this State.

4 (c) “Notice : Unless otherwise agreed, a person gives notice by taking
5 such steps as may be reasonably required to inform another party in ordinary course
6 whether or not the other party actually knows of it. A person receives notice when (1) the
7 contents thereof comes to the person’s attention; or (2) it is delivered at the person’s place
8 of residence or place of business or at any other place generally considered as the place
9 for receipt of such communications for the person.

10 (d) “Record means information that is inscribed on a tangible medium or
11 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 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, NASD Regulation, Inc., 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 RUA section 7, appointment of arbitrators, and RUA section 11, the arbitration process). The important hallmarks of such agencies are that they are neutral and impartial. *See, e.g.,* Engalla v. Permanente Medical Group, Inc., 15 Cal.4th 951, 938 P.2d 903, 64 Cal.Rptr.2d 843 (Cal. 1997) (defendants' self-administered arbitration program between insurer and customers that did not

impartially administer arbitration system and made representations about timeliness of the proceedings contrary to what defendant knew would occur was improper). The term “arbitration institution” is used in RUAA section 8 concerning arbitrator disclosure and RUAA section 10 concerning arbitrator immunity.

At the March 20, 1998, meeting the Drafting Committee determined to eliminate the term “independent” from the definition of “arbitration institution” because many arbitrations are administered by institutions that are involved in the industry, such as NASD, NYSE, AMSE. So long as the “arbitration institution” is neutral, the Committee determined that it should be covered under the RUAA and receive the immunity protections of Section 10(b).

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 that could be given.

The concept of notice also occurs in UAA section 8(b) (RUAA § 15(b)) concerning a party notifying an arbitrator of untimely delivery of an award; section 9 (RUAA § 16) concerning a party's notice of requesting a change in the award by arbitrators; and section 13(a) (RUAA § 20(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 § 23) 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 § 23) 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(d) is based on the definition of "record" in Sec. 5-102(a)(14) of the Uniform

Commercial Code and in proposed revised Article 2 of the Uniform Commercial Code and is intended to carry forward established policy of the Conference to accommodate the use of electronic evidence in business and governmental transactions. It is not intended to mean that a document must be filed in a governmental office.

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). RUAA section 5 requires that the notice for commencement of an arbitration proceeding be a “record.” In addition section 8(a) (RUAA § 15(a)) requiring that an award be in writing and a copy of a written award be delivered to the parties, section 9 (RUAA § 16) concerning written notice of an application to the arbitrators to change the award, section 13(a) (RUAA § 20(a)) concerning an application to modify or correct an award after receiving notice of a copy of the award, and new RUAA § 17(c) concerning punitive damages have been changed accordingly.

1 **SECTION 2. VALIDITY OF ARBITRATION AGREEMENT.**

2 (a) An agreement or a provision in a contract contained in a record to
3 submit to arbitration any existing or subsequent controversy arising between the parties is
4 enforceable except upon grounds that exist at law or in equity for the revocation *or*
5 *invalidation* of a contract.

6 (b) Unless otherwise provided in the contract the following rules apply:

1 (1) A court shall decide whether an agreement to arbitrate exists or
2 whether a dispute is subject to such an agreement.

3 (2) Arbitrators, chosen in accordance with Section 7, shall decide
4 whether the conditions precedent to arbitrability have been met and whether the contract
5 of which the arbitration agreement is a part is enforceable.

6 (3) If a party challenges in court the existence of an agreement to
7 arbitrate or whether a dispute is subject to an agreement to arbitrate, the arbitration may
8 proceed pending final resolution of the issue by the court, unless the court otherwise
9 orders.

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(d) 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. Duinick 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); *In re Gardner Zemke Co.*, 978 S.W.2d 624 (Tex.App. 1998); *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 7, 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 7, 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); Dallas Cardiology Associates v. Mallick, 978 S.W.2d 209 (Tex.App. 1998); 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. *S&R Company of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80 (2d Cir. 1998). Allowing the court to decide this issue of arbitrability comports with the separability doctrine because in most instances waiver concerns only the arbitration clause itself and not an attack on the underlying contract. *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 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 there are many arbitration cases conducted in the securities industry, this somewhat unique issue of the application of the NASD Section 15 and whether it is a statute of limitations has been widely litigated with mixed results. However, its somewhat limited applicability in the

⁴Section 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.

overall scheme of commercial arbitration 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.

6. At the meeting of March 20, 1998, the Drafting Committee made a number of changes in this section:

(1) eliminate “valid” and “irrevocable” in Section 2(a) and leave only the word enforceable. The Committee decided that these terms were redundant and in 1956 only served to underscore, what was then somewhat questionable, the legal enforceability of arbitration clauses. With the widespread acceptance of arbitration as an alternative to litigation, the additional terms are unnecessary. The Committee concluded that the Comments should reflect that the elimination of this language is not intended to be a substantive change.

(2) Eliminate the last sentence of Section 2(a): “This Act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].” The Committee determined similarly that this language was historical in nature and unnecessary because of the widespread acceptability of the UAA to all disputes, including arbitration clauses between employers and employees. The Committee determined that the Comments should reflect that the elimination of this language is not intended to be a substantive change.

(3) Note in Comments that the term “court” in Section 2(b) is not limited to the definition of “court” in Section 1(b) because an action involving arbitrability may be in other than “a court of competent jurisdiction of this State,” such as a federal

court because of diversity of citizenship.

(4) Put in Comment that the term “contract” in Section 2(b) refers to the entire contractual arrangement and that the term “agreement” refers only to the arbitration agreement.

7. At the meeting of October 9, 1998, the Drafting Committee determined to make an official comment the Memorandum of September 9, 1998, regarding contracts of adhesion and unconscionability as modified by discussion at the meeting. The comment would be as follows:

“Unequal bargaining power often occurs in arbitration provisions involving employers and employees, sellers and consumers, health maintenance organizations and patients, franchisors and franchisees, and others.

“Despite some recent developments to the contrary, courts do not often find contracts unenforceable for unconscionability. To determine whether to void a contract on this ground, courts examine a number of factors. These factors include: unequal bargaining power, whether the weaker party may opt out of arbitration, the arbitration clause’s clarity and conspicuousness, whether an unfair advantage is obtained, whether the arbitration clause is negotiable, whether the arbitration provision is boilerplate, whether the aggrieved party had a meaningful choice or was compelled to accept, whether the arbitration agreement is within the reasonable expectations of the weaker party, and whether the stronger party used deceptive tactics. *See, e.g., Broemmer v. Abortion Serv. of Phoenix, Ltd.*, 173

Ariz. 148, 840 P.2d 1013 (1992); *Chor v. Piper, Jaffray & Hopwood, Inc.*, 261 Mont. 143, 862 P.2d 26 (1993); *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Powers v. Dickson, Carlson & Campillo*, 54 Cal.App. 4th 1102, 63 Cal.Rptr.2d 261 (1997); *Beldon Roofing & Remodeling Co. v. Tanner*, 1997 W.L. 280482 (Tex.Ct.App.).

“Despite these many factors, courts have been reluctant to find arbitration agreements unconscionable. II MACNEIL TREATISE § 19.3; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33 (1997); Steven J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Cassarotto*, 31 Wake Forest L. Rev. 1001 (1996). However, in the last few years, some cases have gone the other way and courts have begun to scrutinize more closely the enforceability of arbitration agreements. *Shankle v. B-G Maintenance Mgt., Inc.*, _____ F.3d _____, 1999 WL 2444 (10th Cir.) (arbitration clause does not apply to employee’s discrimination claims where employee is required to pay portion of arbitrator’s fee that is a prohibitive cost for him so as to substantially limit his use of arbitral forum); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998) (employee not required to arbitrate Title VII claim where the contract limits damages below that allowed by the statute); *Hooters of America, Inc. v. Phillips*, 1998 U.S. Dist. LEXIS 3962 (D. S.C.) (one-sided arbitration agreement that takes away numerous substantive rights and

remedies of employee under Title VII unenforceable as unconscionable and void on public policy grounds); *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, *supra* (arbitration agreement unenforceable as contract of adhesion because it required a patient to arbitrate a malpractice claim and to waive the right to jury trial and was beyond the patient's reasonable expectations where drafter inserted potentially advantageous term requiring arbitrator of malpractice claims to be a licensed medical doctor); *Engalla v. Permanente Med. Grp.*, 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843 (1997) (health maintenance organization may not compel arbitration where it fraudulently induced participant to agree to the arbitration of disputes, fraudulently misrepresented speed of arbitration selection process and forced delays so as to waive the right of arbitration); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 68 Cal. App. 4th 374 (1998) (clause in arbitration agreement limiting employee's remedies in state anti-discrimination claims severed from the agreement and held void on grounds of unconscionability); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997) (one-sided compulsory arbitration clause which reserved litigation rights to the employer only and denied employees rights to exemplary damages, equitable relief, attorney fees, costs, and a shorter statute of limitations unconscionable); *Alamo Rent A Car, Inc. v. Galarza*, 306 N.J. Super. 384, 703 A.2d 961 (1997) (arbitration clause that does not clearly and unmistakably include claims of employment discrimination fails to waive employee's statutory rights and

remedies).

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

with these standards will be a legitimate and meaningful alternative to litigation. *See, e.g., Cole v. Burns Int'l Security Serv.*, 105 F.3d 1465 (D.C. Cir. 1997) (referring specifically to the due process protocol in the employment relationship in a case involving the arbitration of an employee's rights under Title VII).

“The Drafting Committee determined to leave the issue of adhesion contracts and unconscionability to developing law (1) because the issue of unconscionability reflects so much the substantive law of the states and not just arbitration, (2) because the case law, statutes and arbitration standards are rapidly changing, and (3) because treating arbitration clauses differently than other contract provisions would raise significant preemption issues under the Federal Arbitration Act.

“However, because an arbitration agreement in many instances effectively waives a party's right to a jury trial, courts should ensure ~~that the parties have knowingly and voluntarily assented to an arbitration procedure.~~ This scrutiny is *the fairness of an agreement to arbitrate*, particularly ~~important~~ in instances involving statutory rights which provide claimants with important remedies. Courts should determine that an arbitration process is ~~fair and~~ adequate to protect these important rights. Without these safeguards, arbitration loses credibility as an appropriate option to litigation.

8. At the meeting of October 9, 1998, members of the Drafting Committee raised the issue of whether the term “revocation” was appropriate in section 2(a), line 4, or whether

a term such as “unenforceable” or “invalidation” should be used. This is a good point in regard to contract law and points out the difference that sometimes exists between the general law of contracts and that of arbitration. Most courts have used the terms “unenforceable” or “invalidate” in general contract cases when they refuse to uphold agreements based “upon grounds that exist at law or in equity, such as those tainted by fraud, duress, mistake, unconscionability, illegality, misrepresentation, and public policy. *See, e.g.,* Katz v. Village of Southampton, 244 A.D.2d 461, 664 N.Y.S.2d 457 (N.Y. App.Div. 1997) (fraud, collusion, mistake or accident); Welker v. Teacher Standards and Practices Comm., 953 P.2d 403 (Or.Ct.App. 1998) (public policy); Smith v. O’Connell, 997 F.Supp. 226 (D. R.I. 1998) (mental incompetency); Regensburger v. China Adoption Consultants, Ltd., 138 F.3d 1201 (7th Cir. 1998) (fraud); Pirelli Armstrong Tire Co. v. Titan Tire Corp., 4 F.Supp.2d 786 (C.D. Ill. 1998) (fraud). On the other hand, most courts when interpreting the language in UAA section 2(a) concerning “revocation” of arbitration agreements “upon grounds that exist at law or in equity” use the same grounds that are used to invalidate contracts in non-arbitration cases. In essence these courts interpret “revocation” as “invalidation” or “unenforceable. *See, e.g.,* Holmes v. Coverall North America, Inc., 98 Md.App. 519, 633 A.2d 932 (1993), *quoting* Goebel v. Blocks & Marbles Brand Toys, Inc., 568 N.E.2d 552 (Ind. Ct. App. 1991) (“grounds in equity or law for revocation of a contract include an allegation that the contract is void for lack of mutual consent, consideration or capacity or voidable for fraud, duress, lack of capacity, mistake, or violation of a public purpose. ”); Lee v. Heftel, 81 Hawaii 1, 911 P.2d 721

(1996) (grounds for revocation include fraud in the inducement); *Ratchye v. Lucas*, 957 P.2d 1128 (Mont. 1998) (grounds for revocation include mistake, duress, menace, fraud, undue influence, failure of consideration, void consideration, or lack of consent of the parties); *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990) (fraud or excessive economic power grounds for revocation under the FAA); *Lynch v. Cruttenden & Co.*, 18 Cal.App.4th 802, 22 Cal.Rptr.2d 636 (1993) (fraud is a ground for revocation).

The confusion that can be engendered by the use of the term “revocation” in section 2(a) can be seen in a case such as *Carl Gregory Chrysler-Plymouth, Inc. v. Barnes*, 700 So.2d 1358 (Ala. 1997). The contract in question was a “Used Vehicle Extended Service Agreement,” which was to operate as an extended warranty on the car. When the buyer received the paperwork in the mail after purchasing a car, he noticed that there was a service agreement charge of \$1,495. He claimed that he never wanted the service agreement, did not sign it, and his signature was forged. The dealer, pursuant to the underlying purchase contract, demanded arbitration. Both contracts contained an arbitration clause. The court noted the United States Supreme Court’s assertions that an arbitration clause is to be read broadly, but did not believe that the dispute was covered by the arbitration agreement. In so doing, it stated “courts should be even more attuned to claims that the agreement from which arbitration allegedly stems was, in fact, a forged document, which would not even provide the basis from which a court could find a valid contract to be revoked; *it is impossible to revoke a contract that never existed.*” *Id.* at 1361 (*emphasis added*).

Because the term “revocation” is used in sections 2 of both the FAA and the UAA and there has been a jurisprudence of many decades utilizing this term, the Reporter would suggest that both the terms “revocation” and “invalidation” be used in section 2(a) of the RUAA.

1 **SECTION 3. PROCEEDINGS TO COMPEL OR STAY ARBITRATION.**

2 (a). On application of a party showing an agreement described in Section
3 2, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed
4 with arbitration unless an opposing party denies the existence of the agreement to
5 arbitrate, in which case the court shall proceed summarily to determine the issue. Unless
6 the court finds that there is no agreement to arbitrate, it shall order the parties to proceed
7 with the arbitration.

8 (b) On application, the court may stay an arbitration proceeding
9 commenced or threatened on a showing that there is no agreement to arbitrate. This
10 issue, when in substantial and bona fide dispute, shall be immediately and summarily
11 tried, and the court shall order the stay if it finds for the moving party. If it finds for the
12 opposing party, the court shall order the parties to go to arbitration.

13 (c) If an issue referable to arbitration under the alleged agreement is
14 involved in an action or proceeding pending in a court having jurisdiction to hear
15 applications under subsection (a), the application shall be filed in that court. Otherwise
16 and subject to Section 18, the application may be made in any other court of competent

1 jurisdiction.

2 (d) An action or proceeding involving an issue subject to arbitration shall
3 be stayed if an order or an application for arbitration has been made under this section. If
4 the issue subject to arbitration is severable, the stay may be ordered with respect to that
5 issue only. When the application is made in this action or proceeding, the order
6 compelling arbitration shall include a stay of the court action or proceeding.

7 (e) An order for arbitration shall not be refused on the ground that the
8 claim in issue lacks merit or because grounds for the claim sought to be arbitrated have
9 not been shown.

10 **SECTION 4. PROVISIONAL REMEDIES.**

11 (a) Before arbitrators are appointed in accordance with Section 7 and are
12 authorized and able to act, the court, upon application of a party, may for good cause
13 shown enter an order for provisional remedies to preserve property, secure the
14 satisfaction of judgment, or protect the integrity of the arbitration process to the same
15 extent and under the same conditions as if the dispute were in civil litigation rather than
16 arbitration.

17 (b) After the arbitrators are appointed in accordance with Section 7 and are
18 authorized and able to act, the arbitrators may issue such orders for provisional remedies,
19 including the issuance of interim awards, as the arbitrators find necessary for the fair and

1 expeditious resolution of the dispute to the same extent and under the same conditions as
2 if the dispute were in civil litigation rather than arbitration.

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 concluded 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 district court to issue preliminary injunctive relief in disputes that are ultimately to be resolved by an arbitration panel. *Id.* at 214. The First, Second, Fourth, Seventh and Tenth Circuits have followed this approach. *See* II Macneil Treatise §25.4.

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

2. The *Hovey* case underscores the difficult conflict raised by interim judicial remedies: they can preempt the arbitrator’s authority to decide a case and cause delay, cost, complexity, and formality 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 award⁶ 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

⁵Both 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.

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 preliminary relief to "any time before the arbitrators are appointed in accordance with Section 7 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

⁹Section 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.

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 11(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 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 11(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 14, 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 13 with which a party refuses to comply on the grounds of privilege, and that ruling may also trigger a necessary enforcement by a court.

9. At the meeting of March 20, 1998, the Drafting Committee decided (1) to add the term “civil” before “litigation” in Sections 4(a) and (b); (2) to change the term “available” to “provisional” in Section 4(a) for consistency with the title of the provision; and (3) to add the terms “fair and expeditious” before “resolution” in Section 4(b) in order to emphasize this underlying purpose of the RUAA. Commissioner Pavetti suggested that these terms “fair” and “expeditious” also be inserted in connection with the term “arbitration” in Sections 11 and 13 for the same reason.

1 **SECTION 5. COMMENCEMENT OF AN ARBITRATION**

2 **PROCEEDING.**

3 (a) A party desiring to arbitrate a dispute pursuant to an arbitration agreement
4 shall give a record of notice to all parties *to the arbitration agreement* of the
5 commencement of an arbitration proceeding. Unless otherwise agreed by the parties, the

1 notice shall include the nature of the dispute; the amount in controversy, if any; the
2 remedy sought *and the location of the hearing, if any has been determined.*

3 (b) The record of notice commencing the arbitration proceeding shall be served
4 upon the other parties in the manner provided in the arbitration agreement or, in the
5 absence of such a provision, *either (i) by registered or certified, return-receipt-requested*
6 *mail* [~~Alternative to consider: or by telex or facsimile transmission~~], or *(ii) by personal*
7 *service as authorized by law in a civil action* ~~may be served personally on the other party.~~

REPORTER'S COMMENT:

1. The Drafting Committee at its March 20, 1998, meeting instructed the Reporter to draft a provision regarding commencement of an arbitration proceeding. The Committee determined that the "notice provision in Section 1(c) of Definitions was insufficient to give a party formal notice of the initiation of an arbitration case. The proposed new provision includes both the contents of the notice of a claim and the means of bringing the notice to the attention of the other parties. The language in new Section 5 is based upon the Florida arbitration statute and, to some extent, the Indiana arbitration act, both of which include provisions regarding the commencement of an arbitration. Fla. Stat. Ann. §648.08 (1990); Ind. Code §34-57-2-2 (1998).

2. Both the content of the notice and the means of giving the notice are subject to the parties' agreement. Not only does this approach comport with the concept of party autonomy in arbitration but it also recognizes that many parties utilize arbitration

institutions that require greater or lesser specificity of notice and service. The requirement in Section 5(a) that the initiating party inform the other parties of “the nature of the dispute; the amount in controversy, if any; and the remedy sought” is found in the Florida and Indiana statutes and in the arbitration rules of institutions such as the American Arbitration Association, the Center for Public Resources, JAMS/Endispute, NASD Regulation, Inc., and the New York Stock Exchange (although slightly different language may be used in the institutional rules). In Section 5(a) the Reporter attempted to insure that sufficient information was given in the notice to inform opposing parties of the arbitration claims while recognizing that this notice was not a formal pleading and that it is often drafted by persons who are not attorneys.

3. The means of informing other parties of the arbitration proceeding is in Section 5(b).

The Drafting Committee should note that many arbitration institutions allow parties to initiate arbitration through the use of regular mail and do not require “registered or certified or return-receipt-requested mail. *See, e.g.,* American Arb. Ass’n, National Rules for the Resolution of Employment Disputes, R. 4(b)(i)(2); Center for Public Resources, Rules for Non-Administered Arbitration of Business Disputes, R. 2.1; National Ass’n of Securities Dealers Code of Arb. Procedure, Part I, sec. 25(a); New York Stock Exchange Arb. Rules, R. 612(b). This more informal means of giving notice without evidence of receipt would be allowed under Section 5(b) because it recognizes the manner of notice agreed to by the parties.

4. The Drafting Committee should consider CPR R. 2.1 that allows notice of

commencement of arbitration to be given by “telex or facsimile transmission. Not only are these a more modern and often-used means of notice but each provides a method of evidencing whether the other parties received the notice.

5. Finally, the term “record” is utilized instead of “written. The term “record” is defined in Section 1(d) and, as explained in Comment 4 to Section 1, is used throughout the RUAA.

6. As a result of the Drafting Committee meeting of October 9, 1998, at the request of Commissioner Marsh, the Reporter has added “and the location of the hearing, if any has been determined” to Section 5(a). The Drafting Committee also decided to delete the proposed alternative means of notice of commencement of the proceedings “by telex or facsimile transmission” because of the uncertainties as to whether a party would likely be put on actual notice of the arbitration and to change the language regarding personal service to “by personal service as authorized by law in a civil action.

7. A point was raised by a Commissioner that Section 5(a) was ambiguous as to who should receive the notice--all parties to the arbitration agreement or all parties to the dispute. For example, a construction contract may involve multiple parties, such as owner, contractors, subcontractors and all have agreed to arbitrate a dispute. Who should receive notice of commencement of an arbitration proceeding--all parties to the arbitration agreement or just those who have the dispute? The Reporter opted for all parties to the arbitration agreement, so that others who may be affected by the dispute would have notice of the arbitration proceeding.

1 **SECTION 6. CONSOLIDATION OF SEPARATE ARBITRATION**

2 **PROCEEDINGS.**

3 (a) Upon application of a party to an arbitration agreement, a court may order
4 consolidation of separate arbitration proceedings if:

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

8 (2) the disputes arise in substantial part from the same transactions or
9 series of related transactions; and

10 (3) there is a common issue of law or fact creating the possibility of
11 conflicting rulings by more than one arbitrator or panel of arbitrators.

12 (3) there is a common issue of law or fact creating the possibility of
13 conflicting rulings by more than one arbitrator or panel of arbitrators.

14 ~~Despite the foregoing, however, But~~ the court may not order consolidation if it is
15 ~~proven that such action~~ would be contrary to the express terms of an applicable
16 arbitration agreement, *would undermine substantial rights of* or would result in
17 significant undue delay or hardship to a party opposing consolidation, ~~or for other~~
18 ~~reasons be contrary to the interests of justice.~~

19 (b) If a court orders consolidation under subsection (a), it has discretion to order
20 consolidated arbitration 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-Diamond*

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); *Polshak v. Bergen Cty. Iron Works*, 142 N.J. Super. 516, 362 A.2d 63 (Ch. Div. 1976)(consolidated arbitration hearings even though not every party had an arbitration agreement with every other party); *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-Diamond 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); *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. The current trend under the FAA disfavors court-ordered consolidation absent express agreement. *See generally* III MACNEIL TREATISE §33.3. However, a recent California appellate decision held that state law regarding class-wide arbitration was not preempted by federal arbitration law under the FAA. *Blue Cross of*

Calif. v. Superior Ct., 67 Cal. App. 4th 42, 78 Cal. Rptr.2d 779 (1998).

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 multiparty

disputes. See Dean B. Thomson, *The Forum's Survey on the Current and Proposed AIA A201 Dispute Resolution Provisions*, 16 CONSTR. LAW. 3, 5 (No. 3, 1996).

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). Moreover, it is likely that in many cases one or more parties, often non-drafting parties, will not have considered the impact of the arbitration clause on multiparty disputes. By establishing a default provision which permits consolidation (subject to various limitations) in the absence of a specific contractual provision, the clause encourages drafters to address the issue expressly and enhances the possibility that all parties will be on notice regarding the issue.

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* *Blue Cross of Calif. v. Superior Ct.*, 67 Cal. App. 4th 42, 78 Cal. Rptr.2d 779 (1998); *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.*, 140 Cal. App.3d 251, 262, 191 Cal. Rptr. 15 (1983).

Like all other sections of the RUAA, however, the provision also embodies the fundamental principle of judicial respect for the preservation and enforcement of the terms of agreements to arbitrate. Thus, pursuant to RUAA § 7, 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, a court is required to refer the consolidation issue to that tribunal. Similarly, if all the arbitration agreements incorporate a common arbitrator selection method which can be applied in the multiparty context (such as the list selection method commonly employed by the American Arbitration Association), the court should defer to such a method in the order to consolidate.

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, it has been recognized that consolidation should not be ordered in contravention of asserted provisions prohibiting consolidation of claims without the parties' written consent. *Cf. Ure v. Wangler Constr. Co.*, 232 Ill. App.3d 492, 597 N.E.2d 759 (1992). Thus, Section (6)(a) limits the authority of courts to consolidate by permitting proof that consolidation "would be

contrary to the express terms of an applicable arbitration agreement.

Even in the absence of express prohibitions on consolidation, moreover, the legitimate expectations of contracting parties may limit the ability of courts to consolidate arbitration proceedings. Thus, a number of decisions have recognized the right of parties opposing consolidation to prove that consolidation would undermine their stated expectations, especially regarding arbitrator selection procedures. *See Continental Energy Assoc. v. Asea Brown Boveri, Inc.*, 192 A. D.2d 467, 596 N.Y.S.2d 416 (1993) (denial of consolidation not an abuse of discretion where parties' two arbitration agreements differed substantially with respect to procedures for selecting arbitrators and manner in which award was to be rendered); *Stewart Tenants Corp. v. Diesel Constr. Co.*, 16 A. D.2d 895, 229 N.Y.S.2d 204 (1962) (refusing to consolidate arbitrations where one agreement required AAA tribunal, other called for arbitrator to be appointee of president of real estate board). Therefore, Section 6(a) also prohibits consolidation when such action would undermine "substantial rights of a party opposing consolidation. Such rights would normally be deemed to include arbitrator selection procedures, terms fixing the hearing situs, standards for the admission of evidence and rendition of the award, and other express terms of the arbitration agreement. In some circumstances, however, the imposition on contractual expectations will be slight, and no impediment to consolidation: for example, if one agreement provides for arbitration in St. Paul and the other in adjoining Minneapolis, consolidated hearings in either city should not normally be deemed to violate a "substantial right of a party.

Section 6(a) also provides grounds determined by the Drafting Committee at its March 1998 meeting as to when a court might properly deny consolidation when, for example, one or more of the separate arbitration proceedings have progressed so far that consolidation would result in “*significant* delay or hardship to a party which is required to recommence hearings with multiple parties. The modifier “significant” reflects the drafters’ intent that the burden of proof on this matter be substantial. *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).

As the cases reveal, the desire to have one's dispute heard in a separate proceeding is not in and of itself the kind of proof sufficient to prevent consolidation. *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).

5. At the March 20, 1998 meeting, the Drafting Committee also added a provision that a court may deny consolidation "for other reasons contrary to the interests of justice.

After due consideration, the Reporter and Professor Stipanowich recommend that the latter be dropped as excess baggage -- particularly since no cases have been found which underpin such a principle.

6. The differences in the alternatives is that Alternative A requires that consolidation would contravene express contractual rights. This would be a bright-line prohibition on consolidation. Alternative B is closer to our initial consideration in that consolidation could be denied if such action would either be contrary to express terms of the agreement or meet one of the four grounds.

7. On consideration the Reporter recommends dropping sections 6(b) and (c) from

Tentative Draft No. 2. Section 6(b) is unnecessary because if all the agreements designate the same arbitrators, the courts will follow the agreements; if they do not and the court decides to consolidate, Section 7, Appointment of Arbitrators, will apply. Section 6(c) also seems to weigh too heavily in the direction of imposing consolidation despite “inconsistent provisions. Such provisions may be enough for a court to deny consolidation under section 6(a). If, despite the inconsistent provision, a court decides to order consolidation under section 6(a), the court has the inherent powers to resolve any conflicts.

8. The Drafting Committee at the March 1998 meeting requested that the prefatory language to section 6(b) in Tentative Draft No. 3 be added for clarity and that the term “deny” was changed to “order.

9. Commissioner Zeldon asked whether an order to consolidate could be appealed. Section 26, Appeals, would seem to answer the question in the negative because it gives the grounds on which a party can appeal a decision of a lower court and there is no express inclusion of an order granting or denying consolidation. The only possible ground might be section 26(a)(6) that a “decree” was entered pursuant to the provisions of the act. The Reporter and Academic Adviser Stipanowich do not believe that this ground would be applicable because the intent of section 26(a)(6) seems to require a final decision. In addition, the policy behind sections 26(a) (1) and (2) is not to allow appeals of orders that result in delaying arbitration. Whether consolidation is ordered or denied, the arbitrations likely will continue--either separately or in a consolidated proceeding--

and to allow appeals would delay the arbitration process. Indeed, it is the opinion of Professor Stipanowich that if appeals from such orders are allowed, their net effect on arbitration would be so detrimental that we would be better off deleting Section 6 altogether.

1 **SECTION 7. APPOINTMENT OF ARBITRATORS.**

2 (a) If an arbitration agreement provides a method for appointing arbitrators, the
3 method shall be followed. If there is no agreed method or the agreed method fails or
4 cannot be followed, or if an arbitrator appointed fails or is unable to act and a successor
5 has not been duly appointed, the court on application of a party shall appoint one or more
6 arbitrators. An arbitrator so appointed has all the powers of an arbitrator specifically
7 named in the agreement or appointed by the agreed method.

8 (b) *If any arbitrators appointed in accordance with subsection (a) know of facts*
9 *reasonably likely to affect that person's impartiality, that arbitrator shall not accept the*
10 *appointment unless (i) the facts are disclosed in accordance with section 8 and (ii) the*
11 *parties waive any objections to the disclosures.*

REPORTER'S COMMENTS:

1. Section 7(b) was added at the request of the Drafting Committee after the October, 9, 1998 meeting. There is something to be said for a self-disqualification requirement which mirrors certain arbitration rules and Canon VII of the ABA/AAA Code of Ethics

for Arbitrators in Commercial Disputes. On the other hand, it goes beyond nearly all existing federal and state statutory provisions and related case law, except for the California statute. *See* CAL. CIV. PROC. CODE § 1281.9 (West Supp. 1998). The latter establishes limited bases for disqualifying arbitrators at the beginning of hearings backed up by court intervention if necessary (see *id.* at (c)(2)) -- something we have not specifically provided in this Act. As it stands, the RUAA requires disclosure, but expressly provides a remedy only through the mechanism of vacatur of award. The existence of a self-disqualification provision begs the question of a contemporaneous judicial enforcement mechanism; courts may be tempted to imply such a mechanism.

For the foregoing reasons, the Reporter and Professor Stipanowich have reservations regarding the new Section 7(b). It is preferable either to eliminate the language or to consider expressly treating the possibility of up-front judicial intervention to disqualify arbitrators.

1 **SECTION 8. ARBITRATOR DISCLOSURE.**

2 (a) Before accepting appointment, a person who is requested to serve as an
3 arbitrator shall disclose any facts ~~reasonably~~ *which a reasonable person would consider*
4 likely to affect the impartiality of the arbitrator, including but not limited to:

5 (1) financial or personal interest in the outcome of the arbitration,

6 and

7 (2) existing or past relationships with the parties, their counsel or

1 representatives, witnesses, or arbitrators.

2 Unless the parties have agreed to other procedures for disclosure,
3 disclosure shall be made directly to all parties and to other arbitrators.

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

7 (c) Objections based on any undisclosed interests, relationships, or facts
8 described in subsections (a) and (b) or any unwaived objections of a party based on any
9 interests, relationships or facts disclosed in accordance with subsections (a) and (b) may
10 be grounds for vacation of an award under Section 19(a)(2). The failure of an arbitrator
11 to disclose (i) a known direct, material personal or financial interest in the outcome of the
12 arbitration or (ii) a known substantial relationship with a party, a lawyer or representative,
13 a witness, or other arbitrator; shall establish a presumption of evident partiality in the
14 award under Section 19(a)(2).

15 (d) If the parties have agreed to the procedures of an arbitration institution
16 or any other procedures for pre-award challenges to arbitrators on grounds in subsection
17 (a), reasonable compliance with such procedures shall be a condition precedent to an
18 application to vacate on such grounds under Section 19(a)(2).

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 decision maker 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). See also Minn. Stat. Ann. § 572.10 (2) (1998)(establishing affirmative disclosure requirements for arbitrators).

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. As noted above, moreover, some state statutes provide for disclosure.

As discussed below, the disclosure requirements of this Section apply to all arbitrators in the absence of contrary agreement. This includes non-neutral party-arbitrators (that is, arbitrators who are appointed unilaterally by a single party and who are deemed to be predisposed toward the party appointing them). Therefore, the obligation to disclose relationships extends to certain relationships with other arbitrators reasonably likely to affect partiality, such as a relationship between a neutral arbitrator and a non-neutral party-arbitrator on a tripartite panel. *See, e.g.*, *Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 636-37 (Tex. 1997).

3. The fundamental standard of Section 8 is an objective one: disclosure is required of facts which a reasonable person would consider likely to affect the arbitrator's impartiality. In accordance with the general consensus reached at the Drafting Committee Meeting of March 20, 1998, the proposed statutory standard is intended to be less rigorous than Justice Black's test in *Commonwealth Coatings* (requiring disclosure of "any dealings that might create an impression of possible bias" or creating "even an

appearance of bias"), and analogous to Justice Stewart's test and the weight of existing federal and state case authority. The "reasonable person" test was adopted with the intent of making clear that the subjective views of the arbitrator or the parties are not controlling.

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 19(a)(6). The rule seeks to accommodate the tensions between concepts of partiality and the need for experienced decision makers, as well as the policy of relative finality in arbitral awards. Therefore, an arbitrator's failure to disclose direct interests in the outcome or a substantial relationship with a party, attorney or representative, witness, or fellow arbitrator gives rise to a presumption of ~~on~~ grounds of "evident partiality" under Section 19(a)(2). *Cf.* Ann. Minn. Stat. Ann. § 572.10 (2) (1998)(failure to disclose conflict of interest or material relationship is grounds for vacatur of award). 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 challenges based upon evident partiality, including disclosed or undisclosed interests, relationships or facts are subject to the developing case law under Section 19(a)(2) (formerly 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, but are deemed to be predisposed toward the party which appointed them. *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 19(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 established by this section.

6. Parties may agree to higher or lower 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 non-disclosure 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, post-award resort to the courts under Section 19(a)(2) is conditioned upon compliance with that procedure.

7. At the March 20, 1998, meeting the Drafting Committee requested that Section 8(a) be rewritten to clarify the general rule that an arbitrator disclose "any facts reasonably likely

to affect * * * impartiality, including certain interests and relationships. This represented a tightening of the disclosure requirement in Draft 1, which was based on the Code of Ethics for Arbitrators in Commercial Disputes. At that meeting, the Committee also suggested the inclusion of “representatives” in Section 8(a)(2) because non-attorneys sometimes represent parties in arbitrations. The Reporter also added a disclosure requirement of relationships an arbitrator may have with witnesses or other arbitrators (where there is a panel of arbitrators, especially when some may be party arbitrators) because such an undisclosed relationship may cause at least an appearance of impropriety.

Although at the October, 1998 meeting it was suggested that the general disclosure requirement be modified to encompass “any facts which might reasonably cause either party to question the impartiality of the arbitrator,” the Reporter and Professor Stipanowich did not incorporate that standard for two reasons. First, such a rigorous test, which appears analogous to Justice Black’s test in *Commonwealth Coatings* and the Code of Ethics provision which was the basis of our original draft, is inconsistent with the general consensus achieved in the March 20, 1998 meeting for a more limited disclosure requirement more consistent with Justice White’s *Commonwealth Coatings* test and the weight of existing authority. Moreover, its reference to the parties invites attempts to introduce a subjective element into the analysis.

Instead, the Reporter and Professor Stipanowich recommend the substitution of the language to the effect that disclosures must be of facts “*which a reasonable person would consider* likely to affect the impartiality of the arbitrator. See Comment 3 above.

8. In an earlier draft, Section 8(c) established that the failure to disclose a “known direct,

material personal or financial interest in the outcome of the arbitration or a known substantial relationship with a party, a lawyer or representative, a witness or other arbitrator to be conclusive grounds for vacatur of award. Based on the comments of the Drafting Committee and some other organizations, however, this provision was modified. Based upon these same comments, the Reporter and Professor Stipanowich recommend that the two specific types of non-disclosure noted in Section 8(c) be the basis for a “presumption of evident partiality” under Section 19(a)(2) which *prima facie* establishes prejudice but which the party defending the award can overcome by a showing that the award was not tainted by the non-disclosure or there in fact was no prejudice.

9. The Reporter and Professor Stipanowich deleted the language in Section 8(d) because of adverse comment from representatives of arbitration institutions.

10. There were also suggestions from some quarters that the section incorporate a requirement respecting disclosure by the parties. This was rejected in light of the general absence of existing precedent for such a provision in the statutes or caselaw.

1 **SECTION 9. MAJORITY ACTION BY ARBITRATORS.** The powers of the
2 arbitrators may be exercised by a majority unless otherwise provided by the arbitration
3 agreement or by this [Act].

4 **SECTION 10. ARBITRATOR IMMUNITY; *COMPETENCY TO TESTIFY.***

5 (a) An arbitrator has the immunity of a *judge of a court of this state*
6 ~~judicial officer~~ from civil liability ~~when acting in the capacity of arbitrator under any~~

1 ~~statute, rule, or contract.~~

2 (b) A neutral arbitration institution that administers the arbitration shall be
3 immune from liability to the same extent as ~~the~~ an arbitrator.

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

6 (d) *No arbitrator shall be competent to testify in any subsequent civil*
7 *proceeding as to any statement, conduct, decision or ruling, occurring at or in an*
8 *arbitration proceeding under this Act except where a party has made application to*
9 *vacate an award under Sections 19(a)(1) or (2) and has made a sufficient showing of*
10 *facts to prove that the grounds outlined in Sections 19(a)(1) or (2) may exist.*

REPORTER'S COMMENT

1. The proposed provision is based on the language of former Section 1280.1¹⁰ of the California Code of Civil Procedure establishing immunity for arbitrators; the proposal adds such immunity for neutral arbitration institutions mutually selected by the parties to administer the arbitration proceeding.

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

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).

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 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., *Hawkins v. NASD, Inc.*, 149 F.3d 330 (5th Cir. 1998) (holding that arbitration institution is immune from civil liability arising from its actions taken in the course of conducting arbitration proceedings); *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); *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); *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 19(a)(1), (2) on vacatur provides 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 10 and (2) to state the present position of the Drafting Committee that section 10 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 10(a).

7. At the meeting of March 20, 1998, the Drafting Committee determined by a 6-1 vote to eliminate the brackets from Section 10, Arbitrator Immunity. The Reporter had received no adverse comment from outsiders after Tentative Draft. No. 2 was made public. The Committee also concluded that the provision is very important to the RUAA for the policy reasons outlined above.

8. The Drafting Committee also determined at the March 20, 1998, meeting that Section 10(b) should be changed to eliminate the requirement of “mutual selection. An arbitration institution that administers a case in which one party later successfully challenges arbitrability would be open to liability. If a court determined a matter not to be arbitrable, then the challenging party could claim that there was no mutual selection and the arbitration institution would lose its immunity under the prior draft of Section 10(b).

9. The Drafting Committee also concluded that a Comment should be added to the effect that if an arbitrator fails to make a disclosure required by Section 8 then the typical remedy is vacatur under Section 19 and not loss of arbitral immunity under Section 10.

10. At the meeting of October 9, 1998, the Drafting Committee determined to change “judicial officer to “judge of a court of this state in Section 10(a). Commissioner Marsh made a suggestion to the Reporter to delete “when acting in the capacity of arbitrator under any statute, rule, or contract in Section 10(a) because a court might later determine that a matter was not arbitrable under a particular contract or statute or rule. In such an instance, an arbitrator who has been duly appointed should not risk loss of immunity.

11. At this same meeting, a concern was raised about parties either subpoenaing or naming an arbitrator in a subsequent lawsuit. A suggestion was made to draft a provision that would make an arbitrator incompetent to testify in a subsequent civil proceeding. The new provision Section 10(d) is based on the California Evidence Code which provides that arbitrators¹¹ shall not be “competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling occurring at or in conjunction with the prior proceeding. CA Evid. Code §703.5. There are similar provisions that prohibit anyone from calling an arbitrator as a witness in a subsequent proceeding in New Jersey and New York. NJR Super. Ct. R. 4:21A-4; N.Y. Ct. Rules §28.12. The last provision recognizes that arbitrators who have engaged in corruption, fraud, partiality or other misconduct which are grounds to vacate an award under Sections 19(a)(1) and (2) may have to give testimony so that a party will have evidence to prove such grounds but only upon an initial showing that such grounds exist. A party’s bare allegation of these grounds should not cause an arbitrator to be required to testify. Also Section 17(d) is limited to civil actions; an arbitrator may be required to give testimony in criminal proceedings as a result of matters arising from an arbitration proceeding.

1 **SECTION 11. THE ARBITRATION PROCESS.** Except as otherwise

2 provided by an arbitration agreement:

3 (a) Arbitrators have authority to manage all aspects of the arbitration

¹¹The Code also covers those who preside at judicial or quasi-judicial proceeding and mediators.

1 process. The arbitrators may hold conferences with the parties prior to the hearing to
2 ~~consider~~ *act upon* any matters, *including requests for summary disposition*, which may
3 aid in the fair and expeditious disposition of the arbitration

4 ~~[(b) Arbitrators may decide a motion for summary disposition of a claim~~
5 ~~or particular issue, either by agreement of all interested parties or at the request of one~~
6 ~~party, provided that other interested *all* parties have reasonable notice and opportunity to~~
7 ~~respond to and to be heard on the motion.]~~

8 (b) ~~(c)~~ If the arbitrators have not made a final decision on a matter under
9 subsection ~~(b)~~, the arbitrators shall appoint a time and place for the hearing and cause
10 notice of the hearing to be received by the parties not less than five days before the
11 hearing. Unless a party makes timely objection at the commencement of the hearing to
12 the ~~lack~~ *insufficiency* of notice, appearance at the hearing waives notice. The arbitrators
13 may adjourn the hearing from time to time as necessary and, on request of a party and for
14 good cause shown, or upon their own motion, may postpone the hearing to a time before
15 the date fixed by the agreement for making the award unless the parties consent to a later
16 date. The arbitrators may hear and determine the controversy upon the evidence
17 produced notwithstanding the failure of a party duly notified to appear. A court, on
18 request, may direct the arbitrators to proceed promptly with the hearing and determination
19 of the controversy.

20 (c) ~~(d)~~ If the arbitrators order a hearing under subsection ~~(c)~~ *(b)*, the parties
21 are entitled to be heard, to present evidence material to the controversy, and to
22 cross-examine witnesses appearing at the hearing.

1 (d) ~~(e)~~ The hearing shall be conducted by all the arbitrators but a majority
2 may determine any question and render a final award. *Whenever* ~~If~~, during the course of
3 the hearing, an arbitrator for any reason ceases or is unable to act, the remaining arbitrator
4 or arbitrators *if* appointed to act as neutrals may continue with the hearing and
5 determination of the controversy.

**A. REPORTER'S COMMENT ON SECTION 11(a): MANAGEMENT OF
ARBITRATION PROCESS AND PRE-HEARING CONFERENCES**

1. The Study Committee Report was concerned that presently section 5 (RUAA § 11) does not specify that arbitrators may hold pre-hearing conferences. At 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 11(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 § 11(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.

8. At the meeting of March 20, 1998, the Drafting Committee decided to strike the listings of the types of matters which arbitrators may consider in prehearing conferences in RUAA section 11(a) in accordance with our policy to avoid such non-exhaustive listings and to place these examples in the Official Comments.

B. REPORTER'S COMMENT ON SECTION 11(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 11(b) is based upon Rule 16 of JAMS/Endispute Comprehensive Arbitration Rules and Procedures.¹² 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 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 19 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 11(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 11(c)] states that the arbitrators “shall appoint a time and place for the hearing” and UAA section 12(a)(4) [RUAA section 19(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

¹²“**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.

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 19(a)(4)). Of course, if this proposed section 11(b) is adopted, it would obviate any claim that section 19(a)(4) precludes summary disposition. If speed is an important concept in arbitration, explicit adoption of a provision that 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 11(b) or a similar provision, it should consider the prefatory language to sections 11(c) and 11(d). The Committee should also determine whether to modify the language in section 19(a)(4) on vacatur from “refused to hear evidence material to the controversy” to “refused to *consider* evidence material to the controversy.

5. At the meeting of March 20, 1998, the members of the Drafting Committee and others in attendance expressed strong positions for and against summary disposition. The Drafting Committee decided to bracket section 11(b) because the issue is still up for consideration and to encourage comment from those following the developments of the RUA. At the request of the Drafting Committee, the Reporter requested information from a number of arbitration institutions as to the extent of the use of summary

dispositions. Representatives from the American Arbitration Association and JAMS/ENDISPUTE reported that, although they had no actual data, it was their impression summary dispositions was used sparingly (AAA representative estimated 1% of cases; JAMS/ENDISPUTE representative said perhaps 5%).

6. At the March 20, 1998, meeting a number of Commissioners proposed a change in section 11(b) to the effect that a party has a right to a hearing before the arbitrators can rule on a motion for summary disposition. To this effect, the term “hear” was deleted in the first line of section 11(b) and the section read “*all* parties have reasonable notice and opportunity to respond to *and to be heard on* the motion.

7. The Drafting Committee at the March 20, 1998 meeting decided to eliminate the language “either by agreement of all interested parties or at the request of one party” as unnecessary and misleading in that the opposing party by definition is not “interested” in a summary disposition. Also the arbitrators, on their own motion, may determine that summary disposition is appropriate in a particular case.

8. The Drafting Committee at the October 9, 1998 meeting by a vote of 4-3 decided to delete Section 11(b) on summary dispositions; later the Committee by a vote of 5-1 decided to add to Section 11(a) “and act on any matters, including requests for summary disposition which may aid in the fair and expeditious disposition of the arbitration. As a result of these changes, it was necessary to strike language at the beginning of new Section 11(b).

9. The Drafting Committee also amended the language of the second sentence in Section 11(d) to insure that only neutral arbitrators and not party arbitrators can continue the

hearing if an arbitrator “for any reason ceases or is unable to act. If the “remaining arbitrator or arbitrators are not neutral, then neutral arbitrators should be appointed in accordance with Section 7.

1 **SECTION 12. REPRESENTATION BY ATTORNEY.** A party has the right
2 to be represented by an attorney at any proceeding or hearing under this [Act]. A waiver
3 of representation prior to the proceeding or hearing is ineffective.

REPORTER COMMENT

1. At the meeting of October 9, 1998, the Drafting Committee considered whether to add “or any other person after “an attorney. A concern was expressed about incompetent and unscrupulous individuals, especially in securities arbitration, who held themselves out as advocates. The Drafting Committee voted 4-1 against such an addition and to leave this section intact.

1 **SECTION 13. WITNESSES, SUBPOENAS, DEPOSITIONS, DISCOVERY.**

2 (a) Arbitrators may cause to be issued subpoenas for the attendance of
3 witnesses and for the production of books, records, documents, and other evidence at any
4 hearing and shall have the power to administer oaths. Subpoenas so issued shall be
5 served, and upon request to the court by a party or the arbitrators, enforced, in the manner
6 provided by law for the service and enforcement of subpoenas in a civil action.

7 (b) Unless otherwise agreed by the parties, the arbitrators may permit such

1 discovery as they shall determine is appropriate in the circumstances, taking into account
2 the needs of the parties and the desirability of making the arbitration fair, expeditious and
3 cost-effective.

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

8 (d) The arbitrators may issue protective orders to prevent the disclosure of
9 privileged information, confidential information, and trade secrets.

10 (e) The arbitrators may permit a deposition to be taken, in the manner
11 designated by the arbitrators, on request of a party, for use as evidence, of a witness who
12 cannot be subpoenaed or is unable to attend the hearing.

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

15 (g) Fees for attendance as a witness shall be the same as for a witness in
16 theCourt.

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 13 of RUAA does this by retaining UAA section 7 (with minor style

modifications) in Subsections (a) and (e) through (g) and adding Subsections (b) and (d) 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 Deulemar 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,¹³ thereby minimizing the involvement of (and resort of the parties to) the courts in the discovery process. At the same time, it should be clear that the discovery contemplated by Section 13 is not coextensive with that which occurs in the course of civil litigation under federal or state rules of civil procedure.

4. The simplified, straightforward approach to discovery reflected in Section 13(b)-(d) 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

¹³Note 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.

arbitrator. In a manner similar to Section 4(b) which allows arbitrators to issue provisional remedies, it is contemplated that arbitrators will be granted the power and flexibility to ensure that the discovery process is fair and expeditious.

5. Section 13(b) contemplates that an arbitrator may allow parties to take discovery depositions.

6. At the meeting of March 20, 1998, the Drafting Committee discussed substitution of the word “proprietary” for the word “confidential” in Section 12(d). Both the dictionary definitions of these two terms and their use in the relevant case law indicate that retention of the latter word is advised. In the case law, the word “proprietary” is used almost exclusively to describe business-related information, usually with regard to controversies involving trade secrets. The word “confidential” has a much broader reach, extending to, *inter alia*, relationships, and communications, medical records, criminal law and business-related matters. The use of the two subject terms in statutes provides no additional insight, except for the much more frequent appearance of the word “confidential.” For all of these reasons, the most rational approach is to retain the word “confidential” in Section 12(d).

1 **SECTION 14. COURT ENFORCEMENT OF PRE-AWARD RULINGS BY**

2 **ARBITRATORS.** If a party receives a favorable pre-award ruling from the arbitrators,
3 the party may apply to the court for an expedited summary order to enforce the pre-award
4 ruling. The court shall issue an order to enforce the pre-award ruling, unless the ruling of
5 the arbitrator is vacated, modified, or corrected under the standards provided in Sections

REPORTER'S COMMENT

1. New section 14 is currently the law in almost all jurisdictions to enforce pre-award arbitral determinations. Because the orders of arbitrators are not self-enforcing, a party, who receives a favorable ruling with which another of the parties refuses to comply, must apply to a court to have the ruling made an enforceable order. *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 14 provides for an “expedited summary order” that 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 14(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 14 would be similar to the standards for vacatur in RUAA sections 19 and 20. This language is now the second sentence of section 14 in Tentative Draft No. 2 and is similar to the language in RUAA section 18.
4. The Drafting Committee at the October 31, 1997 meeting, 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 is 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 26 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.

6. The Drafting Committee at its March 20, 1998, meeting decided (1) to change "review" to "enforcement" in the title of the provision to reflect the substantive language in this section and (2) to delete the terms "and another party to the arbitration proceeding refuses to obey the ruling" in order to take care of the problem of a writ of attachment where there may be no service or refusal to obey the ruling by the other party.

7. During the discussions of Section 14, Commissioner Fisher raised an issue whether Section 19 vacatur standards were appropriate because a reviewing court will be considering a "ruling" of an arbitrator rather than an "award." The Reporter believes that

the language in Section 14 is sufficient because a “pre-award ruling” is quite similar to an “award” and this can be made clear in the Comments. It would also be awkward to change the terminology of Section 14 to read “pre-award award.” Moreover, the last sentence of Section 14 instructs the court apply the “standards” in Section 19, Vacating an Award, and Section 20, Modification or Correction of an Award to the “pre-award ruling” which courts should be able to follow for a “pre-award ruling.”

In this regard, Commissioner Fisher raised a related question as to whether Section 19, Vacating an Award, should be changed to language that would allow a court to “vacate or modify” or “vacate and remand” or “partially vacate and partially confirm” an award or is the court only allowed to “vacate.” The Reporter would note that Section 20 provides authority for a court to modify an award. As to a “remand” situation, Section 19(d) gives the court authority to order a rehearing before the same or new arbitrators. The issue of a court deciding to vacate in part and confirm in part is difficult. The Reporter believes that such power likely exists under the UAA as written. Section 18 gives a court authority to confirm of an award and Section 19 gives it the authority to vacate. It would seem inherent from this dual authority that a court could exercise authority under both sections if the court believed that justice requires an award be confirmed in part and vacated in part. The Drafting Committee may wish to have an Official Comment to make this authority explicit.

8. A Commissioner has raised a question as to the meaning of “pre-award ruling” in line 2. Does this mean all rulings by arbitrators prior to the issuance of the award, e.g., even rulings on evidence or location or are the terms more restrictive by meaning orders

analogous to temporary restraining orders or preliminary injunctions. Should the terms be defined better? Also should the terms “expedited summary order” be defined, such as to mean court should enforce the arbitrator’s ruling without taking evidence or making any other factual findings?

1 **SECTION 15. AWARD.**

2 (a) Upon determining an award, the arbitrators shall make a record of the
3 award that shall be signed by the arbitrators joining in the award. The arbitrators *or the*
4 *arbitration institution* shall give notice of the record of the award to each party.

5 (b) An award shall be made within the time fixed by the agreement or, if
6 not fixed, within the time the court orders on application of a party. The court may
7 extend or the parties may agree in a record to extend the time either before or after the
8 time period expires. A party waives any objection that an award was not made within the
9 time required unless the party gives notice of the objection to the arbitrators prior to the
10 delivery of the award to the party.

11 **SECTION 16. CHANGE OF AWARD BY ARBITRATORS.**

12 (a) On application of a party to the arbitrators, the arbitrators may modify
13 or correct the award:

14 (1) upon the grounds stated in paragraphs (1) and (3) of subsection
15 (a) of Section 20;

16 (2) if the arbitrators have not made a mutual, final and definite

1 award upon any or all of the issues submitted by the parties; or

2 (3) for the purpose of clarifying the award.

3 The application must be made within 20 days after delivery of the award to the applicant.

4 The applicant shall give a record of notice forthwith to the opposing party, stating that the
5 opposing party must serve any objections within 10 days following receipt of the notice.

6 (b) If an application to a court is pending under Sections 18, 19 or 20, the
7 court may submit the matter to the arbitrators under such conditions as the court may
8 order for the arbitrators to consider whether to modify or correct the award:

9 (1) upon the grounds stated in paragraphs (1) and (3) of subsection
10 (a) of Section 20;

11 (2) where the arbitrators so imperfectly executed their powers that
12 a mutual, final and definite award upon any or all of the issues submitted was not made;
13 or

14 (3) for the purpose of clarifying the award.

15 (c) An award modified or corrected under this section is subject to the
16 provisions of Sections 18, 19 and 20.

REPORTER'S COMMENT

1. Section 16 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 §§18, 19 or 20 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 16 serves an important purpose in light of the arbitration doctrine of *functus officio*¹⁴ 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 clarification of an arbitration award either (1) when there is an error as 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).

¹⁴The term “*functus officio*” is a Latin term for “office performed. *Glass Workers Int’l Union Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844 (7th Cir. 1995).

The benefit of a provision such as RUAA §16 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 clarify a matter and, in most instances, for a court to remand cases to arbitrators has caused confusing case law under the FAA on whether and when a court can remand or arbitrators can clarify matters. *See* Macneil Treatise §§37.6.4.4; 42.2.4.3. The mechanism for correction of errors in RUAA §16 enhances the efficiency of the arbitral process.

2. Section 20 seems to overlap and perhaps contradict §16 on timing. A party who files a motion with a court to modify or correct an award under §20 must do so within 90 days; the timing in §16 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 §16 motion to which the 20-day time limit applies is to the arbitrators and the §20 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 §16) 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 10 that is based on the Federal Arbitration Act §10(a)(4) where an arbitrators' award is either so imperfectly executed or incomplete that it is questionable whether the arbitrators ruled on a submitted issue.
5. The giving of notice in a record, i.e., in writing, as used in revised section 16(a) is defined in sections 1(b) and (c) of the Revised UAA.

1 **SECTION 17. REMEDIES; FEES AND EXPENSES OF ARBITRATION.**

2 (a) The arbitrators shall have the ~~authority~~ *power* to award attorney fees
3 ~~and or~~ punitive damages or other exemplary relief if such an award is authorized by law
4 ~~as to any recovery~~ in a civil action involving the same subject matter or by the agreement
5 of the parties.

6 (b) As to all remedies other than those provided by subsection (a), except
7 as otherwise provided in the agreement to arbitrate, the arbitrators shall have the authority
8 to order such remedies, as the arbitrators consider just and appropriate under the
9 circumstances of the case. The fact that such relief could not or would not be granted by a
10 court of law or equity is not alone grounds for vacating or refusing to confirm the award

1 under Sections 18 or 19.

2 (c) Except as otherwise provided in the agreement to arbitrate, the
3 arbitrators' expenses and fees, together with other expenses shall be paid as provided in
4 the award.

5 (d) If the arbitrators award a remedy of ~~attorney fees or~~ punitive damages
6 or other exemplary relief under subsection (a), they shall state the award in a record and
7 shall specify the ~~facts justifying~~ *the law authorizing* the award and the amount of the
8 award attributable to ~~attorney fees and~~ punitive damages or other exemplary relief. Any
9 award of ~~attorney fees and~~ punitive damages or other exemplary relief shall be subject to
10 review under Section 19(a)(3).

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 17(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 19(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 (unless the law specifically confines them) and this was the import of the language previously in UAA section 12(a) [RUAA section 19(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 17(a) to section 17(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 17(a) 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 (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 can 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 attorneys fees, there is doubt whether one of the parties can eliminate the right to attorney fees even though RUAA section 17(a) 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) (May 9, 1995) ("The arbitrator should be empowered to award whatever relief would be available in court under the law. "); GUIDELINES ON ARBITRATION OF STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS Article 4(D) (May 21, 1997) ("Remedies should be consistent with the statute or statutes being applied, and with the remedies a party would have received had the case been tried in Court. These remedies may well exceed the traditional arbitral remedies of reinstatement and back pay, and may include witnesses'

and attorneys' fees, costs, interest, punitive damages, injunctive relief, etc.).

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 17(a). As discussed in 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 that it should 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 § 17(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); GUIDELINES ON ARBITRATION OF STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS (May 21, 1997); 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 RUA section 17(a) purporting to eliminate punitive damages would be operative. *See, e.g., Armendariz v. Foundation Health Psychcare Services, Inc.*, 68 Cal.App.4th 374 (1998) (limitation in arbitration agreement on remedies to only backpay and not allowing employee in anti-discrimination claim to attempt recovery of punitive damages is unconscionable and court severs remedy limitation from the arbitration agreement).

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 17(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 17(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 to 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 19(a)(6).

7. At the Drafting Committee meeting on March 20, the members asked the Reporter to redraft this provision concerning attorney fees and punitive damages to limit recovery to instances when such could be had if the action were in civil litigation. The language in Section 17(a) is similar to that in the Reporter's first draft of the RUAA. The Reporter has also included the term "or other exemplary relief" to cover situations where a statute, such as the Age Discrimination in Employment Act or Fair Labor Standards Act, might provide for liquidated or types of exemplary relief rather than punitive damages. New Subsection 17(b) preserves the flexibility that presently exists in the UAA as to arbitrators awarding other types of remedies. Both Sections 17(a) and (b) are subject to the parties' agreements to limit or expand remedies.

8. At the March 20 Drafting Committee meeting, there was much discussion concerning standards for vacatur of awards of attorney fees or punitive damages in sections 17(c)--now section 17(d)--and Section 19, vacatur. The Reporter is suggesting one of the three following options:

- 1) Review awards of attorney fees and punitive damages or other exemplary relief under the standards of Section 19(a)(3) of whether "[t]he arbitrators exceeded their powers. There is a well-developed body of case law under this provision under both the UAA and FAA counterpart. This would be the most limited review.
- 2) Maintain Section 19(a)(6) standard of "clearly erroneous" from Tentative Draft No. 2. Because this would be a new review provision, it would probably cause litigation to establish the contours of the standard. Still

courts would be fairly stringent before overturning an award of attorney fees or punitive or exemplary relief.

- 3) Rewrite Section 19(a)(6) standard to be the same type of court review as if the matter had been in civil litigation. This would allow courts a much broader review of such awards and likely cause the most appeals of these decisions by arbitrators. But this standard would more likely insure that arbitrators only make awards if “authorized by law as to any recovery in a civil action” as required by Section 19(a)(1).

9. At the Drafting Committee meeting of March 20 the committee requested the Reporter to draft language for Section 19(a)(6) to the effect that a reviewing court could vacate only the attorney fee or punitive or exemplary relief portion of an award rather than the entire award. If the committee decides on option 1 above, i.e., to use Section 19(a)(3) as a standard of review, then the Reporter suggests that a Note be included to the same effect.

10. At the meeting of October 9, 1998, the Drafting Committee made a number of minor changes in Section 17(a), as noted in that provision, such as change “authority” to “power” and change “attorney fees and punitive damages” to “attorney fees or punitive damages.” Also strike as surplusage “as to any recovery.” The Reporter struck the introductory phrase “[e]xcept as otherwise provided in the agreement to arbitrate” because this was essentially redundant with the ending phrase “or by the agreement of the parties.”

11. The Drafting Committee also decided that Section 17(d) requirements of a written

award with facts justifying the award and the special review provision of Section 19(a)(3) should apply only to punitive damages and not to an award of attorney fees.

12. Finally, the Drafting Committee determined that in Section 17(d) the arbitrators should be required to specify the “law” rather than the “facts” that authorize punitive damages and also decided that the reviewability of a decision to award punitive damages would be under Section 19(a)(3) which requires a court to vacate an award when the arbitrators exceed their powers. This review provision has been interpreted by courts essentially to mean that the arbitrators’ award will only be set aside when the arbitrators go beyond the powers contractually delegated to them by the parties. The courts should not use Section 19(a)(3) as a means to review the merits of the award. *See Eljer Mfg. V. Kowin Dev. Corp.*, 14 F.3d 1250 (7th Cir.), cert. denied, 512 U.S. 1205 (1994); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Georgia L. Rev. 731, 752 (1996). Thus, even if the arbitrators incorrectly apply the law or erroneously find facts, these mistakes will be insufficient to set aside an award of punitive damages by a reviewing court so long as the arbitrators were expressly or impliedly authorized by the contract to award such relief. The Drafting Committee requested that the Reporter emphasize this contractual nature of arbitration and resulting limited review of punitive damages in an Official Comment and in the Prefatory Note. One means to explain this approach in an Official Comment might be through an illustration such as the following:

“*Illustration:* The parties to an employment contract agree that all disputes will be decided by arbitration. A panel of arbitrators decides to award a claimant punitive

damages on her employment discrimination claim under Title VII of the Civil Rights Act of 1964. The arbitrators state the award in a record, refer to the law authorizing punitive damages, and state the amount attributable to punitive damages in compliance with Section 17(d). However, the arbitrators erroneously determined facts that the respondent intentionally violated the act and inaccurately applied the statutory provisions of Title VII in awarding the claimant punitive damages. A court reviewing the arbitrators' award of punitive damage should uphold the award because such an award was "authorized by law" in accordance with Section 17(a) and thus impliedly authorized by the parties arbitration agreement. The arbitrators have not "exceeded their powers" under Section 19(a)(3).

13. There is a problem with Section 17(d)'s reference only to Section 19(a)(3) because a court also should set aside an award of punitive or exemplary damages if the award runs afoul of Sections 19(a)(1), (2), (4), or (5). Perhaps the best way to resolve this problem would be to say in Section 17(d) shall be "subject to review primarily but not exclusively under Section 19(a)(3). If the language of Section 17(d) reads that the punitive award is "subject to review under Section 19(a), then the provision is unnecessary because all awards are subject to these review provisions.

14. A Commissioner has raised a question concerning the structure of Section 17 and whether the "exception" or "special treatment provision, which is subsection (a) should come after the general remedial provision which is subsection (b). The Reporter believes that "attorney fees and punitive damages or other exemplary relief" has been the heart of

our discussion and the major change in the Act, so that it should come first.

1 **SECTION 18. CONFIRMATION OF AWARD.** After receipt of notice of an
2 award, a party to an arbitration may apply to a court for an order confirming the award,
3 and thereupon a court shall issue such an order unless the award is modified or corrected
4 pursuant to Section 16 or the award is vacated, modified, or corrected pursuant to
5 Sections 19 and 20.

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 RUAA §18 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.

1 (a) Upon application of a party, the court shall vacate an award if any of
2 the following occur:

3 (1) The award was procured by corruption, fraud, or other undue
4 means.

5 (2) There was evident partiality by an arbitrator appointed as a
6 neutral or corruption or misconduct by any of the arbitrators prejudicing the rights of any
7 party.

8 (3) The arbitrators exceeded their powers.

9 (4) The arbitrators refused to postpone the hearing upon sufficient
10 cause being shown therefor, refused to consider evidence material to the controversy, or
11 otherwise so conducted the hearing, contrary to the provisions of Section 11, as to
12 prejudice substantially the rights of a party.

13 (5) There was no arbitration agreement, unless the party
14 participated in the arbitration proceeding without having raised the objection not later
15 than the commencement of the arbitration hearing on the merits ~~at the initiation of the~~
16 ~~arbitration process.~~

17 ~~(6) If the arbitrators included attorney fees or punitive damages or~~
18 ~~other exemplary relief under Section 17 in an award and the court determines that an~~
19 ~~award of attorney fees and punitive damages or other exemplary relief is clearly~~
20 ~~erroneous under the facts and circumstances of the arbitration proceeding, then the court~~
21 ~~shall vacate that portion of the award that provides for attorney fees and punitive~~
22 ~~damages or other exemplary relief.~~

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

6 (c) An application under this section shall be made within 90 days after
7 delivery of a copy of the award to the applicant unless the application is predicated upon
8 corruption, fraud, or other undue means, in which case it shall be made within 90 days
9 after those grounds are known or should have been known to the moving party.

10 (d) In vacating the award on grounds other than that stated in paragraph (5)
11 of subsection (a), a court may order a rehearing before new arbitrators chosen as provided
12 in the agreement or, in the absence thereof, by the court in accordance with Section 7. If
13 the award is vacated on grounds set forth in clauses (3), (4) ~~or (6)~~ of subsection (a), the
14 court may order a rehearing before the arbitrators who made the award or their successors
15 appointed in accordance with Section 7. The time within which the agreement requires
16 the award to be made is applicable to the rehearing and commences from the date of the
17 order.

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

**A. REPORTER'S COMMENT ON VACATUR FOR ARBITRATOR FAILURE
TO DISCLOSE UNDER SECTION 19(a)(2)**

At the meeting of October 31, 1997, the Drafting Committee suggested that RUAA Section 19(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 8 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 8, 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 19(a)(2). This addition of requiring a prejudicial effect of a failure to disclose makes sense in terms of symmetry with the other grounds in RUAA Section 19(a)(2) and it also makes clear that vacatur is not warranted for inconsequential omissions to disclose by the arbitrator.

B. REPORTER'S COMMENT ON SECTION 19(a)(4)

1. The words "hear evidence" have been changed to "consider evidence." This corresponds to the proposal in RUAA Section 11(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 11(b) is approved by the Drafting Committee, then Section 19(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 RUAA Section 11(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.

C. REPORTER’S COMMENT ON SECTION 19(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 §26(a)(1) from an order denying an application to compel arbitration under RUAA §3 or under RUAA §26(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 §19(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 language requiring a party participating in an arbitration proceeding to raise an objection that no arbitration agreement exists at "the commencement of the arbitration hearing on the merits" is to insure that the party makes a timely objection at the beginning of the arbitration rather than going through the time and expense of the full arbitration proceeding only to raise the objection for the first time in an application to vacate an award. It is emphasized that the obligation to object attaches at the first hearing before the arbitrator, including hearings on preliminary matters. 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 19(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 § 19(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 § 19(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.

8. At the meeting of March 20, 1998, the Drafting Committee determined that the objection to arbitrability should be raised early in the proceeding and requested the reporter to insert at the end of this subsection “at the initiation of the arbitration process.

D. THE POSSIBLE CODIFICATION OF THE “MANIFEST DISREGARD OF THE LAW” AND THE “PUBLIC POLICY” GROUNDS FOR VACATUR
MANIFEST DISREGARD OF THE LAW AND PUBLIC POLICY

1. In the course of the Drafting Committee’s deliberations, some question has arisen as to the advisability of adding a new subsection to Section 19(a) sanctioning vacatur of awards that result from a “manifest disregard of the law. Although not explicitly discussed by the Committee, the possibility of codifying the “manifest disregard of the law” standard raises the additional issue of codification of the “public policy” ground for vacatur. Neither of these two standards is presently codified in the FAA or in any of the state arbitration acts. However, all of the federal circuit courts of appeals have embraced one or both of these standards in commercial arbitration cases. See Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 734 (1996).

2. Manifest disregard of the law is the seminal nonstatutory ground for vacatur of commercial arbitration awards. It has its origin in the following dictum from the Supreme Court’s 1953 opinion in *Wilko v. Swan*, 346 U.S. 427, 436, 74 S. Ct. 182, 187 (1953):

While it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of [relevant law] would “constitute grounds for vacating the award pursuant to section 10[a] of the Federal Arbitration Act, (citation omitted) that failure would need to be made clearly to appear. In unrestricted submissions [to arbitration] . . . the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject,

in the federal courts, to judicial review for error in interpretation.

Id. at 436, 187. The relevant case law from the federal circuit courts of appeals establishes that “a party seeking to vacate an arbitration award on the ground of “manifest disregard of the law may not proceed by merely objecting to the results of the arbitration.” *O.R. Securities, Inc. v. Professional Planning Associates, Inc.* 857 F.2d 742, 747 (11th Cir. 1988).

“Manifest disregard of the law “clearly means more than [an arbitral] error or misunderstanding with respect to the law. *Carte Blanche (Singapore) PTE. Ltd. v. Carte Blanche Int’l.*, 888 F.2d 260, 265 (2d Cir. 1989) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (citing *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1985

The numerous other articulations of the manifest disregard of law standard reflected in the circuit appeals court case law reveal its two constituent elements. One element looks to the result reached in arbitration and evaluates whether it is clearly result consistent or inconsistent with controlling law. For this element to be satisfied, a reviewing court must conclude that the arbitrator misapplied the relevant law touching upon the dispute before her in a manner that constitutes something akin to a blatant, gross error of law that is apparent on the face of the award. Thus, this component of the manifest disregard inquiry looks to an “actus reus -like dimension—the commission of a very serious error of application of law to fact by the arbitrator.

The other element of the “manifest disregard of the law standard requires a reviewing court to evaluate the arbitrator’s knowledge, her awareness of the relevant law—leading to a “mens rea -like, state of mind determination. Even if a reviewing court finds a clear error

of law, vacatur is warranted under the “manifest disregard of the law” ground only if the court is able to conclude the arbitrator knew, was aware of, the correct law but nevertheless “made a conscious decision to ignore it in fashioning the award. *M&C Corporation v. Erwin Behr & Co.*, 87 F.3d 844, 851 (6th Cir. 1996) (observing that, on the facts of the case before it, no “manifest disregard of the law” was shown because “any mistake by the arbitrator in applying [the relevant law] was more likely the result of inadvertence, rather than a conscious decision to ignore the relevant law.”) For a full discussion of the “manifest disregard of the law” standard see Stephen L. Hayford, “Reining in the Manifest Disregard of the Law Standard: The Key to Stabilizing the Law of Commercial Arbitration,” 1999 J. OF DISPUTE RESOLUTION (forthcoming).

3. The public policy nonstatutory ground for vacatur is founded on two Supreme Court opinions in the labor arbitration field—*W.R. Grace & Co. v. Local Union No. 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 103 S. Ct. 2177 (1983) and *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S. Ct. 364, 370 (1987).

The origin and essence of the “public policy” ground for vacatur is well captured in the Tenth Circuit’s opinion *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993) (“The public policy exception is rooted in the common law doctrine of a court’s power to refuse to enforce a contract that violates public policy or law. It derives legitimacy from the public’s interest in having its views represented in matters to which it is not a party but which could harm the public interest.”) After a discussion of the principles enunciated by the Supreme Court in *W.R. Grace*, the Tenth Circuit observed further: “[I]n determining whether

an arbitration award violates public policy, a court must assess whether ‘the specific terms contained in [the contract] violate public policy, by creating an ‘explicit conflict with other ‘laws and legal precedents.’” Id. at 1024 (citing *Misco*, 484 U.S. at 43, 108 S. Ct. at 373.

Like the “manifest disregard of the law” nonstatutory ground, vacatur under the “public policy” ground requires something more than a mere error or misunderstanding of the relevant law by the arbitrator. Under all of the articulations of this nonstatutory ground, the public policy at issue must be a clearly defined, dominant, undisputed rule of law. However, on closer examination, the language employed by the various circuits to describe and apply this ground in the commercial arbitration milieu reflects two distinct, different thresholds for vacatur being used by those courts.

First, the test articulated by the Tenth Circuit in *Seymour* and the Eighth Circuit in *Painewebber, Inc. v. Argon*, 49 F.3d 347 (8th Cir. 1995) contemplate that an award can be vacated when it "explicitly" conflicts with, violates, or is contrary to the subject public policy. The judicial inquiry under this variant of the “public policy” ground obliges the court to delve into the merits of the arbitration award in order to ascertain whether the arbitrator's analysis and application of the parties’ contract or relevant law "violates" or "conflicts" with the subject public policy.

The threshold for vacatur under the “public policy” rubric employed by the opinions of the Eleventh Circuit in *Brown v. Rauscher Pierce Refnses, Inc.*, 994 F.2d 775 (11th Cir. 1994) and the Second Circuit in *Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108 (2d Cir. 1980) is quite different. It triggers vacatur only when a court concludes that implementation of the arbitral result (typically, effectuation of the remedy directed by the arbitrator) compels one of the parties to violate a well-defined and dominant public policy,

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

4. The reported case law from the states 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.).

5. 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); *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).

6. As of the October 9-11, 1998, meeting of the Drafting Committee there was no consensus as to the advisability of incorporating the “manifest disregard of the law and/or the “public policy grounds into Section 19. The strongest potential reason for doing so would be to stabilize the law of vacatur with regard to these two, presently nonstatutory grounds by confirming their legal status and setting out clear tests for vacatur under each. The peril posed to the law of commercial arbitration by the absence of codification of at least the “manifest disregard of the law standard is demonstrated by the recent opinion of the Second Circuit in *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998). *Halligan* tracks very closely a 1997 opinion of the Eleventh Circuit in *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456 (11th Cir. 1997). For reasons of brevity, and because it is the more extreme of the two opinions, only *Halligan* is discussed in this comment.

Halligan involved a petition for vacatur under Section 10(a) of the FAA of an arbitration award centering on a claim of illegal age discrimination brought under the Age Discrimination in Employment Act (ADEA). Following the normal “drill in “manifest

disregard of the law cases, the Second Circuit first emphasized that the “reach of the doctrine [of manifest disregard] is severely limited and stated further that in order to vacate for “manifest disregard of the law a court must “find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case. After discussing the “growing concern over the problem of employees being held to their a priori agreements to arbitrate statutory discrimination claims, the court proceeded to review the proof of illegal age discrimination adduced by the claimant employee, characterizing that proof as “overwhelming. It found further that the arbitrators had been advised of the correct legal principles on which the outcome of the arbitration should have turned and noted that the arbitrators had not issued a reasoned award explaining the basis for their decision denying the employee’s claim of illegal age discrimination. Because of the strong proof of illegal discrimination the court found in the record, combined with the fact that the arbitrators had been advised of the correct law, the Second Circuit concluded, “we are inclined to hold that [the arbitrators] ignored the law or the evidence or both. It then fashioned a unique, new version of the “manifest disregard of the law ground whereby vacatur of an award is warranted if a court, after evaluating the facts and the law, and determining that the arbitrators were advised of the correct law, concludes the award was wrong and finds nothing in the award itself to demonstrate that the arbitrators did not knowingly ignore the law.

Halligan is a remarkable opinion that reveals the dangers of the current

“unregulated state of the law of vacatur with regard to the “manifest disregard of the

law standard. In both it is clear the Second Circuit used the “manifest disregard” device as a vehicle for substituting its judgment for that of the arbitrators. Like the Eleventh Circuit in *Montes*, in *Halligan* the Second Circuit evaluated the facts and the law and vacated the award because it disagreed with the arbitrator’s evaluation of both, presuming that the arbitrators must have ignored the law (or the facts) in reaching their erroneous result. The opinion is also remarkable because it virtually mandates reasoned awards in statutory-based arbitrations (in order to preclude the presumption of “manifest disregard when a court finds a grave error of law in the arbitral result)—a significant development and a most serious step that runs counter to a long line of Supreme Court case law to the opposite effect.

There are reasons for the RUAA not to embrace these two standards. The first is presented by the omission from the FAA of either standard. Given that omission, there is a very significant question of possible FAA preemption of a such a provision in the RUAA, should the Supreme Court or Congress eventually confirm that the four narrow grounds for vacatur set out in Section 10(a) of the federal act are the exclusive grounds for vacatur. The second reason for hesitation is the certain dilemma the Drafting Committee would encounter in attempting to fashion unambiguous, “bright line” tests for these two standards. In the absence of Section 19(b), the Drafting Committee would not be obliged to engage this issue, thereby leaving it for resolution by Congress and/or the Supreme Court.

The Drafting Committee must decide whether the potential for increased stability and consistency in this dimension of the law of vacatur offered by codification of the “manifest

disregard of the law. It is not certain that codifying the “manifest disregard of the law” and “public policy” grounds outweighs the downsides of such action.

E. REPORTER’S COMMENT ON THE SECTION 19(b) “OPT IN” PROVISION FOR ERRORS OF LAW

1 Consistent with the Drafting Committee’s earliest discussions, this provision is drafted in a manner that reflects the rule of law in New Jersey under the New Jersey Arbitration Act, N.J. STAT. ANN. §.2A:24-1, et. seq, and the New Jersey Alternate Procedure for Dispute Resolution (NJADR) statute, N.J. STAT. ANN. T.2A, Subt. 6 §§ 23A-1, et. seq, as well as Clause 69 of the English Arbitration Act. Parties operating under New Jersey law that contractually agree that their arbitration is to be governed by the NJADR thereby subject arbitrator’s awards to judicial review for “erroneously applying the law to the issues and facts, by virtue of Section 2A:23A-13 of the NJADR which sanctions vacatur on that ground. New Jersey is the only state that explicitly sanctions “opt-in” review based on errors of law—albeit within the context of a decision by the parties to conduct their arbitration under the full panoply of procedures set in the NJADR and not a specific vacatur-related “opt-in” provision in the arbitration agreement.

2. The New Jersey Arbitration Act does not contain language similar to proposed Section 19(b). Instead, the rule permitting parties to “opt-in” into judicial review for errors of law results from the opinion of the New Jersey Supreme Court in *Tretina Printing Co. v. Fitzpatrick & Associates, Inc.*, 640 A.2d 788 (N.J. 1994)(per curiam). In *Tretina* the New Jersey Court, in the course of holding that arbitration awards can be vacated only for

“fraud, corruption, or similar wrongdoing on the part of the arbitrators [as provided for by the NJADR statute], observed “[f]or those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, [we] hold that the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that the arbitrators shall render their decision only in conformance with New Jersey law, and that such awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that. I doubt that many will. And if they do, they should abandon arbitration and go directly to the courts. Id. at 793, cited in *Mt. Hope Development Associates v. Mt. Hope Waterpower Project, L.P.*, 712 A.2d 180, 184 (N.J. 1998)(quoting *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 610 A.2d 364, 399 (N.J. 1992)(Wilentz, C.J., concurring).

3. 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). If that were to happen, a legitimate question of preemption would arise concerning the validity of a state law provision sanctioning vacatur for errors of law when the FAA does not permit it. If the FAA is eventually interpreted to bar contractual “opt-in” provisions, Section 19(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 19(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 mooted) of Section 19(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—UHC/Chicago Typographical Union debate (addressed in detail in Reporter’s Comment 4) 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 19(b) is included in the Act.

The second way in which preemption of Section 19(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 be 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 be contrary to the pro-arbitration public policy underpinning the FAA. In this scenario Section 19(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 19(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.

4. The concerns pertaining to FAA preemption are 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 assertion is particularly persuasive if one agrees that the proposed new Subsection (b) cannot be characterized as “anti-arbitration. By this view, the “opt in feature of Section 19(b) 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.

5. The second primary point of inquiry for the Drafting Committee with regard to 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. The “creation of jurisdiction transpires because a statutory provision that authorizes the parties to contractually create or expand the jurisdiction of the state or federal courts can result in courts being obliged to vacate arbitration awards on a ground(s) they

otherwise would be foreclosed from relying upon. Court cases under the federal law show the uncertainty of an “opt in” approach. See, e.g., *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991) (“If the parties want, they can contract for an appellate arbitration panel to review the arbitrator’s award. But they cannot contract for judicial review of that award; federal [court] jurisdiction cannot be created by contract.) (labor arbitration case), and *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).

The continuing uncertainty as to the legal propriety and enforceability of contractual “opt-in” provisions is best demonstrated by 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).

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.

A final significant recent federal Circuit Court of Appeals opinion is UHC Management Co. v. Computer Sciences Corp., 148 F.3d 992 (8th Cir. 1998). In UHC the Eighth Circuit was concerned primarily with the effect of a choice of law provision on the applicability of the FAA under the standards set down in Volt and Mastrobuono. The key issue at play within the context of the choice of law analysis was the effect of a provision in the parties’ arbitration agreement that stated the arbitrators were “bound by controlling law. One of the parties argued this contractual provision constituted an agreement requiring the federal district court to review the disputed arbitration award for errors of law under applicable state substantive law. The Eighth Circuit rejected this argument because of its conclusion that the cited contract language did not clearly establish the parties’ intent to contract for expanded judicial review.

The portion of the analysis relevant here is that which concerned the propriety of contractual agreements providing for expanded judicial review beyond that contemplated by Sections 10 and 11 of the FAA. At the outset of that discussion the Court observed as below.

“Parties may choose to be governed by whatever rules they wish regarding how an arbitration itself will be conducted It is not clear, however,

that parties have any say in how a federal court will review an arbitration award when Congress has ordained a specific, self-limiting procedure for how such a review is to occur. Section 9 of the FAA provides that federal courts “must grant an order confirming an arbitration award “unless the award is vacated, modified, or corrected as prescribed in section 10 and 11 of this title. Congress did not authorize the de novo review of such an award on its merits; it commanded that when the exceptions [to the rule of finality set out in sections 10 and 11] do not apply, a federal court has no choice but to confirm [the challenged award].

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

Because of its determination that the parties’ arbitration agreement did not clearly establish the parties’ intent to contract for expanded judicial review, the Eighth Circuit deferred decision on the “creating jurisdiction -FAA preemption questions raised by “opt-in provisions of the nature sanctioned by proposed section 19(b). Regardless, even though the thoughts of the Eighth Circuit regarding this matter can be accurately characterized as dictum, there is no doubt that it, like the Seventh Circuit in *Chicago Typographical Union*, finds contractual provisions requiring the courts to apply

contractually-created standards for judicial review of arbitration awards to be highly dubious.

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

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

In a similar manner, the Illinois Court of Appeals, in *Chicago, Southshore and South Bend RR v. Northern Indiana Commuter Transportation District*, 682 N.E.2d 156, 159 (Ill. App. 3d 1997), rev’d on other grounds, 184 Ill. 151 (1998), refused to effect the provision of an arbitration agreement permitting a party claiming that the arbitrator’s

award is based upon an error of law “to initiate an action at law [] to determine such legal issue. In so holding the Illinois Court stated: “The subject matter jurisdiction of the trial court to review an arbitration award is limited and circumscribed by statute. The parties may not, by agreement or otherwise, expand that limited jurisdiction. Judicial review is limited because the parties have chosen the forum and must therefore be content with the informalities and possible eccentricities of their choice. (citing *Konicki v. Oak Brook Racquet Club, Inc.* 441 N.E.2d 1333 (Ill. App. 1982).

In *NAB Construction Corp. v. Metropolitan Transport Authority*, 180 S.D. 436 (N.Y. App. Div. 1992) the Appellate Division of the New York Supreme Court, without engaging in any substantive analysis, approved application of a contractual provision permitting judicial review of an arbitration award “limited to the question of whether or not the [designated decision maker under an alternative dispute resolution procedure] is arbitrary, capricious or so grossly erroneous to evidence bad faith. (citing *NAB Construction Corp. v. The Metropolitan Transportation Authority*, 167 S.D.2d 301 (N.Y. App. Div. 199x). This sparse state court case law is not a sufficient basis for identifying a trend in either direction with regard to the legitimacy of contractual “opt-in provisions for expanded judicial review.

7. 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 as to FAA preemption of conflicting state law with regard to the “front end” issues of enforceability of the agreement to arbitrate and arbitrability, and the “back end” issue of vacatur as regards are on point here.

8. This uncertainty of the proposed Subsection (b) would likely cause concern among the state legislatures considering adoption of the Revised UAA. As noted above, the only state that has expressly sanctioned the “opt-in” device, New Jersey, did so not by statute but through a collateral reference in an opinion of its Supreme Court. 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.

9. 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 19(b).

10. 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.

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.

A few of the federal circuit courts of appeals 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.

The strong majority view in the states does not recognize errors of law as a ground for vacatur. 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).

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. Nevertheless, failure to articulate a singular standard in the Act would lead to chaos resulting from the myriad thresholds for vacatur that would be devised by various parties.

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 be 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. Although it remains untested, the “prejudicial error of law” standard of Section 8 (c)(4) of the Model Employment Termination Act is the only other attempt to articulate a statutory ground sanctioning vacatur for errors of law. The substantial difficulty inherent in attempting to fashion 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.

11. 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. Section 2A:23A-13 of the NJADR statute stipulates that application for review of an award for an error of law under its auspices 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).

12. The Committee should also 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 would not present the “creating jurisdiction and line drawing problem identified in the paragraph above and would raise no concerns regarding FAA preemption. It is also consistent with the Supreme Court’s contractual view of commercial arbitration in that it preserves the parties’ agreement to resolve the merits of the controversy between them through arbitration, without resort to the courts. When parties agree that the decision of an arbitrator will be “final and binding, it is implicit that it is the arbitrator’s interpretation of the contract and the law that they seek, and not the legal opinion of a court.

13. On a general public policy level, the primary question that must be addressed with regard to Section 19(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 19(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 §19(b) would clearly inform the parties that they can “opt-in” to enhanced judicial review. Second, Section 19(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 19(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 19(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 RUA 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 19(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. Arbitrators would be effectively obliged to provide detailed findings of law (and if the parties agree to judicial review for errors of fact—findings of fact) in order to facilitate review. In order to lay the predicate for the appeal of unfavorable awards, transcripts would become the norm and counsel would be required to expend substantial time and energy making sure the record would support an appeal. Arbitrators would find themselves routinely involved in post-award judicial proceedings requiring significant time and expense. Finally, the time to resolution in many cases would be greatly lengthened, as well as increasing the prospect of reopened proceedings on remand following judicial review.

At its core, arbitration is supposed to be an alternative to litigation in a court of law, not a prelude to it. It can be argued that parties unwilling to accept the risk of binding awards because of an inherent mistrust of the process and arbitrators are best off contracting for advisory arbitration or foregoing arbitration entirely and relying instead on traditional litigation. As Chief Justice Wilentz of the New Jersey Supreme Court stated in his concurring opinion in *Perini*, 610 A.2d at 399, in reference to his belief that under the NJADR Act the parties are free to contract for judicial review for errors of law: “[I]f they do [so contract], they should abandon arbitration and go directly to the law courts.

The third argument raised in opposition to the “opt-in” device of Section 19(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.

14. The final issue to be addressed is the advisability of expanding the reach of the Section 19(b) “opt-in” provision to embrace appeals based on purported arbitral errors of fact. This question was not expressly discussed at the November 1997 and March 1998 meetings of the Drafting Committee. 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 19(b) is a step the Drafting Committee should take with the utmost caution. All of the Section 19(b) arguments advising reticence with regard to errors of law can be advanced with much greater force here. Undoubtedly the potential number of disputed factual determinations in any given dispute greatly exceeds the number of potential legal errors. Thus, it seems certain that losers in arbitration would be much more likely to believe they have a valid basis for seeking vacatur if they have contractually secured the right to obtain judicial review of alleged errors of fact.

15. At the meeting of October 9, 1998, the Drafting Committee unanimously voted to retain Section 19(b) “opt in” provision in brackets to show the continued concern on the Committee over this provision and so as to solicit comments from outside, interested parties. The Committee was unanimous in rejecting suggestions that Section 19(b) be broadened to include “errors of fact.

F. OTHER CHANGES IN SECTION 19

1. The language in section 19(a)(2) “failure by any of the arbitrators to properly disclose information under the standards in Section 8” has been deleted because the standard in Section 8 makes clear that failure to make proper disclosure would be grounds for vacatur under the “evident partiality” language. This has been the operative provision under which disclosure cases have traditionally been decided.

2. Section 19(d) that allows a court to vacate an award and order a rehearing before new or old arbitrators has been changed to include section 19(a)(6) as a grounds to reorder a hearing on attorney fees and punitive damages or other exemplary relief before the same arbitrators who made the award. The grounds for providing rehearing before new arbitrators involve corruption, bias, or other types of misconduct that raise questions about the neutrality of the prior arbitrators. Vacating because of the grounds in section 19(a)(6) should raise no such concerns.

1 **SECTION 20. MODIFICATION OR CORRECTION OF AWARD.**

2 (a) Upon application made within 90 days after the applicant receives record
3 of notice of the award, the court shall modify or correct the award if any of the following
4 occur:

5 (1) There was an evident miscalculation of figures or an evident
6 mistake in the description of a person, thing, or property referred to in the award.

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

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

3 (b) If the application is granted, the court shall modify or correct the award
4 so as to effect its intent and shall confirm the award as so modified or corrected. Otherwise,
5 the court shall confirm the award as made.

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

8 **SECTION 21. JUDGMENT OR DECREE ON AWARD.** Upon granting an order
9 confirming, modifying, or correcting an award, judgment, or decree shall be entered in
10 conformity therewith and be enforced as any other judgment or decree. Costs of the
11 application and subsequent proceedings, and disbursements may be awarded by the court.

12 **SECTION 22. JUDGMENT ROLL, DOCKETING.**

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

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

17 (2) the award;

18 (3) a copy of the order confirming, modifying or correcting the award;

19 and

20 (4) a copy of the judgment or decree.

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

2 **SECTION 23. APPLICATIONS TO COURT.**

3 (a) Except as otherwise provided, an application to the court under this [Act] shall
4 be by motion and shall be heard in the manner and upon the notice provided by law or rule
5 of court for the making and hearing of motions.

6 (b) Unless the parties have agreed otherwise, notice of an initial application for an
7 order shall be served in the manner provided by law for the service of a summons in an
8 action.

9 **SECTION 24. JURISDICTION.** An agreement pursuant to Section 2 providing for
10 arbitration in this State confers jurisdiction on the court to enforce the agreement and to enter
11 judgment on an award under this [Act].

REPORTER'S COMMENT

1. The term "court" is now in the definitional section at section 1(c).

1 **SECTION 25. VENUE.** An initial application shall be made to the court of the
2 [county] in which the agreement provides the arbitration hearing shall be held or, if the
3 hearing has been held, in the county in which it was held. Otherwise the application shall
4 be made in the [county] where the adverse party resides or has a place of business or, if the

1 adverse party has no residence or place of business in this State, to the court ~~of~~ *in any county*
2 *having contacts with one or more of the parties or the matters in dispute, or in the absence*
3 *thereof, in any [county]. All subsequent applications shall be made to the court hearing the*
4 initial application unless the court otherwise directs.

5 **SECTION 26. APPEALS.**

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

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

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

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

12 (4) an order modifying or correcting an award;

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

14 (6) a judgment or decree entered pursuant to the provisions of this act

15 *[(7) an order granting consolidation].*

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

REPORTER'S COMMENT

1. At the meeting of October 9, 1998, the Drafting Committee by a vote of 3-2 decided to add

subsection 7 to Section 26(a) and to put the section in brackets. This was a close vote and it was decided to revisit this issue at the next Drafting Committee meeting because many Commissioners were not present when the issue was voted on Sunday morning. Those voting for the provision wanted to ensure that consolidation was not forced on a party; those voting against it were concerned with delay.

1 **SECTION 27. EFFECTIVE DATE.**

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

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

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

7 (b) After [January 1, 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 27 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 27 is based upon the effective-date provisions in the 1996 Amendments constituting the Uniform Limited Liability Partnership Act of 1994.

4. At the meeting on October 9, 1998, in Rapid City, the Drafting Committee determined to adopt the approach of the Uniform Limited Partnership Act by allowing parties to an arbitration agreement entered into prior to the effective date of the Act to “opt into” the RUAA. After a date chosen by the state legislature, all arbitration agreements will be subject to the RUAA, regardless of when parties agreed to these arbitration provisions.

1 **SECTION 28. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

2 In applying and construing the [Act], consideration must be given to the need to promote
3 uniformity of the law with respect to its subject matter among States that enact it.

4 ***SECTION 29. EFFECT OF ARBITRATION AGREEMENT; NONWAIVABLE***
5 ***PROVISIONS.***

6 (a) *Except as otherwise provided in subsection (b) or unless otherwise provided by*

1 *law, the arbitration between the parties is governed by the arbitration agreement. To the*
2 *extent the arbitration agreement does not otherwise provide, this Act governs the arbitration*
3 *between the parties.*

4 *(b) The arbitration agreement may not:*

5 *(1) waive Section 2(a); Section 3; Section 4; Section 7(b); Sections 8 (a), (b),*
6 *and (c); Section 10; Section 12; Sections 13(a) and (f); Section 14; Section 16(b) and (c);*
7 *17(d); Section 18; Sections 19(a), (c), (d), and (e); Section 20; Section 21; Section 22;*
8 *Section 23(a); Section 24; Section 25; Section 26; Section 27; or Section 28 or*

9 *(2) unreasonably restrict the right to notice of the commencement of an*
10 *arbitration proceeding under Section 5.*

REPORTER'S COMMENT

1. At the Drafting Committee meeting of October 9, 1998, Chair Fran Pavetti requested the Reporter to draft a section similar to those in the Uniform Partnership Act (Section 103) and in the proposed Revised Uniform Limited Partnership Act (Section 101B) stating that the Act was primarily a default mechanism and the parties' autonomy, as expressed in the arbitration agreement, should normally control the arbitration. However, there was sentiment that the RUAA should specifically point out those provisions that parties cannot waive, especially in light of the adhesion situation where one party has substantially more bargaining power than the other but either does not have so much power or does not exercise it in such a way that a court would conclude that the arbitration agreement is an unconscionable one.

2. The language "unless otherwise provided by law" in Section 29(a) insures that one party cannot subject another to unconscionable provisions or other requirements that a court would

determine illegal. In particular, there was discussion that although parties might limit remedies, such as punitive damages or attorney fees in Section 17, a court might deem such a limitation inapplicable where, for instance, an arbitration involves statutory rights which would require these remedies.

3. Section 29(b) is a listing of those provisions that the Reporter would like the Drafting Committee to consider which cannot be waived. Special mention should be made of the following sections:

a. Section 4 is a close call as to whether the parties' arbitration agreement could limit access to a court or an arbitrator for an extraordinary remedy, such as an order to preserve assets, either before or after the arbitration proceeding begins.

b. Section 5 allows the parties to shape what goes into a notice to commence an arbitration proceeding or the means of giving the notice but Section 29(b) (2) preserves the idea that at least some notice must be given.

c. The basic requirement of arbitrator disclosure in Section 8 should not be waivable, particularly in the adhesion situation. However, Section 8(d), whether and to what extent to use the procedures of an arbitration institution, is within the control of the parties.

d. Section 10 is also a provision that deserves some scrutiny. It would seem odd that the parties could waive the immunity of the arbitrator but perhaps an arbitrator can, e.g., by agreeing to serve under an arbitration agreement that waives arbitral immunity. The same would be true for an arbitration institution.

e. An argument can be made that Section 12 which gives the parties a right to be represented by an attorney should be waivable. In labor arbitration many parties agree to expedited

provisions where they knowingly waive the right to have attorneys present their cases (and also prohibit transcripts and briefs) in order to have a quick and informal arbitration mechanism.

f. While most of the discovery provisions in Section 13 are subject to agreement by the parties, the basic right of arbitrators under Section 13(a) to issue subpoenas for witnesses and documents to the hearing exists under present UAA and is not “subject to the agreement of the parties. Section 13(f) makes applicable legal provisions regarding compelling a person to testify and would likely come under the clause in Section 29(a) “unless otherwise provided by law.

g. Sections 3, 14, 16(b) and (c), 18, 19(a) and (c)-(e), 20, 21, 22, 23(a), 24, 25, and 26 all involve access to courts or the judicial process and likely should not be within the control of the parties.

- 1) Section 3 involves the court’s authority either to compel or stay arbitration proceedings. Parties should not be able to interfere with this power of the court to initiate or deny the right to arbitrate.

- 2) 14 dealing with court enforcement of pre-award rulings should be an inherent right; otherwise there is no mechanism to carry out a pre-award order.

- 3) Section 16(a) gives the parties the right to apply to the arbitrators to correct or clarify an award; presumably this should be waivable. But the right of a court to order an arbitrator to correct or clarify an award should not.

- 4) Section 19(b) is excluded because it gives the parties the right to establish judicial review for errors of law.

5) The Reporter has subdivided Section 23 because (a) establishes the mechanism for a party to bring an application by way of motion to a court where the Act grants such rights, e.g., vacatur. Section 23(b) is a notice provision which the parties can vary.

h. Parties probably should not be able to vary the effective date of the Act in Section 27, the uniformity of interpretation in Section 28, or the nonwaivability provision of this Section.