

DRAFT

FOR DISCUSSION ONLY

**PROPOSED REVISIONS OF THE
UNIFORM ARBITRATION ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MARCH, 2000

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UNIFORM ARBITRATION ACT**

With Prefatory Note and Reporter's Notes

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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PREFATORY NOTE

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

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

There are a number of principles that the Drafting Committee agreed upon at the outset of its consideration of a revision to the UAA. First, that arbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs. The RUAA provides a default mechanism if the parties do not have a specific agreement on a particular issue. Second, the underlying reason many parties choose arbitration is the

relative speed, lower cost, and greater efficiency of the process. The law should take these factors, where applicable, into account. For example, section 10 allows consolidation of issues involving multiple parties. Such a provision can be of special importance in adhesion situations where there are numerous persons with essentially the same claims against a party to the arbitration agreement. Finally, in most 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 23 is limited. This is so even where an arbitrator may award attorney fees, punitive damages or other exemplary relief under section 21. Section 14 insulates arbitrators from unwarranted litigation to insure their independence by providing them with immunity.

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

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

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

vacatur.

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

An important caveat to the general rule of FAA preemption is found in *Volt Information Sciences, Inc. and Mastrobuono*. *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468 (1989) and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The focus in these cases is on the effect of FAA preemption on choice-of-law provisions routinely included in commercial contracts. *Volt* and *Mastrobuono* establish that a clearly expressed contractual agreement by the parties to an arbitration contract to conduct their arbitration under state law rules effectively trumps the preemptive effect of the FAA. If the parties elect to govern their contractual arbitration mechanism by the law of a particular state and thereby limit the issues that they will arbitrate or the procedures under which the arbitration will be conducted, their bargain will be honored—as long as the state law principles invoked by the choice-of-law provision do not conflict with the FAA's prime directive that agreements to arbitrate be enforced. *See, e.g.*, *ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. 1999); *Russ Berrie & Co. v. Gantt*, 988 S.W.2d 713 (Tex. App. 1999). It is in these situations that the RUAA will have most impact.

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 are used for all other contracts. *Terminix*, 513 U.S. at 281 (1995)(quoting *Volt*, 489 U.S. at 474 (1989)) and quoted in *Cassarotto*, 517 U.S. 681, 685 (1996); and *Cassarotto*, 517 U.S. at 688 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Arbitration agreements may not be invalidated under state laws applicable only to arbitration provisions. *Id.* The FAA will preempt state law that does not place arbitration agreements on "equal footing" with other contracts.

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

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

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

of arbitration.

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

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

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

Any provisions of these state international arbitration statutes that are inconsistent with the New York Convention, to which the United States adhered in 1970 (for the terms of the New York Convention, *see* 9 U.S.C. § 201), or with the federal legislation in Chapter 2 of Title 9 of the United States Code are preempted. Chapter 2 creates federal-question jurisdiction in the federal district courts for any case “falling under the [New York] Convention” and permits removal of any such case from a state court to the federal court “at any time prior to trial.” 9 U.S.C. §§ 203, 205. The statute covers any commercial agreement to arbitrate and arbitral award unless the matter involves only American citizens and has no reasonable relationship to any foreign country and the courts have broadly applied the statute. Therefore, it is unlikely that state arbitration law will

have major application to an international case. There are two instances where state arbitration law might apply in the international context: (1) where the parties designate a specific state arbitration law to govern the international arbitration and (2) where all parties to an arbitration proceeding involving an international transaction decide to proceed on a matter in state court and do not exercise their rights of removal under Chapter 2 of Title 9 and the relevant provision of state arbitration law is not preempted by federal arbitration law or the New York Convention. In these relatively rare cases, the state courts will refer to the RUAA unless the state has enacted a special international arbitration law.

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

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

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

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

5 (2) “**Arbitrator**” means an individual appointed to render an award in a
6 controversy between persons who are parties to an agreement to arbitrate.

7 (3) “**Authenticate**” means i) to sign, or ii) to execute or adopt a symbol,
8 or encrypt or similarly process a record in whole or in part, with present intent to identify
9 the authenticating person or to adopt or accept a record or term.

10 (4) “**Court**” means [a **court** of competent jurisdiction] in this State.

11 (5) “**Knowledge**” means actual knowledge.

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

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

18 **Reporter’s Notes:**

19 1. The term “arbitration organization” is similar to the one used in section 74 of
20 the 1996 English Arbitration Act and describes well the functions of agencies such as the
21 American Arbitration Association, the Center for Public Resources, JAMS, the National
22 Arbitration Forum, NASD Regulation, Inc., the American Stock Exchange, the New York
23 Stock Exchange, and the International Chamber of Commerce. The arbitration institutions

1 under their specific administrative rules oversee and administer all aspects of the
2 arbitration process. The important hallmarks of such agencies are that they are neutral and
3 unbiased. *See, e.g.,* Engalla v. Permanente Medical Group, Inc., 15 Cal.4th 951, 938 P.2d
4 903, 64 Cal. Rptr.2d 843 (Cal. 1997) (defendants’ self-administered arbitration program
5 between insurer and customers that did not impartially administer arbitration system and
6 made representations about timeliness of the proceedings contrary to what defendant
7 knew would occur was improper). The term “arbitration organization” is used in section
8 12 concerning arbitrator disclosure and section 14 concerning arbitrator immunity.

9 2. Commissioner Hill of Maryland suggested that the term “arbitrator” be defined.
10 It was not under the UAA. In Section 1(2), the Reporter suggests using the term
11 “individual” rather than “person” because business entities or organizations do not
12 function as “arbitrators.” The definition of “arbitrator” is based on that used most often in
13 the case law. *See* BLACK’S LAW DICTIONARY 105 (1990); WEST’S LEGAL
14 THESAURUS/Dictionary 60 (1985); *Hoteles Condado Beach v. Union de Tronquistas*
15 *Local 901*, 763 F.2d 34 (1st Cir. 1985).

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

21 4. The definition of “court” is presently found in section 17 of the UAA. The
22 court must have appropriate subject matter or personal jurisdiction. Different states
23 determine which court in its system has jurisdiction over arbitration matters in the first
24 instance. Most give authority to the court of general jurisdiction.

25 5. The term “knowledge” is used in section 2 regarding notice under the RUAA.
26 It is based on the definition used in Article 1-202 of the Uniform Commercial Code.

27 6. Section 1(7) is based on the definition of “record” in Sec. 5-102(a)(14) of the
28 Uniform Commercial Code and in proposed revised Article 2 of the Uniform Commercial
29 Code and is intended to carry forward established policy of the Conference to
30 accommodate the use of electronic evidence in business and governmental transactions. It
31 is not intended to mean that a document must be filed in a governmental office nor is it
32 meant to imply that the term “written” or like phrases in other statutes of an enacting state
33 may not be given equally broad interpretation as the term “record.”

34 **SECTION 2. NOTICE.** Unless the parties to an agreement to arbitrate

1 otherwise agree or unless otherwise provided by this [Act], a **person** gives notice by
2 taking action that is reasonably necessary to inform another **person** in ordinary course,
3 whether or not the other **person** acquires **knowledge** of the notice. A **person** has notice
4 if the **person** has **knowledge** of the notice or has received notice. A **person** receives
5 notice when it comes to that **person's** attention or the notice is delivered at the **person's**
6 place of residence or place of business, or at another location held out by that **person** as
7 the place of receipt of such communications.

8 **Reporter's Notes:**

9 1. The conditions for giving and receiving notice are based on terminology used in
10 Article 1-202 of the Uniform Commercial Code. They spell out standards for when notice
11 is given and received rather than any particular means of notice. This allows parties to use
12 systems of notice that become technologically feasible and acceptable, such as by fax or
13 electronic mail.

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

22 2. The concept of notice occurs in section 15(b) and (c) concerning the arbitrators
23 giving notice of a request for summary disposition or of an arbitration hearing; section
24 19(a) regarding an arbitrator or an arbitration organization giving notice of an award and
25 section 19(b) concerning a party notifying an arbitrator of untimely delivery of an award;
26 section 20(b) concerning a party's notice of requesting a change in the award by
27 arbitrators; section 22 concerning a party applying to a court to confirm an award after
28 receiving notice of it; and section 24(a) concerning a party applying to modify or correct
29 an award after receiving notice of it.

30 3. "Notice" is also used in section 9 regarding initiation of an arbitration
31 proceeding; section 9(b) requires that, unless the parties otherwise agree as per section 4,

1 notice must be given either by mail registered or certified, return receipt requested, or by
2 personal service as authorized by law in a civil action. Because of the language in section
3 2 “unless otherwise provided by this [Act],” the manner of notice provided in section 9(b)
4 takes precedence as to notice of initiation of an arbitration proceeding.

5 **SECTION 3. WHEN ACT APPLIES.**

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

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

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

10 (b) After [date], this [Act] governs agreements to arbitrate.

11 **Reporter’s Notes:**

12 1. Section 3 is based upon the effective-date provisions in the Revised Uniform
13 Partnership Act and 1996 Amendments constituting the Uniform Limited Liability
14 Partnership Act of 1994. Section 3(a)(2) allows parties who have entered into arbitration
15 agreements under the UAA the option to elect coverage under the RUAA. Section 3(b)
16 establishes a certain date when all arbitration agreements, whether entered into before or
17 after the effective date of the RUAA, will be governed by the RUAA rather than the UAA.

18 2. Section 20 of the UAA provided that the law was only applicable to agreements
19 entered into after the effective date of the Act. The Drafting Committee rejected this
20 approach. If it were followed, such a section would cause two sets of rules to develop for
21 arbitration agreements under state arbitration law: one for agreements under the UAA
22 and one for agreements under the RUAA. This is especially troublesome in situations
23 where parties have a continuing relationship that is governed by a contract with an
24 arbitration clause. There would be no mechanism, such as section 3(a)(2) for these parties
25 to opt into the provisions of the RUAA without rescinding their initial agreement. Section
26 3(b) also sets a time certain when all arbitration agreements will be governed by the
27 RUAA.

28 **SECTION 4. EFFECT OF AGREEMENT TO ARBITRATE;**

29 **NONWAIVABLE PROVISIONS.**

1 (a) Except as otherwise provided in subsection (b), the parties to an
2 agreement to arbitrate or to an arbitration proceeding may waive or vary the terms of the
3 provisions of this [Act] in their agreement to arbitrate to the extent permitted by law.

4 (b) Prior to a controversy arising under an arbitration agreement, the
5 parties may not:

6 (1) waive or vary the requirements of this section or Section 3(b),
7 5(a), 6(a), 8, 15(a), 17(a) and (b), 26, or 28;

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

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

14 (c) The parties may not waive or vary the requirements of Section 7, 18,
15 20(c) and (d), 22, 23, 24, 25(a) and (b), 29, 30, or 31.

16 **Reporter's Notes:**

17 1. Section 4 is similar to provisions in the Uniform Partnership Act (section 103)
18 and in the proposed Revised Uniform Limited Partnership Act (section 101B). The intent
19 of section 4 is to indicate that, although the RUAA is primarily a default statute and the
20 parties' autonomy, as expressed in the arbitration agreement, normally should control the
21 arbitration, there are provisions that parties cannot waive prior to a dispute arising under
22 an arbitration agreement.

23 2. Section 4(a) embodies the notion of party autonomy in shaping their arbitration
24 agreement or arbitration process. It should be noted that, subject to section 4(b) and (c)

1 and in accordance with Reporter Note 1 to Section 6, although the parties' arbitration
2 agreement must be in a record, they subsequently may vary that agreement orally, for
3 instance, during the arbitration proceeding.

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

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

19 Special mention should be made of the following sections:

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

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

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

1 5. Section 4(c) is listing of those provisions that involve the judicial processes and
2 should not be within the control of the parties either before or after the arbitration dispute
3 arises.

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

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

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

14 d. The vacatur provisions of section 23 are not waivable.

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

20 f. Parties should not be able to vary the nonwaivability provision of this section,
21 the uniformity of interpretation in section 29, or the effective date in section 30, or section
22 31 regarding repeal of the UAA.

23 **SECTION 5. APPLICATIONS TO COURT.**

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

28 (b) Notice of an initial motion to a **court** under this [Act] must be served in
29 the manner provided by law for the service of a summons in a civil action unless an action

1 is already pending involving an arbitration agreement.

2 **Reporter's Notes:**

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

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

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

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

22 (a) An agreement contained in a **record** to submit to arbitration any
23 existing or subsequent controversy arising between or among the parties to the agreement
24 is valid, enforceable, and irrevocable except upon grounds that exist at law or in equity for
25 the revocation of any contract.

26 (b) Whether an agreement to arbitrate exists or a controversy is subject to
27 an agreement to arbitrate must be decided by a **court**.

28 (c) Whether a condition precedent to arbitrability has been fulfilled and

1 whether a contract containing an agreement to arbitrate is enforceable must be decided by
2 an **arbitrator**.

3 (d) If a party to a judicial proceeding challenges the existence of or claims
4 that a controversy is not subject to an agreement to arbitrate, the arbitration proceeding
5 may continue pending final resolution of the issue by the **court**, unless the **court** otherwise
6 orders.

7 **Reporter's Notes:**

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

14 Section 6 (a) provides that any terms in the arbitration agreement must be in a
15 "record." This too follows both the UAA and FAA requirements that arbitration
16 agreements be in writing. However a subsequent, oral agreement about terms of an
17 arbitration contract is valid. This position is in accordance with the unanimous holding of
18 courts that a written contract can be modified by a subsequent, oral arrangement provided
19 that the latter is supported by valid consideration. Premier Technical Sales, Inc. v. Digital
20 Equipment Corp., 11 F.Supp.2d 1156 (N.D. Cal. 1998); Cambridgeport Savings Bank v.
21 Boersner, 413 Mass. 432, 597 N.E.2d 1017 (1992); Pellegrine v. Luther, 403 Pa. 212,
22 169 A.2d 298 (1961); Pacific Development, L.C. v. Orton, 982 P.2d 94 (Utah App.
23 1999).

24 2. Section 6(b) and (c) reflect the decision of the Drafting Committee to include
25 language in the RUAA that incorporates the holdings of the vast majority of state courts
26 and the law that has developed under the FAA that, in the absence of an agreement to the
27 contrary, issues of substantive arbitrability, i.e., whether a dispute is encompassed by an
28 agreement to arbitrate, are for a court to decide and issues of procedural arbitrability, i.e.,
29 whether prerequisites such as time limits, notice, laches, estoppel, and other conditions
30 precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.
31 City of Cottonwood v. James L. Fann Contracting, Inc. 179 Ariz. 185, 877 P.2d 234, 292
32 (1994); Thomas v. Farmers Ins. Exchange, 857 P.2d 532, 534 (Colo.Ct.App. 1993);
33 Executive Life Ins. Co. v. John Hammer & Assoc., Inc., 569 So.2d 855, 857
34 (Fla.Dist.Ct.App. 1990); Amalgamated Transit Union Local 900 v. Suburban Bus Div.,

1 262 Ill.App.3d 334, 199 Ill.Dec. 630, 635, 634 N.E.2d 469, 474 (1994); Des Moines
2 Asphalt & Paving Co. v. Colcon Industries Corp., 500 N.W.2d 70, 72 (Iowa 1993); City
3 of Lenexa v. C.L. Fairley Const. Co., 15 Kan.App.2d 207, 805 P.2d 507, 510 (1991); The
4 Beyt, Rish, Robbins Group v. Appalachian Regional Healthcare, Inc. 854 S.W.2d 784,
5 786 (Ky.Ct.App. 1993); City of Dearborn v. Freeman-Darling, Inc., 119 Mich.App. 439,
6 326 N.W.2D 831 (1982); City of Morris v. Duininck Bros. Inc., 531 N.W.2D 208, 210
7 (Minn.Ct.App. 1995); Gaines v. Financial Planning Consultants, Inc. 857 S.W.2d 430, 433
8 (Mo.Ct.App. 1993); Exber v. Sletten, 92 Nev.. 721, 558 P.2d 517 (1976); State v.
9 Stremick Const. Co., 370 N.W.2D 730, 735 (N.D. 1985); Messa v. State Farm Ins. Co.,
10 433 Pa.Super. 594, 641 A.2d 1167, 1170 (1994); Valero Energy Corp. v. Teco Pipeline
11 Co., 2 S.W.3d 576 (Tex. App. 1999); City of Lubbock v. Hancock, 940 S.W.2d 123 (Tex.
12 App. 1996), *but see* Smith Barney, Harris Upham & Co. v. Luckie, 58 N.Y.2d 193, 647
13 N.E.2d 1308, 623 N.Y.S.2d 800 (1995) (a court rather than an arbitrator under New
14 York arbitration law should decide whether a statute of limitations time bars an
15 arbitration).

16 3. The language in section 6(c) “whether a contract containing the agreement to
17 arbitrate is enforceable” is intended to follow the “separability” doctrine outlined in *Prima*
18 *Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270
19 (1967). There the plaintiff filed a diversity suit in federal court to rescind an agreement for
20 fraud in the inducement and to enjoin arbitration. The alleged fraud was in inducing assent
21 to the underlying agreement and not to the arbitration clause itself. The Supreme Court,
22 applying the FAA to the case, determined that the arbitration clause is separable from the
23 contract in which it is made. So long as no party claimed that only the arbitration clause
24 was induced by fraud, a broad arbitration clause encompasses arbitration of a claim that
25 the underlying contract was induced by fraud. Thus, if a disputed issue is within the scope
26 of the arbitration clause, challenges to the enforceability of the underlying contract on
27 grounds such as fraud, illegality, mutual mistake, duress, unconscionability, ultra vires and
28 the like are to be decided by the arbitrator and not the court. *See* II Ian Macneil, Richard
29 Speidel, and Thomas Stipanowich, FEDERAL ARBITRATION LAW §§15.2-15.3 (1995)
30 [hereinafter “MACNEIL TREATISE”]. A majority of states recognize some form of the
31 separability doctrine under their state arbitration laws.

32 4. Waiver is one area where courts, rather than arbitrators, often make the decision
33 as to enforceability of an arbitration clause. However, because of the public policy
34 favoring arbitration, a court normally will only find a waiver of a right to arbitrate where a
35 party claiming waiver meets the burden of proving that the waiver has caused prejudice.
36 *Sedillo v. Campbell*, 5 S.W.3d 824 (Tex. App. 1999). For instance, where a plaintiff
37 brings an action against a defendant in court, engages in extensive discovery and then
38 attempts to dismiss the lawsuit on the grounds of an arbitration clause, a defendant might
39 challenge the dismissal on the grounds that the plaintiff has waived any right to use of the
40 arbitration clause. *S&R Company of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80 (2d
41 Cir. 1998). Allowing the court to decide this issue of arbitrability comports with the

1 separability doctrine because in most instances waiver concerns only the arbitration clause
2 itself and not an attack on the underlying contract. It is also a matter of judicial economy
3 to require that a party, who pursues an action in a court proceeding but later claims
4 arbitrability, be held to a decision of the court on waiver.

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

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

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

17 “Despite some recent developments to the contrary, courts do not often
18 find contracts unenforceable for unconscionability. To determine whether to void
19 a contract on this ground, courts examine a number of factors. These factors
20 include: unequal bargaining power, whether the weaker party may opt out of
21 arbitration, the arbitration clause’s clarity and conspicuousness, whether an unfair
22 advantage is obtained, whether the arbitration clause is negotiable, whether the
23 arbitration provision is boilerplate, whether the aggrieved party had a meaningful
24 choice or was compelled to accept, whether the arbitration agreement is within the
25 reasonable expectations of the weaker party, and whether the stronger party used
26 deceptive tactics. *See, e.g., We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838 (7th
27 Cir. 1999); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173 (3d Cir. 1999);
28 *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013
29 (1992); *Chor v. Piper, Jaffray & Hopwood, Inc.*, 261 Mont. 143, 862 P.2d 26
30 (1993); *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996); *Sosa v. Paulos*, 924
31 P.2d 357 (Utah 1996); *Powers v. Dickson, Carlson & Campillo*, 54 Cal. App. 4th
32 1102, 63 Cal. Rptr.2d 261 (1997); *Beldon Roofing & Remodeling Co. v. Tanner*,
33 1997 W.L. 280482 (Tex.Ct.App.).

34 “Despite these many factors, courts have been reluctant to find arbitration
35 agreements unconscionable. II MACNEIL TREATISE § 19.3; David S. Schwartz,
36 *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights*
37 *Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997);
38 Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates*,

1 *Inc. v. Cassarotto*, 31 WAKE FOREST L. REV. 1001 (1996). However, in the last
2 few years, some cases have gone the other way and courts have begun to
3 scrutinize more closely the enforceability of arbitration agreements. *Hooters of*
4 *America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (one-sided arbitration
5 agreement that takes away numerous substantive rights and remedies of employee
6 under Title VII is so egregious as to constitute a complete default of employer's
7 contractual obligation to draft arbitration rules in good faith); *Shankle v. B-G*
8 *Maintenance Mgt., Inc.*, 163 F.3d 1230 (10th Cir. 1999) (arbitration clause does
9 not apply to employee's discrimination claims where employee is required to pay
10 portion of arbitrator's fee that is a prohibitive cost for him so as to substantially
11 limit his use of arbitral forum); *Randolph v. Green Tree Financial Corp.*, 178 F.3d
12 1149 (11th Cir. 1999) (consumer not required to arbitrate where arbitration clause
13 is silent on subject of arbitration fees and costs due to risk that imposition of large
14 fees and costs on consumer may defeat remedial purposes of Truth in Lending
15 Act); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998)
16 (employee not required to arbitrate Title VII claim where the contract limits
17 damages below that allowed by the statute); *Broemmer v. Abortion Serv. of*
18 *Phoenix, Ltd.*, *supra* (arbitration agreement unenforceable as contract of adhesion
19 because it required a patient to arbitrate a malpractice claim and to waive the right
20 to jury trial and was beyond the patient's reasonable expectations where drafter
21 inserted potentially advantageous term requiring arbitrator of malpractice claims to
22 be a licensed medical doctor); *Engalla v. Permanente Med. Grp.*, 15 Cal. 4th 951,
23 938 P.2d 903, 64 Cal. Rptr. 2d 843 (1997) (health maintenance organization may
24 not compel arbitration where it fraudulently induced participant to agree to the
25 arbitration of disputes, fraudulently misrepresented speed of arbitration selection
26 process and forced delays so as to waive the right of arbitration); *Maciejewski v.*
27 *Alpha Systems Lab., Inc.*, 73 Cal. App. 4th 1372, 87 Cal. Rptr.2d 390 (1999)
28 (contract requiring employee to pay costs of arbitrators, limits on discovery, and
29 forfeiture of statutory right to attorney's fees renders arbitration provision
30 unconscionable); *Gonzalez v. Hughes Aircraft Employees Federal Credit Union*,
31 70 Cal. App.4th 468, 82 Cal. Rptr.2d 526 (1999) (arbitration agreement which has
32 unfair time limits for employees to file claims, requires employees to arbitrate
33 virtually all claims but allows employer to obtain judicial relief in virtually all
34 employment matters, and severely limits employees' discovery rights is both
35 procedurally and substantively unconscionable); *Armendariz v. Foundation Health*
36 *Psychcare Services, Inc.*, 68 Cal. App. 4th 374, 80 Cal. Rptr.2d 255 (1998) (clause
37 in arbitration agreement limiting employee's remedies in state anti-discrimination
38 claims severed from the agreement and held void on grounds of unconscionability);
39 *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997) (one-
40 sided compulsory arbitration clause which reserved litigation rights to the
41 employer only and denied employees rights to exemplary damages, equitable relief,
42 attorney fees, costs, and a shorter statute of limitations unconscionable); *Rembert*
43 *v. Ryan's Family Steak House*, 235 Mich.App. 118, 596 N.W.2d 208 (1999)

1 (predispute agreement to arbitrate statutory employment discrimination claims was
2 valid only as long as employee did not waive any rights or remedies under the
3 statute and arbitral process was fair); *Alamo Rent A Car, Inc. v. Galarza*, 306 N.J.
4 Super. 384, 703 A.2d 961 (1997) (arbitration clause that does not clearly and
5 unmistakably include claims of employment discrimination fails to waive
6 employee’s statutory rights and remedies); *Arnold v. United Companies Lending*
7 *Corp.*, 511 S.E.2d 854 (W.Va. 1998) (arbitration clause in consumer loan
8 transaction that contained waiver of the consumer’s rights to access to the courts,
9 while reserving practically all of the lender’s right to a judicial forum found
10 unconscionable).

11 “As a result of concerns over fairness in arbitration involving those with
12 unequal bargaining power, organizations and individuals involved in employment,
13 consumer and health-care arbitration have determined common standards for
14 arbitration in these fields. In 1995, a broad-based coalition representing interests
15 of employers, employees, arbitrators and arbitration institutions agreed upon a
16 DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF
17 STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT
18 RELATIONSHIP; *see also* National Academy of Arbitrators, GUIDELINES ON
19 ARBITRATION OF STATUTORY CLAIMS UNDER EMPLOYER-
20 PROMULGATED SYSTEMS (May 21, 1997). In May 1998, a similar group,
21 the National Consumer Disputes Advisory Committee, under the auspices of the
22 American Arbitration Association, adopted a DUE PROCESS PROTOCOL FOR
23 MEDIATION AND ARBITRATION OF CONSUMER DISPUTES. In July
24 1998 the Commission on Health Care Dispute Resolution, comprised of
25 representatives from the American Arbitration Association, the American Bar
26 Association and the American Medical Association endorsed a DUE PROCESS
27 PROTOCOL FOR MEDIATION AND ARBITRATION OF HEALTH CARE
28 DISPUTES. The purpose of these protocols is to ensure both procedural and
29 substantive fairness in arbitrations involving employees, consumers and patients.
30 The arbitration of employment, consumer and health-care disputes in accordance
31 with these standards will be a legitimate and meaningful alternative to litigation.
32 *See, e.g., Cole v. Burns Int’l Security Serv.*, 105 F.3d 1465 (D.C. Cir. 1997)
33 (referring specifically to the due process protocol in the employment relationship in
34 a case involving the arbitration of an employee’s rights under Title VII).

35 “The Drafting Committee determined to leave the issue of adhesion
36 contracts and unconscionability to developing law (1) because the issue of
37 unconscionability reflects so much the substantive law of the states and not just
38 arbitration, (2) because the case law, statutes, and arbitration standards are rapidly
39 changing, and (3) because treating arbitration clauses differently from other
40 contract provisions would raise significant preemption issues under the Federal
41 Arbitration Act. However, it should be pointed out that a primary purpose of

1 Section 4 which provides that some sections of the RUAA are not waivable is to
2 address the problem of contracts of adhesion in the statute while taking into
3 account the limitations caused by federal preemption.

4 “Because an arbitration agreement effectively waives a party’s right to a
5 jury trial, courts should ensure the fairness of an agreement to arbitrate,
6 particularly in instances involving statutory rights which provide claimants with
7 important remedies. Courts should determine that an arbitration process is
8 adequate to protect these important rights. Without these safeguards, arbitration
9 loses credibility as an appropriate option to litigation.”

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

11 (a) On motion of a person showing an agreement to arbitrate and alleging
12 another person’s refusal to arbitrate pursuant to the agreement, the court shall order the
13 parties to arbitrate if the adverse party does not appear or does not oppose the motion. If
14 the adverse party opposes the motion, the **court** shall proceed summarily to decide the
15 issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall
16 order the parties to arbitrate. If the court finds that there is no enforceable agreement, it
17 shall not order the parties to arbitrate but shall take such action as is appropriate.

18 (b) On motion of a person alleging that an arbitration proceeding has been
19 commenced or threatened but that there is no agreement to arbitrate, the court shall
20 proceed summarily to decide the issue. If the court finds that there is an enforceable
21 agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is
22 no enforceable agreement, it shall not order the parties to arbitrate but shall take such
23 action as is appropriate.

24 (c) The **court** may not refuse to order arbitration because the claim subject
25 to arbitration lacks merit or grounds for the claim have not been established.

1 (d) If a proceeding involving a claim referable to arbitration under an
2 alleged agreement to arbitrate is pending in a **court**, a motion under this section must be
3 filed in that **court**. Otherwise, subject to Section 27, a motion under this section may be
4 filed in any **court**.

5 (e) If a party files a motion with the **court** to order arbitration under this
6 section, the **court** shall stay any judicial proceeding that involves a claim subject to
7 arbitration until the court makes a final decision under this section.

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

11 **Reporter's Notes:**

12 1. The term "summarily" in section 7(a) and (b) is presently in the UAA section
13 2(a) and (b). It has been defined to mean that a trial court should act expeditiously and
14 without a jury trial to determine whether a valid arbitration agreement exists. *Burke v.*
15 *Wilkins*, 507 S.E.2d 913 (N.C. Ct. App. 1998); *see also* *Wallace v. Wiedenbeck*, 251
16 A.D.2d 1091, 674 N.Y.S.2d 230, 231 (N.Y. App. Div. 1998); *Grad v. Wetherholt*
17 *Galleries*, 660 A.2d 903 (D.C. 1995). The term is also used in Section 4 of the FAA.

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

23 **SECTION 8. PROVISIONAL REMEDIES.**

24 (a) Before an **arbitrator** is appointed and is authorized and able to act, a
25 **court**, upon motion of a party to an arbitration proceeding, for good cause shown, may

1 enter an order for provisional remedies to protect the effectiveness of the arbitration
2 proceeding to the same extent and under the same conditions as if the controversy were
3 the subject of a civil action.

4 (b) After an **arbitrator** is appointed and is authorized and able to act, the
5 **arbitrator** may issue such orders for provisional remedies, including the issuance of
6 interim awards, as the **arbitrator** finds necessary to protect the effectiveness of the
7 arbitration proceeding and to promote the fair and expeditious resolution of the
8 controversy, to the same extent and under the same conditions as if the controversy were
9 the subject of a civil action. After an **arbitrator** is appointed and is authorized and able to
10 act, a party to an arbitration proceeding may move a **court** for a provisional remedy only if
11 the matter is urgent and the **arbitrator** cannot act timely or if the **arbitrator** cannot
12 provide an adequate remedy.

13 (c) A motion for a provisional remedy under Section 8(a) or (b) does not
14 operate to waive any right of arbitration which the movant would otherwise have.

15 **Reporter's Notes:**

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

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

23 In *Salvucci v. Sheehan*, 349 Mass. 659, 212 N.E.2d 243 (1965), the court allowed
24 the issuance of a temporary restraining order to prevent the defendant from conveying or
25 encumbering property that was the subject of a pending arbitration. The Massachusetts

1 Supreme Court noted the 1954 language and concluded that it was not adopted by the
2 National Conference because the section would be rarely needed and raised concerns
3 about the possibility of unwarranted labor injunctions. The court concluded that the
4 drafters of the UAA assumed that courts' jurisdiction for granting such provisional
5 remedies was not inconsistent with the purposes and terms of the act. Many states have
6 allowed courts to grant provisional relief for disputes that will ultimately be resolved by
7 arbitration. *BancAmerica Commercial Corp. v. Brown*, 806 P.2d 897 (Ariz. Ct. App.
8 1991) (writ of attachment in order to secure a settlement agreement between debtor and
9 creditor); *Lambert v. Superior Court*, 228 Cal. App.3d 383, 279 Cal. Rptr. 32 (1991)
10 (mechanic's lien); *Ross v. Blanchard*, 251 Cal. App.2d 739, 59 Cal. Rptr. 783 (Cal. Ct.
11 App. 1967) (discharge of attachment); *Hughley v. Rocky Mountain Health Maintenance*
12 *Organization, Inc.*, 927 P.2d 1325 (Colo. 1996) (preliminary injunction to continue status
13 quo that health maintenance organization must provide chemotherapy treatment until
14 arbitration decision); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court*, 672
15 P.2d 1015 (Colo. 1983) (preliminary injunctive relief to preserve status quo); *Langston v.*
16 *National Media Corp.*, 420 Pa.Super. 611, 617 A.2d 354 (1992) (preliminary injunction
17 requiring party to place money in an escrow account); CAL. CIV. PROC. CODE § 1281.8;
18 N.J. STAT. ANN. § 2A:23A-6(b); N.Y. C.P.L.R. § 7502(c).

19 Most federal courts applying the FAA agree with the *Salvucci* court. In *Merrill*
20 *Lynch v. Salvano*, 999 F.2d 211 (7th Cir. 1993), the Seventh Circuit allowed a temporary
21 restraining order to prevent employees from soliciting clients or disclosing client
22 information in anticipation of a securities arbitration. The court held that the temporary
23 injunctive relief would continue in force until the arbitration panel itself could consider the
24 order. The court noted that "the weight of federal appellate authority recognizes some
25 equitable power on the part of the district court to issue preliminary injunctive relief in
26 disputes that are ultimately to be resolved by an arbitration panel." *Id.* at 214. The First,
27 Second, Fourth, Seventh and Tenth Circuits have followed this approach. *See* II
28 MACNEIL TREATISE §25.4.

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

35 2. The *Hovey* case underscores the difficult conflict raised by interim judicial
36 remedies: they can preempt the arbitrator's authority to decide a case and cause delay,
37 cost, complexity, and formality through intervening litigation process, but without such
38 protection an arbitrator's award may be worthless. *See* II MACNEIL TREATISE §25.1.
39 Such relief generally takes the form of either an injunctive order, e.g., requiring that a
40 discontinued franchise or distributorship remain in effect until an arbitration award, Roso-

1 Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co., 749 F.2d 124 (2d Cir. 1984);
2 Guinness-Harp Corp. v. Jos. Schlitz Brewing Co., 613 F.2d 468 (2d Cir. 1980); or that a
3 former employee not solicit customers pending arbitration, Merrill Lynch, Pierce, Fenner
4 & Smith, Inc. v. Salvano, 999 F.2d 211 (7th Cir. 1993); Merrill Lynch, Pierce, Fenner &
5 Smith, Inc. v. Dutton, 844 F.2d 726 (10th Cir. 1988) or that a party be required to post
6 some form of security by attachment, lien, or bond; The Anaconda v. American Sugar Ref.
7 Co., 322 U.S. 42, 64 S.Ct. 863 (1944) (attachment); Blumenthal v. Merrill Lynch, Pierce,
8 Fenner & Smith, Inc., 910 F.2d 1049 (2d Cir. 1990) (injunction bond); *see* II MACNEIL
9 TREATISE §25.4.3.; to insure payment of an arbitral award. In a judicial proceeding for
10 preliminary relief, the court does not have the benefit of the arbitrator’s determination of
11 disputed issues or interpretation of the contract. Another problem for a court is that in
12 determining the propriety of an injunction, order, or writ for attachment or other security,
13 the court must make an assessment of hardships upon the parties and the probability of
14 success on the merits. Such determinations fly in the face of the underlying philosophy of
15 arbitration that the parties have chosen arbitrators to decide the merits of their disputes.

16 3. The approach in RUAA section 8 that limits a court granting preliminary relief
17 to any time “[b]efore an arbitrator is appointed in accordance with section 8 or are
18 authorized or able to act . . . upon motion of a party” and provides that after the
19 appointment, the arbitrators initially must decide the propriety of a provisional remedy,
20 avoids the delay of intervening court proceedings, does not cause courts to become
21 involved in the merits of the dispute, defers to parties’ choice of arbitration to resolve their
22 disputes, and allows courts that may have to review an arbitrator’s preliminary order the
23 benefit of the arbitrator’s judgment on that matter. *See* II MACNEIL TREATISE §§ 25.1.2,
24 25.3, 36.1. This language incorporates the notions of the *Salvano* case which upheld the
25 district court’s granting of a temporary restraining order to prevent defendant from
26 soliciting clients or disclosing client information but “only until the arbitration panel is able
27 to address whether the TRO should remain in effect. Once assembled, an arbitration panel
28 can enter whatever temporary injunctive relief it deems necessary to maintain the status
29 quo.” 999 F.2d at 215. The preliminary remedy of the court in *Salvano* was necessary to
30 prevent actions that could undermine an arbitration award but was accomplished in a
31 fashion that protected the integrity of the arbitration process. *See also* Ortho
32 Pharmaceutical Corp. v. Amgen, Inc., 882 F.2d 806, 814, appeal after remand, 887 F.2d
33 460 (3d Cir. 1989) (court order to protect the status quo is that necessary “to protect the
34 integrity of the applicable dispute resolution process”); *Hughley v. Rocky Mountain*
35 *Health Maintenance Org., Inc.*, 927 P.2d 1325 (Colo. 1996) (court grants preliminary
36 injunction to continue status quo that health maintenance organization must provide
37 chemotherapy treatment when denial of the relief would make the arbitration process a
38 futile endeavor); *King County v. Boeing Co.*, 18 Wash. App. 595, 570 P.2d 712 (1977)
39 (court denies request for declaratory judgment because the issue was for determination by
40 the arbitrators rather than the court); N.J. STAT. ANN. § 2A:23A-6(b).

41 After the arbitrator is appointed and authorized and able to act, the only instance in

1 which a party may seek relief from a court rather than the arbitrator is when the matter is
2 an urgent one and the arbitrator could not provide an effective provisional remedy. The
3 notion of “urgency” is from the 1996 English Arbitration Act § 44(1), (3), (4), (6). These
4 circumstances of a party seeking provisional relief from a court rather than an arbitrator
5 after the appointment process of section 8 should be limited for the policy reasons
6 previously discussed.

7 4. The case law, commentators, the rules of arbitration institutions and some state
8 statutes are very clear that arbitrators have broad authority to order provisional remedies
9 and interim relief, including interim awards, in order to make a fair determination of an
10 arbitral matter. This authority has included the issuance of measures equivalent to civil
11 remedies of attachment, replevin, and sequestration to preserve assets or to make
12 preliminary ruling ordering parties to undertake certain acts that affect the subject matter
13 of the arbitration proceeding. *See, e.g.*, *Island Creek Coal Sales Co. v. City of*
14 *Gainesville, Fla.*, 729 F.2d 1046 (6th Cir. 1984) (upholding under FAA arbitrator’s interim
15 award requiring city to continue performance of coal purchase contract until further order
16 of arbitration panel); *Fraulo v. Gabelli*, 37 Conn. App. 708, 657 A.2d 704 (1995)
17 (upholding under UAA arbitrator issuing preliminary orders regarding sale and proceeds
18 of property); *Fishman v. Streeter*, 1992 WL 146830 (Ohio App. 1992) (upholding under
19 UAA arbitrator’s interim order dissolving partnership); *Park City Assoc. v. Total Energy*
20 *Leasing Corp.*, 58 App. Div.2d 786, 396 N.Y.S.2d 377 (1977) (upholding under New
21 York state arbitration statute a preliminary injunction by an arbitrator); N.J. STAT. ANN. §
22 2A:23A-6 (allowing provisional remedies such as “attachment, replevin, sequestration and
23 other corresponding or equivalent remedies”); AAA Commercial Rules 34, 43 (allowing
24 interim awards to safeguard property and to “grant any remedy or relief that the arbitrator
25 deems just and equitable and within the scope of the agreement, including, but not limited
26 to, specific performance of a contract”); CPR Rules 12.1, 13.1 (allowing interim measures
27 including those “for preservation of assets, the conservation of goods or the sale of
28 perishable goods,” requiring “security for the costs of these measures,” and permitting
29 “interim, interlocutory and partial awards”); UNCITRAL Commer. Arb. L. Art. 17
30 (providing that arbitrators can take “such interim measure of protection as the arbitral
31 tribunal may consider necessary in respect of the subject-matter of the dispute,” including
32 security for costs); II MACNEIL TREATISE §§ 25.1.2, 25.3, 36.1.

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

1 6. Section 8(c) is intended to insure that so long as a party is pursuing the
2 arbitration process while requesting the court to provide provisional relief under RUAA
3 section 8(a) or (b), the motion to the court should not act as a waiver of that party's right
4 to arbitrate a matter. *See* CAL. CIV. PROC. CODE §1281.8(d).

5 7. If there is more than one arbitrator to be appointed, then unless the parties have
6 otherwise agreed, they must act by majority action in accordance with section 13.

7 **SECTION 9. INITIATION OF ARBITRATION.**

8 (a) A **person** initiates an arbitration proceeding by serving a notice in a
9 **record** upon the other parties to the agreement to arbitrate in the manner in which the
10 parties agree or, in the absence of agreement, by mail certified or registered, return receipt
11 requested, or by personal service as authorized in a civil action. The notice must describe
12 the nature of the controversy and the remedy sought.

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

17 **Reporter's Notes:**

18 1. The Drafting Committee decided to include a new provision in the RUAA
19 regarding initiation of an arbitration proceeding which is more formal than the notice
20 requirements in section 2. Section 9(a) includes both the means of bringing the notice to
21 the attention of the other parties and the contents of the notice of a claim. The language
22 in new section 9 is based upon the Florida arbitration statute and, to some extent, the
23 Indiana arbitration act, both of which include provisions regarding the commencement of
24 an arbitration. FLA. STAT. ANN. §648.08 (1990); IND. CODE §34-57-2-2 (1998).

25 2. Both the means of giving the notice and the content of the notice are subject to
26 the parties' agreement under sections 4(b)(2) and 9(a) so long as any restrictions on the
27 means or content are reasonable. Not only does this approach comport with the concept

1 of party autonomy in arbitration but it also recognizes that many parties utilize arbitration
2 organizations that require greater or lesser specificity of notice and service.

3 3. The introductory language to section 9(a) is the means of informing other
4 parties of the arbitration proceeding. Many arbitration institutions allow parties to initiate
5 arbitration through the use of regular mail and do not require “mail registered or certified,
6 return receipt requested.” *See, e.g.*, American Arb. Ass’n, National Rules for the
7 Resolution of Employment Disputes, R. 4(b)(i)(2); Center for Public Resources, Rules for
8 Non-Administered Arbitration of Business Disputes, R. 2.1; National Arb. Forum Code of
9 Pro. R. 6(B); National Ass’n of Securities Dealers Code of Arb. Procedure, Part I, sec.
10 25(a); New York Stock Exchange Arb. Rules, R. 612(b). This more informal means of
11 giving notice without evidence of receipt would be allowed under section 9 because
12 section 4(b)(2) allows the parties to agree to the means of giving notice so long as there
13 are no unreasonable restrictions.

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

18 4. Section 9(a) explicitly requires that notice of initiation of an arbitration
19 proceeding be given to all parties to the arbitration agreement and not just to the party
20 against whom a person files an arbitration claim. For instance, in a construction contract
21 with a single arbitration agreement between multiple contractors and subcontractors, if
22 one contractor commenced an arbitration proceeding against one subcontractor, Section
23 9(a) requires that the contractor give notice to all persons signatory to the arbitration
24 agreement. This is appropriate because a different contractor or subcontractor may have
25 an interest in the arbitration proceeding so as to initiate its own arbitration proceeding or
26 to request consolidation under Section 10 or to take other action.

27 5. Section 9(a) also includes a content requirement that the initiating party inform
28 the other parties of “the nature of the controversy and the remedy sought.” Similar
29 requirements are found in the Florida and Indiana statutes and in the arbitration rules of
30 organizations such as the American Arbitration Association, the Center for Public
31 Resources, JAMS/Endispute, NASD Regulation, Inc., and the New York Stock Exchange
32 (although slightly different language may be used in the institutional rules). This language
33 in section 9(a) is intended to insure that parties provide sufficient information in the notice
34 to inform opposing parties of the arbitration claims while recognizing that this notice is not
35 a formal pleading and that it is often drafted by persons who are not attorneys.

36 6. Section 23(a)(6) allows a court to vacate an award if there is not proper notice
37 under section 9 and the rights of the other party were substantially prejudiced. Section
38 9(b) requires that the complaining party make a timely objection to the lack of or

1 insufficiency of notice of initiation of the arbitration; this requirement is similar to that
2 found in section 15(c) regarding notice of the arbitration hearing. While section 9(b)
3 requires the party to object “no later than the commencement of the hearing under Section
4 15(c),” an arbitrator or court could conclude that under the facts of a particular case a
5 party is required to object at an earlier time than the commencement of the hearing. For
6 example, in a complex arbitration case there may be a number of prehearing conferences
7 prior the arbitration hearing itself. An arbitrator or court could conclude that a party
8 waived the objection by not raising it during a prehearing conference.

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

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

13 **PROCEEDINGS.**

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

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

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

22 (3) there is a common issue of law or fact creating the possibility of
23 conflicting decisions in the separate arbitration proceedings; and

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

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

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

6 **Reporter's Notes:**

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

18 Most state arbitration statutes, the FAA, and most arbitration agreements do not
19 specifically address consolidated arbitration proceedings. In the common case where the
20 parties have failed to address the issue in their arbitration agreements, some courts have
21 ordered consolidated hearings while others have denied consolidation. In the interest of
22 adjudicative efficiency and the avoidance of potentially conflicting results, courts in New
23 York and a number of other states concluded that they have the power to direct
24 consolidated arbitration proceedings involving common legal or factual issues. *See*
25 *County of Sullivan v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 366 N.E.2d 72, 397
26 N.Y.S.2d 371 (1977) ; *see also* *Litton Bionetics, Inc. v. Glen Constr. Co.*, 292 Md. 34,
27 437 A.2d 208 (1981); *Grover-Diamond Assoc. v. Am. Arbitration Ass'n*, 297 Minn. 324,
28 211 N.W.2d 787 (1973); *Polshek v. Bergen Cty. Iron Works*, 142 N.J. Super. 516, 362
29 A.2d 63 (Ch. Div. 1976); *Exber v. Sletten Constr. Co.*, 558 P.2d 517 (Nev. 1976); *Plaza*
30 *Dev. Serv. v. Joe Harden Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (S.C. Ct. App.
31 1988).

32 A number of other courts have held that they do not have the power to order
33 consolidation of arbitrations despite the presence of common legal or factual issues in the
34 absence of an agreement by all parties to multiparty arbitration. *See, e.g.*, *Stop & Shop*

1 Co. v. Gilbane Bldg. Co., 364 Mass. 325, 304 N.E.2d 429 (1973); J. Brodie & Son, Inc.
2 v. George A. Fuller Co., 16 Mich. App. 137, 167 N.W.2d 886 (1969); Balfour, Guthrie &
3 Co. v. Commercial Metals Co., 93 Wash.2d 199, 607 P.2d 856 (1980).

4 The split of authority regarding the power of courts to consolidate arbitration
5 proceedings in the absence of contractual consolidation provisions extends to the federal
6 sphere. In the absence of clear direction in the FAA, courts have reached conflicting
7 holdings. The current trend under the FAA disfavors court-ordered consolidation absent
8 express agreement. *See generally* III MACNEIL TREATISE §33.3; Glencore, Ltd. v.
9 Schnitzer Steel Products Co., 189 F.3d 264 (2nd Cir. 1999). However, a recent California
10 appellate decision held that state law regarding consolidated arbitration was not
11 preempted by federal arbitration law under the FAA. *Blue Cross of Calif. v. Superior Ct.*,
12 67 Cal. App. 4th 42, 78 Cal. Rptr.2d 779 (1998).

13 2. A growing number of jurisdictions have enacted statutes empowering courts to
14 address multiparty conflict through consolidation of proceedings or joinder of parties even
15 in the absence of specific contractual provisions authorizing such procedures. *See* CAL.
16 CIV. PROC. CODE §1281.3 (West 1997) (consolidation); GA. CODE ANN. § 9-9-6 (1996)
17 (consolidation); MASS. GEN. LAWS ANN. ch. 251, § 2A (West 1997) (consolidation); N.J.
18 STAT. ANN. § 2A-23A-3 (West 1997) (consolidation); S.C. CODE ANN. § 15-48-60 (1996)
19 (joinder); UTAH CODE ANN. § 78-31a-9 (1996) (joinder).

20 Also some recent empirical studies support court-ordered consolidation. In a
21 survey of arbitrators in construction cases, 83% favored consolidated arbitrations
22 involving all affected parties. *See* Dean B. Thomson, *Arbitration Theory and Practice: A*
23 *Survey of Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 165-67 (1994). A similar
24 survey of members of the ABA Forum on the Construction Industry found that 83% of
25 nearly 1,000 responding practitioners also favored consolidation of arbitrations involving
26 multiparty disputes. *See* Dean B. Thomson, *The Forum's Survey on the Current and*
27 *Proposed AIA A201 Dispute Resolution Provisions*, 16 CONSTR. LAW. 3, 5 (No. 3, 1996).
28

29 3. A provision in the RUAA specifically empowering courts to order
30 consolidation in appropriate cases makes sense for several reasons. As in the judicial
31 forum, consolidation effectuates efficiency in conflict resolution and avoidance of
32 conflicting results. By agreeing to include an arbitration clause, parties have indicated that
33 they wish their disputes to be resolved in such a manner. In many cases, moreover, a
34 court may be the only practical forum within which to effect consolidation. *See*
35 *Schenectady v. Schenectady Patrolmen's Benev. Ass'n*, 138 A. D.2d 882, 883, 526
36 N.Y.S.2d 259, 260 (1988). Furthermore, it is likely that in many cases one or more
37 parties, often non-drafting parties, will not have considered the impact of the arbitration
38 clause on multiparty disputes. By establishing a default provision which permits
39 consolidation (subject to various limitations) in the absence of a specific contractual

1 provision, section 10 encourages drafters to address the issue expressly and enhances the
2 possibility that all parties will be on notice regarding the issue.

3 Section 10 is an adaptation of consolidation provisions in the California and
4 Georgia statutes. CAL. CIV. PROC. CODE §1281.3 (West 1997); GA. CODE ANN. § 9-9-6
5 (1996). It gives courts discretion to consolidate separate arbitration proceedings in the
6 presence of multiparty disputes involving common issues of fact or law.

7 Like other sections of the RUAA, however, the provision also embodies the
8 fundamental principle of judicial respect for the preservation and enforcement of the terms
9 of agreements to arbitrate. Thus, Section 10(c) recognizes that consolidation of a party's
10 claims should not be ordered in contravention of provisions of arbitration agreements
11 prohibiting consolidation.

12 At the same time, however, courts should closely scrutinize anti-consolidation
13 provisions in adhesion contracts. There is evidence that a growing number of arbitration
14 provisions in standardized consumer services agreements purport to prohibit class actions
15 or consolidation. See Christopher R. Drahozal, *Unfair Arbitration Clauses* (1999)
16 (unpublished manuscript), at 41. In some cases, such provisions may effectively
17 undermine consumers' rights by making the relative cost of arbitrating or of securing
18 effective legal representation cost-prohibitive. In such cases, it may be appropriate for a
19 court to refuse to enforce the term prohibiting class actions or consolidation under Section
20 6 of this Act.

21 Even in the absence of express prohibitions on consolidation, the legitimate
22 expectations of contracting parties may limit the ability of courts to consolidate arbitration
23 proceedings. Thus, a number of decisions have recognized the right of parties opposing
24 consolidation to prove that consolidation would undermine their stated expectations,
25 especially regarding arbitrator selection procedures. See *Continental Energy Assoc. v.*
26 *Asea Brown Boveri, Inc.*, 192 A. D.2d 467, 596 N.Y.S.2d 416 (1993) (denial of
27 consolidation not an abuse of discretion where parties' two arbitration agreements differed
28 substantially with respect to procedures for selecting arbitrators and manner in which
29 award was to be rendered); *Stewart Tenants Corp. v. Diesel Constr. Co.*, 16 A. D.2d 895,
30 229 N.Y.S.2d 204 (1962) (refusing to consolidate arbitrations where one agreement
31 required AAA tribunal, other called for arbitrator to be appointee of president of real
32 estate board). Therefore, section 10(a)(4) requires courts to consider proof that the
33 potential prejudice resulting from a failure to consolidate is not outweighed by prejudice
34 to the rights of parties to the arbitration proceeding opposing consolidation. Such rights
35 would normally be deemed to include arbitrator selection procedures, standards for the
36 admission of evidence and rendition of the award, and other express terms of the
37 arbitration agreement. In some circumstances, however, the imposition on contractual
38 expectations will be slight, and no impediment to consolidation: for example, if one
39 agreement provides for arbitration in St. Paul and the other in adjoining Minneapolis,

1 consolidated hearings in either city should not normally be deemed to violate a substantial
2 right of a party.

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

8 As the cases reveal, the mere desire to have one’s dispute heard in a separate
9 proceeding is not in and of itself the kind of proof sufficient to prevent consolidation.
10 *Vigo S.S. Corp. v. Marship Corp. of Monrovia*, 26 N.Y.2d 157, 162, 257 N.E.2d 624,
11 626, 309 N.Y.S.2d 165, 168 (1970), *remititur den.* 27 N.Y.2d 535, 261 N.E.2d 112, 312
12 N.Y.S.2d 1003, *cert. den.* 400 U.S. 819, 27 L.Ed. 46, 91 S.Ct. 36 (197); *see also* III
13 *MACNEIL TREATISE* § 33.3.2 (citing cases in which consolidation was ordered despite
14 allegations that arbitrators might be confused because of the increased complexity of
15 consolidated arbitration or that consolidation would impose additional economic burdens
16 on the party opposing it).

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

22 **SECTION 11. APPOINTMENT OF ARBITRATOR.** If the parties to an
23 agreement to arbitrate agree on a method for appointing an **arbitrator**, that method must
24 be followed, unless the method fails. If the parties have not agreed on a method, the
25 agreed method fails, or an **arbitrator** appointed fails or is unable to act and a successor
26 has not been appointed, the **court** on motion of a party to the arbitration proceeding shall
27 appoint one or more **arbitrators** as the case may require. An **arbitrator** so appointed has
28 all the powers of an **arbitrator** designated in the agreement to arbitrate or appointed
29 pursuant to the agreed method.

1 **SECTION 12. DISCLOSURE BY ARBITRATOR.**

2 (a) Before accepting appointment, an individual who is requested to serve
3 as an **arbitrator**, after making a reasonable inquiry, shall disclose to all parties to the
4 arbitration agreement and arbitration proceedings and to any other arbitrators any facts
5 that a reasonable **person** would consider likely to affect the impartiality of the **arbitrator**
6 in the arbitration proceeding, including any:

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

9 (2) existing or past relationships with any of the parties to the
10 agreement to arbitrate or the parties to the arbitration proceeding, their counsel or
11 representatives, witnesses, or the other **arbitrators**.

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

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

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

21 (e) An **arbitrator** appointed as a neutral who did not disclose a known,
22 direct, and material interest in the outcome of the arbitration proceeding or a known,

1 existing, and substantial relationship with a party is presumed to have acted with evident
2 partiality under Section 23(a)(2).

3 (f) If the parties to an arbitration proceeding agree to the procedures of an
4 **arbitration organization** or any other procedures for pre-award challenges to
5 **arbitrators**, substantial compliance with those procedures is a condition precedent to a
6 motion to vacate an award on those grounds under Section 23(a)(2).

7 **Reporter's Notes:**

8 1. The notion of decision making by independent neutrals is central to the
9 arbitration process. The UAA and other legal and ethical norms reflect the principle that
10 arbitrating parties have the right to be judged impartially and independently. III MACNEIL
11 TREATISE § 28.2.1. Thus, section 12(a)(4) of the UAA provides that an award may be
12 vacated where "there was evident partiality by an arbitrator appointed as a neutral or
13 corruption in any of the arbitrators or misconduct prejudicing the rights of any party." *Cf.*
14 RUAA section 23(a)(2); FAA § 10(a)(2). This basic tenet of procedural fairness assumes
15 even greater significance in light of the strict limits on judicial review of arbitration
16 awards. *See* *Drinane v. State Farm Mut. Auto Ins. Co.*, 153 Ill.2d 207, 212, 606 N.E.2d
17 1181, 1183, 180 Ill. Dec. 104, 106 (1992) ("Because courts have given arbitration such a
18 presumption of validity once the proceeding has begun, it is essential that the process by
19 which the arbitrator is selected be certain as to the impartiality of the arbitrator.").

20 The problem of arbitrator partiality is a difficult one because consensual arbitration
21 involves a tension between abstract concepts of impartial justice and the notion that
22 parties are entitled to a decision maker of their own choosing, including an expert with the
23 biases and prejudices inherent in particular worldly experience. Arbitrating parties
24 frequently choose arbitrators on the basis of prior professional or business associations, or
25 pertinent commercial expertise. The competing goals of party choice, desired expertise
26 and impartiality must be balanced by giving parties "access to all information which might
27 reasonably affect the arbitrator's partiality." *Burlington N. R.R. Co. v. Tuco Inc.*, 1997
28 WL 336314, *6 (Tex.) Other factors favoring early resolution of the partiality issues by
29 informed parties are legal and practical limitations on post-award judicial policing of such
30 matters.

31 Much of the law on the issue of arbitrator partiality stems from the seminal case of
32 *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), a decision
33 under the FAA. In that case the Supreme Court held that an undisclosed business

1 relationship between an arbitrator and one of the parties constituted "evident partiality"
2 requiring vacating of the award. Members of the Court differed, however, on the
3 standards for disclosure. Justice Black, writing for a four-judge plurality, concluded that
4 disclosure of "any dealings that might create an impression of possible bias" or creating
5 "even an appearance of bias" would amount to evident partiality. *Id.* at 149. Justice
6 White, in a concurrence joined by Justice Marshall, supported a more limited test which
7 would require disclosure of "a substantial interest in a firm which has done more than
8 trivial business with a party." *Id.* at 150. Three dissenting justices favored an approach
9 under which an arbitrator's failure to disclose certain relationships established a rebuttable
10 presumption of partiality.

11 The split of opinion in *Commonwealth Coatings* is reflected in many subsequent
12 decisions addressing motions to vacate awards on grounds of "evident partiality" under
13 federal and state law. A number of decisions have applied tests akin to Justice Black's
14 "appearance of bias" test. *See, e.g., S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1263
15 (2d Cir. 1973) (applying FAA; failure to disclose relationships that "might create an
16 impression of possible bias"). Some courts have introduced an objective element into the
17 standard--that is, viewing the facts from the standpoint of a reasonable person apprised of
18 all the circumstances. *See, e.g., Ceriale v. AMCO Ins. Co.*, 48 Cal. App.4th 500, 55 Cal.
19 Rptr. 2d 685 (1996) (question is whether record reveals facts which might create an
20 impression of possible bias in eyes of hypothetical, reasonable person).

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

30 2. In view of the critical importance of arbitrator disclosure to party choice and
31 perceptions of fairness and the need for more consistent standards to ensure expectations
32 in this vital area, the Drafting Committee determined that the RUAA should set forth
33 affirmative requirements to assure that parties should have access to all information that
34 might reasonably affect the potential arbitrator's neutrality. A primary model for the
35 disclosure standard in section 9 is the AAA/ABA Code of Ethics for Arbitrators in
36 Commercial Disputes (1977), which embodies the principle that "arbitrators should
37 disclose the existence of any interests or relationships which are likely to affect their
38 impartiality or which might reasonably create the appearance of partiality or bias." Canon
39 II, p.6. These disclosure provisions are often cited by courts addressing disclosure issues,
40 *e.g., William C. Vick Constr. Co. v. North Carolina Farm Bureau Fed.*, 123 N.C. App. 97,

1 100-01, 472 S.E.2d 346, 348 (1996), and have been formally adopted by at least one state
2 court. *See* Safeco Ins. Co. of Am. v. Stariha, 346 N.W.2d 663, 666 (Minn. Ct. App.
3 1984); for a more stringent arbitration disclosure statute, *see* CAL. CIV. PROC. CODE §§
4 1281.6, 1281.9, 1281.95, 1297.121, 1297.122 (West. Supp. 1998). Substantially similar
5 language is contained in disclosure requirements of widely used securities arbitration
6 rules. *See, e.g.*, NASD Code of Arbitration Procedure § 10312 (1996). Many arbitrators
7 are already familiar with these standards, which provide for disclosure of pertinent
8 interests in the outcome of an arbitration and of relationships with parties, representatives,
9 witnesses, and other arbitrators.

10 3. The fundamental standard of section 12(a) is an objective one: disclosure is
11 required of facts which a reasonable person would consider likely to affect the arbitrator's
12 impartiality in the arbitration proceeding. *See* ANR Coal Co. v. Cogentrix of North
13 Carolina, Inc., 173 F.3d 493 (4th Cir. 1999) (relationship between arbitrator and a party is
14 too insubstantial for "reasonable person" to conclude that there was improper partiality so
15 as to vacate award under FAA). The Drafting Committee adopted the "reasonable
16 person" test with the intent of making clear that the subjective views of the arbitrator or
17 the parties are not controlling. However, parties may agree to higher or lower standards
18 for disclosure and also establish mechanisms for disqualification. For instance, in labor
19 arbitration under a collective-bargaining agreement because the parties interact often with
20 each other and arbitrators and have personal relationships with each other and arbitrators,
21 the Code of Professional Responsibility of Arbitrators of Labor-Management Disputes
22 provides: "There should be no attempt to be secretive about such friendships or
23 acquaintances but disclosure is not necessary unless some feature of a particular
24 relationship might reasonably appear to impair impartiality." Section 2.B.3.a. Thus a
25 reasonable person in the field of labor arbitration may not expect personal, professional, or
26 other past relationships to be disclosed. In other fields where parties do not have ongoing
27 relationships, an arbitrator may be required to disclose such relationships.

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

35 Section 12(b) is intended to make the disclosure requirement a continuing one and
36 applies to conflicts which arise or become evident during the course of arbitration
37 proceedings. Sections 12(a) and (b) also provide to whom the arbitrator must make
38 disclosure. Unless the parties agree to a different method, the arbitrator must disclose
39 facts required under section 12(a) and (b) to the parties to the arbitration agreement and
40 to the arbitration proceeding and to any other arbitrators. If the parties are represented by

1 counsel or other authorized persons, the arbitrators can make such representations to
2 those individuals.

3 4. Sections 12(c), (d), and (e) seek to accommodate the tensions between concepts
4 of partiality and the need for experienced decision makers, as well as the policy of relative
5 finality in arbitral awards. Therefore, in section 12(e) a neutral arbitrator's failure to
6 disclose "a known, direct, and material interest in the outcome" or "a known, existing, and
7 substantial relationship with a party," gives rise to a presumption of "evident partiality"
8 under section 23(a)(2). *Cf.* MINN. STAT. ANN. § 572.10(2) (1998) (failure to disclose
9 conflict of interest or material relationship is grounds for vacatur of award). In such cases,
10 it is then the burden of the party defending the award to rebut the presumption by showing
11 that the award was not tainted by the non-disclosure or there in fact was no prejudice.
12 *See, e.g.,* Drinane v. State Farm Mut. Auto Ins. Co., 153 Ill.2d 207, 214-16, 606 N.E.2d
13 1181, 1184-85, 180 Ill. Dec. 104, 107-08 (1992). The failure to disclose by a party
14 arbitrator would be covered under the corruption and misconduct provisions of Section
15 23(a)(2) because in most cases it is presumed that a party arbitrator is intended to be
16 partial to the side which appointed that person.

17 Section 12(d) involves other instances of an arbitrator's failure to disclose and
18 section 12(c) covers instances where the arbitrator makes a required disclosure, a party
19 objects to that arbitrator's service, but the arbitrator overrules the objection and continues
20 to serve. Challenges based upon a lack of impartiality, including disclosed or undisclosed
21 facts, interests, or relationships are subject to the developing case law under section
22 23(a)(2). Also courts are given wider latitude in deciding whether to vacate an award
23 under section 12(c) and (d) which is permissive in nature (an award "may" be vacated)
24 rather than section 23(a) which is mandatory (a court "shall" vacate an award).

25 Section 12(c) also requires a party to make a timely objection to the arbitrator's
26 continued service in order to preserve grounds to vacate an award under section 23(a)(2).

27 5. Special problems are presented by tripartite panels involving "party-
28 arbitrators"--that is, where each of the arbitrating parties selects an arbitrator--and a third
29 arbitrator jointly selected by the party-arbitrators. *See generally* III MACNEIL TREATISE §
30 28.4. In some such cases, it may be agreed that the party-arbitrators are not regarded as
31 "neutral" arbitrators, but are deemed to be predisposed toward the party which appointed
32 them. *See, e.g.,* AAA Commercial Arbitration Rule 12 (1996). Nevertheless, the integrity
33 of the process demands that party-arbitrators, like other arbitrators, disclose pertinent
34 interests and relationships to all parties as well as other members of the arbitration panel.
35 Similarly, an undisclosed substantial relationship between a party-arbitrator and the party
36 appointing that arbitrator may be the subject of a motion to vacate under section 23(a)(2).
37 *Cf. Donegal Ins. Co. v. Longo*, 415 Pa. Super. 628, 632-34, 610 A.2d 466, 468-69 (1992)
38 (in view of attorney-client relationship between insured and its party-arbitrator, arbitration
39 proceeding did not comport with procedural due process).

1 6. Often parties agree to a procedure for challenges to arbitrators such as a
2 determination by an arbitration institution. Section 12(f) conditions post-award resort to
3 the courts under section 23(a)(2) upon compliance with such agreed-upon procedures.
4 *See, e.g.,* Bernstein v. Gramercy Mills, Inc., 16 Mass. App. Ct. 403, 414, 452 N.E.2d 231,
5 238 (1983) (AAA rule incorporated by arbitration agreement helps to describe level of
6 non-disclosure that can lead to invalidation of award).

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

10 **Reporter's Notes:**

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

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

16 (a) An **arbitrator**, when acting in that capacity, or an **arbitration**
17 **organization**, when administering an arbitration proceeding, is immune from civil liability
18 to the same extent as a judge of a **court** of this State acting in a judicial capacity.

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

20 (c) If an **arbitrator** fails to make a disclosure required by Section 12, such
21 failure shall not result in loss of immunity under this section.

22 (d) An **arbitrator** or representative of an **arbitration organization** is not
23 competent to testify nor required to produce records in any judicial, administrative, or

1 similar proceeding as to any statement, conduct, decision, or ruling occurring during an
2 arbitration proceeding under this [Act] unless the **arbitrator** or **arbitration organization**
3 is asserting a claim against a party to the arbitration proceeding or the testimony or
4 records (a) could give rise to civil or criminal contempt, (b) constitute a crime, or (c) are
5 the subject of investigation by the [State Bar]. This subsection does not apply if a party to
6 the arbitration proceeding files a motion to vacate an award under Section 23(a)(1) or (2)
7 and establishes prima facie that grounds for vacating the award exist.

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

16 **Reporter's Notes:**

17 1. Section 14(a) in regard to immunity for an arbitrator is based on the language of
18 former section 1280.1 of the California Code of Civil Procedure establishing immunity for
19 arbitrators. Section 1280.1 was enacted with an expiration date and was not renewed.
20 See also CAL. CIV. PROC. CODE § 1297.119 which gives the same protection to arbitrators
21 in international arbitrations and unlike § 1280.1 had no expiration date and is still in effect.
22 Three other states presently provide some form of arbitral immunity in their arbitration
23 statutes. FLA. STAT. ANN. § 44.107 (West 1995); N.C. GEN. STAT. § 7A-37.1 (1995);
24 UTAH CODE ANN. § 78-31b-4 (1994).

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

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

18 2. Section 14(a) also provides the same immunity of arbitrators to neutral
19 arbitration institutions which administer the arbitration proceeding. Extension of judicial
20 immunity to those arbitration institutions is appropriate to the extent that they are acting
21 “in certain roles and with certain responsibilities” that are functionally comparable to those
22 of a judge. *Corey v. New York Stock Exchange*, 691 F.2d at 1209. This immunity to
23 neutral arbitration institutions is because the duties that they perform in administering the
24 arbitration process are the functional equivalent of the comparable role and responsibility
25 of judges in administering the adjudication process in a court of law. There is substantial
26 precedent for this conclusion. *See, e.g., New England Cleaning Services, Inc. v. American*
27 *Arbitraatin Ass’n*, 1999 WL 1191517 (1st Cir. 1999); *Honn v. National Ass’n of Sec.*
28 *Dealers, Inc.*, 182 F.3d 1014 (8th Cir. 1999); *Hawkins v. Nat’l Ass’n Sec. Dealers, Inc.*,
29 *149 F.3d 330* (5th Cir. 1998); *Olson v. National Ass’n of Sec. Dealers, Inc.*, 85 F.3d 381
30 (8th Cir. 1996); *Aerojet-General Corp. v. Am. Arbitration Ass’n*, 478 F.2d 248 (9th Cir.
31 1973); *Cort v. Am. Arbitration Ass’n*, 795 F. Supp. 970 (N.D. Cal. 1992); *Boraks v. Am.*
32 *Arbitration Ass’n*, 205 Mich.App. 149, 517 N.W.2d 771 (1994); *Candor v. Am.*
33 *Arbitration Ass’n*, 97 Misc.2d 267, 411 N.Y.S.2d 162 (Sup. Ct., Tioga Cty. 1978).

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

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

1 the effect of judicial immunity.

2 4. Section 14(d) is based on the California Evidence Code which provides that
3 arbitrators shall not be “competent to testify * * * as to any statement, conduct, decision,
4 or ruling occurring at or in conjunction with the prior proceeding.” CAL. EVID. CODE §
5 703.5. There are similar provisions that prohibit anyone from calling an arbitrator as a
6 witness in a subsequent proceeding in New Jersey and New York. N.J.R. SUPER. CT. R.
7 4:21A-4; N.Y. Ct. R. §28.12. The section is intended to protect an arbitrator for being
8 required to testify or produce records from an arbitration proceeding in any civil action,
9 administrative proceeding, or related matter.

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

21 Other exceptions for matters involving civil or criminal contempt, criminal activity,
22 and bar association disciplinary proceedings are based on those in the California statute
23 and are reasonable exceptions when public policy should require that an arbitrator testify
24 or produce relevant records.

25 The second sentence of section 14(d) recognizes that arbitrators who have
26 engaged in corruption, fraud, partiality or other misconduct which are grounds to vacate
27 an award under sections 23(a)(1) and (2) may be required to give testimony so that a party
28 will have evidence to prove such grounds. Such testimony or records from an arbitrator
29 are only required after the objecting party makes a sufficient initial showing that such
30 grounds exist. *See Carolina-Virginia Fashion Exhibitors Inc. v. Gunter*, 291 N.C. 208,
31 230 S.E.2d 380, 388 (N.C. 1976) (holding that where there is objective basis to believe
32 that arbitrator misconduct has occurred, deposition of the arbitrator may be permitted and
33 the deposition admitted in action for vacatur). A party’s bare allegation of these grounds
34 should not cause an arbitrator to be required to testify or produce records from the
35 arbitration proceeding.

36 5. Section 14(e) is intended to promote arbitral immunity. By definition, almost all
37 suits against arbitrators arising from the good-faith discharge of their arbitral powers are

1 frivolous because of the breadth of arbitrators' immunity. Spurious lawsuits against
2 arbitrators or arbitration organizations are detrimental to the arbitration process and deter
3 persons from serving as arbitrators or administering arbitrations because of the cost of
4 defending even frivolous actions. Potential plaintiffs in such litigation should be
5 discouraged by the prospect of paying the arbitrator's litigation expenses. When they are
6 not, the statute enables the arbitrators and arbitration organizations to recover their
7 litigation expenses and not to lose their fee and more to the defense of a frivolous lawsuit.
8 The terms "other reasonable expenses of litigation" are intended to include both actions at
9 the trial-court level and on appeal.

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

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

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

30 8. It should be noted that section 14 can be waived by agreement of the parties
31 under section 4. The parties may decide that arbitrators or arbitration organizations
32 handling their disputes will have to waive immunity and may be required to testify in other
33 proceedings. While the parties have the autonomy to shape their arbitration agreement in
34 such a fashion, an arbitrator or arbitration organization has the autonomy to decline to
35 serve under such conditions.

36 SECTION 15. ARBITRATION PROCESS.

1 (a) The parties shall be treated fairly and each party shall be given a
2 reasonable opportunity of presenting that party's case.

3 (b) The parties are free to agree on the procedure to be followed by the
4 arbitrator in conducting the proceedings. Failing such agreement, the **arbitrator** may
5 conduct the arbitration in such manner as the **arbitrator** considers appropriate so as to aid
6 in the fair and expeditious disposition of the arbitration proceeding. The authority
7 conferred upon the **arbitrator** includes the power to hold conferences with the parties to
8 the arbitration proceeding before the hearing and to determine the admissibility, relevance,
9 materiality and weight of any evidence.

10 (c) An **arbitrator** may decide a request for summary disposition of a claim
11 or particular issue by agreement of all interested parties or upon request of one party to
12 the arbitration proceeding if all other parties to the arbitration proceeding receive
13 reasonable notice and have an opportunity to respond.

14 (d) If an **arbitrator** has not made a final decision on a matter subject to
15 summary disposition under subsection (b), the **arbitrator** shall set a time and place for a
16 hearing and issue notice of the hearing not less than five days before the hearing. Unless a
17 party to the arbitration proceeding interposes an objection to lack of or insufficiency of
18 notice not later than the commencement of the hearing, that **person's** appearance at the
19 hearing waives the objection. Upon request of a party to the arbitration proceeding and
20 for good cause shown, or upon the **arbitrator's** own initiative, the **arbitrator** may
21 adjourn the hearing from time to time as necessary but may not postpone the hearing to a

1 time later than that fixed by the agreement to arbitrate for making the award unless the
2 parties to the arbitration proceeding consent to a later date. The **arbitrator** may hear and
3 decide the controversy upon the evidence produced although a party who was duly
4 notified of the arbitration proceeding did not appear. The **court**, on request, may direct
5 the **arbitrator** to proceed promptly with the hearing and with a decision of the
6 controversy.

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

10 (f) All of the **arbitrators** must conduct the hearing under subsection (c);
11 however, a majority may decide any question and render a final award.

12 (g) If any **arbitrator** ceases, or is unable, to act during the arbitration
13 proceeding, then a sufficient number of replacement **arbitrators** must be appointed in
14 accordance with Section 11 to continue the hearing and to decide the controversy.

15 **Reporter's Notes:**

16 1. Section 15 is a default provision and under section 4(a) is subject to the
17 agreement of the parties, except for section 15(a) which is a fundamental right of the
18 parties to be treated fairly and given a reasonable opportunity to present their cases.
19 Section 15(b) is intended to give an arbitrator wide latitude in conducting an arbitration
20 subject to the parties' agreement and to determine what evidence should be considered. It
21 should be noted that the rules of evidence are inapplicable in an arbitration proceeding
22 except that an arbitrator's refusal to consider evidence material to the controversy which
23 substantially prejudices the rights of a party are grounds for vacatur under section
24 23(a)(3). *See* Reporter Note 4 to this section.

25 The language in sections 15(a) and (b) are based primarily upon Articles 18 and 19

1 of the UNCITRAL Model Arbitration Law.

2 2. As the use of arbitration increases, there are more cases that involve complex
3 issues. In such cases arbitrators are often involved in numerous pre-hearing matters
4 involving conferences, motions, subpoenas, and other preliminary issues. Although the
5 present UAA makes no specific provision for arbitrators to hold pre-hearing conferences
6 or to rule on preliminary matters, arbitrators likely have the inherent authority to do such.
7 Numerous cases have concluded that in arbitration proceedings, procedural matters are
8 within the province of the arbitrators. *Stop & Shop Cos. v. Gilbane Bldg. Co.*, 364 Mass.
9 325, 304 N.E.2d 429 (1973); *Gozdor v. Detroit Auto. Inter-Insurance Exchange*, 52
10 Mich. App. 49, 214 N.W.2d 436 (1974); *Upper Bucks Cnty. Area Vocational-Technical*
11 *Sch. Joint Comm. v. Upper Bucks Cnty. Vocational Technical Sch. Educ. Ass'n*, 91
12 Pa.Cmnwlth. 463, 497 A.2d 943 (1985).

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

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

28 3. Presently the UAA has no provision on whether to allow an arbitrator to grant a
29 request for summary disposition. A number of courts have upheld the authority of
30 arbitrators to decide cases or issues on such requests without an evidentiary hearing but
31 have been cautious in their support of such holdings. *Intercarbon Bermuda, Ltd. v. Caltex*
32 *Trading and Transp. Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993) (court confirmed a summary
33 adjudication by an arbitrator based on documentary evidence but expressed reservations
34 about deciding arbitration cases without an evidentiary hearing); *Schlessinger v.*
35 *Rosenfeld, Meyer & Susman*, 40 Cal. App.4th 1096, 47 Cal. Rptr.2d 650 (1995) (court
36 upheld arbitrator’s award based on a summary adjudication but cautioned that the
37 appropriateness of such summary action depends upon whether the party opposing a
38 summary motion is given a fair opportunity to present its position); *Stifler v. Seymour*
39 *Weiner*, 62 Md. App. 19, 488 A.2d 192 (1985) (dispositive motion appropriate on issue of

1 statute of limitations); *Pegasus Constr. Corp. v. Turner Constr. Co.*, 84 Wash. App. 744,
2 929 P.2d 1200 (1997) (full hearing of all evidence regarding merits of a claim is
3 unnecessary where decision can be made on basis of motion to dismiss); *but see* *Prudential*
4 *Securities, Inc. v. Dalton*, 929 F.Supp. 1411 (N.D. Okla. 1996) (court vacates arbitration
5 award and finds that the arbitration panel is guilty of misconduct and exceeded its powers
6 in refusing to hear pertinent evidence by deciding case without a hearing). Thus, although
7 some courts have affirmed arbitrators who have made a summary disposition of a case, the
8 opinions indicate both a hesitancy to endorse such an approach on a broad basis and a
9 closer judicial scrutiny of the arbitrator’s rulings.

10 Section 15(c) was intended to allow arbitrators to decide a request for summary
11 disposition but only after all parties receive reasonable notice and have an opportunity to
12 respond. The language in section 15(c) is based upon Rule 16 of JAMS/Endispute
13 Comprehensive Arbitration Rules and Procedures. In the arbitration context, the Drafting
14 Committee decided that the use of the terms “request for summary disposition” is
15 preferable to “motions for summary judgment” or “motions for failure to state a claim.”
16 The latter terms, which are used in civil litigation, usually refer to situations where there
17 are no genuine issues of material facts in dispute and a case can be determined as a matter
18 of law. In most arbitrations, the arbitrators are not required to make rulings only as a
19 “matter of law.” As discussed in the Reporter’s Notes to section 23 on vacatur, numerous
20 courts have held that arbitrators are not bound by rules of law and their awards generally
21 cannot be overturned for errors of law. Because of this, the terms “summary judgment”
22 or “failure to state a claim” are misleading and the language “summary disposition” used in
23 the JAMS/Endispute rules is more applicable.

24 4. Section 15(d) allows an arbitrator to “hear and decide the controversy upon the
25 evidence produced.” The general rule in arbitration is that the rules of evidence need not
26 be observed. III MACNEIL TREATISE § 35.1.2.1; CAL. CIV. PROC. CODE § 1282.2(d); AAA
27 Commercial Arb. R. 31; Center for Public Resources, Rules for Non-Administered Arb.
28 Of Business Disp. R. 11. It is the intent of Drafting Committee that this general rule be
29 continued in the RUAA. However, it should be noted that one of the grounds on which a
30 court may vacate an arbitration award under section 23(a)(3) is where “an arbitrator
31 refused to consider evidence material to the controversy.”

32 **SECTION 16. REPRESENTATION BY ATTORNEY.** A party to an
33 arbitration proceeding may be represented by an attorney at any proceeding or hearing
34 under this [Act].

35 **Reporter’s Notes:**

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

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

8 3. Section 4(b)(3) provides that a waiver of the right to be represented by an
9 attorney under section 16 prior to the initiation of an arbitration proceeding under section
10 9 is ineffective except that an employer and a labor organization may waive the right to
11 representation by an attorney in a labor arbitration.

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

13 **DISCOVERY.**

14 (a) An **arbitrator** may issue a subpoena for the attendance of a witness and
15 for the production of **records** and other evidence at any hearing and may administer oaths.

16 A subpoena so issued must be served and, upon motion to the **court** by a party to the
17 arbitration proceeding or the **arbitrator**, enforced in the manner provided by law for
18 service and enforcement of subpoenas in a civil action.

19 (b) An **arbitrator**, on request of a party or a witness to the arbitration
20 proceeding, may permit a deposition of any witness, including a witness who cannot be
21 subpoenaed for or is unable to attend a hearing, to be taken in the manner designated by
22 the **arbitrator** for use as evidence in order to make the proceeding fair, expeditious, and
23 cost effective.

24 (c) An **arbitrator** may permit such discovery as the **arbitrator** decides is
25 appropriate in the circumstances, taking into account the needs of the parties to the

1 arbitration proceeding and other affected **persons** and the desirability of making the
2 proceeding fair, expeditious, and cost-effective.

3 (d) If an **arbitrator** permits discovery under subsection (c), the **arbitrator**
4 may order the parties to the arbitration proceeding to comply with the **arbitrator's**
5 discovery-related orders, including the issuance of a subpoena for the attendance of a
6 witness and for the production of **records** and other evidence at a discovery proceeding,
7 and may take actions against parties to the arbitration proceeding who do not comply to
8 the extent permitted by law as if the matter were the subject of a civil action.

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

11 (f) All laws compelling a **person** under subpoena to testify and all fees for
12 attending an arbitration proceeding, a deposition, or a discovery proceeding as a witness
13 are applicable to an arbitration proceeding as if the matter were the subject of a civil
14 action.

15 (g) A **court** may enforce a subpoena or any discovery-related order for the
16 attendance of a witness and for the production of **records** and other evidence issued by an
17 arbitrator in connection with an arbitration proceeding in another state. A subpoena so
18 issued must be served and, upon motion to the **court** by a party to the arbitration
19 proceeding or the **arbitrator**, enforced in the manner provided by law for service and
20 enforcement of subpoenas in a civil action in this state.

21 **Reporter's Notes:**

1 1. Presently, UAA section 7 provides an arbitrator only with subpoena authority
2 for the attendance of witnesses and production of documents at the hearing (RUAA
3 section 17(a)) or to depose a witness who is unable to attend a hearing (RUAA section
4 17(b)). Section 17(b) allows an arbitrator to permit a hearing deposition only where it will
5 insure that the proceeding is “fair, expeditious, and cost effective.” This standard is also
6 required in Section 17(c) concerning prehearing discovery. Note that section 17(a) and
7 (b) are not waivable under section 4(b) because they go to the inherent power of an
8 arbitrator to provide a fair hearing by insuring that witnesses and records will be available
9 at an arbitration proceeding.

10 2. This authority in UAA section 7 which is limited only to subpoenas and
11 depositions for an arbitration hearing has caused some courts to conclude that “pretrial
12 discovery is not available under our present statutes for arbitration.” *Rippe v. West*
13 *American Ins. Co.*, 1993 WL 512547 (Conn. Super. Ct.); *see also* *Burton v. Bush*, 614
14 F.2d 389 (4th Cir. 1980) (party to arbitration contract had no right to pre-hearing
15 discovery). Others require a showing of extraordinary circumstances before allowing
16 discovery. *See, e.g.*, *In re Deulemar di Navigazione*, 153 F.R.D. 592 (E.D.La. 1994);
17 *Oriental Commercial & Shipping Co. v. Rosseel*, 125 F.R.D. 398 (S.D.N.Y. 1989). Most
18 courts have allowed discovery only at the discretion of the arbitrator. *See, e.g.*, *Stanton v.*
19 *PaineWebber Jackson & Curtis, Inc.*, 685 F.Supp 1241 (S.D. Fla. 1988); *Transwestern*
20 *Pipeline Co. v. J.E. Blackburn*, 831 S.W.2d 72 (Tex.Ct.App. 1992). The few state
21 arbitration statutes that have addressed the matter of discovery also leave these issues to
22 the discretion of the arbitrator. California--CAL. CIV. PROC. CODE § 1283.05(d)
23 (depositions for discovery shall not be taken unless leave to do so is first granted by the
24 arbitrator); Massachusetts--MASS. GEN. LAWS. ANN. ch.251, § 7(e) (only the arbitrators
25 can enforce a request for production of documents and entry upon land for inspection and
26 other purposes); Texas--TEX. CIV. PRAC. & REM. CODE ANN. § 171.007(b) (arbitrator
27 may allow deposition of adverse witness for discovery purposes); Utah--UTAH CODE ANN.
28 § 78-31a-8 (arbitrators may order discovery in their discretion). Most commentators and
29 courts conclude that extensive discovery, as allowed in civil litigation, eliminates the main
30 advantages of arbitration in terms of cost, speed and efficiency.

31 3. The approach to discovery in section 17(c) is modeled after the Center for
32 Public Resources (CPR) Rules for Non-Administered Arbitration of Business Disputes, R.
33 10 and United Nations Commission on International Trade Law (UNCIRTAL) Arbitration
34 Rules, Arts. 24(2), 26. The language follows the majority approach under the case law of
35 the UAA and FAA that, unless the contract specifies to the contrary, the discretion rests
36 with the arbitrators whether to allow discovery. The purpose of the discovery procedure
37 in section 17(c) is to aid the arbitration process and ensure an expeditious, efficient and
38 informed arbitration, while adequately protecting the rights of the parties. Because section
39 17(c) is waivable under section 4, the provision is intended to encourage parties to
40 negotiate their own discovery procedures. Section 17(d) establishes the authority of the
41 arbitrator to oversee the prehearing process and enforce discovery-related orders in the

1 same manner as would occur in a civil action, thereby minimizing the involvement of (and
2 resort of the parties to) the courts during the arbitral discovery process.

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

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

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

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

35 7. The Drafting Committee has made clear in Section 17(d) that if an arbitrator
36 allows discovery, the arbitrator has the authority to issue subpoenas for a discovery
37 proceeding such as a deposition. This issue was raised during the first reading of the

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

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

21 9. Third parties. At the first reading of the RUAA at the 1999 annual meeting
22 Commissioner Blackburn of Idaho raised a question as to whether a third party, e.g., a
23 non-party witness, can challenge an arbitrator's order, such as a subpoena to disclose
24 information that the witness believes is privileged. It is clear from the case law that
25 arbitrators have the power under the UAA (Section 7) and the FAA (Section 7) to issue
26 orders, such as subpoenas, to non-parties whose information may be necessary for a full
27 and fair hearing. *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69
28 (S.D.N.Y. 1995) (court enforced subpoena duces tecum issued by arbitrator against non-
29 party under FAA); *Amgen, Inc. v. v. Kidney Center of Delaware County, Ltd.*, 879
30 F.Supp. 878 (N.D. Ill. 1995) (arbitrator had the power under FAA to subpoena a third
31 party to produce documents and to testify at a deposition); *Meadows Indemnity Co. v.*
32 *Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994) (court held that because the burden
33 was minimal, the nonparty would have to produce documents pursuant to arbitrator's
34 subpoena under FAA); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F.Supp. 1241
35 (S.D. Fla. 1988) (court upholds subpoena issued by arbitrator under FAA that nonparties
36 must appear at prehearing conference and arbitration hearing); *Drivers Local Union No.*
37 *639 v. Seagram Sales Corp.*, 531 F.Supp. 364, 366 (D.D.C. 1981) ("the Uniform
38 Arbitration Act provides for the issuance of subpoenas by an arbitrator to non-party
39 witnesses at an arbitration proceeding, to compel their testimony or the production of
40 documents"); *United Elec. Workers Local 893 v. Schmitz*, 576 N.W.2d 357 (Iowa 1998)
41 (court held that Iowa Arbitration Act confers on arbitrators the power to subpoena

1 nonparty witnesses).

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

12 In determining whether to enforce an arbitral subpoena, the courts have been very
13 solicitous of the nonparty status of a person challenging such an order. For example, in
14 *Reuters Ltd. v. Dow Jones Telerate, Inc., 231 A.D.2d 337, 662 N.Y.S.2d 450 (N.Y. App.*
15 *Div. 1997),* an arbitrator attempted to subpoena documents from a nonparty competitor.
16 The court held that, although arbitrators do have authority to issue subpoenas, this
17 subpoena required the nonparty to divulge certain information which may put it at a
18 competitive disadvantage and was not sufficiently relevant to the arbitration case.

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

29 10. Section 17(g) is intended to allow a court in State A (the state adopting the
30 RUAA) to give effect to a subpoena or any discovery-related order issued by an arbitrator
31 in an arbitration proceeding in State B without the need for the party who has received the
32 subpoena first to go to a court in State B to receive an enforceable order. This procedure
33 would eliminate duplicative court proceedings in both State A and State B before a
34 witness or record or other evidence can be produced for the arbitration proceeding in
35 State B. The court in State A would have the authority to determine whether and, if so,
36 under what appropriate conditions the subpoena or discovery-related orders should be
37 enforced. The last sentence of 17(g) requires that the subpoena be served and enforced
38 under the laws of a civil action in State A where the request to enforce the subpoena is
39 being made.

1 **SECTION 18. COURT ENFORCEMENT OF PRE-AWARD RULING BY**

2 **ARBITRATOR.** If an **arbitrator** makes a pre-award ruling in favor of a party to the
3 arbitration proceeding, that party may request the arbitrator to incorporate the ruling into
4 an award under Section 19 and may file a motion for an expedited order to confirm the
5 award under Section 22 which motion the **court** shall proceed summarily to decide. The
6 **court** shall issue an order to confirm the award unless the court vacates, modifies or
7 corrects the award of the **arbitrator** pursuant to Sections 23 and 24.

8 **Reporter’s Notes:**

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

21 As a general proposition, courts are very hesitant to review interlocutory orders of
22 an arbitrator. The Ninth Circuit in *Aerojet-General Corp. v. Am. Arbitration Ass’n*, 478
23 F.2d 248, 251 (9th Cir. 1973) stated that “judicial review prior to the rendition of a final
24 arbitration award should be indulged, if at all, only in the most extreme cases.” The court
25 concluded that a more lax rule would frustrate a basic purpose of arbitration for a speedy
26 disposition without the expense and delay of a court proceeding. In *Harleyville Mut. Cas.*
27 *Co. v. Adair*, 421 Pa. 141, 145, 218 A.2d 791, 794 (Pa. 1966), the Pennsylvania Supreme
28 Court held that to allow challenges to an arbitrator’s interlocutory rulings would be
29 “unthinkable.” Massachusetts also rejected the appeal of an interlocutory order in
30 *Cavanaugh v. McDonnell & Co.*, 357 Mass. 452, 457, 258 N.E.2d 561, 564 (Mass. 1970),
31 noting that to allow a court to review an arbitrator’s interlocutory order “would tend to
32 render the proceedings neither one thing nor the other, but transform them into a hybrid,

1 part judicial and part arbitrational.” Thus section 18 requires a court to enforce the pre-
2 award ruling unless the ruling should be vacated under the standards for confirming,
3 modifying, or vacating awards under sections 23 and 24.

4 Courts have considered more closely substantive challenges to pre-award ruling of
5 arbitrators on grounds of privilege or confidentiality. In *Hull Municipal Lighting Plant v.*
6 *Massachusetts Mun. Wholesale Elec. Co.*, 414 Mass. 609, 609 N.E.2d 460 (1993), the
7 defendant refused to turn over to the plaintiff certain documents, despite an arbitral
8 subpoena requiring such, because the defendant claimed that portions of the documents
9 contained attorney-client and work-product privileges. The court concluded that because
10 the matters fell under Massachusetts public records law, the question of privilege was
11 within the discretion of the judge and not the arbitrator after the supervisor of public
12 records had decided issues arising under the public records law. *See also World*
13 *Commerce Corp. v. Minerals and Chem. Philipp Corp.*, 15 A.D. 432, 224 N.Y.S.2d 763
14 (1962) (court and not arbitrator decides whether documents of non-party to arbitration are
15 protected as confidential); *Civil Serv. Employees Ass’n v. Soper*, 105 Misc.2d 230, 431
16 N.Y.S.2d 909 (1980) (court vacates award of arbitrator who incorrectly determined
17 privilege of patient’s confidential records); *DiMania v. New York State Dept. of Mental*
18 *Hygiene*, 87 Misc.2d 736, 386 N.Y.S.2d 590 (1976) (court overrules decision of arbitrator
19 regarding client’s privilege of confidentiality); *compare Great Scott Supermarkets, Inc. v.*
20 *Teamsters Local 337*, 363 F.Supp. 1351 (E.D. Mich. 1973) (arbitrator does not exceed
21 powers in contract under FAA §10 by ordering production of documents, with deletions,
22 that party claims are subject to attorney-client privilege). A court should review more
23 carefully claims of confidentiality, trade secrets, or privilege because of the involvement of
24 important legal rights than other assertions that a pre-award order of an arbitrator is
25 invalid.

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

1 The term “summarily” has the same meaning as in section 7 that a trial court
2 should expeditiously and without a jury trial determine whether an arbitrator’s pre-award
3 ruling should be enforced. *Burke v. Wilkins*, 507 S.E.2d 913 (N.C. Ct. App. 1998); *see*
4 *also Wallace v. Wiedenbeck*, 251 A.D.2d 1091, 674 N.Y.S.2d 230, 231 (N.Y. App. Div.
5 1998); *Grad v. Wetherholt Galleries*, 660 A.2d 903 (D.C. 1995).

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

9 4. The Drafting Committee unanimously concluded that an arbitrator’s order
10 denying a request for a pre-award ruling should not be subject to an action under section
11 18 because (1) such a provision would lead to delay and more litigation without
12 corresponding benefit to the process and (2) the primary reason to allow a court to
13 consider a favorable pre-award ruling is because such arbitral orders are not self-
14 enforcing. The parties whose pre-award requests for relief are denied by an arbitrator can
15 seek review of such denial after the final award is issued under section 20, vacatur, or
16 section 21, modification or correction of an award.

17 5. Section 18 requires an arbitrator’s ruling be incorporated into an “award under
18 Section 19” because for procedural purposes there must be an award under Section 19 for
19 a court to confirm under section 22 or to vacate, modify or correct under sections 23 or
20 24.

21 SECTION 19. AWARD.

22 (a) An **arbitrator** shall make a **record** of an award. The record must be
23 **authenticated** by any **arbitrator** who concurs with the award. The **arbitrator** or the
24 **arbitration organization** shall give notice of the award to each party to the arbitration
25 proceeding.

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

1 arbitration proceeding waives any objection that an award was not made within the time
2 required unless the party gives notice of the objection to the **arbitrator** before that party
3 has notice of the award.

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

5 (a) On motion of a party to the arbitration proceeding to an **arbitrator**, the
6 **arbitrator** may modify or correct an award:

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

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

10 (3) to clarify the award.

11 (b) A motion under subsection (a) must be made to the **arbitrator** within
12 20 days after notice of the award to the movant. The movant at the same time shall give
13 notice in a **record** to the opposing party stating that the opposing party to the arbitration
14 proceeding must serve any objections to the motion within 10 days after receipt of the
15 notice.

16 (c) If a motion to a **court** is pending under Section 22, 23, or 24, the **court**
17 may submit the matter to the **arbitrator** to consider whether to modify or correct the
18 award:

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

20 (2) because the **arbitrator** has not made a final and definite award

1 upon a claim submitted by the parties to the arbitration proceeding; or

2 (3) to clarify the award.

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

5 **Reporter's Notes:**

6 1. Section 20 provides a mechanism in subsections (a) and (b) for the parties to
7 apply directly to the arbitrators to modify or correct an award and in subsection (c) for a
8 court to submit an award back to the arbitrators for a determination whether to modify or
9 correct an award. The latter situation would occur if either party under sections 22, 23 or
10 24 files a motion with a court within 90 days to confirm, vacate, modify or correct an
11 award and the court decides to remand the matter back to the arbitrators. The revised
12 alternative is based on the Minnesota version of the UAA. MINN. STAT. ANN. §572.16;
13 *see also* 710 ILL. COMP. STAT. ANN. 5/9; KY. REV. STAT. 417.130.

14 2. Section 20 serves an important purpose in light of the arbitration doctrine of
15 *functus officio* which is “a general rule in common law arbitration that when arbitrators
16 have executed their awards and declared their decision they are *functus officio* and have
17 no power to proceed further.” *Mercury Oil Ref. Co. v. Oil Workers*, 187 F.2d 980, 983
18 (10th Cir. 1951); *see also* *Int’l Bhd. of Elec. Workers, Local Union 1547 v. City of*
19 *Ketchikan, Alaska*, 805 P.2d 340 (Alaska 1991); *Chaco Energy Co. v. Thercol Energy*
20 *Co.*, 97 N.M. 127, 637 P.2d 558 (1981). Under this doctrine when arbitrators finalize an
21 award and deliver it to the parties, they can no longer act on the matter. *See* 1 DOMKE ON
22 COMMERCIAL ARBITRATION §§22:01, 32:01 (Gabriel M. Wilner, ed. 1996) [hereinafter
23 DOMKE]. Indeed there is some question whether, in the absence of an authorizing statute,
24 a court because of the *functus officio* doctrine can remand an arbitration decision to the
25 arbitrators who initially heard the matter. 1 DOMKE §35:03.

26 3. Sections 20(a) and (c) are essentially the same as present section 9 of the UAA
27 which provides the parties with a limited opportunity to request modification or
28 corrections of an arbitration award either (1) when there is an error as described in section
29 24(a)(1) for miscalculation or mistakes in descriptions or in section 24(a)(3) for awards
30 imperfect in form or (2) “for the purpose of clarifying the award.” *Chaco Energy Co. v.*
31 *Thercol Energy Co.*, 97 N.M. 127, 637 P.2d 558 (1981) (an amended arbitration award
32 for purposes other than those enumerated in statute is void).

33 The Drafting Committee concluded an additional ground for modification or
34 correction be added in sections 20(a)(2) and (c)(2) which is based on the FAA section

1 10(a)(4) where an arbitrator's award is either so imperfectly executed or incomplete that it
2 is questionable whether the arbitrators ruled on a submitted issue.

3 The benefit of a provision such as section 20 is evident in a comparison with the
4 FAA which has no similar provision. Under the FAA, there is no statutory authority for
5 parties to request arbitrators to correct or modify evident errors and only a limited
6 exception in FAA section 10(a)(5) for a court to order a rehearing before the arbitrators
7 when an award is vacated and the time within which the agreement required the award has
8 not expired. This lack of a statutory basis both for arbitrators to clarify a matter and, in
9 most instances, for a court to remand cases to arbitrators has caused confusing case law
10 under the FAA on whether and when a court can remand or arbitrators can clarify matters.
11 *See* III MACNEIL TREATISE §§37.6.4.4; 42.2.4.3; *see also* Legion Ins. Co. v. VCW, Inc.,
12 193 F.3d 972 (8th Cir. 1999). The mechanism for correction of errors in RUAA section 20
13 enhances the efficiency of the arbitral process.

14 SECTION 21. REMEDIES; FEES AND EXPENSES OF ARBITRATION

15 PROCEEDING.

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

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

21 (c) As to all remedies other than those provided by subsection (a), an
22 **arbitrator** may order such remedies as the **arbitrator** considers just and appropriate
23 under the circumstances of the arbitration proceeding. That such a remedy could not or
24 would not be granted by a **court** is not grounds for refusing to confirm an award under
25 Section 22 or vacating an award under Section 23.

26 (d) An **arbitrator's** expenses and fees, together with other expenses, must

1 be paid as provided in the award.

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

6 **Reporter's Notes:**

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

13 In regard to punitive damages, it is now well established that arbitrators have
14 authority to award punitive damages under the FAA. *Mastrobuono v. Shearson Lehman*
15 *Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L.Ed.2d 76 (1995). Federal authority is
16 in accord with the preponderance of decisions applying the UAA and state arbitration
17 statutes. *See, e.g.*, *Baker v. Sadick*, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984);
18 *Eychner v. Van Vleet*, 870 P.2d 486 (Colo. Ct. App. 1993); *Richardson Greenshields*
19 *Sec., Inc. v. McFadden*, 509 So.2d 1212 (Fla. Dist. Ct. App. 1987); *Bishop v. Holy Cross*
20 *Hosp.*, 44 Md. App. 688, 410 A.2d 630 (1980); *Rodgers Builders, Inc. v. McQueen*, 76
21 N.C. App. 16, 331 S.E.2d 726 (1985), review denied, 315 N.C. 590, 341 N.E.2d 29
22 (1986); *Kline v. O'Quinn*, 874 S.W.2d 776 (Tex. Ct. App. 1994), cert. denied, 515 U.S.
23 1142, 115 S. Ct. 2579, 132 L. Ed.2d 829 (1995); *Grissom v. Greener & Sumner Constr.,*
24 *Inc.*, 676 S.W.2d 709 (Tex. Ct. App. 1984); *Anderson v. Nichols*, 178 W. Va. 284, 359
25 S.E.2d 117 (1987). *But see* *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793,
26 386 N.Y.S.2d 831 (1976); *Leroy v. Waller*, 21 Ark. App. 292, 731 S.W.2d 2d 789
27 (1987); *School City of E. Chicago, Ind. v. East Chicago Fed. of Teachers*, 422 N.E.2d
28 656 (Ind. Ct. App. 1981); *Shaw v. Kuhnel & Assocs.*, 102 N.M. 607, 698 P.2d 880, 882
29 (1985).

30 As to attorney's fees, statutes in Texas and Vermont allow recovery for attorney's
31 fees in arbitration when law or parties' agreement would allow for such a recovery in a
32 civil action, TEX CIV. PRAC. & REM. CODE ANN. § 171.010; 12 VT. STAT. ANN. §5665;
33 *Monday v. Cox*, 881 S.W.2d 381 (Tex. App. 1994) (Texas arbitration act provides that

1 arbitrator shall award attorney fees when parties' agreement so specifies or state's law
2 would allow such an award); *see also* CAL. CIVIL CODE § 1717 (allowing award of
3 attorney fees if contract specifically provides such). Also, statutes, such as those
4 involving civil rights, employment discrimination, antitrust, and others, specifically allow
5 courts to order attorney fees in appropriate cases. Today many of these types of causes of
6 action are subject to arbitration clauses. *Gilmer v. Interstate/Johnson Lane Corp.*, 500
7 U.S. 20 (1991) (age discrimination); *Shearson/American Express, Inc. v. McMahon*, 482
8 U.S. 220 (1987) (civil RICO claims); *Mitsubishi Motors Corp. v. Soler Chrysler-*
9 *Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust claim); Pub. L. No. 102-166, § 118, 105
10 Stat. 1071, 1081 (1991 Civil Rights Act that states "arbitration * * * is encouraged to
11 resolve disputes" under the Americans with Disabilities Act, Title VII of the 1964 Civil
12 Rights Act, the Civil Rights Act of 1866, and the Age Discrimination in Employment Act).

13 2. Because section 21 is a waivable provision under section 4, the parties can
14 agree to limit or eliminate certain remedies. However, it should be noted that in
15 arbitration cases where, if the matter had been in litigation, a person would have been
16 entitled to an award of attorneys fees or punitive damages or other exemplary relief, there
17 is doubt whether one of the parties by contract can eliminate the right to attorney's fees or
18 punitive damages or other exemplary relief. Some courts have held that they will defer to
19 an arbitration award involving statutory rights only if a party has the right to obtain the
20 same relief in arbitration as is available in a court. *See, e.g., Cole v. Burns Int'l Sec. Serv.*,
21 105 F.3d 1465 (D.C. Cir. 1997) (employee with race discrimination claim under Title VII
22 is bound by pre-dispute arbitration agreement under FAA if the employee has the right to
23 the same relief as if he had proceeded in court); *Graham Oil Co. v. ARCO Prods. Co.*, 43
24 F.3d 1244 (9th Cir.), cert. denied, 516 U.S. 907 (1995) (arbitration clause compelling
25 franchisee to surrender important rights, including right of attorney fees, guaranteed by the
26 Petroleum Marketing Practices Act, contravenes this statute); *DeGaetano v. Smith*
27 *Barney, Inc.*, 75 FEP Cases 579 (S.D.N.Y. 1997) (award under arbitration clause,
28 requiring each side to pay own attorney fees, in Title VII claim on which plaintiff prevailed
29 but where arbitrators refused to award attorney fees set aside as a manifest disregard of
30 the law; the arbitration of statutory claims as a condition of employment are enforceable
31 only to the extent that the arbitration preserves protections and remedies afforded by the
32 statute); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 68 Cal. App.4th 374
33 (1998) (limitation in arbitration agreement on remedies to only backpay and not allowing
34 employee in anti-discrimination claim to attempt recovery of punitive damages is
35 unconscionable and court severs remedy limitation from the arbitration agreement); DUE
36 PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES
37 ARISING OUT OF THE EMPLOYMENT RELATIONSHIP Section C(5) (May 9, 1995) ("The
38 arbitrator should be empowered to award whatever relief would be available in court
39 under the law."); National Academy of Arbitrators, GUIDELINES ON ARBITRATION OF
40 STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS Art. 4(D) (May 21,
41 1997) ("Remedies should be consistent with the statute or statutes being applied, and with

1 the remedies a party would have received had the case been tried in Court. These
2 remedies may well exceed the traditional arbitral remedies of reinstatement and back pay,
3 and may include witnesses' and attorneys' fees, costs, interest, punitive damages, injunctive
4 relief, etc.”).

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

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

27 5. Section 21(e) addresses concerns respecting arbitral remedies of punitive
28 damages concerning the absence, under present law, of guidelines for arbitral awards and
29 of the severe limitations on judicial review. Recent data from the securities industry
30 provides some evidence that arbitrators do not abuse the power to punish through
31 excessive awards. *See generally* Thomas J. Stipanowich, *Punitive Damages and the*
32 *Consumerization of Arbitration*, 92 NW. L. REV. 1 (1997); Richard Ryder, *Punitive*
33 *Award Survey*, 8 SEC. ARB. COMMENTATOR, Nov. 1996, at 4. Because legitimate
34 concerns remain, however, specific provisions have been included in section 21(e) that
35 require arbitrators who award a remedy of punitive damages to specify in the award the
36 law authorizing and the amounts of the award attributable to the punitive damage remedy.
37 A party can seek to vacate the punitive damage remedy under section 23—especially
38 section 23(a)(4) which prohibits arbitrators from exceeding their power. For instance, a
39 party may claim that the arbitrators exceeded their powers by awarding any punitive
40 damages or an excessive amount of punitive damages and that the award of punitive

1 damages or the excessive amount should be vacated under section 23(a)(4).

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

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

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

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

32 **Reporter's Notes:**

33 1. The language in section 22 has been changed to be similar to that in FAA

1 section 9 to indicate that a court has jurisdiction when a party files a motion to confirm an
2 award unless a party has applied to the arbitrators for change of an award under section 20
3 or filed a motion to vacate, modify or correct under sections 23 or 24.

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

8 SECTION 23. VACATING AN AWARD.

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

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

13 (2) there was evident partiality by an **arbitrator** appointed as a
14 neutral or corruption by any of the **arbitrators** or misconduct by any of the **arbitrators**
15 prejudicing the rights of a party to the arbitration proceeding;

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

20 (4) an **arbitrator** exceeded the **arbitrator's** powers; or

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

24 (6) the arbitration was conducted without notice as required in

1 Section 9 so as to prejudice substantially the rights of a party to the arbitration
2 proceeding.

3 (b) A motion under this section must be filed within 90 days after delivery
4 of a copy of the award to the movant unless the motion is predicated upon corruption,
5 fraud, or other undue means, in which case it must be filed within 90 days after those
6 grounds are known or by the exercise of reasonable care would have been known by the
7 movant.

8 (c) In vacating an award on a ground other than that set forth in subsection
9 (a)(5), a **court** may order a rehearing before a new **arbitrator**. If the award is vacated on
10 grounds stated in subsection (a)(3) or (4), the **court** may order a rehearing before the
11 **arbitrator** who made the award or the **arbitrator's** successor. The time for the
12 **arbitrator's** decision in the rehearing commences on the day after the date of the **court's**
13 order and is the same time as that required in the agreement to arbitrate.

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

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

17 1. Section 23(a)(2) is based primarily on UAA section 12(a)(2). The reason
18 "evident partiality" is a grounds for vacatur only for a neutral arbitrator is because party
19 arbitrators, unless otherwise agreed, serve as representatives of the parties appointing
20 them. As such, party arbitrators are not expected to be impartial in the same sense as
21 neutral arbitrators. MACNEIL TREATISE §28.4. However, corruption or misconduct is
22 grounds to vacate an award by both neutral arbitrators and party arbitrators. As to
23 misconduct, before courts will vacate an award on this ground, objecting parties must
24 demonstrate that the misconduct actually prejudiced their rights. *Creative Homes and*
25 *Millwork, Inc. v. Hinkle*, 426 S.E.2d 480 (N.C. App. 1993). Courts have not required a
26 showing of prejudice when parties challenge an arbitration award on grounds of evident

1 partiality of the neutral arbitrator or corruption in any of the arbitrators. *Gaines Constr.*
2 *Co. v. Carol City Utilities, Inc.*, 164 So.2d 270 (Fl. Dist. Ct. 1964); *Northwest*
3 *Mechanical, Inc. v. Public Utilities Comm’n*, 283 N.W.2d 522 (Minn. 1979); *Egan & Sons*
4 *Co. v. Mears Park Dev. Co.*, 414 N.W.2d 785 (Minn. App. 1987). As to corruption, that
5 is also a ground for vacatur in section 23(a)(1) without requiring any showing of
6 prejudice.

7 2. The purpose of section 23(a)(5) is to establish that if there is no valid arbitration
8 agreement, then the award can be vacated; however, the right to contest an award on this
9 ground is conditioned upon the party contesting the validity of an arbitration agreement
10 raising this objection if the party participates in the arbitration proceeding. *See, e.g.*,
11 *Hwang v. Tyler*, 253 Ill. App.3d 43, 625 N.E.2d 243, appeal denied, 153 Ill.2d 559, 624
12 N.E.2d 807 (1993) (if issue not adversely determined under § 2 of UAA and if party raised
13 objection in arbitration hearing, party can raise challenge to agreement to arbitrate in
14 proceeding to vacate award); *Borg, Inc. v. Morris Middle Sch. Dist. No. 54*, 3 Ill.App.3d
15 913, 278 N.E.2d 818 (1972) (issue of whether there is an agreement to arbitrate cannot be
16 raised for first time after the arbitration award); *Spaw-Glass Constr. Serv., Inc. v. Vista*
17 *De Santa Fe, Inc.*, 114 N.M. 557, 844 P.2d 807 (1992) (party who compels arbitration
18 and participates in hearing without raising objection to the validity of arbitration
19 agreement then cannot attack arbitration agreement).

20 3. The purpose of the language requiring a party participating in an arbitration
21 proceeding to raise an objection that no arbitration agreement exists “not later than the
22 beginning of the arbitration hearing” is to insure that the party makes a timely objection at
23 the start of the arbitration rather than causing the other parties to go through the time and
24 expense of the full arbitration proceeding only to raise the objection for the first time later
25 in the arbitration process or in a motion to vacate an award. The obligation to object
26 attaches at the first hearing before the arbitrator, including hearings on preliminary
27 matters. A person who refuses to participate in or appear at an arbitration proceeding
28 retains the right to challenge the validity of an award on the ground that there was no
29 arbitration agreement in a motion to vacate.

30 4. Section 23(a)(6) is a new ground of vacatur related to improper notice as to the
31 initiation of the arbitration proceeding under section 9. The notice requirement in section
32 9 is a minimal one intended to meet due process concerns by informing a person as to the
33 controversy and remedy sought. The notice of initiation of the arbitration proceeding is
34 also subject to the parties’ agreement.

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

1 **B. Reporter’s Notes on the Concept of Contractual Provisions for “Opt-In” Review**
2 **of Awards**

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

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

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

34 This line of argument asserts further that an opt-in provision would virtually ensure
35 that, in cases of consequence, losers will petition for vacatur, thereby robbing commercial
36 arbitration of its finality and making the process more complicated, time consuming and
37 expensive. Arbitrators would be effectively obliged to provide detailed findings of law and
38 if the parties agree to judicial review for errors of fact, findings of fact in order to facilitate
39 review. In order to lay the predicate for the appeal of unfavorable awards, transcripts

1 would become the norm and counsel would be required to expend substantial time and
2 energy making sure the record would support an appeal. Arbitrators would find
3 themselves routinely involved in post-award judicial proceedings requiring significant time
4 and expense. Finally, the time to resolution in many cases would be greatly lengthened, as
5 well as increasing the prospect of reopened proceedings on remand following judicial
6 review.

7 At its core, arbitration is supposed to be an alternative to litigation in a court of
8 law, not a prelude to it. It can be argued that parties unwilling to accept the risk of
9 binding awards because of an inherent mistrust of the process and arbitrators are best off
10 contracting for advisory arbitration or foregoing arbitration entirely and relying instead on
11 traditional litigation.

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

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

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

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

8 However, the specter of FAA preemption is balanced by the assertion that the
9 principle of *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468, 109 S. Ct. 1248,
10 103 L. Ed. 2d 488 (1989)—that a clear expression of intent by the parties to conduct their
11 arbitration under a state law rule that conflicts with the FAA effectively trumps the rule of
12 FAA preemption—should serve to legitimize a state arbitration statute with different
13 standards of review. This assertion is particularly persuasive if one believes that an
14 arbitration agreement by the parties whereby they provide for judicial review of an
15 arbitrator’s decisions for errors of law or fact cannot be characterized as “anti-arbitration.”
16 By this view, such an “opt in” feature of judicial review of arbitral awards for errors of law
17 or fact is intended to further and to stabilize commercial arbitration and therefore is in
18 harmony with the pro-arbitration public policy of the FAA. Of course, in order to fully
19 track the preemption caveat articulated in *Volt* and further refined in *Mastrobuono v.*
20 *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995),
21 the parties’ arbitration agreement would need to specifically and unequivocally invoke the
22 law of the adopting state in order to override any contrary FAA law.

23 4. The second major impediment to inclusion of an “opt-in” provision for judicial
24 review in the RUAA (and contractual provisions to the same effect) is the contention that
25 the parties cannot contractually “create” subject matter jurisdiction in the courts when it
26 does not otherwise exist. The “creation” of jurisdiction transpires because a statutory
27 provision that authorizes the parties to contractually create or expand the jurisdiction of
28 the state or federal courts can result in courts being obliged to vacate arbitration awards
29 on grounds they otherwise would be foreclosed from relying upon. Court cases under the
30 federal law show the uncertainty of an “opt in” approach. *See, e.g., Chicago*
31 *Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991) (“If the
32 parties want, they can contract for an appellate arbitration panel to review the arbitrator’s
33 award. But they cannot contract for judicial review of that award; federal [court]
34 jurisdiction cannot be created by contract.”) (labor arbitration case); *but see Gateway*
35 *Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir. 1995)
36 (The court, relying on the Supreme Court’s contractual view of the commercial arbitration
37 process reflected in *Volt*, *Mastrobuono* and *First Options of Chicago v. Kaplan*, 514 U.S.
38 938, 947, 115 S. Ct. 1920, 1925 (1995), held valid a contractual provision providing for
39 judicial review of arbitral errors of law. The court concluded that the vacatur standards
40 set out in section 10(a) of the FAA provide only the default option in circumstances where
41 the parties fail to contractually stipulate some alternate criteria for vacatur).

1 The continuing uncertainty as to the legal propriety and enforceability of
2 contractual “opt-in” provisions for judicial review is best demonstrated by the opinion of
3 the Ninth Circuit Court of Appeals in *LaPine Tech. Corp. v. Kyocera*, 130 F.3d 884 (9th
4 Cir. 1997). The majority opinion in *Kyocera* framed the issue before the court to be: “[i]s
5 federal court review of an arbitration agreement necessarily limited to the grounds set
6 forth in the FAA or can the court apply greater scrutiny, if the parties have so agreed?”
7 The court held that it was obliged to honor the parties’ agreement that the arbitrator’s
8 award would be subject to judicial review for errors of fact or law. It based that holding
9 on the contractual view of arbitration articulated in *Volt* and *Prima Paint Corp. v. Flood*
10 *& Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 1806 n. 12 (1967) and their
11 progeny. In doing so it observed that body of case law “makes it clear that the primary
12 purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in
13 accordance with the agreement’s terms.” The Ninth Circuit relied squarely on the opinion
14 of the Fifth Circuit in *Gateway*. The court rejected the “jurisdictional” view of the FAA
15 set out by the Seventh Circuit in *Chicago Typographical Union*.

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

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

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

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

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

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

22 In a similar manner, the Illinois Court of Appeals, in *Chicago, Southshore and*
23 *South Bend R.R. v. N. Indiana Commuter Transp. Dist.*, 682 N.E.2d 156, 159 (Ill. App.
24 3d 1997), *rev'd on other grounds*, 184 Ill. 151 (1998), refused to give effect to the
25 provision of an arbitration agreement permitting a party claiming that the arbitrator's
26 award is based upon an error of law "to initiate an action at law * * * to determine such
27 legal issue." In so holding the Illinois Court stated: "The subject matter jurisdiction of the
28 trial court to review an arbitration award is limited and circumscribed by statute. The
29 parties may not, by agreement or otherwise, expand that limited jurisdiction. Judicial
30 review is limited because the parties have chosen the forum and must therefore be content
31 with the informalities and possible eccentricities of their choice." (citing *Konicki v. Oak*
32 *Brook Racquet Club, Inc.* 441 N.E.2d 1333 (Ill. App. 1982).

33 In *NAB Constr. Corp. v. Metro. Transp. Auth.*, 180 A.D. 436, 579 N.Y.S.2d 375
34 (N.Y. App. Div. 1992) the Appellate Division of the New York Supreme Court, without
35 engaging in any substantive analysis, approved application of a contractual provision
36 permitting judicial review of an arbitration award "limited to the question of whether or
37 not the [designated decision maker under an alternative dispute resolution procedure] is
38 arbitrary, capricious or so grossly erroneous to evidence bad faith." (citing *NAB Constr.*
39 *Corp. v. Metro. Transp. Auth.*, 167 A.D.2d 301, 562 N.Y.S.2d 44 (N.Y. App. Div. 1990).

1 This sparse state court case law is not a sufficient basis for identifying a trend in either
2 direction with regard to the legitimacy of contractual opt-in provisions for expanded
3 judicial review.

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

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

22 8. Statutory sanction of “opt-in” provisions for internal appellate arbitral review
23 are significantly less troubling than the sanction of “opt-in” provisions for judicial
24 review—because they do not entangle the courts in reviewing the merits of challenged
25 arbitration awards. Instead, appellate arbitral review mechanisms merely add a second
26 level to the contractual arbitration procedure that permits parties disappointed with the
27 initial arbitral result to secure a degree of protection from the occasional “wrong”
28 arbitration decision. *See* Stephen L. Hayford and Ralph Peeples, *Commercial Arbitration*
29 *in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RES. 405-06
30 (1995). This approach would not present the FAA preemption, “creating jurisdiction,”
31 and line-drawing problems identified with the expanded judicial review through the “opt
32 in” approach. It is also consistent with the Supreme Court’s contractual view of
33 commercial arbitration in that it preserves the parties’ agreement to resolve the merits of
34 the controversy between them through arbitration, without resort to the courts. When
35 parties agree that the decision of an arbitrator will be “final and binding,” it is implicit that
36 it is the arbitrator’s interpretation of the contract and the law that they seek, and not the
37 legal opinion of a court. In addition, an internal, arbitral appeal mechanism is more likely
38 to keep arbitration decisions out of the courts and maintain the overall goals of speed,
39 lower cost, and greater efficiency.

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

9 **C. Reporter’s Notes on the Possible Codification of the “Manifest Disregard of the**
10 **Law” and the “Public Policy” Grounds For Vacatur:**

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

18 2. “Manifest disregard of the law” is the seminal nonstatutory ground for vacatur
19 of commercial arbitration awards. The relevant case law from the federal circuit courts of
20 appeals establishes that “a party seeking to vacate an arbitration award on the ground of
21 ‘manifest disregard of the law’ may not proceed by merely objecting to the results of the
22 arbitration.” *O.R. Securities, Inc. v. Prof’l Planning Associates, Inc.* 857 F.2d 742, 747
23 (11th Cir. 1988). “Manifest disregard of the law” “clearly means more than [an arbitral]
24 error or misunderstanding with respect to the law.” *Carte Blanche (Singapore) PTE Ltd.*
25 *v. Carte Blanche Int’l.*, 888 F.2d 260, 265 (2d Cir. 1989) (quoting *Merrill Lynch, Pierce,*
26 *Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986).

27 The numerous other articulations of the “manifest disregard of law” standard
28 reflected in the circuit appeals court case law reveal its two constituent elements. One
29 element looks to the result reached in arbitration and evaluates whether it is clearly
30 consistent or inconsistent with controlling law. For this element to be satisfied, a
31 reviewing court must conclude that the arbitrator misapplied the relevant law touching
32 upon the dispute before her in a manner that constitutes something akin to a blatant, gross
33 error of law that is apparent on the face of the award.

34 The other element of the “manifest disregard of the law” standard requires a
35 reviewing court to evaluate the arbitrator’s knowledge of the relevant law. Even if a
36 reviewing court finds a clear error of law, vacatur is warranted under the “manifest
37 disregard of the law” ground only if the court is able to conclude that the arbitrator knew
38 the correct law but nevertheless “made a conscious decision” to ignore it in fashioning the

1 award. *See* M&C Corp. v. Erwin Behr & Co., 87 F.3d 844, 851 (6th Cir. 1996). For a full
2 discussion of the “manifest disregard of the law” standard, *see* Stephen L. Hayford,
3 *Reining in the Manifest Disregard of the Law Standard: The Key to Stabilizing the Law*
4 *of Commercial Arbitration*, 1999 J. DISP. RESOL. 117.

5 3. The origin and essence of the “public policy” ground for vacatur is well
6 captured in the Tenth Circuit’s opinion in *Seymour v. Blue Cross/Blue Shield*, 988 F.2d
7 1020,1023 (10th Cir. 1993). *Seymour* observed: “[I]n determining whether an
8 arbitration award violates public policy, a court must assess whether ‘the specific terms
9 contained in [the contract] violate public policy, by creating an ‘explicit conflict with
10 other ‘laws and legal precedents.’” *Id.* at 1024 (citing *United Paperworkers Int’l Union*
11 *v. Misco*, 484 U.S.29, 43, 108 S. Ct. 364, 373 (1987)).

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

25 Second, the Eleventh Circuit in *Brown v. Rauscher Pierce Refnses, Inc.*, 994 F.2d
26 775 (11th Cir. 1994) and the Second Circuit in *Diapulse Corp. of Am. v. Carba, Ltd.*, 626
27 F.2d 1108 (2d Cir. 1980) trigger vacatur only when a court concludes that implementation
28 of the arbitral result (typically, effectuation of the remedy directed by the arbitrator)
29 compels one of the parties to violate a well-defined and dominant public policy, a
30 determination which does not require a reviewing court to evaluate the merits of the
31 arbitration award. Instead, the court need only ascertain whether confirmation of, or
32 refusal to vacate an arbitration award, and a judicial order directing compliance with its
33 terms, will place one or both of the parties to the award in violation of the subject public
34 policy. If it would, the award must be vacated. If it does not, vacatur is not warranted.
35 For a full discussion of the evolution and application of the public policy exception in the
36 labor arbitration sphere, *see* Stephen L. Hayford and Anthony V. Sinicropi, *The Labor*
37 *Contract and External Law: Revisiting the Arbitrator's Scope of Authority*, 1993 J. DISP.
38 RESOL. 249.

39 4. States have rarely addressed “manifest disregard of the law” or “public policy”

1 as grounds for vacatur.

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

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

12 (a) Upon motion filed within 90 days after the movant receives notice of
13 the award in a **record**, the **court** shall modify or correct an award if:

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

16 (2) the **arbitrator** has awarded upon a matter not submitted to the
17 **arbitrator** and the award may be corrected without affecting the merits of the decision
18 upon the claims submitted; or

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

21 (b) If a motion filed under subsection (a) is granted, the **court** shall modify
22 or correct the award to effect its intent and shall confirm the award as modified or
23 corrected. Otherwise, the **court** shall confirm the award.

24 (c) A motion to modify or correct an award may be joined, in the
25 alternative, with a motion to vacate the award.

1 **SECTION 25. JUDGMENT ON AWARD; ATTORNEY’S FEES AND**
2 **LITIGATION EXPENSES.**

3 (a) Upon granting an order confirming, vacating without directing a
4 rehearing, modifying, or correcting an award, the **court** shall enter a judgment in
5 conformity therewith. The judgment may be recorded, docketed, and enforced as any
6 other judgment in a civil action.

7 (b) A **court** may award reasonable costs of the motion and subsequent
8 judicial proceedings.

9 (c) On application of a prevailing party to a contested judicial proceeding
10 under Section 22, 23, or 24, a **court** may add to a judgment confirming, vacating without
11 directing a rehearing, modifying, or correcting an award, reasonable attorney’s fees and
12 other reasonable expenses of litigation incurred in post-award judicial proceedings.

13 **Reporter’s Notes:**

14 1. The same sections in the UAA (sections 14, 15) and similar section in the FAA
15 (section 13 regarding judgments and docketing) also included court orders confirming,
16 modifying or correcting awards but not vacating awards. In researching this issue, there is
17 no explanation in the legislative history or the case law for the omission of the inclusion of
18 vacatur in reference to judgments and recording judgments. The indication from the cases
19 is that courts which vacate arbitration awards refer to the vacatur orders as judgments.
20 Arizona in its version of the UAA states that courts which vacate awards should enter a
21 “judgment.” ARIZ. REV. STAT. § 12-1512 (1994). There are other state appellate
22 decisions which refer to vacatur orders as “judgments.” *Judith v. Graphic Communicats.*
23 *Intn’l Union*, 727 A.2d 890, 891 (D.C. Ct. App. 1999); *Guider v. McIntosh*, 689 N.E.2d
24 231, 233 (Ill. App. 1997); *FCR Greensboro, Inc. v. C & M Investments of High Point,*
25 *Inc.* 459 S.E.2d 292, 295 (N.C. App 1995); *Rademaker v. Atlas Assur Co.* 120 N.E.2d
26 592, 596 (Ohio App. 1954). The Reporter concludes that the term “vacating without
27 directing a rehearing” should be included in sections 25(a) and (c). The terms “without
28 directing a rehearing” were added because an order of vacatur is a final one and subject to
29 appeal under section 28(a)(5) if the court does not order a rehearing under section 23(c).

1 2. The Drafting Committee decided to combine UAA section 15 on judgment rolls
2 and docketing into section 25(a) that the judgment may be “recorded, docketed, and
3 enforced as any other judgment in a civil action” both to delete what in some states would
4 be considered archaic procedure and to allow states more flexibility in recording
5 judgments according to the procedures in their states.

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

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

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

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

29 **SECTION 26. JURISDICTION.** An agreement to arbitrate providing for
30 arbitration in this State confers jurisdiction on the **court** to enforce the agreement and to
31 enter judgment on an award under this [Act].

32 **Reporter’s Notes:**

1. The term “court” is now in the definition section at section 1(4).

SECTION 27. VENUE. An initial motion pursuant to Section 5 must be filed in the **court** of the [county] in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the [county] in which it was held. Otherwise, the motion must be filed in the [county] in which the adverse party to the arbitration proceeding resides or has a place of business or, if the adverse party to the arbitration proceeding has no residence or place of business in this State, to the **court** of any [county] in this State. All subsequent motions must be filed in the **court** hearing the initial motion unless the **court** otherwise directs.

Reporter Notes:

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

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

The Drafting Committee is concerned with the issues raised by Commissioner Ossen and others about adhesion situations involving not only consumers but also others with unequal bargaining power, such as employees, franchisees, patients, etc. However, the Drafting Committee concluded that special provisions for consumers or other groups would run a substantial preemption risk because the RUAA would be treating agreements to arbitrate, for instance for those involving consumers, by standards different from those used for all other contracts. In these instance the Supreme Court consistently has invalidated such state laws under the federal preemption doctrine of the FAA. *See* Doctor’s Associates v. Cassarotto, 517 U.S. 681 (1996); Allied-Bruce Terminix

1 Companies v. Dobson, 513 U.S. 265 (1995); Erickson v. Aetna Health Plans of California,
2 Inc., 71 Cal.App.4th 646, 84 Cal.Rptr.2d 76 (Cal. App. 1999); Mueller v. Hopkins &
3 Howard, P.C., 5 S.W.3d 182, 187 (Mo.App. 1999). In the recent case of KKW
4 Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42 (1st
5 Cir. 1999), the federal court of appeals held that a state statute that could be construed to
6 override a provision in a franchise agreement which required arbitration and designated an
7 arbitration forum in a different state was preempted under the FAA because of the
8 principle of differential treatment.

9 Although the Drafting Committee has been frustrated in a number of areas that the
10 federal preemption doctrine limits its choices, the Committee decided that it did not want
11 to risk having the RUAA voided on preemption grounds by giving special recognition to
12 certain groups. Rather the Drafting Committee has attempted to address the adhesion
13 situation in section 4 regarding provisions of this Act which cannot be waived and in
14 section 6 on the validity of an agreement to arbitrate, especially Reporter Note 6. It
15 should be noted that courts, in determining the enforceability of arbitration agreements
16 under provisions such as section 6(a) of the RUAA, have voided as unconscionable
17 provisions in arbitration agreements that require persons to arbitrate in distant locations.
18 *See, e.g.,* Brower v. Gateway 2000, Inc., 246 A.D. 246, 676 N.Y.S.2d 569 (1998)
19 (holding unconscionable on ground of cost a clause which both required computer
20 purchasers to arbitrate disputes in Chicago, Illinois, and also required arbitration according
21 to rules of the International Chamber of Commerce which impose high administrative
22 costs); Patterson v. ITT Consumer Fin. Corp., 14 Cal.App. 4th 1659, 18 Cal. Rptr. 2d 563
23 (1999) (refusing to enforce arbitration clause imposed by financing corporation on state's
24 consumers that required arbitration to be heard in Minneapolis, Minnesota, and required
25 payment of substantial filing fees).

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

30 **SECTION 28. APPEALS.**

31 (a) An appeal may be taken from:

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

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

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

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

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

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

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

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

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

11 **SECTION 31. REPEAL.** The [Uniform Arbitration Act] is repealed.