

DRAFT  
FOR DISCUSSION ONLY

# **PROPOSED REVISIONS OF THE UNIFORM ARBITRATION ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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**FEBRUARY, 2000**

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*With Prefatory Note and Reporter's Notes*

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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, mooted 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 (5<sup>th</sup> 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 Comments 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, or commission that initiates, sponsors, or administers arbitration proceedings or is  
4                   involved in the appointment of arbitrators.

5                   (2) “**Arbitrator**” means an individual appointed or serving under this [Act]  
6                   to render an award in a controversy between persons who are parties to an agreement to  
7                   arbitrate.

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

9                   (4) “**Knowledge**” means actual knowledge.

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

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

16                  **Reporter’s Notes:**

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

15           2. Commissioner Hill of Maryland suggested that the term “arbitrator” be defined.  
16 It was not under the UAA. In Section 1(2), line 5, the Reporter suggests using the term  
17 “individual” rather than “person” because business entities or organizations do not  
18 function as “arbitrators.” Also the terms “appointed under this [Act]” was used rather  
19 than “by agreement of the parties” because sometimes the arbitrator under Section 11 may  
20 be appointed by the court rather than by the parties. *See* BLACK’S LAW DICTIONARY 105  
21 (1990); WEST’S LEGAL THESAURUS/Dictionary 60 (1985); *Hoteles Condado Beach v.*  
22 *Union de Tronquistas Local 901*, 763 F.2d 34 (1<sup>st</sup> Cir. 1985).

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

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

29           5. Section 1(6) is based on the definition of “record” in Sec. 5-102(a)(14) of the  
30 Uniform Commercial Code and in proposed revised Article 2 of the Uniform Commercial  
31 Code and is intended to carry forward established policy of the Conference to  
32 accommodate the use of electronic evidence in business and governmental transactions. It  
33 is not intended to mean that a document must be filed in a governmental office.

## 34           **SECTION 2. NOTICE; KNOWLEDGE.**

1 (a) Unless otherwise provided in this [Act] and subject to subsection (e), a  
2 **person** has notice of a fact if the **person**:

3 (1) has **knowledge** of it;  
4 (2) has received a notice of it; or  
5 (3) from all the facts and circumstances known to the **person** at the  
6 time in question, has reason to know that it exists.

7 (b) “Learn” and words of similar import refer to **knowledge** and not to  
8 notice.

9 (c) A **person** notifies or gives notice to another person by taking such steps  
10 as may be reasonably required to inform the other in ordinary course, whether or not the  
11 other **person** acquires **knowledge** of it.

12 (d) Subject to subsection (e), a **person** receives a notice when:  
13 (1) it comes to that **person’s** attention; or  
14 (2) it is duly delivered in a form reasonable under the circumstances  
15 at the place of business through which the agreement to arbitrate was made or at another  
16 location or system held out by that **person** as the place for receipt of such  
17 communications.

18 (e) Notice received or **knowledge** acquired by an organization is effective  
19 for a particular agreement to arbitrate or for an arbitration proceeding from the time it is  
20 brought to the attention of the individual making the agreement to arbitrate or conducting  
21 the arbitration proceeding and, in any event, from the time it would have been brought to

1 the individual's attention if the organization had exercised due diligence. An organization  
2 exercises due diligence if it maintains reasonable routines for communicating significant  
3 information to the **person** making the agreement to arbitrate or conducting the arbitration  
4 proceeding and there is reasonable compliance with the routines. Due diligence does not  
5 require an individual acting for the organization to communicate information unless the  
6 communication is part of the individual's regular duties or the individual has reason to  
7 know of the agreement to arbitrate or of the arbitration proceeding and that the agreement  
8 or the proceeding would be materially affected by the information.

9 **Reporter's Notes:**

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

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

23 "Notice" is also used in section 9 regarding initiation of an arbitration proceeding;  
24 section 9(b) requires that, unless the parties otherwise agree, notice must be given either  
25 by mail registered or certified, return receipt requested, or by personal service as  
26 authorized by law in a civil action. Because of the language in section 2 "unless otherwise  
27 provided by this [Act]," the manner of notice provided in section 9(b) takes precedence as  
28 to notice of initiation of an arbitration proceeding.

29 The term "learns" is used in section 12(b) regarding arbitrator disclosure.

1                   **SECTION 3. WHEN ACT APPLIES.**

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

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

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

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

7                   **Reporter's Notes:**

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

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

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

25                   **NONWAIVABLE PROVISIONS.**

26                   (a) Except as otherwise provided in subsection (b), the parties to an  
27 agreement to arbitrate may waive or vary the terms of the provisions of this [Act] in their

1 agreement to arbitrate to the extent permitted by law.

2 (b) The parties to an arbitration agreement or to the arbitration proceeding  
3 may not:

4 (1) waive or vary the requirements of this section or Section 3(b),  
5 5(a), 6(a), 7, 8, 18, 20(c) and (d), 22, 23, 24, 25(a) and (b), 26, 27, 29, 30, or 31;

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

8 (3) waive the right of a party to an agreement to arbitrate under  
9 Section 16 to be represented by an attorney at any proceeding or hearing under this [Act]  
10 before the initiation of the arbitration proceeding under Section 9.

11 **Reporter's Notes:**

12 1. Section 4 is similar to provisions in the Uniform Partnership Act (section 103)  
13 and in the proposed Revised Uniform Limited Partnership Act (section 101B). The intent  
14 of section 4 is to indicate that, although the RUAA is primarily a default statute and the  
15 parties' autonomy, as expressed in the arbitration agreement, should normally control the  
16 arbitration, there are provisions that parties cannot waive.

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

27 3. Section 4(b) is a listing of those provisions that the Drafting Committee  
28 determined cannot be waived. Special mention should be made of the following sections:

1 a. Section 9 allows the parties to shape what goes into a notice to commence an  
2 arbitration proceeding or the means of giving the notice but section 4(b) (2) preserves the  
3 idea that some reasonable notice must be given.

4 b. Some groups have argued that section 16 which gives the parties a right to be  
5 represented by an attorney should be waivable. In labor arbitration many parties agree to  
6 expedited provisions where, prior to any hearing on a particular matter, they knowingly  
7 waive the right to have attorneys present their cases (and also prohibit transcripts and  
8 briefs) in order to have a quick and informal arbitration mechanism. Section 4(b)(3)  
9 restates the notion in section 16 that before the arbitration proceeding a party cannot  
10 waive the right to be represented by an attorney.

11 d. Sections 7, 18, 20(c) and (d), 22, 23, 24, 25(a), 26, 27, and 29 all involve access  
12 to courts or the judicial process and should not be within the control of the parties.

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

16 2) Section 18, dealing with court enforcement of pre-award rulings, should be an  
17 inherent right; otherwise there is no mechanism to carry out a pre-award order.

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

23 4) The vacatur provisions of section 23 are not waivable.

24 5) Section 25(a) and (b) provides the mechanisms for a court to enter judgment  
25 and to award costs. Because these powers are within the province of a court they  
26 should not be waivable. Section 25(c) concerns remedies of attorney's fees and  
27 litigation expenses which, similar to other remedies in section 21, parties can  
28 determine by agreement. Section 26, recording and docketing a judgment; section  
29 27, jurisdiction; and section 29, appeals, are matters under the control of the  
30 court's processes.

31 e. Parties should not be able to vary the nonwaivability provision of this section,  
32 the uniformity of interpretation in section 30, or the effective date in section 31.



1                   **SECTION 5. JUDICIAL PROCEEDINGS BY MOTION.**

2                   (a) Except as otherwise provided by Section 29, an application for judicial  
3 relief under this [Act] must be made by motion to the **court** and will be heard in the  
4 manner and upon the notice provided by law or rule of **court** for the making and hearing  
5 of motions.

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

8                   **Reporter's Notes:**

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

13                   2. The UAA uses the term “application” rather than “motion” throughout the  
14 statute but the Style Committee suggested that this term was outmoded and should be  
15 replaced by the term “motion.” Legal actions under both the UAA and the FAA are by  
16 motion practice and not subject to the delays of a civil trial. This system has worked well  
17 and the Drafting Committee concluded to retain it.

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

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

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

1 (c) Whether a condition precedent to arbitrability has been fulfilled and  
2 whether a contract containing an agreement to arbitrate is enforceable must be decided by  
3 an **arbitrator**.

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

8 **Reporter's Notes:**

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

15 Section 6 (a) provides that any terms in the arbitration agreement must be in a  
16 "record." This too follows both the UAA and FAA requirements that arbitration  
17 agreements be in writing. However a subsequent, oral agreement about terms of an  
18 arbitration contract is valid. This position is in accordance with the unanimous holding of  
19 courts that a written contract can be modified by a subsequent, oral arrangement provided  
20 that the latter is supported by valid consideration. *Premier Technical Sales, Inc. v. Digital*  
21 *Equipment Corp.*, 11 F.Supp.2d 1156 (N.D. Cal. 1998); *Cambridgeport Savings Bank v.*  
22 *Boersner*, 413 Mass. 432, 597 N.E.2d 1017 (1992); *Pellegrene v. Luther*, 403 Pa. 212,  
23 169 A.2d 298 (1961); *Pacific Development, L.C. v. Orton*, 982 P.2d 94 (Utah App.  
24 1999).

25 2. Section 6(b)(1) and (2) reflect the decision of the Drafting Committee to include  
26 language in the RUAA that incorporates the holdings of the vast majority of state courts  
27 and the law that has developed under the FAA that, in the absence of an agreement to the  
28 contrary, issues of substantive arbitrability, i.e., whether a dispute is encompassed by an  
29 agreement to arbitrate, are for a court to decide and issues of procedural arbitrability, i.e.,  
30 whether prerequisites such as time limits, notice, laches, estoppel, and other conditions  
31 precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.

1 City of Cottonwood v. James L. Fann Contracting, Inc. 179 Ariz. 185, 877 P.2d 234, 292  
2 (1994); Thomas v. Farmers Ins. Exchange, 857 P.2d 532, 534 (Colo.Ct.App. 1993);  
3 Executive Life Ins. Co. v. John Hammer & Assoc., Inc., 569 So.2d 855, 857  
4 (Fla.Dist.Ct.App. 1990); Amalgamated Transit Union Local 900 v. Suburban Bus Div.,  
5 262 Ill.App.3d 334, 199 Ill.Dec. 630, 635, 634 N.E.2d 469, 474 (1994); Des Moines  
6 Asphalt & Paving Co. v. Colcon Industries Corp., 500 N.W.2d 70, 72 (Iowa 1993); City  
7 of Lenexa v. C.L. Fairley Const. Co., 15 Kan.App.2d 207, 805 P.2d 507, 510 (1991); The  
8 Beyt, Rish, Robbins Group v. Appalachian Regional Healthcare, Inc. 854 S.W.2d 784,  
9 786 (Ky.Ct.App. 1993); City of Dearborn v. Freeman-Darling, Inc., 119 Mich.App. 439,  
10 326 N.W.2D 831 (1982); City of Morris v. Duininck Bros. Inc., 531 N.W.2D 208, 210  
11 (Minn.Ct.App. 1995); Gaines v. Financial Planning Consultants, Inc. 857 S.W.2d 430, 433  
12 (Mo.Ct.App. 1993); Exber v. Sletten, 92 Nev.. 721, 558 P.2d 517 (1976); State v.  
13 Stremick Const. Co., 370 N.W.2D 730, 735 (N.D. 1985); Messa v. State Farm Ins. Co.,  
14 433 Pa.Super. 594, 641 A.2d 1167, 1170 (1994); Valero Energy Corp. v. Teco Pipeline  
15 Co., 2 S.W.3d 576 (Tex. App. 1999); City of Lubbock v. Hancock, 940 S.W.2d 123 (Tex.  
16 App. 1996), *but see* Smith Barney, Harris Upham & Co. v. Luckie, 58 N.Y.2d 193, 647  
17 N.E.2d 1308, 623 N.Y.S.2d 800 (1995) (a court rather than an arbitrator under New  
18 York arbitration law should decide whether a statute of limitations time bars an  
19 arbitration).

20 3. The language in section 6(b)(2) “whether a contract containing the arbitration  
21 agreement is enforceable” is intended to follow the “separability” doctrine outlined in  
22 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d  
23 1270 (1967). There the plaintiff filed a diversity suit in federal court to rescind an  
24 agreement for fraud in the inducement and to enjoin arbitration. The alleged fraud was in  
25 inducing assent to the underlying agreement and not to the arbitration clause itself. The  
26 Supreme Court, applying the FAA to the case, determined that the arbitration clause is  
27 separable from the contract in which it is made. So long as no party claimed that only the  
28 arbitration clause was induced by fraud, a broad arbitration clause encompasses arbitration  
29 of a claim that the underlying contract was induced by fraud. Thus, if a disputed issue is  
30 within the scope of the arbitration clause, challenges to the enforceability of the underlying  
31 contract on grounds such as fraud, illegality, mutual mistake, duress, unconscionability,  
32 ultra vires and the like are to be decided by the arbitrator and not the court. *See* II Ian  
33 Macneil, Richard Speidel, and Thomas Stipanowich, FEDERAL ARBITRATION LAW §§15.2-  
34 15.3 (1995) [hereinafter “MACNEIL TREATISE”]. A majority of states recognize some  
35 form of the separability doctrine under their state arbitration laws.

36 4. Waiver is one area where courts, rather than arbitrators, often make the decision  
37 as to enforceability of an arbitration clause. However, because of the public policy  
38 favoring arbitration, a court will only find a waiver of a right to arbitrate where a party  
39 claiming waiver meets the burden of proving that the waiver has caused prejudice. *Sedillo*  
40 *v. Campbell*, 5 S.W.2d 824 (Tex. App. 1999). For instance, where a plaintiff brings an  
41 action against a defendant in court, engages in extensive discovery and then attempts to

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

9 5. Section 6(b)(3) follows the practice of the American Arbitration Association  
10 and most other arbitration institutions that if arbitrators are appointed and either party  
11 challenges the substantive arbitrability of a dispute in a court proceeding, the arbitrators in  
12 their discretion may continue the arbitration hearings unless a court issues an order to stay  
13 the arbitration or makes a final determination that the matter is not arbitrable.

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

17  
18 “Unequal bargaining power often occurs in arbitration provisions involving  
19 employers and employees, sellers and consumers, health maintenance organizations  
20 and patients, franchisors and franchisees, and others.

21  
22 “Despite some recent developments to the contrary, courts do not often  
23 find contracts unenforceable for unconscionability. To determine whether to void  
24 a contract on this ground, courts examine a number of factors. These factors  
25 include: unequal bargaining power, whether the weaker party may opt out of  
26 arbitration, the arbitration clause’s clarity and conspicuousness, whether an unfair  
27 advantage is obtained, whether the arbitration clause is negotiable, whether the  
28 arbitration provision is boilerplate, whether the aggrieved party had a meaningful  
29 choice or was compelled to accept, whether the arbitration agreement is within the  
30 reasonable expectations of the weaker party, and whether the stronger party used  
31 deceptive tactics. *See, e.g., We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838 (7<sup>th</sup>  
32 Cir. 1999); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173 (3d Cir. 1999);  
33 *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013  
34 (1992); *Chor v. Piper, Jaffray & Hopwood, Inc.*, 261 Mont. 143, 862 P.2d 26  
35 (1993); *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996); *Sosa v. Paulos*, 924  
36 P.2d 357 (Utah 1996); *Powers v. Dickson, Carlson & Campillo*, 54 Cal. App. 4th  
37 1102, 63 Cal. Rptr.2d 261 (1997); *Beldon Roofing & Remodeling Co. v. Tanner*,  
38 1997 W.L. 280482 (Tex.Ct.App.).

39  
40 “Despite these many factors, courts have been reluctant to find arbitration  
41 agreements unconscionable. II MACNEIL TREATISE § 19.3; David S. Schwartz,

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

1 employer only and denied employees rights to exemplary damages, equitable relief,  
2 attorney fees, costs, and a shorter statute of limitations unconscionable); *Rembert*  
3 *v. Ryan's Family Steak House*, 235 Mich.App. 118, 596 N.W.2d 208 (1999)  
4 (predispute agreement to arbitrate statutory employment discrimination claims was  
5 valid only as long as employee did not waive any rights or remedies under the  
6 statute and arbitral process was fair); *Alamo Rent A Car, Inc. v. Galarza*, 306 N.J.  
7 Super. 384, 703 A.2d 961 (1997) (arbitration clause that does not clearly and  
8 unmistakably include claims of employment discrimination fails to waive  
9 employee's statutory rights and remedies); *Arnold v. United Companies Lending*  
10 *Corp.*, 511 S.E.2d 854 (W.Va. 1998) (arbitration clause in consumer loan  
11 transaction that contained waiver of the consumer's rights to access to the courts,  
12 while reserving practically all of the lender's right to a judicial forum found  
13 unconscionable).

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

38 "The Drafting Committee determined to leave the issue of adhesion  
39 contracts and unconscionability to developing law (1) because the issue of  
40 unconscionability reflects so much the substantive law of the states and not just  
41 arbitration, (2) because the case law, statutes, and arbitration standards are rapidly

1 changing, and (3) because treating arbitration clauses differently than other  
2 contract provisions would raise significant preemption issues under the Federal  
3 Arbitration Act. However, it should be pointed out that a primary purpose of  
4 Section 4 which provides that some sections of the RUAA are not waivable is to  
5 address the problem of contracts of adhesion in the statute while taking into  
6 account the limitations caused by federal preemption.

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

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

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

20 (b) On motion of a person alleging that an arbitration proceeding has been  
21 commenced or threatened but that there is no agreement to arbitrate, the court shall  
22 proceed summarily to decide the issue. If the court finds that there is an enforceable  
23 agreement to arbitrate, it shall order the parties to arbitrate.

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.

26 (d) If a proceeding involving a claim referable to arbitration under an

1       alleged agreement to arbitrate is pending in a **court**, a motion under this section must be  
2       filed in that **court**. Otherwise, subject to Section 28, a motion under this section may be  
3       filed in any **court**.

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

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

#### 10       **Reporter's Notes:**

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

### 17       **SECTION 8. PROVISIONAL REMEDIES.**

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



1 the subject of a civil action.

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

#### 10 **Reporter's Notes:**

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

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

18 In *Salvucci v. Sheehan*, 349 Mass. 659, 212 N.E.2d 243 (1965), the court allowed  
19 the issuance of a temporary restraining order to prevent the defendant from conveying or  
20 encumbering property that was the subject of a pending arbitration. The Massachusetts  
21 Supreme Court noted the 1954 language and concluded that it was not adopted by the  
22 National Conference because the section would be rarely needed and raised concerns  
23 about the possibility of unwarranted labor injunctions. The court concluded that the  
24 drafters of the UAA assumed that courts' jurisdiction for granting such provisional  
25 remedies was not inconsistent with the purposes and terms of the act. Many states have  
26 allowed courts to grant provisional relief for disputes that will ultimately be resolved by  
27 arbitration. *BancAmerica Commercial Corp. v. Brown*, 806 P.2d 897 (Ariz. Ct. App.  
28 1991) (writ of attachment in order to secure a settlement agreement between debtor and  
29 creditor); *Lambert v. Superior Court*, 228 Cal. App.3d 383, 279 Cal. Rptr. 32 (1991)

(mechanic's lien); *Ross v. Blanchard*, 251 Cal. App.2d 739, 59 Cal. Rptr. 783 (Cal. Ct. App. 1967) (discharge of attachment); *Hughley v. Rocky Mountain Health Maintenance Organization, Inc.*, 927 P.2d 1325 (Colo. 1996) (preliminary injunction to continue status quo that health maintenance organization must provide chemotherapy treatment until arbitration decision); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court*, 672 P.2d 1015 (Colo. 1983) (preliminary injunctive relief to preserve status quo); *Langston v. National Media Corp.*, 420 Pa.Super. 611, 617 A.2d 354 (1992) (preliminary injunction requiring party to place money in an escrow account); CAL. CIV. PROC. CODE § 1281.8; N.J. STAT. ANN. § 2A:23A-6(b); N.Y. C.P.L.R. § 7502(c).

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

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

2. The *Hovey* case underscores the difficult conflict raised by interim judicial remedies: they can preempt the arbitrator's authority to decide a case and cause delay, cost, complexity, and formality through intervening litigation process, but without such protection an arbitrator's award may be worthless. *See* II MACNEIL TREATISE §25.1. Such relief generally takes the form of either an injunctive order, e.g., requiring that a discontinued franchise or distributorship remain in effect until an arbitration award, *Rosolino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984); *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468 (2d Cir. 1980); or that a former employee not solicit customers pending arbitration, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211 (7th Cir. 1993); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton*, 844 F.2d 726 (10th Cir. 1988) or that a party be required to post some form of security by attachment, lien, or bond; *The Anaconda v. American Sugar Ref. Co.*, 322 U.S. 42, 64 S.Ct. 863 (1944) (attachment); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990) (injunction bond); *see* II MACNEIL TREATISE §25.4.3.; to insure payment of an arbitral award. In a judicial proceeding for

1 preliminary relief, the court does not have the benefit of the arbitrator's determination of  
2 disputed issues or interpretation of the contract. Another problem for a court is that in  
3 determining the propriety of an injunction, order, or writ for attachment or other security,  
4 the court must make an assessment of hardships upon the parties and the probability of  
5 success on the merits. Such determinations fly in the face of the underlying philosophy of  
6 arbitration that the parties have chosen arbitrators to decide the merits of their disputes.

7           3. The approach in RUAA section 8 that limits a court granting preliminary relief  
8 to any time "[b]efore an arbitrator is appointed in accordance with section 8 or are  
9 authorized or able to act . . . upon motion of a party" and provides that after the  
10 appointment, the arbitrators initially must decide the propriety of a provisional remedy,  
11 avoids the delay of intervening court proceedings, does not cause courts to become  
12 involved in the merits of the dispute, defers to parties' choice of arbitration to resolve their  
13 disputes, and allows courts that may have to review an arbitrator's preliminary order the  
14 benefit of the arbitrator's judgment on that matter. *See* II MACNEIL TREATISE §§ 25.1.2,  
15 25.3, 36.1. This language incorporates the notions of the *Salvano* case which upheld the  
16 district court's granting of a temporary restraining order to prevent defendant from  
17 soliciting clients or disclosing client information but "only until the arbitration panel is able  
18 to address whether the TRO should remain in effect. Once assembled, an arbitration panel  
19 can enter whatever temporary injunctive relief it deems necessary to maintain the status  
20 quo." 999 F.2d at 215. The preliminary remedy of the court in *Salvano* was necessary to  
21 prevent actions that could undermine an arbitration award but was accomplished in a  
22 fashion that protected the integrity of the arbitration process. *See also* Ortho  
23 Pharmaceutical Corp. v. Amgen, Inc., 882 F.2d 806, 814, appeal after remand, 887 F.2d  
24 460 (3d Cir. 1989) (court order to protect the status quo is that necessary "to protect the  
25 integrity of the applicable dispute resolution process"); *Hughley v. Rocky Mountain*  
26 *Health Maintenance Org., Inc.*, 927 P.2d 1325 (Colo. 1996) (court grants preliminary  
27 injunction to continue status quo that health maintenance organization must provide  
28 chemotherapy treatment when denial of the relief would make the arbitration process a  
29 futile endeavor); *King County v. Boeing Co.*, 18 Wash. App. 595, 570 P.2d 712 (1977)  
30 (court denies request for declaratory judgment because the issue was for determination by  
31 the arbitrators rather than the court); N.J. STAT. ANN. § 2A:23A-6(b).

32           After the arbitrator is appointed and authorized and able to act, the only instance in  
33 which a party may seek relief from a court rather than the arbitrator is when the matter is  
34 an urgent one and the arbitrator could not provide an effective provisional remedy. The  
35 notion of "urgency" is from the 1996 English Arbitration Act § 44(1), (3), (4), (6). These  
36 circumstances of a party seeking provisional relief from a court rather than an arbitrator  
37 after the appointment process of section 8 should be limited for the policy reasons  
38 previously discussed.

39           4. The case law, commentators, the rules of arbitration institutions and some state  
40 statutes are very clear that arbitrators have broad authority to order provisional remedies

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

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

34 6. So long as a party is pursuing the arbitration process while requesting the court  
35 to provide provisional relief under RUAA section 8(a), such request should not act as a  
36 waiver of that party’s right to arbitrate a matter. *See* CAL. CIV. PROC. CODE §1281.8(d).

## 37 SECTION 9. INITIATION OF ARBITRATION.

38 (a) A **person** initiates an arbitration proceeding by serving a notice in a

1       **record** upon the other parties to the agreement to arbitrate in the manner in which the  
2       parties agree or, in the absence of agreement, by mail certified or registered, return receipt  
3       requested, or by personal service as authorized in a civil action. The notice must describe  
4       the nature of the controversy, any amount in controversy, and the remedy sought.

5               (b) If a **person** does not comply with subsection (a), the **court** may refuse  
6       to confirm the award under Section 22 or may vacate the award under Section 23. Unless  
7       the other **person** interposes an objection no later than the commencement of the hearing,  
8       any objection as to lack of or insufficiency of notice under this section is waived.

9  
10       **Reporter's Notes:**

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

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

23               3. The introductory language to section 9(a) is the means of informing other  
24       parties of the arbitration proceeding. Many arbitration institutions allow parties to initiate  
25       arbitration through the use of regular mail and do not require "mail registered or certified,  
26       return receipt requested." *See, e.g.,* American Arb. Ass'n, National Rules for the  
27       Resolution of Employment Disputes, R. 4(b)(i)(2); Center for Public Resources, Rules for  
28       Non-Administered Arbitration of Business Disputes, R. 2.1; National Arb. Forum Code of  
29       Pro. R. 6(B); National Ass'n of Securities Dealers Code of Arb. Procedure, Part I, sec.  
30       25(a); New York Stock Exchange Arb. Rules, R. 612(b). This more informal means of  
31       giving notice without evidence of receipt would be allowed under section 9(b) because  
32       section 4(b)(2) allows the parties to agree to the means of giving notice so long as there

1 are no unreasonable restrictions.

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

6 4. Section 9(a) explicitly requires that notice of initiation of an arbitration  
7 proceeding be given to all parties to the arbitration agreement and not just to the party  
8 against whom a person files an arbitration claim. For instance, in a construction contract  
9 with a single arbitration agreement between multiple contractors and subcontractors, if  
10 one contractor commenced an arbitration proceeding against one subcontractor, Section  
11 9(a) requires that the contractor give notice to all persons signatory to the arbitration  
12 agreement. This is appropriate because a different contractor or subcontractor may have  
13 an interest in the arbitration proceeding so as to initiate its own arbitration proceeding or  
14 to request consolidation under Section 10 or to take other action.

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

25 6. Section 9(b) indicates the sanction if a party who commences the arbitration  
26 proceeding fails to follow the notice provisions in Section 9(a). The requirement that the  
27 other party make a timely objection to the lack of or insufficiency of notice of initiation of  
28 the arbitration is similar to that found in section 15(c) regarding notice of the arbitration  
29 hearing.

## 30 **SECTION 10. CONSOLIDATION OF SEPARATE ARBITRATION**

### 31 **PROCEEDINGS.**

32 (a) Except as provided in subsection (b), upon motion of a party to an

1 agreement to arbitrate or to an arbitration proceeding, the **court** may order consolidation  
2 of separate arbitration proceedings if:

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

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

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

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

13 (b) The **court** may not order consolidation of separate arbitration  
14 proceedings if it would be contrary to an agreement to arbitrate that expressly prohibits  
15 consolidation.

16 (c) The **court** may order the consolidation of separate arbitration  
17 proceedings as to certain claims and allow other claims to be resolved in separate  
18 arbitration proceedings.

19 **Reporter's Notes:**

20 1. Multiparty disputes have long been a source of controversy in the enforcement  
21 of agreements to arbitrate. When conflict erupts in complex transactions involving  
22 multiple contracts, it is rare for all parties to be signatories to a single arbitration  
23 agreement. In such cases, some parties may be bound to arbitrate while others are not; in

1 other situations, there may be multiple arbitration agreements. Such realities raise the  
2 possibility that common issues of law or fact will be resolved in multiple fora, enhancing  
3 the overall expense of conflict resolution and leading to potentially inconsistent results.  
4 *See* III MACNEIL TREATISE § 33.3.2. Such scenarios are particularly common in  
5 construction, insurance, maritime and sales transactions, but are not limited to those  
6 settings. *See* Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search*  
7 *for Workable Solutions*, 72 IOWA L. REV. 473, 481-82 (1987).

8 Most state arbitration statutes, the FAA, and most arbitration agreements do not  
9 specifically address consolidated arbitration proceedings. In the common case where the  
10 parties have failed to address the issue in their arbitration agreements, some courts have  
11 ordered consolidated hearings while others have denied consolidation. In the interest of  
12 adjudicative efficiency and the avoidance of potentially conflicting results, courts in New  
13 York and a number of other states concluded that they have the power to direct  
14 consolidated arbitration proceedings involving common legal or factual issues. *See*  
15 *County of Sullivan v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 366 N.E.2d 72, 397  
16 N.Y.S.2d 371 (1977) ; *see also* *Litton Bionetics, Inc. v. Glen Constr. Co.*, 292 Md. 34,  
17 437 A.2d 208 (1981); *Grover-Diamond Assoc. v. Am. Arbitration Ass'n*, 297 Minn. 324,  
18 211 N.W.2d 787 (1973); *Polshek v. Bergen Cty. Iron Works*, 142 N.J. Super. 516, 362  
19 A.2d 63 (Ch. Div. 1976); *Exber v. Sletten Constr. Co.*, 558 P.2d 517 (Nev. 1976); *Plaza*  
20 *Dev. Serv. v. Joe Harden Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (S.C. Ct. App.  
21 1988).

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

28 The split of authority regarding the power of courts to consolidate arbitration  
29 proceedings in the absence of contractual consolidation provisions extends to the federal  
30 sphere. In the absence of clear direction in the FAA, courts have reached conflicting  
31 holdings. The current trend under the FAA disfavors court-ordered consolidation absent  
32 express agreement. *See generally* III MACNEIL TREATISE §33.3; *Glencore, Ltd. v.*  
33 *Schnitzer Steel Products Co.*, 189 F.3d 264 (2<sup>nd</sup> Cir. 1999). However, a recent California  
34 appellate decision held that state law regarding consolidated arbitration was not  
35 preempted by federal arbitration law under the FAA. *Blue Cross of Calif. v. Superior Ct.*,  
36 67 Cal. App. 4<sup>th</sup> 42, 78 Cal. Rptr.2d 779 (1998).

37 2. A growing number of jurisdictions have enacted statutes empowering courts to  
38 address multiparty conflict through consolidation of proceedings or joinder of parties even  
39 in the absence of specific contractual provisions authorizing such procedures. *See* CAL.



1 CIV. PROC. CODE §1281.3 (West 1997) (consolidation); GA. CODE ANN. § 9-9-6 (1996)  
2 (consolidation); MASS. GEN. LAWS ANN. ch. 251, § 2A (West 1997) (consolidation); N.J.  
3 STAT. ANN. § 2A-23A-3 (West 1997) (consolidation); S.C. CODE ANN. § 15-48-60 (1996)  
4 (joinder); UTAH CODE ANN. § 78-31a-9 (1996) (joinder).

5 Also some recent empirical studies support court-ordered consolidation. In a  
6 survey of arbitrators in construction cases, 83% favored consolidated arbitrations  
7 involving all affected parties. *See* Dean B. Thomson, *Arbitration Theory and Practice: A*  
8 *Survey of Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 165-67 (1994). A similar  
9 survey of members of the ABA Forum on the Construction Industry found that 83% of  
10 nearly 1,000 responding practitioners also favored consolidation of arbitrations involving  
11 multiparty disputes. *See* Dean B. Thomson, *The Forum's Survey on the Current and*  
12 *Proposed AIA A201 Dispute Resolution Provisions*, 16 CONSTR. LAW. 3, 5 (No. 3, 1996).  
13

14 3. A provision in the RUAA specifically empowering courts to order  
15 consolidation in appropriate cases makes sense for several reasons. As in the judicial  
16 forum, consolidation effectuates efficiency in conflict resolution and avoidance of  
17 conflicting results. By agreeing to include an arbitration clause, parties have indicated that  
18 they wish their disputes to be resolved in such a manner. In many cases, moreover, a  
19 court may be the only practical forum within which to effect consolidation. *See*  
20 *Schenectady v. Schenectady Patrolmen's Benev. Ass'n*, 138 A. D.2d 882, 883, 526  
21 N.Y.S.2d 259, 260 (1988). Furthermore, it is likely that in many cases one or more  
22 parties, often non-drafting parties, will not have considered the impact of the arbitration  
23 clause on multiparty disputes. By establishing a default provision which permits  
24 consolidation (subject to various limitations) in the absence of a specific contractual  
25 provision, section 10 encourages drafters to address the issue expressly and enhances the  
26 possibility that all parties will be on notice regarding the issue.

27 Section 10 is an adaptation of consolidation provisions in the California and  
28 Georgia statutes. CAL. CIV. PROC. CODE §1281.3 (West 1997); GA. CODE ANN. § 9-9-6  
29 (1996). It gives courts discretion to consolidate separate arbitration proceedings in the  
30 presence of multiparty disputes involving common issues of fact or law.

31 Like other sections of the RUAA, however, the provision also embodies the  
32 fundamental principle of judicial respect for the preservation and enforcement of the terms  
33 of agreements to arbitrate. Thus, Section 10(b) ("would be contrary to an agreement to  
34 arbitrate that expressly prohibits consolidation") recognizes that consolidation should not  
35 be ordered in contravention of provisions of arbitration agreements prohibiting  
36 consolidation of claims.

37 At the same time, however, courts should closely scrutinize anti-consolidation  
38 provisions in adhesion contracts. There is evidence that a growing number of arbitration

1 provisions in standardized consumer services agreements purport to prohibit class actions  
2 or consolidation. *See* Christopher R. Drahozal, *Unfair Arbitration Clauses* (1999)  
3 (unpublished manuscript), at 41. In some cases, such provisions may effectively  
4 undermine consumers' rights by making the relative cost of arbitrating or of securing  
5 effective legal representation cost-prohibitive. In such cases, it may be appropriate for a  
6 court to refuse to enforce the term prohibiting class actions or consolidation under Section  
7 6 of this Act.

8 Even in the absence of express prohibitions on consolidation, the legitimate  
9 expectations of contracting parties may limit the ability of courts to consolidate arbitration  
10 proceedings. Thus, a number of decisions have recognized the right of parties opposing  
11 consolidation to prove that consolidation would undermine their stated expectations,  
12 especially regarding arbitrator selection procedures. *See* Continental Energy Assoc. v.  
13 Asea Brown Boveri, Inc., 192 A. D.2d 467, 596 N.Y.S.2d 416 (1993) (denial of  
14 consolidation not an abuse of discretion where parties' two arbitration agreements differed  
15 substantially with respect to procedures for selecting arbitrators and manner in which  
16 award was to be rendered); *Stewart Tenants Corp. v. Diesel Constr. Co.*, 16 A. D.2d 895,  
17 229 N.Y.S.2d 204 (1962) (refusing to consolidate arbitrations where one agreement  
18 required AAA tribunal, other called for arbitrator to be appointee of president of real  
19 estate board). Therefore, section 10(a)(4) requires courts to consider proof that the  
20 potential prejudice resulting from a failure to consolidate is not outweighed by prejudice  
21 to the rights of parties to the arbitration proceeding opposing consolidation. Such rights  
22 would normally be deemed to include arbitrator selection procedures, standards for the  
23 admission of evidence and rendition of the award, and other express terms of the  
24 arbitration agreement. In some circumstances, however, the imposition on contractual  
25 expectations will be slight, and no impediment to consolidation: for example, if one  
26 agreement provides for arbitration in St. Paul and the other in adjoining Minneapolis,  
27 consolidated hearings in either city should not normally be deemed to violate a substantial  
28 right of a party.

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

34 As the cases reveal, the mere desire to have one's dispute heard in a separate  
35 proceeding is not in and of itself the kind of proof sufficient to prevent consolidation.  
36 *Vigo S.S. Corp. v. Marship Corp. of Monrovia*, 26 N.Y.2d 157, 162, 257 N.E.2d 624,  
37 626, 309 N.Y.S.2d 165, 168 (1970), remittitur den. 27 N.Y.2d 535, 261 N.E.2d 112, 312  
38 N.Y.S.2d 1003, cert. den. 400 U.S. 819, 27 L.Ed. 46, 91 S.Ct. 36 (197 ); *see also* III  
39 MACNEIL TREATISE § 33.3.2 (citing cases in which consolidation was ordered despite  
40 allegations that arbitrators might be confused because of the increased complexity of

1 consolidated arbitration or that consolidation would impose additional economic burdens  
2 on the party opposing it).

3 4. A party cannot appeal a lower court decision of an order granting or denying  
4 consolidation under Section 29, Appeals, because the policy behind sections 29(a) (1) and  
5 (2) is not to allow appeals of orders that result in delaying arbitration. Whether  
6 consolidation is ordered or denied, the arbitrations likely will continue--either separately  
7 or in a consolidated proceeding--and to allow appeals would delay the arbitration process.

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

16 **SECTION 12. DISCLOSURE BY ARBITRATOR.**

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

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

1 proceeding; and

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

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

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

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

14 (e) An **arbitrator** appointed as a neutral who did not disclose a known,  
15 direct, and material interest in the outcome of the arbitration proceeding or a known,  
16 existing, and substantial relationship with a party is presumed to have acted with evident  
17 partiality under Section 23(a)(2).

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

1           **Reporter's Notes:**

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

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

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

38           The split of opinion in *Commonwealth Coatings* is reflected in many subsequent  
39 decisions addressing motions to vacate awards on grounds of "evident partiality" under

1 federal and state law. A number of decisions have applied tests akin to Justice Black's  
2 "appearance of bias" test. *See, e.g., S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1263  
3 (2d Cir. 1973) (applying FAA; failure to disclose relationships that "might create an  
4 impression of possible bias"). Some courts have introduced an objective element into the  
5 standard--that is, viewing the facts from the standpoint of a reasonable person apprised of  
6 all the circumstances. *See, e.g., Ceriale v. AMCO Ins. Co.*, 48 Cal. App.4th 500, 55 Cal.  
7 Rptr. 2d 685 (1996) (question is whether record reveals facts which might create an  
8 impression of possible bias in eyes of hypothetical, reasonable person).

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

18 2. In view of the critical importance of arbitrator disclosure to party choice and  
19 perceptions of fairness and the need for more consistent standards to ensure expectations  
20 in this vital area, the Drafting Committee determined that the RUAA should set forth  
21 affirmative requirements to assure that parties should have access to all information that  
22 might reasonably affect the potential arbitrator's neutrality. A primary model for the  
23 disclosure standard in section 9 is the AAA/ABA Code of Ethics for Arbitrators in  
24 Commercial Disputes (1977), which embodies the principle that "arbitrators should  
25 disclose the existence of any interests or relationships which are likely to affect their  
26 impartiality or which might reasonably create the appearance of partiality or bias." Canon  
27 II, p.6. These disclosure provisions are often cited by courts addressing disclosure issues,  
28 *e.g., William C. Vick Constr. Co. v. North Carolina Farm Bureau Fed.*, 123 N.C. App. 97,  
29 100-01, 472 S.E.2d 346, 348 (1996), and have been formally adopted by at least one state  
30 court. *See Safeco Ins. Co. of Am. v. Stariha*, 346 N.W.2d 663, 666 (Minn. Ct. App.  
31 1984); for a more stringent arbitration disclosure statute, *see CAL. CIV. PROC. CODE* §§  
32 1281.6, 1281.9, 1281.95, 1297.121, 1297.122 (West. Supp. 1998). Substantially similar  
33 language is contained in disclosure requirements of widely used securities arbitration  
34 rules. *See, e.g., NASD Code of Arbitration Procedure* § 10312 (1996). Many arbitrators  
35 are already familiar with these standards, which provide for disclosure of pertinent  
36 interests in the outcome of an arbitration and of relationships with parties, representatives,  
37 witnesses, and other arbitrators.

38 3. The fundamental standard of section 12(a) is an objective one: disclosure is  
39 required of facts which a reasonable person would consider likely to affect the arbitrator's  
40 impartiality in the arbitration proceeding. *See ANR Coal Co. v. Cogentrix of North*

1 Carolina, Inc., 173 F.3d 493 (4<sup>th</sup> Cir. 1999) (relationship between arbitrator and a party is  
2 too insubstantial for “reasonable person” to conclude that there was improper partiality so  
3 as to vacate award under FAA). The Drafting Committee adopted the “reasonable  
4 person” test with the intent of making clear that the subjective views of the arbitrator or  
5 the parties are not controlling. However, parties may agree to higher or lower standards  
6 for disclosure and also establish mechanisms for disqualification. For instance, in labor  
7 arbitration under a collective-bargaining agreement because the parties interact often with  
8 each other and arbitrators and have personal relationships with each other and arbitrators,  
9 the Code of Professional Responsibility of Arbitrators of Labor-Management Disputes  
10 provides: “There should be no attempt to be secretive about such friendships or  
11 acquaintances but disclosure is not necessary unless some feature of a particular  
12 relationship might reasonably appear to impair impartiality.” Section 2.B.3.a. Thus a  
13 reasonable person in the field of labor arbitration may not expect personal, professional, or  
14 other past relationships to be disclosed. In other fields where parties do not have ongoing  
15 relationships, an arbitrator may be required to disclose such relationships.

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

23 Section 12(b) is intended to make the disclosure requirement a continuing one and  
24 applies to conflicts which arise or become evident during the course of arbitration  
25 proceedings. Sections 12(a) and (b) also provide to whom the arbitrator must make  
26 disclosure. Unless the parties agree to a different method, the arbitrator must disclose  
27 facts required under section 12(a) and (b) to the parties to the arbitration agreement and  
28 to the arbitration proceeding and to any other arbitrators. If the parties are represented by  
29 counsel or other authorized persons, the arbitrators can make such representations to  
30 those individuals.

31 4. Sections 12(c), (d), and (e) seek to accommodate the tensions between concepts  
32 of partiality and the need for experienced decision makers, as well as the policy of relative  
33 finality in arbitral awards. Therefore, in section 12(e) a neutral arbitrator's failure to  
34 disclose “a known, direct, and material interest” in the outcome or “a known, existing, and  
35 substantial relationship with a party,” attorney or representative, witness, or other  
36 arbitrator, i.e., a failure to make a “significant disclosure,” gives rise to a presumption of  
37 “evident partiality” under section 23(a)(2). *Cf.* MINN. STAT. ANN. § 572.10(2) (1998)  
38 (failure to disclose conflict of interest or material relationship is grounds for vacatur of  
39 award). In such cases, it is then the burden of the party defending the award to rebut the  
40 presumption by showing that the award was not tainted by the non-disclosure or there in

fact was no prejudice. *See, e.g.,* Drinane v. State Farm Mut. Auto Ins. Co., 153 Ill.2d 207, 214-16, 606 N.E.2d 1181, 1184-85, 180 Ill. Dec. 104, 107-08 (1992). Section 12(d) involves other instances of an arbitrator's failure to disclose and section 12(c) covers instances where the arbitrator makes a required disclosure, a party objects to that arbitrator's service, but the arbitrator overrules the objection and continues to serve. Challenges based upon a lack of impartiality, including disclosed or undisclosed facts, interests, or relationships are subject to the developing case law under section 23(a)(2).

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

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

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

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

**Reporter's Notes:**



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

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

6                   (a) An **arbitrator**, when acting in that capacity, is immune from civil action  
7 to the same extent as a judge of a **court** of this State acting in a judicial capacity.

8                   (b) An **arbitration organization** that administers an arbitration proceeding  
9 is immune from a civil action to the same extent as an **arbitrator**.

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

11                  (d) An **arbitrator** or representative of an **arbitration organization** who  
12 asserts immunity under this section as to any claim is not competent to testify in a civil  
13 action as to any statement, conduct, decision, or ruling occurring during an arbitration  
14 proceeding relating to that claim under this [Act]. However, this subsection does not  
15 apply if a party to the arbitration proceeding files a motion to vacate an award under  
16 Section 23(a)(1) or (2) and establishes prima facie that the grounds for vacation exist.

17                  (e) If a **person** commences a civil action against an **arbitrator** or an  
18 **arbitration organization** arising from the services of the **arbitrator** or organization, or if  
19 a **person** seeks to compel an **arbitrator** or a representative of an **arbitration**  
20 **organization** to testify in violation of  
21 subsection (d), and the **court** decides that the **arbitrator** or organization is immune from  
22 civil action or that the **arbitrator** or representative of the organization is incompetent to

1 testify, the **court** shall award to the **arbitrator** or organization reasonable attorney's fees,  
2 costs, and expenses of defending the civil action, including reasonable attorney's fees,  
3 costs, and expenses on appeal.

4 **Reporter's Notes:**

5 1. Section 14(a) is based on the language of former section 1280.1 of the  
6 California Code of Civil Procedure establishing immunity for arbitrators. Section 1280.1  
7 was enacted with an expiration date and was not renewed. See also CAL. CIV. PROC.  
8 CODE § 1297.119 which gives the same protection to arbitrators in international  
9 arbitrations and unlike § 1280.1 had no expiration date and is still in effect. Three other  
10 states presently provide some form of arbitral immunity in their arbitration statutes. FLA.  
11 STAT. ANN. § 44.107 (West 1995); N.C. GEN. STAT. § 7A-37.1 (1995); UTAH CODE ANN.  
12 § 78-31b-4 (1994).

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

24 In addition to the grant of immunity from civil liability, arbitrators are also  
25 generally accorded immunity from process when subpoenaed or summoned to testify in a  
26 judicial proceeding in a case arising from their service as arbitrator. See, e.g., *Andros*  
27 *Compania Maritima v. Marc Rich*, 579 F.2d 691 (2d Cir. 1978); *Gramling v. Food Mach.*  
28 *and Chem. Corp.*, 151 F. Supp. 853 (W.D.S.C. 1957).

29 2. Section 14(b) provides the same immunity of arbitrators to neutral arbitration  
30 institutions which administer the arbitration proceeding. Extension of judicial immunity to  
31 those arbitration institutions is appropriate to the extent that they are acting "in certain  
32 roles and with certain responsibilities" that are functionally comparable to those of a  
33 judge. *Corey v. New York Stock Exchange*, 691 F.2d at 1209. Section 11(b) extends  
34 immunity to neutral arbitration institutions because the duties that they perform in  
35 administering the arbitration process are the functional equivalent of the comparable role

1 and responsibility of judges in administering the adjudication process in a court of law.  
2 There is substantial precedent for this conclusion. *See, e.g.,* New England Cleaning  
3 Services, Inc. v. American Arbitration Ass'n, 1999 WL 1191517 (1<sup>st</sup> Cir. 1999); Honn v.  
4 National Ass'n of Sec. Dealers, Inc., 182 F.3d 1014 (8<sup>th</sup> Cir. 1999); Hawkins v. Nat'l  
5 Ass'n Sec. Dealers, Inc., 149 F.3d 330 (5<sup>th</sup> Cir. 1998); Olson v. National Ass'n of Sec.  
6 Dealers, Inc., 85 F.3d 381 (8<sup>th</sup> Cir. 1996); Aerojet-General Corp. v. Am. Arbitration  
7 Ass'n, 478 F.2d 248 (9<sup>th</sup> Cir. 1973); Cort v. Am. Arbitration Ass'n, 795 F. Supp. 970  
8 (N.D. Cal. 1992); Boraks v. Am. Arbitration Ass'n, 205 Mich.App. 149, 517 N.W.2d 771  
9 (1994); Candor v. Am. Arbitration Ass'n, 97 Misc.2d 267, 411 N.Y.S.2d 162 (Sup. Ct.,  
10 Tioga Cty. 1978).

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

14 4. Section 14(d) is based on the California Evidence Code which provides that  
15 arbitrators shall not be "competent to testify \* \* \* as to any statement, conduct, decision,  
16 or ruling occurring at or in conjunction with the prior proceeding." CAL. EVID. CODE §  
17 703.5. There are similar provisions that prohibit anyone from calling an arbitrator as a  
18 witness in a subsequent proceeding in New Jersey and New York. N.J.R. SUPER. CT. R.  
19 4:21A-4; N.Y. Ct. R. §28.12. The first sentence of section 14(d) provides that an  
20 arbitrator or representative of an arbitration organization must assert this immunity "to any  
21 claim" and then need not testify about matters "relating to that claim." Thus an arbitrator  
22 or arbitration organization may decide not to assert arbitral immunity in a proceeding that  
23 the arbitrator or arbitration organization initiates by way of claim or counterclaim. For  
24 instance, an arbitrator may bring an action against one of the parties for nonpayment of  
25 fees to the arbitrator and may have to give testimony in order to recover. If in an action by  
26 the arbitrator to recover a fee the other party files a counterclaim against the arbitrator  
27 attacking the award, the intent of this section is that the arbitrator can decide not to assert  
28 immunity as to the arbitrator's claim and can provide testimony about it, but the arbitrator  
29 can assert immunity as to the other party's counterclaim and not be required to give such  
30 testimony. Otherwise the other party can circumvent the general rule against requiring an  
31 arbitrator to provide testimony by forcing an action by the arbitrator, for instance, by the  
32 party not paying a contractually required fee for the arbitrator's services.

33 The second sentence of section 14(d) recognizes that arbitrators who have  
34 engaged in corruption, fraud, partiality or other misconduct which are grounds to vacate  
35 an award under sections 23(a)(1) and (2) may be required to give testimony so that a party  
36 will have evidence to prove such grounds but only after the objecting party makes a  
37 sufficient initial showing that such grounds exist. *See* Carolina-Virginia Fashion  
38 Exhibitors Inc. v. Gunter, 291 N.C. 208, 230 S.E.2d 380, 388 (N.C. 1976) (holding that  
39 where there is objective basis to believe that arbitrator misconduct has occurred,  
40 deposition of the arbitrator may be permitted and the deposition admitted in action for

1 vacatur). A party's bare allegation of these grounds should not cause an arbitrator to be  
2 required to testify.

3 Section 14(d) is limited to civil actions; an arbitrator may be required to give  
4 testimony in criminal proceedings as a result of matters arising from an arbitration  
5 proceeding.

6 5. Section 14(e) is intended to promote arbitral immunity. By definition, almost all  
7 suits against arbitrators arising from the good faith discharge of their arbitral powers are  
8 frivolous, given the breadth of arbitrators' immunity. Spurious lawsuits against arbitrators  
9 are detrimental to the arbitration process and deter persons from serving as arbitrators  
10 because of the cost of defending even frivolous actions. Potential plaintiffs in such  
11 litigation should be discouraged by the prospect of paying the arbitrator's litigation  
12 expenses. When they are not, the statute enables the arbitrators to recover their litigation  
13 expenses, not lose their fee and more to the defense of a frivolous lawsuit.

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

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

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

34 8. The Drafting Committee recommends that an Official Comment should be  
35 added to section 14 that if an arbitrator fails to make a disclosure required by section 12  
36 then the typical remedy is vacatur under section 23 and not loss of arbitral immunity under  
37 section 14. Such a result is similar to the effect of judicial immunity.

1                                   **SECTION 15. ARBITRATION PROCESS.**

2                                   (a) An **arbitrator** may manage all aspects of an arbitration proceeding. An  
3                                   **arbitrator** may hold conferences with the parties to the arbitration proceeding before the  
4                                   hearing to act upon any matters that may aid in the fair and expeditious disposition of the  
5                                   arbitration proceeding.

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

10                                  (c) If an **arbitrator** has not made a final decision on a matter subject to  
11                                  summary disposition under subsection (b), the **arbitrator** shall set a time and place for a  
12                                  hearing and issue notice of the hearing not less than five days before the hearing. Unless a  
13                                  party to the arbitration proceeding interposes an objection to insufficiency of notice not  
14                                  later than the commencement of the hearing, that **person's** appearance at the hearing  
15                                  waives the objection. Upon request of a party to the arbitration proceeding and for good  
16                                  cause shown, or upon the **arbitrator's** own initiative, the **arbitrator** may adjourn the  
17                                  hearing from time to time as necessary but may not postpone the hearing to a time later  
18                                  than that fixed by the agreement to arbitrate for making the award unless the parties to the  
19                                  arbitration proceeding consent to a later date. The **arbitrator** may hear and decide the  
20                                  controversy upon the evidence produced although a party who was duly notified of the

1 arbitration proceeding did not appear. The **court**, on request, may direct the **arbitrator**  
2 to proceed promptly with the hearing and with a decision of the controversy.

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

6 (e) All of the **arbitrators** must conduct the hearing under subsection (c);  
7 however, a majority may decide any question and render a final award. If any **arbitrator**  
8 ceases, or is unable, to act during the hearing, then a sufficient number of replacement  
9 **arbitrators** must be appointed in accordance with Section 11 to continue the hearing and  
10 to decide the controversy.

#### 11 **Reporter's Notes:**

12 1. Section 15 is a default provision and subject to the agreement of the parties.  
13 *See* section 4(a).

14 2. As the use of arbitration increases, there are more cases that involve complex  
15 issues. In such cases arbitrators are often involved in numerous pre-hearing matters  
16 involving conferences, motions, subpoenas, and other preliminary issues. Although the  
17 present UAA makes no specific provision for arbitrators to hold pre-hearing conferences  
18 or to rule on preliminary matters, arbitrators likely have the inherent authority to do such.  
19 Numerous cases have concluded that in arbitration proceedings, procedural matters are  
20 within the province of the arbitrators. *Stop & Shop Cos. v. Gilbane Bldg. Co.*, 364 Mass.  
21 325, 304 N.E.2d 429 (1973); *Gozdor v. Detroit Auto. Inter-Insurance Exchange*, 52  
22 Mich. App. 49, 214 N.W.2d 436 (1974); *Upper Bucks Cnty. Area Vocational-Technical*  
23 *Sch. Joint Comm. v. Upper Bucks Cnty. Vocational Technical Sch. Educ. Ass'n*, 91  
24 Pa.Cmnwlth. 463, 497 A.2d 943 (1985).

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

1           The Drafting Committee unanimously decided to add an explicit section to the  
2 statute, section 15(a), to allow arbitrators broad powers to manage the arbitration process  
3 both before and during the hearing. This section is intended to provide arbitrators with  
4 the authority in appropriate cases to require parties to clarify issues, stipulate matters,  
5 identify witnesses, provide summaries of testimony, to allow discovery, and to resolve  
6 preliminary matters. However, the intent of section 15(a) is not to encourage either  
7 extensive discovery or a form of motion practice. While such methods as discovery or  
8 prehearing conferences may be appropriate in some cases, these should only be used  
9 where they “aid in the fair and expeditious disposition of the arbitration.” The arbitrator  
10 should keep in mind the goals of an expeditious, less costly, and efficient procedure.

11           3. Presently the UAA has no provision on whether to allow an arbitrator to grant a  
12 request for summary disposition. A number of courts have upheld the authority of  
13 arbitrators to decide cases or issues on such requests without an evidentiary hearing but  
14 have been cautious in their support of such holdings. *Intercarbon Bermuda, Ltd. v. Caltex*  
15 *Trading and Transp. Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993) (court confirmed a summary  
16 adjudication by an arbitrator based on documentary evidence but expressed reservations  
17 about deciding arbitration cases without an evidentiary hearing); *Schlessinger v.*  
18 *Rosenfeld, Meyer & Susman*, 40 Cal. App.4th 1096, 47 Cal. Rptr.2d 650 (1995) (court  
19 upheld arbitrator’s award based on a summary adjudication but cautioned that the  
20 appropriateness of such summary action depends upon whether the party opposing a  
21 summary motion is given a fair opportunity to present its position); *Stifler v. Seymour*  
22 *Weiner*, 62 Md. App. 19, 488 A.2d 192 (1985) (dispositive motion appropriate on issue of  
23 statute of limitations); *Pegasus Constr. Corp. v. Turner Constr. Co.*, 84 Wash. App. 744,  
24 929 P.2d 1200 (1997) (full hearing of all evidence regarding merits of a claim is  
25 unnecessary where decision can be made on basis of motion to dismiss); *but see* *Prudential*  
26 *Securities, Inc. v. Dalton*, 929 F.Supp. 1411 (N.D. Okla. 1996) (court vacates arbitration  
27 award and finds that the arbitration panel is guilty of misconduct and exceeded its powers  
28 in refusing to hear pertinent evidence by deciding case without a hearing). Thus, although  
29 some courts have affirmed arbitrators who have made a summary disposition of a case, the  
30 opinions indicate both a hesitancy to endorse such an approach on a broad basis and a  
31 closer judicial scrutiny of the arbitrator’s rulings.

32           Section 15(b) was intended to allow arbitrators to decide a request for summary  
33 disposition. The language in section 15(b) is based upon Rule 16 of JAMS/Endispute  
34 Comprehensive Arbitration Rules and Procedures. In the arbitration context, the Drafting  
35 Committee decided that the use of the terms “request for summary disposition” is  
36 preferable to “motions for summary judgment” or “motions for failure to state a claim.”  
37 The latter terms, which are used in civil litigation, usually refer to situations where there  
38 are no genuine issues of material facts in dispute and a case can be determined as a matter  
39 of law. In most arbitrations, the arbitrators are not required to make rulings only as a  
40 “matter of law.” As discussed in the Reporter’s Notes to section 23 on vacatur, numerous  
41 courts have held that arbitrators are not bound by rules of law and their awards generally

cannot be overturned for errors of law. Because of this, the terms “summary judgment” or “failure to state a claim” are misleading and the language “summary disposition” used in the JAMS/Endispute rules is more applicable.

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

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

**Reporter’s Notes:**

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

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

3. Section 4(b)(3) provides that a waiver of the right to be represented by an attorney under section 16 prior to the initiation of an arbitration proceeding under section 9 is ineffective. This language was previously in section 6 of the UAA.

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

(a) An **arbitrator** may issue a subpoena for the attendance of a witness and



1 for the production of **records** and other evidence at any hearing and may administer oaths.

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

5 (b) An **arbitrator**, on request of a party or a witness to the arbitration  
6 proceeding, may permit a deposition of a witness who cannot be subpoenaed or is unable  
7 to attend a hearing to be taken in the manner designated by the **arbitrator** for use as  
8 evidence.

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

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

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

21 (f) All laws compelling a **person** under subpoena to testify and all fees for

1 attending an arbitration proceeding, a deposition, or a discovery proceeding as a witness  
2 are applicable to an arbitration proceeding as if the matter were the subject of a civil  
3 action.

4 [(g) A **court** may enforce a subpoena or any discovery-related order for the  
5 attendance of a witness and for the production of **records** and other evidence issued by an  
6 arbitrator in connection with an arbitration proceeding in another state.]

### 7 **Reporter's Notes:**

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

31 2. 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

Rules, Arts. 24(2), 26. The language follows the majority approach that, unless the contract specifies to the contrary, the discretion rests with the arbitrators whether to allow discovery. The purpose of the discovery procedure in section 17(c) is to aid the arbitration process and ensure an expeditious, efficient and informed arbitration, while adequately protecting the rights of the parties. Those goals are achieved by encouraging parties to negotiate their own discovery procedures and by establishing the authority of the arbitrator to oversee the process and enforce discovery-related orders in the same manner as would occur in a civil action, thereby minimizing the involvement of (and resort of the parties to) the courts during the arbitral discovery process. At the same time, it should be clear that in many arbitrations discovery is unnecessary and that the discovery contemplated by section 17(c) is not coextensive with that which occurs in the course of civil litigation under federal or state rules of civil procedure.

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

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

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

1           6. The Drafting Committee has made clear in Section 17(d) that if an arbitrator  
2 allows discovery, the arbitrator has the authority to issue subpoenas for a discovery  
3 proceeding such as a deposition. This issue was raised during the first reading of the  
4 RUAA at the 1999 annual meeting. It has become a more important matter as a result of  
5 the recent holding in COMSAT Corp. v. National Science Foundation, F.3d , 1999 WL  
6 638609 (4<sup>th</sup> Cir.), in which the court found that under similar language in the FAA as to  
7 that in the UAA arbitrators did not have power to issue subpoenas to non-parties to  
8 produce materials prior to the arbitration hearing. This holding is contrary to that of three  
9 federal district court opinions under FAA which have enforced arbitral subpoenas for  
10 prehearing discovery so that arbitrators could make a full and fair determination. Amgen,  
11 Inc. v. Kidney Center of Delaware County, 879 F. Supp. 878 (N.D. Ill. 1995); Meadows  
12 Indemnity Co. v. Nutmeg Ins. Co., 157 F.R.D. 42 (M.D. Tenn. 1994); Stanton v. Paine  
13 Webber Jackson & Curtis, Inc., 685 F. Supp. 1241 (S.D. Fl. 1988). However, in Integrity  
14 Ins. Co. v. American Centennial Ins. Co., 885 F. Supp. 69 (S.D.N.Y. 1995), the court  
15 enforced a subpoena for documents of a nonparty but refused enforcement of a subpoena  
16 to depose that person because that would require the person to appear twice—once for the  
17 hearing and once for the deposition. Because of the unclear case law, the Drafting  
18 Committee clarified its intent that arbitrators have subpoena authority for discovery  
19 matters under the RUAA.

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

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

witnesses at an arbitration proceeding, to compel their testimony of the production of documents”); *United Elec. Workers Local 893 v. Schmitz*, 576 N.W.2d 357 (Iowa 1998) (court held that Iowa Arbitration Act confers on arbitrators the power to subpoena nonparty witnesses).

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

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

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

9. Section 17(g) is in brackets because it is a new provision for the Drafting Committee to consider and not because it is intended as an option for the states. The intent of section 17(g) is to allow a court in State A (the state adopting the RUAA) to give effect to a subpoena or any discovery-related order issued by an arbitrator in an arbitration proceeding in State B without the need for the party who has received the subpoena first to go to a court in State B to receive an enforceable order. This procedure would eliminate duplicative court proceedings in both State A and State B before a witness or record or other evidence can be produced for the arbitration proceeding in

1 State B. The court in State A would have the authority to determine whether and, if so,  
2 under what appropriate conditions the subpoena or discovery-related orders should be  
3 enforced. Because State B may or may not have adopted the RUAA, this provision is  
4 bracketed for the consideration of the Drafting Committee.

5 **SECTION 18. COURT ENFORCEMENT OF PRE-AWARD RULING BY**  
6 **ARBITRATOR.** If an **arbitrator** makes a pre-award ruling in favor of a party to the  
7 arbitration proceeding, that party may request the arbitrator to incorporate the ruling in an  
8 award under Section 19 and may file a motion with the **court** for an expedited, summary  
9 order to confirm the award under Section 22. The **court** shall issue an order to confirm  
10 the award unless the court vacates, modifies or corrects the award of the **arbitrator**  
11 pursuant to Sections 23 and 24.

12 **Reporter's Notes:**

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

25 As a general proposition, courts are very hesitant to review interlocutory orders of  
26 an arbitrator. The Ninth Circuit in Aerojet-General Corp. v. Am. Arbitration Ass'n, 478  
27 F.2d 248, 251 (9th Cir. 1973) stated that "judicial review prior to the rendition of a final  
28 arbitration award should be indulged, if at all, only in the most extreme cases." The court

1 concluded that a more lax rule would frustrate a basic purpose of arbitration for a speedy  
2 disposition without the expense and delay of a court proceeding. In *Harleyville Mut. Cas.*  
3 *Co. v. Adair*, 421 Pa. 141, 145, 218 A.2d 791, 794 (Pa. 1966), the Pennsylvania Supreme  
4 Court held that to allow challenges to an arbitrator's interlocutory rulings would be  
5 "unthinkable." Massachusetts also rejected the appeal of an interlocutory order in  
6 *Cavanaugh v. McDonnell & Co.*, 357 Mass. 452, 457, 258 N.E.2d 561, 564 (Mass. 1970),  
7 noting that to allow a court to review an arbitrator's interlocutory order "would tend to  
8 render the proceedings neither one thing nor the other, but transform them into a hybrid,  
9 part judicial and part arbitrational." Thus section 18 requires a court to enforce the pre-  
10 award ruling unless the ruling should be vacated under the standards for confirming,  
11 modifying, or vacating awards under sections 23 and 24.

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

34 2. Section 18 uses the terms "expedited, summary order" which is language  
35 similar to that in section 7 that a court in a proceeding to compel or stay arbitration should  
36 act "summarily." The term "expedited" has been used in other statutes and court rules. 8  
37 U.S.C. § 1252(e)(4) (an immigration statute which provides that when a person is  
38 deported and files an appeal, "it shall be the duty of the court to advance on the docket  
39 and to expedite to the greatest possible extent the disposition of any case" under the  
40 statute); FED. R. CIV. P. 65 (if an adverse party contests a court's granting of a temporary  
41 restraining order the court must proceed as expeditiously as "the ends of justice require")

1 and the hearing for a preliminary injunction “shall be set down for hearing at the earliest  
2 possible time and takes precedence of all matters except older matters of the same  
3 character.”); CAL. ST. BAR P. R. 203 (in cases involving the state bar in California, “a  
4 motion to set aside or vacate a default judgment shall be decided on an expedited basis.”).  
5 The intent of the term “expedited” is that a court should advance on the docket to the  
6 extent possible a matter involving the enforcement of a pre-award ruling by an arbitrator in  
7 order to preserve the integrity of the arbitration proceeding which is underway.

8 The term “summary” has the same meaning as in section 7 that a trial court should  
9 expeditiously and without a jury trial determine whether an arbitrator’s pre-award ruling  
10 should be enforced. *Burke v. Wilkins*, 507 S.E.2d 913 (N.C. Ct. App. 1998); *see also*  
11 *Wallace v. Wiedenbeck*, 251 A.D.2d 1091, 674 N.Y.S.2d 230, 231 (N.Y. App. Div.  
12 1998); *Grad v. Wetherholt Galleries*, 660 A.2d 903 (D.C. 1995).

13 3. There is no provision in RUAA section 29 for an appeal from a court decision  
14 on a pre-award ruling by an arbitrator and the intent of the statute is that such orders from  
15 a lower court are not appealable.

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

24 5. At the Drafting Committee meeting of October 29, 1999, Commissioner  
25 Hawkins suggested to include the language in the second sentence “or unless it is  
26 incorporated, modified, or revoked in an award by the arbitrator under section 19, as  
27 confirmed under Section 22” because for procedural purposes there must be an award  
28 under Section 16 that a court than can confirm under section 22. Thus, procedurally an  
29 arbitrator must make the pre-award ruling in a written “award” for it to be confirmed.

## 30 SECTION 19. AWARD.

31 (a) An **arbitrator** shall make a **record** of an award. The record must be  
32 signed by any **arbitrator** who concurs with the award. The **arbitrator** or the **arbitration**  
33 **organization** shall give notice of the award to each party to the arbitration proceeding.



1 (b) An award must be made within the time specified by the agreement to  
2 arbitrate or, if not specified therein, within the time, on motion of a party to the arbitration  
3 proceeding, the **court** orders. The **court** may extend or the parties to the arbitration  
4 proceeding may agree in a **record** to extend the time. The **court** or the parties may do so  
5 before or after the time expires. A party to the arbitration proceeding waives any  
6 objection that an award was not made within the time required unless the party gives  
7 notice of the objection to the **arbitrator** before delivery of the award to the party.

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

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

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

12 (2) because the **arbitrator** has not made a mutual, final, and  
13 definite award upon any or all of the claims submitted by the parties to the arbitration  
14 proceeding; or

15 (3) to clarify the award.

16 (b) A motion under subsection (a) must be made to the **arbitrator** within  
17 20 days after delivery of the award to the movant. The movant shall give notice in a  
18 **record** forthwith to the opposing party stating that the opposing party to the arbitration  
19 proceeding must serve any objections to the motion within 10 days after receipt of the  
20 notice.

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

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

(2) because the **arbitrator** has not made a mutual, final, and definite award upon any or all of the claims submitted by the parties to the arbitration proceeding; or

(3) to clarify the award.

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

#### **Reporter's Notes:**

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

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

1 arbitrators who initially heard the matter. 1 DOMKE §35:03.

2 3. Sections 20(a) and (c) are essentially the same as present section 9 of the UAA  
3 which provides the parties with a limited opportunity to request modification or  
4 corrections of an arbitration award either (1) when there is an error as described in section  
5 24(a)(1) for miscalculation or mistakes in descriptions or in section 24(a)(3) for awards  
6 imperfect in form or (2) “for the purpose of clarifying the award.” *Chaco Energy Co. v.*  
7 *Thercol Energy Co.*, 97 N.M. 127, 637 P.2d 558 (1981) (an amended arbitration award  
8 for purposes other than those enumerated in statute is void).

9 The Drafting Committee concluded an additional ground for modification or  
10 correction be added in sections 20(a)(2) and (b)(2) which is based on the FAA section  
11 10(a)(4) where an arbitrator’s award is either so imperfectly executed or incomplete that it  
12 is questionable whether the arbitrators ruled on a submitted issue.

13 The benefit of a provision such as section 20 is evident in a comparison with the  
14 FAA which has no similar provision. Under the FAA, there is no statutory authority for  
15 parties to request arbitrators to correct or modify evident errors and only a limited  
16 exception in FAA section 10(a)(5) for a court to order a rehearing before the arbitrators  
17 when an award is vacated and the time within which the agreement required the award has  
18 not expired. This lack of a statutory basis both for arbitrators to clarify a matter and, in  
19 most instances, for a court to remand cases to arbitrators has caused confusing case law  
20 under the FAA on whether and when a court can remand or arbitrators can clarify matters.  
21 *See* III MACNEIL TREATISE §§37.6.4.4; 42.2.4.3; *see also* *Legion Ins. Co. v. VCW, Inc.*,  
22 193 F.3d 972 (8<sup>th</sup> Cir. 1999). The mechanism for correction of errors in RUAA section 17  
23 enhances the efficiency of the arbitral process.

## 24 SECTION 21. REMEDIES; FEES AND EXPENSES OF ARBITRATION 25 PROCEEDING.

26 (a) An **arbitrator** may award attorney’s fees or punitive damages or other  
27 exemplary relief if such an award is authorized by law in a civil action involving the same  
28 subject matter or by the agreement of the parties to the arbitration proceeding.

29 (b) As to all remedies other than those provided by subsection (a), an  
30 **arbitrator** may order such remedies as the **arbitrator** considers just and appropriate

1 under the circumstances of the arbitration proceeding. That such a remedy could not or  
2 would not be granted by a **court** is not grounds for refusing to confirm an award under  
3 Section 22 or vacating an award under Section 23.

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

6 (d) If an **arbitrator** awards punitive damages or other exemplary relief  
7 under subsection (a), the **arbitrator** shall specify in the award the basis in law or the  
8 provisions in the agreement to arbitrate authorizing the award and state separately the  
9 amount of the punitive damages or other exemplary relief.

#### 10 **Reporter's Notes:**

11 1. Section 21 recognizes the parties' autonomy to limit by agreement to the extent  
12 permitted by law the remedies that an arbitrator can award. Unless the arbitration  
13 agreement provides to the contrary, section 21(a) provides arbitrators the authority to  
14 make an award of attorney fees or punitive damages or other exemplary relief.

15 In regard to attorney's fees, statutes in Texas and Vermont allow recovery for  
16 attorney's fees in arbitration when law or parties' agreement would allow for such a  
17 recovery in a civil action, TEX CIV. PRAC. & REM. CODE ANN. § 171.010; 12 VT. STAT.  
18 ANN. §5665; *Monday v. Cox*, 881 S.W.2d 381 (Tex. App. 1994) (Texas arbitration act  
19 provides that arbitrator shall award attorney fees when parties' agreement so specifies or  
20 state's law would allow such an award); *see also* CAL. CIVIL CODE § 1717 (allowing  
21 award of attorney fees if contract specifically provides such). Also, statutes, such as  
22 those involving civil rights, employment discrimination, antitrust, and others, specifically  
23 allow courts to order attorney fees in appropriate cases. Today many of these types of  
24 causes of action are subject to arbitration clauses. *Gilmer v. Interstate/Johnson Lane*  
25 *Corp.*, 500 U.S. 20 (1991) (age discrimination); *Shearson/American Express, Inc. v.*  
26 *McMahon*, 482 U.S. 220 (1987) (civil RICO claims); *Mitsubishi Motors Corp. v. Soler*  
27 *Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust claim); Pub. L. No. 102-166, §  
28 118, 105 Stat. 1071, 1081 (1991 Civil Rights Act that states "arbitration \* \* \* is  
29 encouraged to resolve disputes" under the Americans with Disabilities Act, Title VII of  
30 the 1964 Civil Rights Act, the Civil Rights Act of 1866, and the Age Discrimination in  
31 Employment Act).

1 As to punitive damages, it is now well established that arbitrators have authority to  
2 award punitive damages under the FAA. *Mastrobuono v. Shearson Lehman Hutton, Inc.*,  
3 514 U.S. 52, 115 S. Ct. 1212, 131 L.Ed.2d 76 (1995). Federal authority is in accord with  
4 the preponderance of decisions applying the UAA and state arbitration statutes. *See, e.g.*,  
5 *Baker v. Sadick*, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984); *Eychner v. Van Vleet*,  
6 870 P.2d 486 (Colo. Ct. App. 1993); *Richardson Greenshields Sec., Inc. v. McFadden*,  
7 509 So.2d 1212 (Fla. Dist. Ct. App. 1987); *Bishop v. Holy Cross Hosp.*, 44 Md. App.  
8 688, 410 A.2d 630 (1980); *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 331  
9 S.E.2d 726 (1985), review denied, 315 N.C. 590, 341 N.E.2d 29 (1986); *Kline v.*  
10 *O'Quinn*, 874 S.W.2d 776 (Tex. Ct. App. 1994), cert. denied, 515 U.S. 1142, 115 S. Ct.  
11 2579, 132 L. Ed.2d 829 (1995); *Griessom v. Greener & Sumner Constr., Inc.*, 676 S.W.2d  
12 709 (Tex. Ct. App. 1984); *Anderson v. Nichols*, 178 W. Va. 284, 359 S.E.2d 117 (1987).  
13 *But see* *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831  
14 (1976); *Leroy v. Waller*, 21 Ark. App. 292, 731 S.W.2d 2d 789 (1987); *School City of E.*  
15 *Chicago, Ind. v. East Chicago Fed. of Teachers*, 422 N.E.2d 656 (Ind. Ct. App. 1981);  
16 *Shaw v. Kuhnel & Assocs.*, 102 N.M. 607, 698 P.2d 880, 882 (1985).

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

1 under the law.”); National Academy of Arbitrators, GUIDELINES ON ARBITRATION OF  
2 STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS Art. 4(D) (May 21,  
3 1997) (“Remedies should be consistent with the statute or statutes being applied, and with  
4 the remedies a party would have received had the case been tried in Court. These  
5 remedies may well exceed the traditional arbitral remedies of reinstatement and back pay,  
6 and may include witnesses’ and attorneys’ fees, costs, interest, punitive damages, injunctive  
7 relief, etc.”).

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

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

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

1 section 23(a)(4) which prohibits arbitrators from exceeding their power.

2 Section 23(a)(4) has been interpreted by courts essentially to mean that the  
3 arbitrators' award will only be set aside when the arbitrators go beyond the powers  
4 contractually delegated to them by the parties. The courts do not use section 23(a)(4) as a  
5 means to review the merits of the award. *See Eljer Mfg. v. Kowin Dev. Corp.*, 14 F.3d  
6 1250 (7<sup>th</sup> Cir.), cert. denied, 512 U.S. 1205 (1994); Stephen L. Hayford, *Law in Disarray:*  
7 *Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731,  
8 752 (1996). Thus, even if the arbitrators incorrectly apply the law or erroneously find  
9 facts, these mistakes will be insufficient to set aside an award of punitive damages by a  
10 reviewing court so long as the arbitrators were expressly or impliedly authorized by the  
11 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, vacated pursuant to Section 23, or modified  
32 or corrected pursuant to Section 24.

1           **Reporter's Notes:**

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

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

10                   **SECTION 23. VACATING AN AWARD.**

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

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

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

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

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

23                               (5) there was no agreement to arbitrate, unless the **person**



1 participated in the arbitration proceeding without raising the objection not later than the  
2 commencement of the arbitration hearing.

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)(5):**

17 1. The purpose of this provision is to establish that if there is no valid arbitration  
18 agreement, then the award can be vacated; however, the right to contest an award on this  
19 ground is conditioned upon the party contesting the validity of an arbitration agreement  
20 raising this objection if the party participates in the arbitration proceeding. *See, e.g.,*  
21 *Hwang v. Tyler*, 253 Ill. App.3d 43, 625 N.E.2d 243, appeal denied, 153 Ill.2d 559, 624  
22 N.E.2d 807 (1993) (if issue not adversely determined under § 2 of UAA and if party raised  
23 objection in arbitration hearing, party can raise challenge to agreement to arbitrate in  
24 proceeding to vacate award); *Borg, Inc. v. Morris Middle Sch. Dist. No. 54*, 3 Ill.App.3d  
25 913, 278 N.E.2d 818 (1972) (issue of whether there is an agreement to arbitrate cannot be  
26 raised for first time after the arbitration award); *Spaw-Glass Constr. Serv., Inc. v. Vista*

1 De Santa Fe, Inc., 114 N.M. 557, 844 P.2d 807 (1992) (party who compels arbitration  
2 and participates in hearing without raising objection to the validity of arbitration  
3 agreement then cannot attack arbitration agreement).

4 2. The purpose of the language requiring a party participating in an arbitration  
5 proceeding to raise an objection that no arbitration agreement exists “not later than the  
6 beginning of the arbitration hearing” is to insure that the party makes a timely objection at  
7 the start of the arbitration rather than causing the other parties to go through the time and  
8 expense of the full arbitration proceeding only to raise the objection for the first time later  
9 in the arbitration process or in a motion to vacate an award. The obligation to object  
10 attaches at the first hearing before the arbitrator, including hearings on preliminary  
11 matters. A person who refuses to participate in or appear at an arbitration proceeding  
12 retains the right to challenge the validity of an award on the ground that there was no  
13 arbitration agreement in a motion to vacate.

## 14 **B. Reporter’s Notes on the Concept of Contractual Provisions for “Opt-In” Review** 15 **of Awards**

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

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

37 Any value-added dimensions must then be weighed against the risks/downsides of  
38 adding this provision to the Act. The risks/downsides inherent are several. Paramount is

1 the assertion that permitting parties a “second bite at the apple” on the merits effectively  
2 eviscerates arbitration as a true alternative to traditional litigation. An opt-in section in the  
3 RUAA would propel large numbers of attorneys to put review provisions in arbitration  
4 agreements, as a safe harbor in order to avoid manifold malpractice claims by clients who  
5 lose in arbitration. The inevitable post-award petition for vacatur would in many cases  
6 result in the negotiated settlement of many disputes due to the specter of vacatur litigation  
7 the parties had agreed would be resolved in arbitration.

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

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

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

33 These negative policy implications were a substantial reason why the Committee of  
34 the Whole adopted a sense-of-the-house resolution at the July, 1999, meeting not to  
35 include expanded judicial review but rather to consider an internal arbitral appeals  
36 mechanism. The decision not to include in the RUAA a statutory sanction of either  
37 expanded judicial review or of internal, arbitral review of the “opt-in” device effectively  
38 leaves the issue of the legal propriety of this means for securing review of awards to the  
39 developing case law under the FAA and state arbitration statutes. Consequently, parties

1 remain free to agree to contractual provisions for internal arbitral or judicial review of  
2 challenged awards, on whatever grounds and based on whatever standards they deem  
3 appropriate. The comments below are intended to set out, in summary fashion, the  
4 essential elements of the debate underlying the issue of “opt-in” review.

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

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

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

35         4. The second major impediment to inclusion of an “opt-in” provision for judicial  
36 review in the RUAA (and contractual provisions to the same effect) is the contention that  
37 the parties cannot contractually “create” subject matter jurisdiction in the courts when it  
38 does not otherwise exist. The “creation” of jurisdiction transpires because a statutory  
39 provision that authorizes the parties to contractually create or expand the jurisdiction of

1 the state or federal courts can result in courts being obliged to vacate arbitration awards  
2 on grounds they otherwise would be foreclosed from relying upon. Court cases under the  
3 federal law show the uncertainty of an “opt in” approach. *See, e.g., Chicago*  
4 *Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991) (“If the  
5 parties want, they can contract for an appellate arbitration panel to review the arbitrator’s  
6 award. But they cannot contract for judicial review of that award; federal [court]  
7 jurisdiction cannot be created by contract.”) (labor arbitration case); *but see Gateway*  
8 *Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir. 1995)  
9 (The court, relying on the Supreme Court’s contractual view of the commercial arbitration  
10 process reflected in *Volt*, *Mastrobuono* and *First Options of Chicago v. Kaplan*, 514 U.S.  
11 938, 947, 115 S. Ct. 1920, 1925 (1995), held valid a contractual provision providing for  
12 judicial review of arbitral errors of law. The court concluded that the vacatur standards  
13 set out in section 10(a) of the FAA provide only the default option in circumstances where  
14 the parties fail to contractually stipulate some alternate criteria for vacatur).

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

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

39 A final significant, recent opinion in the federal Circuit Court of Appeals is *UHC*  
40 *Management Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8<sup>th</sup> Cir. 1998). In *UHC*, the

1 Eighth Circuit determined whether the contract language clearly established the parties'  
2 intent to contract for expanded judicial review. The portion of the analysis relevant here is  
3 that which concerns the propriety of contractual agreements providing for expanded  
4 judicial review beyond that contemplated by sections 10 and 11 of the FAA. The court  
5 observed that although parties may elect to be governed by any rules they wish regarding  
6 the arbitration itself, it is not clear whether the court can review an arbitration award  
7 beyond the limitations of FAA sections 10 and 11. Congress never authorized a *de novo*  
8 review of an award on its merits, and therefore, the Court concluded that it had no choice  
9 but to confirm the award when there are no grounds to vacate based on the FAA.

10 The court reviewed *Kyocera* and *Gateway* and observed: “Notwithstanding those  
11 cases, we do not believe it is a foregone conclusion that parties may effectively agree to  
12 compel a federal court to cast aside sections 9, 10, and 11 of the FAA.” It then quoted at  
13 length from Judge Mayer’s dissent in *Kyocera* and concluded by emphasizing its view of  
14 the differing role of the courts in reviewing arbitration awards and judgments from a court  
15 of law. Because the holding of *UHC* was based on the parties’ intent, the thoughts of the  
16 Eighth Circuit regarding this matter can be accurately characterized as dictum. However,  
17 there is no doubt that it, like the Seventh Circuit in *Chicago Typographical Union*, finds  
18 contractual provisions requiring the courts to apply contractually-created standards for  
19 judicial review of arbitration awards to be dubious.

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

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

36 In a similar manner, the Illinois Court of Appeals, in *Chicago, Southshore and*  
37 *South Bend R.R. v. N. Indiana Commuter Transp. Dist.*, 682 N.E.2d 156, 159 (Ill. App.  
38 3d 1997), *rev’d on other grounds*, 184 Ill. 151 (1998), refused to give effect to the  
39 provision of an arbitration agreement permitting a party claiming that the arbitrator’s

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

In *NAB Constr. Corp. v. Metro. Transp. Auth.*, 180 A.D. 436, 579 N.Y.S.2d 375 (N.Y. App. Div. 1992) the Appellate Division of the New York Supreme Court, without engaging in any substantive analysis, approved application of a contractual provision permitting judicial review of an arbitration award “limited to the question of whether or not the [designated decision maker under an alternative dispute resolution procedure] is arbitrary, capricious or so grossly erroneous to evidence bad faith.” (citing *NAB Constr. Corp. v. Metro. Transp. Auth.*, 167 A.D.2d 301, 562 N.Y.S.2d 44 (N.Y. App. Div. 1990)). This sparse state court case law is not a sufficient basis for identifying a trend in either direction with regard to the legitimacy of contractual opt-in provisions for expanded judicial review.

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

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

8. Statutory sanction of “opt-in” provisions for internal appellate arbitral review are significantly less troubling than the sanction of “opt-in” provisions for judicial review—because they do not entangle the courts in reviewing the merits of challenged arbitration awards. Instead, appellate arbitral review mechanisms merely add a second

1 level to the contractual arbitration procedure that permits parties disappointed with the  
2 initial arbitral result to secure a degree of protection from the occasional “wrong”  
3 arbitration decision. *See* Stephen L. Hayford and Ralph Peebles, *Commercial Arbitration*  
4 *in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RES. 405-06  
5 (1995). This approach would not present the FAA preemption, “creating jurisdiction,”  
6 and line-drawing problems identified with the expanded judicial review through the “opt  
7 in” approach. It is also consistent with the Supreme Court’s contractual view of  
8 commercial arbitration in that it preserves the parties’ agreement to resolve the merits of  
9 the controversy between them through arbitration, without resort to the courts. When  
10 parties agree that the decision of an arbitrator will be “final and binding,” it is implicit that  
11 it is the arbitrator’s interpretation of the contract and the law that they seek, and not the  
12 legal opinion of a court. In addition, an internal, arbitral appeal mechanism is more likely  
13 to keep arbitration decisions out of the courts and maintain the overall goals of speed,  
14 lower cost, and greater efficiency.

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

### 23 **C. Reporter’s Notes on the Possible Codification of the “Manifest Disregard of the** 24 **Law” and the “Public Policy” Grounds For Vacatur:**

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

32 2. “Manifest disregard of the law” is the seminal nonstatutory ground for vacatur  
33 of commercial arbitration awards. The relevant case law from the federal circuit courts of  
34 appeals establishes that “a party seeking to vacate an arbitration award on the ground of  
35 ‘manifest disregard of the law’ may not proceed by merely objecting to the results of the  
36 arbitration.” *O.R. Securities, Inc. v. Prof’l Planning Associates, Inc.* 857 F.2d 742, 747  
37 (11th Cir. 1988). “Manifest disregard of the law” “clearly means more than [an arbitral]  
38 error or misunderstanding with respect to the law.” *Carte Blanche (Singapore) PTE Ltd.*  
39 *v. Carte Blanche Int’l.*, 888 F.2d 260, 265 (2d Cir. 1989) (quoting *Merrill Lynch, Pierce,*



1 Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986).

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

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

18 3. The origin and essence of the “public policy” ground for vacatur is well  
19 captured in the Tenth Circuit’s opinion *Seymour v. Blue Cross/Blue Shield*, 988 F.2d  
20 1020,1023 (10th Cir. 1993). *Seymour* observed: “[I]n determining whether an  
21 arbitration award violates public policy, a court must assess whether ‘the specific terms  
22 contained in [the contract] violate public policy, by creating an ‘explicit conflict with  
23 other ‘laws and legal precedents.’” *Id.* at 1024 (citing *United Paperworkers Int’l Union*  
24 *v. Misco*, 484 U.S.29, 43, 108 S. Ct. 364, 373 (1987)).

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

38 Second, the Eleventh Circuit in *Brown v. Rauscher Pierce Refnses, Inc.*, 994 F.2d

1 775 (11th Cir. 1994) and the Second Circuit in *Diapulse Corp. of Am. v. Carba, Ltd.*, 626  
2 F.2d 1108 (2d Cir. 1980) trigger vacatur only when a court concludes that implementation  
3 of the arbitral result (typically, effectuation of the remedy directed by the arbitrator)  
4 compels one of the parties to violate a well-defined and dominant public policy, a  
5 determination which does not require a reviewing court to evaluate the merits of the  
6 arbitration award. Instead, the court need only ascertain whether confirmation of, or  
7 refusal to vacate an arbitration award, and a judicial order directing compliance with its  
8 terms, will place one or both of the parties to the award in violation of the subject public  
9 policy. If it would, the award must be vacated. If it does not, vacatur is not warranted.  
10 For a full discussion of the evolution and application of the public policy exception in the  
11 labor arbitration sphere, *see* Stephen L. Hayford and Anthony V. Sinicropi, *The Labor*  
12 *Contract and External Law: Revisiting the Arbitrator's Scope of Authority*, 1993 J. DISP.  
13 RESOL. 249.

14 4. States have rarely addressed “manifest disregard of the law” or “public policy”  
15 as grounds for vacatur.

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

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

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

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

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

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

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

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

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

10 (a) Upon granting an order confirming, *vacating*, modifying, or correcting  
11 an award, the **court** shall enter a judgment in conformity therewith. The judgment may be  
12 enforced as any other judgment in a civil action.

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

15 (c) On application of a prevailing party to a contested judicial proceeding  
16 under Section 22, 23, or 24, a **court** may add to a judgment confirming, *vacating*,  
17 modifying, or correcting an award, reasonable attorney's fees and litigation expenses  
18 incurred in the post-award judicial proceeding.

19 **Reporter's Notes:**

20 1. Section 25(c) promotes the statutory policy of finality of arbitration awards.  
21 Potential liability for the opposing parties post-award litigation expenditures will tend to

discourage all but the most meritorious challenges or stubborn parties. If a party prevails in a contested judicial proceeding over an arbitration award, section 25(c) allows the court discretion to award attorney's fees and litigation expenses. *Blitz v. Bath Isaac Adas Israel Congregation*, 352 Md. 31 (1998) (court under UAA permits award of attorney's fees in both the trial and appeal of an action to confirm and enforce an arbitration award against party who refused to comply with it).

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

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

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

5. At the meeting with the Committee on Style, a member asked why section 25 concerning judgment and attorney's fees and section 26 regarding recording a judgment included situations where a court confirmed an award under section 22 or modified or corrected an award under section 24 but did not include where a court vacated an award under section 23. The same sections in the UAA (sections 14, 15) and similar section in the FAA (section 13 regarding judgments and docketing) also included court orders confirming, modifying or correcting awards but not vacating awards. In researching this issue, there is no explanation in the legislative history or the case law for the omission of the inclusion of vacatur in reference to judgments and recording judgments. The indication from the cases is that courts which vacate arbitration awards refer to the vacatur orders as judgments. Arizona in its version of the UAA states that courts which vacate awards should enter a "judgment." The Reporter concludes that the term "vacating" should be included in sections 25(a) and (c) and 26(a)(3).

## **SECTION 26. [RECORD]; DOCKETING.**

1 (a) Upon entry of a judgment under Section 25, the clerk shall prepare the  
2 [record] consisting, to the extent filed, of the following:

3 (1) the agreement to arbitrate and any record of an extension of the  
4 time within which to make the award;

5 (2) the award;

6 (3) a copy of the order confirming, *vacating*, modifying, or  
7 correcting the award; and

8 (4) a copy of the judgment.

9 (b) A judgment under Section 25 may be docketed as if rendered in a civil  
10 action.

11 **SECTION 27. JURISDICTION.** An agreement to arbitrate providing for  
12 arbitration in this State confers jurisdiction on the **court** to enforce the agreement and to  
13 enter judgment on an award under this [Act].

14 **Reporter's Notes:**

15 1. The term "court" is now in the definitional section at section 1(3).

16 **SECTION 28. VENUE.** An initial motion pursuant to Section 5 must be filed in  
17 the **court** of the [county] in which the agreement to arbitrate specifies the arbitration  
18 hearing is to be held or, if the hearing has been held, in the [county] in which it was held.  
19 Otherwise, the motion must be filed in the [county] in which the adverse party to the  
20 arbitration proceeding resides or has a place of business or, if the adverse party to the

1 arbitration proceeding has no residence or place of business in this State, to the **court** of  
2 any [county] in this State. All subsequent motions must be filed in the **court** hearing the  
3 initial motion unless the **court** otherwise directs.

4 **Reporter Notes:**

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

11 Section 15 of the RUAA allows the arbitrator to set the location of the hearing if  
12 the parties have not agreed to one. In many arbitration agreements the parties determine  
13 the location of the hearing. The venue provisions in section 28 give priority to the county  
14 in which the arbitration hearing was held.

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

32 Although the Drafting Committee has been frustrated in a number of areas that the  
33 federal preemption doctrine limits its choices, the Committee decided that it did not want  
34 to risk having the RUAA voided on preemption grounds by giving special recognition to  
35 certain groups. Rather the Drafting Committee has attempted to address the adhesion

1 situation in section 4 regarding provisions of this Act which cannot be waived and in  
2 section 6 on the validity of an agreement to arbitrate, especially Reporter Note 6. It  
3 should be noted that courts, in determining the enforceability of arbitration agreements  
4 under provisions such as section 6(a) of the RUAA, have voided as unconscionable  
5 provisions in arbitration agreements that require persons to arbitrate in distant locations.  
6 *See, e.g.,* Brower v. Gateway 2000, Inc., 246 A.D. 246, 676 N.Y.S.2d 569 (1998)  
7 (holding unconscionable on ground of cost a clause which both required computer  
8 purchasers to arbitrate disputes in Chicago, Illinois, and also required arbitration according  
9 to rules of the International Chamber of Commerce which impose high administrative  
10 costs); Patterson v. ITT Consumer Fin. Corp., 14 Cal.App. 4<sup>th</sup> 1659, 18 Cal. Rptr. 2d 563  
11 (1999) (refusing to enforce arbitration clause imposed by financing corporation on state's  
12 consumers that required arbitration to be heard in Minneapolis, Minnesota, and required  
13 payment of substantial filing fees).

14 The Drafting Committee concluded that special protection for certain groups could  
15 be better achieved by provisions in substantive laws such as consumer protection statutes  
16 or the Uniform Commercial Code.

## 17 **SECTION 29. APPEALS.**

18 (a) An appeal may be taken from:

- 19 (1) an order denying a motion to compel arbitration;
- 20 (2) an order granting a motion to stay arbitration;
- 21 (3) an order confirming or denying confirmation of an award;
- 22 (4) an order modifying or correcting an award;
- 23 (5) an order vacating an award without directing a rehearing; or
- 24 (6) a final judgment entered pursuant to this [Act].

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

## 27 **SECTION 30. UNIFORMITY OF APPLICATION AND**

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

4           **SECTION 31. EFFECTIVE DATE.** This [Act] takes effect on [effective date].

5           **SECTION 32. REPEAL.** The [Uniform Arbitration Act] is repealed.