DRAFT

FOR DISCUSSION ONLY

PROPOSED REVISIONS OF THE UNIFORM ARBITRATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

OCTOBER, 1999

PROPOSED REVISIONS OF THE UNIFORM ARBITRATION ACT

With Prefatory Note and Reporter's Notes

The ideas and conclusions set forth, in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the

Tentative Draft No. 6
October 29, 1999

intent or meaning of any promulgated final statutory proposal.

DRAFTING COMMITTEE TO REVISE UNIFORM ARBITRATION ACT

FRANCIS J. PAVETTI, 83 Huntington Street, New London, CT 06320, *Chair*
FRANCISCO L. ACEVEDO, P.O. Box 190998, 16th Floor, Banco Popular Center, Hato Rey, PR 00919
RICHARD T. CASSIDY, 100 Main Street, P.O. Box 1124, Burlington, VT 05402
M. MICHAEL CRAMER, 216 N. Adams Street, Rockville, MD 20850
TIMOTHY J. HEINSZ, University of Missouri-Columbia, School of Law, 203 Hulston Hall, Columbia, MO 65211, *National Conference Reporter*
JEREMIAH MARSH, Suite 4300, Three First National Plaza, Chicago, IL 60602
RODNEY W. SATTERWHITE, P.O. Box 1540, Midland, TX 79702
JAMES A. WYNN, JR., Court of Appeals, One W. Morgan Street, P.O. Box 888, Raleigh, NC 27602
JOAN ZELDON, Superior Court, 500 Indiana Avenue, N.W., Room 1640, Washington, DC 20001

EX OFFICIO

JOHN L. McCLAUGHERTY, P.O. Box 553, Charleston, WV 25322, *President*
STANLEY M. FISHER, 1100 Huntington Building, 925 Euclid Avenue, Cleveland, OH 44115-1475, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

RICHARD CHERNICK, 3055 Wilshire Boulevard, 7th Floor, Los Angeles, CA 90010-1108, *Co-Advisor*
JAMES L. KNOLL, 1500 S.W. Taylor Street, Portland, OR 97205, *Tort and Insurance Practice Section Advisor*
JOHN K. NOTZ, JR., 3300 Quaker Tower, 321 N. Clark Street, Chicago, IL 60610-4795, *Senior Lawyers Division Advisor*
RONALD M. STURTZ, 4 Becker Farm Road, Roseland, NJ 07068, *Co-Advisor*
YARKO SOCHYNSKY, 350 The Embarcadero, San Francisco, CA 94105-1250, *Real Property, Probate, and Trust Section Advisor*

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

Tentative Draft No. 6
October 29, 1999

PROPOSED REVISIONS OF THE UNIFORM ARBITRATION ACT

Tentative Draft No. 6
October 29, 1999

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 would decide the arbitrability of a dispute and by what criteria; (2) whether provisional remedies could be issued by a court or the arbitrators; (3) how a party would commence an arbitration proceeding; (4) whether arbitration proceedings could be consolidated; (5) whether arbitrators were required to disclose facts reasonably likely to affect impartiality; (6) what extent arbitrators or an arbitration institution were immune from civil actions; (7) whether arbitrators could be required to testify in another proceeding; (8) whether arbitrators had the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold pre-hearing conferences and otherwise manage the arbitration process; (9) when a court could enforce a pre-award ruling by an arbitrator; (10) what remedies an arbitrator could award, especially in regard to attorney fees, punitive damages or other exemplary relief; (11) whether parties can contract for an expanded court review for errors of law by arbitrators; and (12) 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 7 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 20 is limited. This is so even where an arbitrator may award attorney fees, punitive damages or other exemplary relief under section 18. Section 11 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 9 requires arbitrators to make important disclosures to the parties. Section 5 allows courts to grant provisional remedies in certain circumstances to protect the integrity of the arbitration process. Section 14 includes limited rights to discovery while recognizing the importance of expeditious arbitration proceedings.

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

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

Nevertheless, the Supreme Court's unequivocal stand to date as to the preemptive effect of the FAA provides strong reason to believe that a similar result will obtain with regard to section 10(a) grounds for vacatur. If it does, and if the Supreme Court eventually determines that the section 10(a) standards are the sole grounds for vacatur of commercial arbitration awards, FAA preemption of conflicting state law with regard to the "back end" issues of vacatur (and confirmation and modification) would be certain. If the Court takes the opposite tack and holds that the section 10(a) grounds are not the exclusive criteria for vacatur, the preemptive effect of §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 §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 20.

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. 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.

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 14], consolidation of claims [RUAA section 7], arbitrator immunity [RUAA section 11]) 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 18) and the standards for arbitrator disclosure of potential conflicts of interest (RUAA section 9) 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 addressed in the RUAA. Although twelve states have passed special arbitration statutes that apply to international arbitration in their states, these statutes in almost all instances are preempted by federal law. Seven states have based their statutes on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Arbitration. The others have approached international arbitration in a variety of ways, such as adopting parts of UNCITRAL or the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) or their own international arbitration provisions. In Chapter 2 of Title 9 of the United States Code, Congress adopted the New York Convention. Both Chapter 1 of Title 9, the Federal Arbitration Act, and Chapter 2, the New York Convention, preempt state acts dealing with international transactions. The only situation where a state international arbitration statute might apply is where the parties designate the law of a particular state international arbitration act in their agreement. Because of the likelihood of federal preemption, the Drafting Committee did not directly address international arbitration, except that the Drafting Committee utilized provisions of UNCITRAL, 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.

SECTION 1. DEFINITIONS. In this [Act]:

(1) "Arbitration ~~institution~~ *organization*" means a neutral organization, association, agency, board, or commission that initiates, sponsors, or administers arbitration proceedings or is involved in the appointment of arbitrators.

(2) "Arbitrator" means an individual appointed under this [Act] to render an award in a controversy between persons who are parties to an agreement to arbitrate.

(3) "Court" means [a court of competent jurisdiction] of this State *which has jurisdiction over the subject matter of or the parties to the controversy*.

(4) "Party," depending on the context as used in this [Act], means:

(A) a person who is covered by an agreement to arbitrate;

(B) a person by or against whom an arbitration proceeding is brought; or

(C) a person by or against whom a civil action in a court involving an agreement to arbitrate is brought.

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

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

Query: Delete?? (7) "Unless the parties otherwise agree" means that the

parties may vary the terms in this [Act] in their agreement to arbitrate or in any other valid agreement between them to the extent permitted by law.

Reporter's Notes:

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

Style committee representative has requested use of term "organization" rather than "institution."

2. Commissioner Hill of Maryland suggested that the term "arbitrator" be defined. It was not under the UAA. In Section 1(2), line 5, the Reporter suggests using the term "individual" rather than "person" because business entities or organizations do not function as "arbitrators." Also the terms "appointed under this [Act]" was used rather than "by agreement of the parties" because sometimes the arbitrator under Section 8 may be appointed by the court rather than by the parties. See BLACK'S LAW DICTIONARY 105 (1990); WEST'S LEGAL THESAURUS/DICTIONARY 60 (1985); Hoteles Condado Beach v. Union de Tronquistas Local 901, 763 F.2d 34 (1st Cir. 1985).

3. The definition of "court" is presently found in section 17 of the UAA. *At the first reading a Commissioner raised the question of the sufficiency of the definition if the court had no jurisdiction over the subject matter or parties. The added language is based on the Texas and Wyoming arbitration acts. TX. CIV. PRAC. & REM. §171.017 (1997); WY. STAT. §1-36-102 (1977).*

4. At the first reading Commissioner Hill of Maryland pointed out that the term "party" is used throughout the Act in different contexts and is not defined. There are

three different references to party or parties in the Act: (1) a person who is a party to the arbitration agreement, (2) a person who is a party to an arbitration proceeding, and (3) a person who is a party to a legal action in court involving an arbitration agreement. In addition to defining the term "party," the Reporter has attempted to make explicit throughout the Act whether in which of the three contexts the statute intends to use the term "party." See BLACK'S LAW DICTIONARY 1122 (1990).

The Commissioner also noted that in some instances the term "person" rather than "party" should be used in the Act. The Reporter also has made suggested changes along these lines.

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

5. The Revised Uniform Arbitration Act is primarily a default statute. A definition of the terms "[u]nless the parties otherwise agree" is included in section 1(7) so that parties will know that they can include provisions in their own arbitration agreement that differ from those in the RUAA; however, in accordance with section 3 any terms in the arbitration agreement must be in a record. The language in section 1(7) "or any other valid agreement" means that the parties may also include terms of their arbitration understanding in contracts other than the arbitration agreement itself. This language also is intended to convey that a subsequent, oral agreement about terms of an arbitration contract is valid. This position is in accordance with the unanimous holding of courts that a written contract can be modified by a subsequent, oral arrangement provided that the latter is supported by valid consideration. Premier Technical Sales, Inc. v. Digital Equipment Corp., 11 F.Supp.2d 1156 (N.D. Cal. 1998); Cambridgeport Savings Bank v. Boersner, 413 Mass. 432, 597 N.E.2d 1017 (1992); Pellegrene v. Luther, 403 Pa. 212, 169 A.2d 298 (1961).

The phrase "to the extent permitted by law" is included in the definition to inform the parties and reviewing courts that the parties cannot vary the terms of an arbitration agreement from the statute if the result would violate applicable law. This situation occurs most often when a party includes unconscionable provisions in an arbitration agreement. *See* Reporter Note 6 to section 3. The remedies of attorney's fees and punitive or other exemplary damages are another instance where the law in certain circumstances may disallow parties from limiting this remedy. *See* Reporter Note 2 to section 18.

However, at the 1st reading Commissioner Henderson of Arizona suggested that Section 1(7) was not a definition but rather a statement of substantive law. In a

discussion with the Reporter afterwards, Commissioner Henderson suggested combining the intent of Section 1(7) into Section 27 on nonwaivable provisions. If the Drafting Committee agrees to this change, it might be better to place the revised Section 27 toward the beginning of the Act, e.g., as Section 2 or Section 3. Commissioner Henderson also noted that this would allow the Drafting Committee to eliminate the repetitive use of "unless the parties otherwise agree" throughout the RUAA. In discussing this last suggestion with the Chair of the Drafting Committee, the Chair noted that placing the terms "unless the parties otherwise agree" throughout the RUAA is helpful to practitioners who may only look to individual sections of the Act for guidance and to non-lawyers who often are involved in arbitrations and likewise refer to the Act.

SECTION 2. NOTICE. Unless the parties *to an agreement to arbitrate* otherwise agree or unless otherwise provided by this [Act], a person gives notice by taking action that is reasonably necessary to inform another ~~party~~ *person* in ordinary course of the contents of the notice. A person receives notice if its contents come to the person's attention or the notice is delivered at the person's place of residence~~,~~ or place of business, ~~or any other place generally considered as the place for receipt of such communications to the person~~.

Reporter's Notes:

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

The concept of notice also occurs in section 12(b) concerning the arbitrators giving notice of a hearing; section 16(b) concerning a partying notifying an arbitrator of untimely delivery of an award; section 17 concerning a party's notice of requesting a change in the award by arbitrators; section 19 concerning a party applying to a court to confirm an award after receiving notice of it; and section 21(a) concerning a party applying to modify or correct an award after receiving notice of it.

"Notice" is also used in section 6 regarding commencement of an arbitration

proceeding; section 6(b) requires that, unless the parties otherwise agree, notice must be given either by mail registered or certified, return receipt requested, or by personal service as authorized by law in a civil action. Because of the language in section 2 "unless otherwise provided by this [Act]," the manner of notice provided in section 6(b) takes precedence as to notice of commencement of an arbitration proceeding.

2. The language "unless the parties otherwise agree," defined in Section 1(5), is intended to allow the parties to agree to vary the notice requirement in Section 2.

3. The Reporter has replaced "party" with "person" in line 3 of Section 2 because "notice" may be given to a non-party, e.g., if a third-party witness is subpoenaed to an arbitration proceeding under Section 14.

4. Commissioner Hawkins of Connecticut suggested that in the absence of an agreement as to place of receipt of notice, the alternatives of "place of residence or place of business" should be exhaustive; otherwise courts are invited to speculate on "any other place generally considered as the place of receipt of such communications to the person." If the parties have in mind some "unusual place of notice," such as a P.O. box or "community sign post" or e-mail address, they should so specify. He suggested to delete the terms "any other place generally considered as the place of receipt of such communications to the person."

5. Commissioner Gibson of Vermont asked the Committee to reconsider the use of UCC-type of notice in an arbitration statute rather than more "judicial" notice because of the adjudicative nature of the RUAA. It was pointed out to Commissioner Gibson that Section 5, Commencement does require more formal notice.

SECTION 3. VALIDITY OF ARBITRATION AGREEMENT.

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

(b) Unless the parties otherwise agree:

(1) A court shall decide whether an agreement to arbitrate exists or

a controversy is subject to an agreement to arbitrate .

(2) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing an agreement to arbitrate is enforceable.

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

Reporter's Notes:

1. The language in Section 3(a) is the same as UAA section 1 and almost the same as the language of FAA Section 2 "shall be valid irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Because of the significant body of case law that has developed over the interpretation of this language in both the UAA and the FAA, the Drafting Committee decided, for the most part, to leave this section intact.

2. Section 3(b)(1) and (2) reflect the decision of the Drafting Committee to include language in the RUAA that incorporates the holdings of the vast majority of state courts and the law that has developed under the FAA that, in the absence of an agreement to the contrary, issues of substantive arbitrability, i.e., whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.

3. The language in section 3(b)(2) "whether a contract containing the arbitration agreement is enforceable" is intended to follow the "separability" doctrine outlined in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). There the plaintiff filed a diversity suit in federal court to rescind an agreement for fraud in the inducement and to enjoin arbitration. The alleged fraud was in inducing assent to the underlying agreement and not to the arbitration clause itself. The Supreme Court, applying the FAA to the case, determined that the arbitration clause is separable from the contract in which it is made. So long as no party claimed that only the arbitration clause was induced by fraud, a broad arbitration clause encompasses arbitration

of a claim that the underlying contract was induced by fraud. Thus, if a disputed issue is within the scope of the arbitration clause, challenges to the enforceability of the underlying contract on grounds such as fraud, illegality, mutual mistake, duress, unconscionability, ultra vires and the like are to be decided by the arbitrator and not the court. *See* II Ian Macneil, Richard Speidel, and Thomas Stipanowich, FEDERAL ARBITRATION LAW §§15.2-15.3 (1995) [hereinafter "MACNEIL TREATISE"]. A majority of states recognize some form of the separability doctrine under their state arbitration laws.

4. Waiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause. For instance, where a plaintiff brings an action against a defendant in court, engages in extensive discovery and then attempts to dismiss the lawsuit on the grounds of an arbitration clause, a defendant might challenge the dismissal on the grounds that the plaintiff has waived any right to use of the arbitration clause. S&R Company of Kingston v. Latona Trucking, Inc., 159 F.3d 80 (2d Cir. 1998). Allowing the court to decide this issue of arbitrability comports with the separability doctrine because in most instances waiver concerns only the arbitration clause itself and not an attack on the underlying contract. It is also a matter of judicial economy to require that a party, who pursues an action in a court proceeding but later claims arbitrability, be held to a decision of the court on waiver.

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

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

> "Unequal bargaining power often occurs in arbitration provisions involving employers and employees, sellers and consumers, health maintenance organizations and patients, franchisors and franchisees, and others.
>
> "Despite some recent developments to the contrary, courts do not often find contracts unenforceable for unconscionability. To determine whether to void a contract on this ground, courts examine a number of factors. These factors include: unequal bargaining power, whether the weaker party may opt out of arbitration, the arbitration clause's clarity and conspicuousness, whether an unfair advantage is obtained, whether the arbitration clause is negotiable, whether the arbitration provision is boilerplate, whether the aggrieved party had a meaningful choice or was compelled to accept, whether the arbitration agreement is within the

reasonable expectations of the weaker party, and whether the stronger party used deceptive tactics. *See, e.g.*, We Care Hair Dev., Inc. v. Engen, 180 F.3d 838 (7th Cir. 1999); Harris v. Green Tree Financial Corp., 183 F.3d 173 (3d Cir. 1999); Broemmer v. Abortion Serv. of Phoenix, Ltd., 173 Ariz. 148, 840 P.2d 1013 (1992); Chor v. Piper, Jaffray & Hopwood, Inc., 261 Mont. 143, 862 P.2d 26 (1993); Buraczynski v. Eyring, 919 S.W.2d 314 (Tenn. 1996); Sosa v. Paulos, 924 P.2d 357 (Utah 1996); Powers v. Dickson, Carlson & Campillo, 54 Cal. App. 4th 1102, 63 Cal. Rptr.2d 261 (1997); Beldon Roofing & Remodeling Co. v. Tanner, 1997 W.L. 280482 (Tex.Ct.App.).

"Despite these many factors, courts have been reluctant to find arbitration agreements unconscionable. II MACNEIL TREATISE § 19.3; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 WIS. L. REV. 33 (1997); Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Cassarotto,* 31 WAKE FOREST L. REV. 1001 (1996). However, in the last few years, some cases have gone the other way and courts have begun to scrutinize more closely the enforceability of arbitration agreements. Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (one-sided arbitration agreement that takes away numerous substantive rights and remedies of employee under Title VII is so egregious as to constitute a complete default of employer's contractual obligation to draft arbitration rules in good faith); Shankle v. B-G Maintenance Mgt., Inc., 163 F.3d 1230 (10th Cir. 1999) (arbitration clause does not apply to employee's discrimination claims where employee is required to pay portion of arbitrator's fee that is a prohibitive cost for him so as to substantially limit his use of arbitral forum); Randolph v. Green Tree Financial Corp., 178 F.3d 1149 (11th Cir. 1999) (consumer not required to arbitrate where arbitration clause is silent on subject of arbitration fees and costs due to risk that imposition of large fees and costs on consumer may defeat remedial purposes of Truth in Lending Act); Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054 (11th Cir. 1998) (employee not required to arbitrate Title VII claim where the contract limits damages below that allowed by the statute); Broemmer v. Abortion Serv. of Phoenix, Ltd., *supra* (arbitration agreement unenforceable as contract of adhesion because it required a patient to arbitrate a malpractice claim and to waive the right to jury trial and was beyond the patient's reasonable expectations where drafter inserted potentially advantageous term requiring arbitrator of malpractice claims to be a licensed medical doctor); Engalla v. Permanente Med. Grp., 15 Cal. 4th 951, 938 P.2d 903, 64 Cal. Rptr. 2d 843 (1997) (health maintenance organization may not compel arbitration where it fraudulently induced participant to agree to the arbitration of disputes, fraudulently misrepresented speed of arbitration selection process and forced delays so as to waive the right of arbitration); Maciejewski v. Alpha Systems Lab., Inc., 73 Cal. App. 4th 1372, 87 Cal. Rptr.2d 390 (1999)

(contract requiring employee to pay costs of arbitrators, limits on discovery, and forfeiture of statutory right to attorney's fees renders arbitration provision unconscionable); Gonzalez v. Hughes Aircraft Employees Federal Credit Union, 70 Cal. App.4th 468, 82 Cal. Rptr.2d 526 (1999) (arbitration agreement which has unfair time limits for employees to file claims, requires employees to arbitrate virtually all claims but allows employer to obtain judicial relief in virtually all employment matters, and severely limits employees' discovery rights is both procedurally and substantively unconscionable); Armendariz v. Foundation Health Psychcare Services, Inc., 68 Cal. App. 4th 374, 80 Cal. Rptr.2d 255 (1998) (clause in arbitration agreement limiting employee's remedies in state anti-discrimination claims severed from the agreement and held void on grounds of unconscionability); Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997) (one-sided compulsory arbitration clause which reserved litigation rights to the employer only and denied employees rights to exemplary damages, equitable relief, attorney fees, costs, and a shorter statute of limitations unconscionable); Rembert v. Ryan's Family Steak House, 235 Mich.App. 118, 596 N.W.2d 208 (1999) (predispute agreement to arbitrate statutory employment discrimination claims was valid only as long as employee did not waive any rights or remedies under the statute and arbitral process was fair); Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, 703 A.2d 961 (1997) (arbitration clause that does not clearly and unmistakably include claims of employment discrimination fails to waive employee's statutory rights and remedies).

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

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

"The Drafting Committee determined to leave the issue of adhesion contracts and unconscionability to developing law (1) because the issue of unconscionability reflects so much the substantive law of the states and not just arbitration, (2) because the case law, statutes, and arbitration standards are rapidly changing, and (3) because treating arbitration clauses differently than other contract provisions would raise significant preemption issues under the Federal Arbitration Act. However, it should be pointed out that a primary purpose of Section 27 which provides that some sections of the RUAA are not waivable is to address the problem of contracts of adhesion in the statute while taking into account the limitations caused by federal preemption.

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

SECTION 4. MOTIONS TO COMPEL OR STAY AN ARBITRATION PROCEEDING.

(a) A court shall order ~~the parties~~ *persons* to arbitrate on motion of a ~~party~~ *person* showing an agreement to arbitrate and ~~another party's~~ *the other person's* refusal to arbitrate.

(b) If a ~~party~~ *person* opposes a motion made under subsection (a), the court shall proceed immediately and summarily to decide the claim. Unless the court finds there is not an agreement to arbitrate, it shall order the ~~parties~~ *persons* to arbitrate.

(c) A court may stay an arbitration proceeding commenced or threatened,

after trying the claim immediately and summarily, on a motion of a ~~party~~ *person* showing that there is no agreement to arbitrate. If the court finds for the movant that there is no agreement to arbitrate, it shall stay the arbitration. If the court finds for the *person* opposing ~~party~~ *the motion*, it shall order the parties *to the judicial proceedings* to arbitrate.

(d) The court may not refuse to order arbitration because an claim subject to arbitration lacks merit or a ~~party~~ *person* has not established grounds for the claim.

(e) If there is a proceeding pending in a court involving a claim referable to arbitration under an alleged agreement to arbitrate, a motion under this section must be filed in that court. Otherwise and subject to Section 25, a motion under this section may be filed in any other court of competent jurisdiction.

(f) *If the court orders the parties to the judicial proceeding to arbitrate or if the parties file a motion with the court to order arbitration under this section, t*he court shall stay a judicial proceeding that involves a claim subject to arbitration ~~if an order for arbitration or a motion for that order is made under this section~~. The court may stay ~~may apply~~ only the cliam subject to arbitration, if that claim is severable *from the claims not subject to arbitration*. An order compelling *the parties to arbitrate* ~~arbitration~~ must also stay the court proceedings.

Reporter's Notes:

1. The term "summarily" has been defined to mean that a trial court should expeditiously and without a jury trial determine whether a valid arbitration agreement exists. Burke v. Wilkins, 507 S.E.2d 913 (N.C. Ct. App. 1998); *see also* Wallace v. Wiedenbeck, 251 A.D.2d 1091, 674 N.Y.S.2d 230, 231 (N.Y. App. Div. 1998); Grad v.

Wetherholt Galleries, 660 A.2d 903 (D.C. 1995). The term is also used in Section 4 of the FAA.

2. In Section 4 the Reporter primarily has inserted the term "person" for "party." Until the court orders or compels individuals to arbitrate it may be questionable whether they are in fact "parties to an arbitration agreement." For instance, a litigant may show under Section 4(c) that "there is no agreement to arbitrate." Thus the use of the term "party" in this Section is misleading. In Section 4(c) the Reporter left the term "parties" in lines 5-6 and added the term "to the judicial proceedings" because the court can order these litigants to arbitrate.

3. Commissioner Hawkins of Connecticut requested a Comment that it be made clear if a court orders arbitration under Section 4, then more than the commencement of an arbitration under Section 5 is intended but that the arbitrator would be chosen in accordance with Section 8 and all other provisions of the Act would apply. The designated arbitrator would have the authority to make the determination under Section 3(b)(2) "whether any condition precedent to arbitrability has been fulfilled and whether a contract containing an arbitration agreement is enforceable.

SECTION 5. PROVISIONAL REMEDIES.

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

(b) After an arbitrator is appointed and is authorized and able to act, the arbitrator may issue such orders for provisional remedies, including the issuance of interim awards, as the arbitrator finds necessary for the fair and expeditious resolution of the controversy to the same extent and under the same conditions as if the controversy were in a civil *action* ~~rather than arbitration~~. After the arbitrator is appointed and is authorized

and able to act, a party *to an arbitration proceeding* may move a court for a provisional remedy only if the matter is one of urgency and the arbitrator cannot provide an adequate remedy.

Reporter's Notes:

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

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

In Salvucci v. Sheehan, 349 Mass. 659, 212 N.E.2d 243 (1965), the court allowed the issuance of a temporary restraining order to prevent the defendant from conveying or encumbering property that was the subject of a pending arbitration. The Massachusetts Supreme Court noted the 1954 language and concluded that it was not adopted by the National Conference because the section would be rarely needed and raised concerns about the possibility of unwarranted labor injunctions. The court concluded that the drafters of the UAA assumed that courts' jurisdiction for granting such provisional remedies was not inconsistent with the purposes and terms of the act. Many states have allowed courts to grant provisional relief for disputes that will ultimately be resolved by arbitration. BancAmerica Commercial Corp. v. Brown, 806 P.2d 897 (Ariz. Ct. App. 1991) (writ of attachment in order to secure a settlement agreement between debtor and creditor); Lambert v. Superior Court, 228 Cal. App.3d 383, 279 Cal. Rptr. 32 (1991) (mechanic's lien); Ross v. Blanchard, 251 Cal. App.2d 739, 59 Cal. Rptr. 783 (Cal. Ct. App. 1967) (discharge of attachment); Hughley v. Rocky Mountain Health Maintenance Organization, Inc., 927 P.2d 1325 (Colo. 1996) (preliminary injunction to continue status quo that health maintenance organization must provide chemotherapy treatment until arbitration decision); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court, 672 P.2d 1015 (Colo. 1983) (preliminary injunctive relief to preserve status quo); Langston v. National Media Corp., 420 Pa.Super. 611, 617 A.2d 354 (1992) (preliminary injunction requiring party to place money in an escrow account); 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, Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co., 749 F.2d 124 (2d Cir. 1984); Guinness-Harp Corp. v. Jos. Schlitz Brewing Co., 613 F.2d 468 (2d Cir. 1980); 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 preliminary relief, the court does not have the benefit of the arbitrator's determination of disputed issues or interpretation of the contract. Another problem for a court is that in determining the propriety of an injunction, order, or writ for attachment or other security, the court must make an assessment of hardships upon the parties and the probability of success on the merits. Such determinations fly in the face of the underlying philosophy of arbitration that the parties have chosen arbitrators to decide the merits of their disputes.

3. The approach in RUAA section 5 that limits a court granting preliminary relief to any time "[b]efore an arbitrator is appointed in accordance with section 8 or are authorized or able to act . . . upon motion of a party" and provides that after the appointment, the arbitrators initially must decide the propriety of a provisional remedy,

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

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

4. The case law, commentators, the rules of arbitration institutions and some state statutes are very clear that arbitrators have broad authority to order provisional remedies and interim relief, including interim awards, in order to make a fair determination of an arbitral matter. This authority has included the issuance of measures equivalent to civil remedies of attachment, replevin, and sequestration to preserve assets or to make preliminary ruling ordering parties to undertake certain acts that affect the subject matter of the arbitration proceeding. *See, e.g.,* Island Creek Coal Sales Co. v. City of Gainesville, Fla., 729 F.2d 1046 (6th Cir. 1984) (upholding under FAA arbitrator's interim award requiring city to continue performance of coal purchase contract until further order of arbitration panel); Fraulo v. Gabelli, 37 Conn. App. 708, 657 A.2d 704 (1995) (upholding under UAA arbitrator issuing preliminary orders regarding sale and proceeds of property); Fishman v. Streeter, 1992 WL 146830 (Ohio App. 1992) (upholding under

UAA arbitrator's interim order dissolving partnership); Park City Assoc. v. Total Energy Leasing Corp., 58 App. Div.2d 786, 396 N.Y.S.2d 377 (1977) (upholding under New York state arbitration statute a preliminary injunction by an arbitrator); N.J. STAT. ANN. § 2A:23A-6 (allowing provisional remedies such as "attachment, replevin, sequestration and other corresponding or equivalent remedies"); AAA Commercial Rules 34, 43 (allowing interim awards to safeguard property and to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement, including, but not limited to, specific performance of a contract"); CPR Rules 12.1, 13.1 (allowing interim measures including those "for preservation of assets, the conservation of goods or the sale of perishable goods," requiring "security for the costs of these measures," and permitting "interim, interlocutory and partial awards"); UNCITRAL Commer. Arb. L. Art. 17 (providing that arbitrators can take "such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute," including security for costs); II MACNEIL TREATISE §§ 25.1.2, 25.3, 36.1.

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

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

SECTION 6. COMMENCEMENT OF AN ARBITRATION PROCEEDING.

(a) A ~~party~~ *person* desiring to arbitrate a controversy pursuant to an agreement to arbitrate shall provide in a record notice to all parties to the *agreement* to arbitrate of the commencement of an arbitration proceeding. Unless the parties *to the agreement to arbitrate* otherwise agree, the notice must describe the nature of the

controversy, any amount in controversy, and the remedy sought.

(b) A notice in a record commencing the arbitration proceeding must be served upon the other parties *to the agreement to arbitrate* in the manner ~~in which the parties agree~~ *provided for in the agreement to arbitrate* or, in the absence of an agreement, either by mail registered or certified, return receipt requested, or by personal service as authorized in a civil action.

(c) If a ~~party~~ *person* fails to commence an arbitration proceeding in compliance with subsections (a) and (b), the court may refuse to confirm an arbitration award under Section 19 or may vacate an arbitration award under Section 20. Unless the other ~~party~~ *person* interposes a timely objection no later than the commencement of the hearing, any objection as to lack of or insufficiency of notice under this section is waived.

Reporter's Notes:

1. The Drafting Committee decided to include a new provision in the RUAA regarding commencement of an arbitration proceeding. Section 6 includes both the contents of the notice of a claim and the means of bringing the notice to the attention of the other parties. The language in new section 6 is based upon the Florida arbitration statute and, to some extent, the Indiana arbitration act, both of which include provisions regarding the commencement of an arbitration. FLA. STAT. ANN. §648.08 (1990); IND. CODE §34-57-2-2 (1998).

2. Both the content of the notice and the means of giving the notice are subject to the parties' agreement. Not only does this approach comport with the concept of party autonomy in arbitration but it also recognizes that many parties utilize arbitration institutions that require greater or lesser specificity of notice and service. The requirement in section 6(a) that the initiating party inform the other parties of "the nature of the controversy and include any amount in controversy and the remedy sought" is found in the Florida and Indiana statutes and in the arbitration rules of institutions such as the American Arbitration Association, the Center for Public Resources, JAMS/Endispute, NASD Regulation, Inc., and the New York Stock Exchange (although slightly different

language may be used in the institutional rules). Section 6(a) is intended to insure that parties provide sufficient information in the notice to inform opposing parties of the arbitration claims while recognizing that this notice is not a formal pleading and that it is often drafted by persons who are not attorneys.

3. Section 6(b) is the means of informing other parties of the arbitration proceeding. Many arbitration institutions allow parties to initiate arbitration through the use of regular mail and do not require "registered or certified, return-receipt-requested mail." *See, e.g.*, American Arb. Ass'n, National Rules for the Resolution of Employment Disputes, R. 4(b)(i)(2); Center for Public Resources, Rules for Non-Administered Arbitration of Business Disputes, R. 2.1; National Ass'n of Securities Dealers Code of Arb. Procedure, Part I, sec. 25(a); New York Stock Exchange Arb. Rules, R. 612(b). This more informal means of giving notice without evidence of receipt would be allowed under section 6(b) because it recognizes the manner of notice agreed to by the parties.

4. Section 6(c) indicates the sanction if a party who commences the arbitration proceeding fails to follow the notice provisions in Section 6(a) and (b). The requirement that the other party make a timely objection to the lack of or insufficiency of notice of commencement is similar to that found in Section 12(c) on notice of the arbitration hearing.

5. The Reporter has made Section 6(a) more explicit by requiring that notice of commencement of an arbitration proceeding be given to all parties to the arbitration agreement and not just to the party against whom a person files an arbitration claim. For instance, in a construction contract with a single arbitration agreement between multiple contractors and subcontractors, if one contractor commenced an arbitration proceeding against one subcontractor, Section 6(a) requires that the contractor give notice to all persons signatory to the arbitration agreement. This is appropriate because a different contractor or subcontractor may have an interest in the arbitration proceeding so as to initiate its own arbitration proceeding or to request consolidation under Section 7 or to take other action. Likewise, Section 6(b) requires that notice be served upon all parties to the arbitration agreement.

SECTION 7. CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS.

(a) *Except as provided in subsection (b),* upon motion of a party to an arbitration ~~agreement~~ *proceeding*, the court may order consolidation of separate

arbitration proceedings if:

(1) there are separate agreements to arbitrate or separate arbitration proceedings between the same ~~parties~~ *persons* or one ~~party~~ *person* is a party to a separate agreement to arbitrate or a separate proceeding with a third ~~party~~ *person*;

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

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

(b) The court may not order consolidation of separate arbitration proceedings if doing so would be contrary to the express terms of an agreement to arbitrate or would substantially prejudice the rights of, or would result in undue delay or hardship to, a party *to the arbitration proceeding* opposing consolidation.

(c) If the court orders consolidation under subsection (a), it may order tje consolidation of the arbitration proceedings as to certain claims, leaving other claims to be resolved in separate arbitration proceedings.

Reporter's Notes:

1. Multiparty disputes have long been a source of controversy in the enforcement of agreements to arbitrate. When conflict erupts in complex transactions involving multiple contracts, it is rare for all parties to be signatories to a single arbitration agreement. In such cases, some parties may be bound to arbitrate while others are not; in other situations, there may be multiple arbitration agreements. Such realities raise the possibility that common issues of law or fact will be resolved in multiple fora, enhancing the overall expense of conflict resolution and leading to potentially inconsistent results. *See* III MACNEIL TREATISE § 33.3.2. Such scenarios are particularly common in construction, insurance, maritime and sales transactions, but are not limited to those

settings. *See* Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 481-82 (1987).

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

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

The split of authority regarding the power of courts to consolidate arbitration proceedings in the absence of contractual consolidation provisions extends to the federal sphere. In the absence of clear direction in the FAA, courts have reached conflicting holdings. The current trend under the FAA disfavors court-ordered consolidation absent express agreement. *See generally* III MACNEIL TREATISE §33.3. However, a recent California appellate decision held that state law regarding class-wide arbitration was not preempted by federal arbitration law under the FAA. Blue Cross of Calif. v. Superior Ct., 67 Cal. App. 4th 42, 78 Cal. Rptr.2d 779 (1998).

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

Also recent empirical studies support court-ordered consolidation. In a survey of

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

3. A provision in the RUAA specifically empowering courts to order consolidation in appropriate cases makes sense for several reasons. As in the judicial forum, consolidation effectuates efficiency in conflict resolution and avoidance of conflicting results. By agreeing to include an arbitration clause, parties have indicated that they wish their disputes to be resolved in such a manner. In many cases, moreover, a court may be the only practical forum within which to effect consolidation. *See* Schenectady v. Schenectady Patrolmen's Benev. Ass'n, 138 A. D.2d 882, 883, 526 N.Y.S.2d 259, 260 (1988). Furthermore, it is likely that in many cases one or more parties, often non-drafting parties, will not have considered the impact of the arbitration clause on multiparty disputes. By establishing a default provision which permits consolidation (subject to various limitations) in the absence of a specific contractual provision, section 7 encourages drafters to address the issue expressly and enhances the possibility that all parties will be on notice regarding the issue.

Section 7 is an adaptation of consolidation provisions in the California and Georgia statutes. CAL. CIV. PROC. CODE §1281.3 (West 1997); GA. CODE ANN. § 9-9-6 (1996). It gives courts discretion to consolidate separate arbitration proceedings in the presence of multiparty disputes involving common issues of fact or law.

Like other sections of the RUAA, however, the provision also embodies the fundamental principle of judicial respect for the preservation and enforcement of the terms of agreements to arbitrate. Thus, Section 7(a) ("would be contrary to the express terms of an applicable arbitration agreement") recognizes that consolidation should not be ordered in contravention of provisions by parties prohibiting consolidation of claims.

Even in the absence of express prohibitions on consolidation, the legitimate expectations of contracting parties may limit the ability of courts to consolidate arbitration proceedings. Thus, a number of decisions have recognized the right of parties opposing consolidation to prove that consolidation would undermine their stated expectations, especially regarding arbitrator selection procedures. *See* Continental Energy Assoc. v. Asea Brown Boveri, Inc., 192 A. D.2d 467, 596 N.Y.S.2d 416 (1993) (denial of consolidation not an abuse of discretion where parties' two arbitration agreements differed substantially with respect to procedures for selecting arbitrators and manner in which award was to be rendered); Stewart Tenants Corp. v. Diesel Constr. Co., 16 A. D.2d 895,

229 N.Y.S.2d 204 (1962) (refusing to consolidate arbitrations where one agreement required AAA tribunal, other called for arbitrator to be appointee of president of real estate board). Therefore, section 7(a) also prohibits consolidation when such action would "substantially prejudice the rights"of a party opposing consolidation. Such rights would normally be deemed to include arbitrator selection procedures, standards for the admission of evidence and rendition of the award, and other express terms of the arbitration agreement. In some circumstances, however, the imposition on contractual expectations will be slight, and no impediment to consolidation: for example, if one agreement provides for arbitration in St. Paul and the other in adjoining Minneapolis, consolidated hearings in either city should not normally be deemed to violate a substantial right of a party.

Section 7(a) also provides as to when a court might properly deny consolidation when, for example, one or more of the separate arbitration proceedings have progressed so far that consolidation would result in "undue delay or hardship" to a party which is required to recommence hearings with multiple parties.

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

4. A party cannot appeal a lower court decision of an order granting or denying consolidation under Section 26, Appeals, because the policy behind sections 26(a) (1) and (2) is not to allow appeals of orders that result in delaying arbitration. Whether consolidation is ordered or denied, the arbitrations likely will continue--either separately or in a consolidated proceeding--and to allow appeals would delay the arbitration process.

5. At the 1st reading Commissioner Hawkins of Connecticut proposed to delete the following language in Section 7(a)(3): "or would substantially prejudice the rights of, or would result in undue delay or hardship to, a party to the arbitration proceeding opposing consolidation." His rationale is that as drafted there is a bias against consolidation which requires the opponent of consolidation only to show substantial prejudice, undue delay or hardship without balancing those effects against the possible substantial prejudice or undue delay or hardship to the <u>proponent</u> of consolidation. He believes that the party opposing consolidation has a "veto power" under the language he urges be deleted. He contends that elimination of this language would "even the playing

field."

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

Reporter's Notes:

1. The language in section 8, "[i]f the parties have agreed on a method for appointing an arbitrator," is intended to include the parties' arbitration agreement and any subsequent agreements between them that are valid to the extent permitted by law as defined in section 1(5) and the Reporter's Notes following.

SECTION 9. DISCLOSURE BY ARBITRATOR.

(a) Before accepting appointment, a person who is requested to serve as an arbitrator shall make an ~~reasonable~~ inquiry *reasonable under the circumstances of an arbitration proceeding* and disclose any facts learned that a reasonable person would consider likely to affect the impartiality of the arbitrator, including any:

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

(2) existing or past relationships with the parties *to the agreement*

to arbitrate, their counsel or representatives, witnesses, or other arbitrators.

(b) The obligation to disclose under subsection (a) is a continuing one that extends throughout the period of appointment as arbitrator.

(c) Unless the parties otherwise agree to procedures for disclosure, disclosure must be made directly to all parties *to the arbitration proceeding* and to other arbitrators.

(d) Objections based on undisclosed interests, relationships, or facts described in subsections (a) and (b) and unwaived objections of a party *to the arbitration proceeding* based on any of those interests, relationships, or facts disclosed in accordance with subsection (c) may be grounds to vacate an award under Section 20(a)(2). The failure of an arbitrator to make a significant disclosure required under this section creates a presumption of evident partiality prejudicing the rights of a party *to the arbitration proceeding* under Section 20(a)(2).

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

Reporter's Notes:

1. The notion of decision making by independent neutrals is central to the arbitration process. The UAA and other legal and ethical norms reflect the principle that arbitrating parties have the right to be judged impartially and independently. III MACNEIL TREATISE § 28.2.1. Thus, §12(a)(4) of the UAA provides that an award may be vacated where "there was evident partiality by an arbitrator appointed as a neutral or corruption in

any of the arbitrators or misconduct prejudicing the rights of any party." *Cf*. RUAA §20(a)(2); FAA § 10(a)(2). This basic tenet of procedural fairness assumes even greater significance in light of the strict limits on judicial review of arbitration awards. *See* Drinane v. State Farm Mut. Auto Ins. Co., 153 Ill.2d 207, 212, 606 N.E.2d 1181, 1183, 180 Ill. Dec. 104, 106 (1992) ("Because courts have given arbitration such a presumption of validity once the proceeding has begun, it is essential that the process by which the arbitrator is selected be certain as to the impartiality of the arbitrator.").

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

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

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

Rptr. 2d 685 (1996) (question is whether record reveals facts which might create an impression of possible bias in eyes of hypothetical, reasonable person).

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

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

3. The fundamental standard of section 9(a) is an objective one: disclosure is required of facts which a reasonable person would consider likely to affect the arbitrator's impartiality. *See ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493 (4th Cir. 1999) (relationship between arbitrator and a party is too insubstantial for "reasonable person" to conclude that there was improper partiality so as to vacate award under FAA). The Drafting Committee adopted the "reasonable person" test with the intent of making clear that the subjective views of the arbitrator or the parties are not controlling. However, parties may agree to higher or lower standards for disclosure and also establish

mechanisms for disqualification. For instance, in labor arbitration under a collective-bargaining agreement because the parties interact often and have personal relationships with each other and arbitrators the Code of Professional Responsibility of Arbitrators of Labor-Management Disputes provides: “There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.” Section 2.B.3.a. In other circumstance where parties do not have ongoing relationships, an arbitrator may be required to disclose such a personal acquaintanceship.

Section 9(b) is intended to make the disclosure requirement a continuing one which applies to conflicts which arise or become evident during the course of arbitration proceedings.

4. Section 9(d) seeks to accommodate the tensions between concepts of partiality and the need for experienced decision makers, as well as the policy of relative finality in arbitral awards. Therefore, an arbitrator's failure to disclose known, direct, and material interests in the outcome or a substantial relationship with a party, attorney or representative, witness, or other arbitrator, i.e., a failure to make a “significant disclosure,” gives rise to a presumption of "evident partiality" and “prejudice” under section 20(a)(2). *Cf.* MINN. STAT. ANN. § 572.10(2) (1998) (failure to disclose conflict of interest or material relationship is grounds for vacatur of award). It is then the burden of the party defending the award to rebut the 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). Other challenges based upon evident partiality, including disclosed or undisclosed interests, relationships, or facts, are subject to the developing case law under section 20(a)(2).

Section 9(d) also requires a party to make a timely objection to the arbitrator’s continued service to preserve grounds to vacate an award under section 20(a)(2).

5. Special problems are presented by tripartite panels involving "party-arbitrators"--that is, usually two arbitrators appointed directly by each of the arbitrating parties--and a third arbitrator jointly selected by the party-arbitrators. *See generally* III MACNEIL TREATISE § 28.4. In some such cases, it may be agreed that the party-arbitrators are not regarded as "neutral" arbitrators, but are deemed to be predisposed toward the party which appointed them. *See, e.g.*, AAA Commercial Arbitration Rule 12 (1996). Nevertheless, the integrity of the process demands that party-arbitrators, like other arbitrators, disclose pertinent interests and relationships to all parties as well as other members of the arbitration panel. Similarly. an undisclosed substantial relationship between a party-arbitrator and the party appointing that arbitrator may be the subject of a motion to vacate under RUAA section 20(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 9(e) conditions post-award resort to the courts under section 20(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).

7. Commissioner Hawkins suggests that Section 9(a) be changed by deleting the terms "a reasonable inquiry" and substituting the words "an inquiry reasonable under the circumstances of the arbitration proceeding" because this would provide more clarity and flexibility as to the type of inquiry the person should undertake.

SECTION 10. MAJORITY ACTION BY ARBITRATORS. The powers of arbitrators may be exercised by a majority unless the parties *to an agreement to arbitrate or to the arbitration proceeding* otherwise agree or otherwise provided by this [Act].

SECTION 11. IMMUNITY OF ARBITRATOR; COMPETENCY TO TESTIFY; ATTORNEY'S FEES AND COSTS.

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

(b) ~~A neutral arbitration institution~~ *An arbitration organization* that administers an arbitration *proceeding* is immune from liability to the same extent as an arbitrator.

(c) The immunity afforded by this section supplements, ~~but does not~~

~~supplant,~~ any other ~~applicable common-law or statutory~~ immunity.

(d) If immunity is asserted by an arbitrator under subsection (a) or by an arbitration ~~institution~~ organization under subsection (b), the arbitrator or a representative of the arbitration ~~institution~~ is not competent to testify in a civil action as to any statement, conduct, decision, or ruling occurring during an arbitration *proceeding* under this [Act]. However, this subsection does not apply if a party *to the arbitration proceeding* files a motion to vacate an award under Section 20(a)(1) or (2) and establishes prima facie that the grounds for vacation exist.

(e) If a ~~party~~ *person* commences a civil action against an arbitrator or an arbitration ~~institution~~ *organization* arising from the services of the arbitrator or arbitration ~~institution~~ *organization* or if a ~~party~~ *person* seeks to compel the arbitrator or a representative of an arbitration ~~institution~~ *organization* to testify in violation of subsection (d) and the court decides that the arbitrator or the arbitration ~~institution~~ *organization* is immune from civil action or that the arbitrator or the representative of an arbitration ~~institution~~ *organization* is incompetent to testify, the court shall award to the arbitrator or the arbitration ~~institution~~ *organization* reasonable attorney's fees, costs, and expenses of defending the civil action including reasonable attorney's fees, costs, and expenses on appeal.

Reporter's Notes:

1. Section 11(a) is based on the language of former section 1280.1 of the California Code of Civil Procedure establishing immunity for arbitrators. Section 1280.1 was enacted with an expiration date and was not renewed. See also CAL. CIV. PROC.

CODE § 1297.119 which gives the same protection to arbitrators in international arbitrations and unlike § 1280.1 had no expiration date and is still in effect. Three other states presently provide some form of arbitral immunity in their arbitration statutes. FLA. STAT. ANN. § 44.107 (West 1995); N.C. GEN. STAT. § 7A-37.1 (1995); UTAH CODE ANN. § 78-31b-4 (1994).

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

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

2. Section 11(b) provides the same immunity of arbitrators to neutral arbitration institutions which administer the arbitration proceeding. Extension of judicial immunity to those arbitration institutions is appropriate to the extent that they are acting "in certain roles and with certain responsibilities" that are functionally comparable to those of a judge. Corey v. New York Stock Exchange, 691 F.2d at 1209. Section 11(b) extends immunity to neutral arbitration institutions because the duties that they perform in administering the arbitration process are the functional equivalent of the comparable role and responsibility of judges in administering the adjudication process in a court of law. There is substantial precedent for this conclusion. *See, e.g.*, Hawkins v. Nat'l Ass'n Sec. Dealers, Inc., 149 F.3d 330 (5th Cir. 1998); Olson v. Nat'l Ass'n Sec. Dealers, Inc., 85 F.3d 381 (8th Cir. 1996); Aerojet-General Corp. v. Am. Arbitration Ass'n, 478 F.2d 248 (9th Cir. 1973); Cort v. Am. Arbitration Ass'n, 795 F. Supp. 970 (N.D. Cal. 1992); Boraks v. Am. Arbitration Ass'n, 205 Mich.App. 149, 517 N.W.2d 771 (1994); Candor v. Am. Arbitration Ass'n, 97 Misc.2d 267, 411 N.Y.S.2d 162 (Sup. Ct., Tioga Cty. 1978).

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

4. Section 11(d) is based on the California Evidence Code which provides that arbitrators shall not be "competent to testify * * * as to any statement, conduct, decision, or ruling occurring at or in conjunction with the prior proceeding." CAL. EVID. CODE § 703.5. There are similar provisions that prohibit anyone from calling an arbitrator as a witness in a subsequent proceeding in New Jersey and New York. N.J.R. SUPER. CT. R. 4:21A-4; N.Y. CT. R. §28.12. The first sentence of section 11(d) provides that an arbitrator must assert this immunity. Thus an arbitrator may decide not to assert arbitral immunity in a proceeding that the arbitrator initiates by way of claim or counterclaim. For instance, an arbitrator may bring an action against one of the parties for nonpayment of fees to the arbitrator and may have to give testimony in order to recover. If in an action by the arbitrator to recover a fee the other party files a counterclaim against the arbitrator attacking the award, the intent of this section is that the arbitrator can decide not to assert immunity as to the arbitrator's claim and can provide testimony about it but the arbitrator can assert immunity as to the other party's counterclaim and not be required to give such testimony. Otherwise the other party can circumvent the general rule against requiring an arbitrator to provide testimony by forcing an action by the arbitrator, for instance by the party not paying a contractually required fee for the arbitrator's services.

The second sentence of section 11(d) recognizes that arbitrators who have engaged in corruption, fraud, partiality or other misconduct which are grounds to vacate an award under sections 20(a)(1) and (2) may be required to give testimony so that a party will have evidence to prove such grounds but only after the objecting party makes a sufficient initial showing that such grounds exist. *See* Carolina-Virginia Fashion Exhibitors Inc. v. Gunter, 291 N.C. 208, 230 S.E.2d 380, 388 (N.C. 1976) (holding that where there is objective basis to believe that arbitrator misconduct has occurred, deposition of the arbitrator may be permitted and the deposition admitted in action for vacatur). A party's bare allegation of these grounds should not cause an arbitrator to be required to testify.

Section 11(d) is limited to civil actions; an arbitrator may be required to give testimony in criminal proceedings as a result of matters arising from an arbitration proceeding.

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

6. Section 11 does not grant arbitrators or neutral arbitration institutions immunity from criminal liability arising from their conduct in their arbitral or administrative roles. This comports with the sparse common law addressing arbitral immunity from criminal liability. *See, e.g.*, Cahn v. ILGWU, 311 F.2d 113, 114-15 (3d Cir. 1962); Babylon Milk & Cream Co. v. Horowitz, 151 N.Y.S.2d 221 (N.Y. Sup. Ct. 1956).

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

7. The Drafting Committee recommends that an Official Comment should be added to Section 11 that if an arbitrator fails to make a disclosure required by section 9 then the typical remedy is vacatur under section 20 and not loss of arbitral immunity under section 11. Such a result is similar to the effect of judicial immunity.

8. In Section 11(d) only a party "to the arbitration proceeding" should be filing a motion to vacate under Section 20. However, Section 11(e) presents an interesting issue. A third party, i.e., a person who is not party to the arbitration agreement or the arbitration proceeding, might bring an action against an arbitrator. For instance, in a series of multiple arbitration proceedings with subcontractors filing separate arbitration claims against general contractor X. Arbitrator A may make an award in a case between general contractor X and subcontractor Y. In a later arbitration proceeding between general contractor X and subcontractor Z before Arbitrator B, Z may attempt to subpoena or bring an action against Arbitrator A. Another scenario is where Arbitrator A issues a subpoena to T, a third party, and T decides to bring an action against Arbitrator A. In these instances, Arbitrator A should be able to assert arbitral immunity and recover costs and attorney's fees under Section 11(d) against Z or T who would be "persons" but not necessarily "parties to the arbitration proceeding" between X and Y.

9. Commissioner Hawkins of Connecticut made a suggestion that has been considered at prior drafting committee meetings to delete the term "[a] neutral" in Section 11(b) and substitute "[a]n" because "arbitration institution" is already defined in Section 1(1) as a "neutral organization." He points out that use of term again in Section 11(b) is redundant and could leave reader wondering why drafting committee drafted with such redundant language.

SECTION 12. ARBITRATION PROCESS. Unless the parties otherwise agree:

(a) An arbitrator may manage all aspects of an arbitration *proceeding.* An

arbitrator may hold conferences with the parties *to the arbitration proceeding* before the hearing to act upon any matters that may aid in the fair and expeditious disposition of the arbitration *proceeding*.

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

(c) If an arbitrator has not made a final decision on a matter subject to summary disposition under subsection (b), the arbitrator shall set a time and place for a hearing and issue notice of the hearing ~~to be received by the parties *to the arbitration proceeding*~~ not less than five days before the hearing. Unless a party *to the arbitration proceeding* interposes timely objection at the commencement of the hearing to insufficiency of notice, ~~the party's~~ *that person's* appearance at the hearing waives the objection. Upon request of a party *to the arbitration proceeding* and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than the date fixed by the agreement to arbitrate for making the award unless the parties *to the arbitration proceeding* consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced notwithstanding the failure of a party *to the arbitration proceeding* notified to appear. A court, on request, may direct the arbitrator to proceed promptly with the hearing and with a decision of the controversy.

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

(e) All the arbitrators must conduct the hearing under subsection (c) but a majority may decide any question and render a final award. If an arbitrator ~~for any reason~~ ceases, or is unable, to act during ~~the course of~~ the hearing, the remaining arbitrator or arbitrators, if appointed to act as neutrals, may continue with the hearing and decide the controversy. If the hearing cannot continue because none of the remaining arbitrators are neutral, then a sufficient number of replacement arbitrators must be appointed to continue the hearing and to decide the controversy.

Reporter's Notes:

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

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

2. The Drafting Committee unanimously decided to add an explicit section to the statute, section 12(a), to allow arbitrators broad powers to manage the arbitration process

both before and during the hearing. This section is intended to provide arbitrators with the authority in appropriate cases to require parties to clarify issues, stipulate matters, identify witnesses, provide summaries of testimony, to allow discovery, and to resolve preliminary matters. However, the intent of section 12(a) is not to encourage either extensive discovery or a form of motion practice. While such methods as discovery or prehearing conferences may be appropriate in some cases, these should only be used where they "aid in the fair and expeditious disposition of the arbitration." The arbitrator should keep in mind the goals of an expeditious, less costly, and efficient procedure.

3. Section 12(b) has been a matter of considerable debate among the members of the Drafting Committee. Those opposed to this provision believe that this section will encourage a form of motion practice that will result in more cost and delay. They also argued that arbitration is already considered a speedy alternative to court proceedings and both sides should be given a full opportunity to present their cases at a hearing. Those favoring the use of summary adjudication argue that such procedures lessen the unwarranted delay and expense of holding arbitration hearings where information developed prior to the hearing makes an evidentiary hearing unnecessary. This is particularly important as arbitration cases involve more complex matters with significant pre-hearing discovery.

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

5. The language in section 12(b) is based upon Rule 16 of JAMS/Endispute Comprehensive Arbitration Rules and Procedures. In the arbitration context, the Drafting Committee decided that the use of the terms "request for summary disposition" is preferable to "motions for summary judgment" or "motions for failure to state a claim." The latter terms, which are used in civil litigation, usually refer to situations where there are no genuine issues of material facts in dispute and a case can be determined as a matter of law. In most arbitrations, the arbitrators are not required to make rulings only as a "matter of law." As discussed in the Reporter's Notes to section 20 on vacatur, numerous 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.

6. The Drafting Committee amended the language of the second sentence in section 12(e) to insure that only neutral arbitrators and not party arbitrators can continue the hearing if an arbitrator "for any reason ceases or is unable to act." If the "remaining arbitrator or arbitrators" are not neutral, then neutral arbitrators should be appointed in accordance with section 8.

7. Commissioner Hawkins from Connecticut suggested that the Drafting Committee delete the phrase "to be received by the parties" in Section 12 (c) because it is administratively easier and more certain to establish that notice was given than that it is to establish that it was "received" by a non-cooperating party. He also believes that giving rather than receiving notice is more consistent with Section 2.

8. A Commissioner from Tennessee suggested that 5 days in Section 12(c) for the arbitrator to give notice of a hearing was too short and suggested 20 days as more appropriate. The Reporter was concerned that a lengthening of required notice for setting of an arbitration hearing might preclude expedited arbitrations which often take place within 5-7 days.

SECTION 13. REPRESENTATION BY ATTORNEY. A party *to an agreement to arbitrate* has the right to be represented by an attorney at any proceeding or hearing under this [Act]. A waiver of representation before the proceeding or hearing is ineffective.

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 in the jurisdiction in which the arbitration is held.

3. Commissioner Hawkins of Connecticut proposed to delete the 2nd sentence of Section 13 because this concept is duplicative and is already fully covered in Section 27(b)(3), where it more properly belongs.

SECTION 14. WITNESSES; SUBPOENAS; DEPOSITIONS; DISCOVERY.

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of books, records, documents, and other evidence at any hearing and may administer oaths. A subpoena so issued must be served and, upon request to the court by a party *to the arbitration proceeding* or the arbitrator, enforced in the manner provided by law for service and enforcement of subpoenas in a civil action.

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

(c) Unless the parties otherwise agree, an arbitrator may permit such discovery as the arbitrator decides 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 *proceeding* fair, expeditious, and cost-effective.

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

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

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

~~(g) Fees for attending an arbitration are the same as those for a witness in a civil action.~~

Reporter's Notes:

1. Presently, UAA section 7 provides an arbitrator only with subpoena authority for the attendance of witnesses and production of documents at the hearing (RUAA section 14(a)) or to depose a witness who is unable to attend a hearing (RUAA section 14(e)). This limited authority has caused some courts to conclude that "pretrial discovery is not available under our present statutes for arbitration." Rippe v. West American Ins. Co., 1993 WL 512547 (Conn. Super. Ct.); *see also* Burton v. Bush, 614 F.2d 389 (4th Cir. 1980) (party to arbitration contract had no right to pre-hearing discovery). Others require a showing of extraordinary circumstances before allowing discovery. *See, e.g.,* In re Deiulemar di Navigazione, 153 F.R.D. 592 (E.D.La. 1994); Oriental Commercial &

Shipping Co. v. Rosseel, 125 F.R.D. 398 (S.D.N.Y. 1989). Most courts have allowed discovery only at the discretion of the arbitrator. *See, e.g.,* Stanton v. PaineWebber Jackson & Curtis, Inc., 685 F.Supp 1241 (S.D. Fla. 1988); Transwestern Pipeline Co. v. J.E. Blackburn, 831 S.W.2d 72 (Tex.Ct.App. 1992). The few state arbitration statutes that have addressed the matter of discovery also leave these issues to the discretion of the arbitrator. California--CAL. CIV. PROC. CODE § 1283.05(d) (depositions for discovery shall not be taken unless leave to do so is first granted by the arbitrator); Massachusetts--MASS. GEN. LAWS. ANN. ch.251, § 7(e) (only the arbitrators can enforce a request for production of documents and entry upon land for inspection and other purposes); Texas--TEX. CIV. PRAC. & REM. CODE ANN. § 171.007(b) (arbitrator may allow deposition of adverse witness for discovery purposes); Utah--UTAH CODE ANN. § 78-31a-8 (arbitrators may order discovery in their discretion). Most commentators and courts conclude that extensive discovery, as allowed in civil litigation, eliminates the main advantages of arbitration in terms of cost, speed and efficiency.

2. The approach to discovery in section 14(c) is modeled after the Center for Public Resources (CPR) Rules for Non-Administered Arbitration of Business Disputes, R. 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 14(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 14(c) is not coextensive with that which occurs in the course of civil litigation under federal or state rules of civil procedure.

3. The simplified, straightforward approach to discovery reflected in section 14(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 14, similar to section 5(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.

4. In Section 14 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 14(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 14(b) has been broadened so that a third party ("any other person) 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. Section 14(f) has been broadened to include witness fees for attending non-hearing depositions or discovery proceedings.

5. At the 1st reading Commissioner Hill of Maryland raised the issue that if an arbitrator allows discovery, then the state rules of civil procedure on discovery should apply. The Committee responded in the negative because then arbitration proceeding becomes too much like litigation. Also the standard in Section 14(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.

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

7. The Reporter has also consolidated the provisions on compelling a person to testify–whether at the arbitration hearing, a deposition, or any discovery proceedings–and fees for witnesses into Section 14(f) and to clarify that the same rules in civil actions apply.

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

Presently the RUAA does not really cover the situation of a nonparty against whom an arbitrator issues a subpoena or discovery order that the nonparty wishes to contest. Section 15, Court Enforcement of Pre-award Rulings by Arbitrators, covers only the situation where a party to an arbitration proceeding seeks a court order to enforce a pre-award ruling against another party. Moreover, the court, in essence, is told to favor the arbitrator's ruling unless the limited grounds of Sections 20 and 21 can be shown, i.e., arbitrator misconduct or arbitrator acted beyond arbitrator's power.

Thus, the Drafting Committee must consider whether to add a specific section on the enforceability of pre-award orders by arbitrators against nonparties or whether to note the situation of nonparties in a Comment and leave this matter to case law development. The Reporter suggests the latter 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.

SECTION 15. COURT ENFORCEMENT OF PRE-AWARD RULING BY ARBITRATOR. If an arbitrator makes a pre-award ruling in favor of a party *to the arbitration proceeding*, that party may file a motion with the court for an expedited, summary order to enforce the pre-award ruling. The court shall issue an order to enforce the pre-award ruling, unless the ruling of the arbitrator is vacated, modified, or corrected under the standards prescribed in Sections 20 and 21.

Reporter's Notes:

1. Section 15 is currently the law in almost all jurisdictions to enforce pre-award arbitral determinations. Because the orders of arbitrators are not self-enforcing, a party, who receives a favorable ruling with which another of the parties refuses to comply, must apply to a court to have the ruling made an enforceable order. *See, e.g.,* Island Creek Coal Sales Co. v. City of Gainesville, Fla., 729 F.2d 1046 (6th Cir. 1984) (enforcing under FAA arbitrator's interim award requiring city to continue performance of coal purchase contract until further order of arbitration panel); Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City, 606 F. Supp. 692 (S.D.N.Y. 1985) (enforcing under FAA arbitrator's interim order removing lien on vessel); Fraulo v.

Gabelli, 37 Conn. App. 708, 657 A.2d 704 (1995) (enforcing under UAA arbitrator issuing preliminary orders regarding sale and proceeds of property); *see also* III MACNEIL TREATISE § 34.2.1.2.

As a general proposition, courts are very hesitant to review interlocutory orders of an arbitrator. The Ninth Circuit in Aerojet-General Corp. v. Am. Arbitration Ass'n, 478 F.2d 248, 251 (9th Cir. 1973) stated that "judicial review prior to the rendition of a final arbitration award should be indulged, if at all, only in the most extreme cases." The court concluded that a more lax rule would frustrate a basic purpose of arbitration for a speedy disposition without the expense and delay of a court proceeding. In Harleyville Mut. Cas. Co. v. Adair, 421 Pa. 141, 145, 218 A.2d 791, 794 (Pa. 1966), the Pennsylvania Supreme Court held that to allow challenges to an arbitrator's interlocutory rulings would be "unthinkable." Massachusetts also rejected the appeal of an interlocutory order in Cavanaugh v. McDonnell & Co., 357 Mass. 452, 457, 258 N.E.2d 561, 564 (Mass. 1970), noting that to allow a court to review an arbitrator's interlocutory order "would tend to render the proceedings neither one thing nor the other, but transform them into a hybrid, part judicial and part arbitrational." Thus section 15 requires a court to enforce the pre-award ruling unless the ruling should be vacated under the standards for confirming, modifying, or vacating awards under sections 20 and 21.

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

2. Section 15 uses the terms "expedited, summary order" which is language similar to that in section 4 that a court in a proceeding to compel or stay arbitration should act "immediately and summarily." The term "expedited" has been used in other statutes and court rules. 8 U.S.C. § 1252(e)(4) (an immigration statute which provides that when a person is deported and files an appeal, "it shall be the duty of the court to advance on the docket and to expedite to the greatest possible extent the disposition of any case" under the statute); FED. R. CIV. P. 65 (if an adverse party contests a court's granting of a temporary restraining order the court must proceed as expeditiously as "the ends of justice require" and the hearing for a preliminary injunction "shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character."); CAL. ST. BAR P. R. 203 (in cases involving the state bar in California, "a motion to set aside or vacate a default judgment shall be decided on an expedited basis."). The intent of the term "expedited" is that a court should advance on the docket to the extent possible a matter involving the enforcement of a pre-award ruling by an arbitrator in order to preserve the integrity of the arbitration proceeding which is underway.

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

3. There is no provision in RUAA section 26 for an appeal from a court decision on a pre-award ruling by an arbitrator and the intent of the statute is that such orders from a lower court are not appealable.

4. The Drafting Committee unanimously concluded that an arbitrator's order denying a request for a pre-award ruling should not be subject to an action under section 15 because such a provision would lead to delay and more litigation without corresponding benefit to the process. The parties whose pre-award requests for relief are denied by an arbitrator can seek review of such denial after the final award is issued under section 20, vacatur, or section 21, modification or correction of an award.

5. Questions were raised at the 1st reading at the annual meeting concerning the relationship between Section 15 and Sections 3, 5, 20, and 21. The Drafting Committee responded that they would consider these issues and whether a party against whom an arbitrator issues a pre-award ruling can seek a court order to overturn the arbitrator's pre-award decision. In regard to the latter issue, it should be noted that the Drafting Committee unanimously voted (8-0) in October of 1997 in regard to Tentative Draft No. 1 to delete the following provision which would allow a party losing an arbitral pre-award ruling to seek court review:

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

SECTION 16. AWARD.

(a) Upon deciding an award, an arbitrator shall make a record of the award, which must be signed by any arbitrator who concurs with the award. The arbitrator or the arbitration ~~institution~~ *organization* shall give notice of the award to each party *to the arbitration proceeding*.

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

SECTION 17. CHANGE OF AWARD BY ARBITRATOR.

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

(1) upon the grounds stated in Section 21(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) for the purpose of clarifying the award.

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

(c) If a motion to a court is pending under Section 19, 20, or 21, 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 21(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) for the purpose of clarifying the award.

(d) An award modified or corrected under this section is subject to Sections 19, 20, and 21.

Reporter's Notes:

1. Section 17 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 19, 20 or 21 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 17 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 arbitrators who initially heard the matter. 1 DOMKE §35:03.

3. Sections 17(a) and (c) are essentially the same as present section 9 of the UAA which provides the parties with a limited opportunity to request modification or corrections of an arbitration award either (1) when there is an error as described in section 21(a)(1) for miscalculation or mistakes in descriptions or in section 21(a)(3) for awards imperfect in form or (2) "for the purpose of clarifying the award." Chaco Energy Co. v. Thercol Energy Co., 97 N.M. 127, 637 P.2d 558 (1981) (an amended arbitration award for purposes other than those enumerated in statute is void).

The Drafting Committee concluded an additional ground for modification or correction be added in sections 17(a)(2) and (b)(2) which is based on the FAA §10(a)(4) where an arbitrator's award is either so imperfectly executed or incomplete that it is questionable whether the arbitrators ruled on a submitted issue.

The benefit of a provision such as section 17 is evident in a comparison with the FAA which has no similar provision. Under the FAA, there is no statutory authority for parties to request arbitrators to correct or modify evident errors and only a limited exception in FAA §10(a)(5) for a court to order a rehearing before the arbitrators when an award is vacated and the time within which the agreement required the award has not expired. This lack of a statutory basis both for arbitrators to clarify a matter and, in most instances, for a court to remand cases to arbitrators has caused confusing case law under

the FAA on whether and when a court can remand or arbitrators can clarify matters. *See* III MACNEIL TREATISE §§37.6.4.4; 42.2.4.3. The mechanism for correction of errors in RUAA section 17 enhances the efficiency of the arbitral process.

SECTION 18. REMEDIES; FEES AND EXPENSES OF ARBITRATION PROCEEDING. Unless the parties otherwise agree:

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

(b) As to all remedies other than those provided by subsection (a), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. That such a remedy could not or would not be granted by a court ~~of law or equity~~ is not grounds for refusing to confirm an award under Sections 19 or vacating an award under Section 20.

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

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

Reporter's Notes:

1. Section 18 recognizes the parties' autonomy to limit by agreement to the extent permitted by law the remedies that an arbitrator can award. Unless the arbitration agreement provides to the contrary, section 18(a) provides arbitrators the authority to

make an award of attorney fees or punitive damages or other exemplary relief.

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

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

2. In arbitration cases where, if the matter had been in litigation, a person would have been entitled to an award of attorneys fees or punitive damages or other exemplary relief, there is doubt whether one of the parties can eliminate the right to attorney's fees or punitive damages or other exemplary relief even though the introductory language to section 18 would allow an agreement that limits these remedies. Some courts have held

that they will defer to an arbitration award involving statutory rights only if a party has the right to obtain the same relief in arbitration as is available in a court. *See, e.g.,* Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465 (D.C. Cir. 1997) (employee with race discrimination claim under Title VII is bound by pre-dispute arbitration agreement under FAA if the employee has the right to the same relief as if he had proceeded in court); Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244 (9th Cir.), cert. denied, 516 U.S. 907 (1995) (arbitration clause compelling franchisee to surrender important rights, including right of attorney fees, guaranteed by the Petroleum Marketing Practices Act, contravenes this statute); DeGaetano v. Smith Barney, Inc., 75 FEP Cases 579 (S.D.N.Y. 1997) (award under arbitration clause, requiring each side to pay own attorney fees, in Title VII claim on which plaintiff prevailed but where arbitrators refused to award attorney fees set aside as a manifest disregard of the law; the arbitration of statutory claims as a condition of employment are enforceable only to the extent that the arbitration preserves protections and remedies afforded by the statute); Armendariz v. Foundation Health Psychcare Services, Inc., 68 Cal. App.4th 374 (1998) (limitation in arbitration agreement on remedies to only backpay and not allowing employee in anti-discrimination claim to attempt recovery of punitive damages is unconscionable and court severs remedy limitation from the arbitration agreement); DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP Section C(5) (May 9, 1995) ("The arbitrator should be empowered to award whatever relief would be available in court under the law."); National Academy of Arbitrators, GUIDELINES ON ARBITRATION OF STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS Art. 4(D) (May 21, 1997) ("Remedies should be consistent with the statute or statutes being applied, and with the remedies a party would have received had the case been tried in Court. These remedies may well exceed the traditional arbitral remedies of reinstatement and back pay, and may include witnesses' and attorneys' fees, costs, interest, punitive damages, injunctive relief, etc.").

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

confined to limitations under principles of law and equity (unless the law or the parties' agreement specifically confines them).

4. Section 18(c) is based upon UAA section 10 that allows arbitrators, unless the agreement provides to the contrary, to determine in the award payment of expenses, including the arbitrator's expenses and fees. The most significant change is that UAA section 10 does not allow an arbitrator to award attorney's fees which is now provided for in section 18(a).

5. Section 18(d) addresses concerns respecting arbitral remedies of punitive damages concerning the absence, under present law, of guidelines for arbitral awards and of the severe limitations on judicial review. Recent data from the securities industry provides some evidence that arbitrators do not abuse the power to punish through excessive awards. *See generally* Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. L. REV. 1 (1997); Richard Ryder, *Punitive Award Survey*, 8 SEC. ARB. COMMENTATOR, Nov. 1996, at 4. Because legitimate concerns remain, however, specific provisions have been included in section 18(d) that require arbitrators who award a remedy of punitive damages to state in a "record" the law authorizing and the amounts of the award attributable to the punitive damage remedy. A party can seek to vacate the punitive damage remedy under section 20–especially section 20(a)(4) which prohibits arbitrators from exceeding their power.

Section 20(a)(4) has been interpreted by courts essentially to mean that the arbitrators' award will only be set aside when the arbitrators go beyond the powers contractually delegated to them by the parties. The courts do not use section 20(a)(4) as a means to review the merits of the award. *See* Eljer Mfg. V. Kowin Dev. Corp., 14 F.3d 1250 (7th Cir.), cert. denied, 512 U.S. 1205 (1994); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 752 (1996). Thus, even if the arbitrators incorrectly apply the law or erroneously find facts, these mistakes will be insufficient to set aside an award of punitive damages by a reviewing court so long as the arbitrators were expressly or impliedly authorized by the contract to award such relief.

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

> "*Illustration:* The parties to an employment contract agree that all disputes will be decided by arbitration. A panel of arbitrators decides to award a claimant punitive damages on her claim that the employer had defamed her in an employee evaluation. The arbitrators state the award in a record, refer to the law authorizing punitive damages for defamation and state the amount attributable to punitive damages in compliance with section 18(d). However, the arbitrators erroneously

determined facts that the respondent intentionally or maliciously defamed the claimant and inaccurately applied the law for awarding punitive damages in a defamation case. A court reviewing the arbitrators' award of punitive damages should uphold the award because an award of punitive damages in a defamation case is "authorized by law" in accordance with section 18(a) and thus impliedly authorized by the parties' arbitration agreement. The arbitrators have not "exceeded their powers" under section 20(a)(4)."

SECTION 19. CONFIRMATION OF AWARD. After receipt of notice of an award, a party to ~~an~~ *the* arbitration *proceeding* may file a motion with the court for an order confirming the award, at which time the court shall issue such an order unless the award is modified or corrected pursuant to Section 17, vacated pursuant to Section 20, or modified or corrected pursuant to Sections 21.

Reporter's Notes:

1. The language in RUAA section 19 has been changed to be similar to that in FAA section 9 to indicate that a court has jurisdiction when a party files a motion to confirm an award unless a party has applied to the arbitrators for change of an award under section 17 or filed a motion to vacate, modify or correct under sections 20 or 21.

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

SECTION 20. VACATING AN AWARD.

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

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

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

(3) an arbitrator refused to postpone the hearing upon sufficient cause being shown for postponement, refused to consider evidence material to the controversy, or otherwise so conducted the hearing contrary to the provisions of Section 12, as to prejudice substantially the rights of a party *to the arbitration proceeding*;

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

(5) there was no agreement to arbitrate, unless the ~~party~~ *person* participated in the arbitration proceeding without having raised the objection not later than the beginning of the arbitration hearing.

(b) In addition to the grounds to vacate an award set forth in subsection (a), the parties may agree to review of the arbitration award by an arbitral appeals panel. The appointment of such appellate arbitrators, the grounds for appeal, the standards for review, and other procedures for conducting the appeal shall be governed by the agreement to arbitrate. If the parties have so agreed, the court shall vacate an award decided by the original arbitrator if the arbitral appeals panel overturns the award of the original arbitrator.

(c) A motion under this section must be filed within 90 days after delivery of a copy of the award to the movant unless the motion is predicated upon corruption, fraud, or other undue means, in which case it must be filed within 90 days after

those grounds are known or should have been known by the ~~moving party~~ *movant*.

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

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

A. Reporter's Notes on Section 20(a)(5):

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

2. The purpose of the language requiring a party participating in an arbitration proceeding to raise an objection that no arbitration agreement exists "not later than the beginning of the arbitration hearing" is to insure that the party makes a timely objection at the start of the arbitration rather than causing the other parties to go through the time and expense of the full arbitration proceeding only to raise the objection for the first time later in the arbitration process or in a motion to vacate an award. The obligation to object attaches at the first hearing before the arbitrator, including hearings on preliminary

matters. A person who refuses to participate in or appear at an arbitration proceeding retains the right to challenge the validity of an award on the ground that there was no arbitration agreement in a motion to vacate.

B. Reporter's Notes on Section 20(b):

(A) Internal, Arbitral Appeal

*1. At the 1st reading of the RUAA, the Committee of the Whole discussed at great length wether Section 20 should include a provision that the parties could "opt in" to a judicial review of an arbitration award for "errors of law" or "for any * * * standard of review of the award not prohibited by applicable law." Commissioner Getty of Illinois made a sense-of-the-house motion not to include in the RUAA a provision allowing for expanded judicial review under the "opt in" approach. This motion passed by a wide majority.*

The Reporter has included for consideration a provision for an internal arbitral appeal, which was designated Alternative IIIB in the last draft.

2. Revised Section 20(b) is in line with those who contend that the protection against the occasional "wrong" arbitral decision can be satisfactorily and properly secured by the parties contracting for some form of appellate arbitral review. *See* Stephen L. Hayford and Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RES. 405-06 (1995). This approach would not present the FAA preemption, "creating jurisdiction," and line-drawing problems identified with the expanded judicial review through the "opt in" approach. It is also consistent with the Supreme Court's contractual view of commercial arbitration in that it preserves the parties' agreement to resolve the merits of the controversy between them through arbitration, without resort to the courts. When parties agree that the decision of an arbitrator will be "final and binding," it is implicit that it is the arbitrator's interpretation of the contract and the law that they seek, and not the legal opinion of a court. In addition, an internal, arbitral appeal mechanism is more likely to keep arbitration decisions out of the courts and maintain the overall goals of speed, lower cost, and greater efficiency.

3. An internal, appellate review within the arbitration system is already established by some arbitration institutions. *See, e.g.*, Jams/Endispute Comprehensive Arbitration Rules and Procedures, R. 23, Optional Appeal Procedure.

(B) Opt-in Provision

1. The sense-of-the house resolution of the Committee of the Whole not to expand

judicial review of arbitral awards by sanctioning in the statute a provision that parties can agree to judicial review for errors of law or fact at this time is understandable given the present state of the law. The Supreme Court has made clear its belief that the FAA preempts conflicting state arbitration law. Neither FAA Section 10(a) nor the federal common law developed by the U.S. Court of Appeals permit vacatur for errors of law. Consequently, there is a legitimate question of federal preemption concerning the validity of a state law provision sanctioning vacatur for errors of law when the FAA does not permit it.

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

2. The second primary point about an opt-in provision is the contention that the parties cannot contractually "create" subject matter jurisdiction in the courts when it does not otherwise exist. The "creation" of jurisdiction transpires because a statutory provision that authorizes the parties to contractually create or expand the jurisdiction of the state or federal courts can result in courts being obliged to vacate arbitration awards on grounds they otherwise would be foreclosed from relying upon. Court cases under the federal law show the uncertainty of an "opt in" approach. *See, e.g.*, Chicago Typographical Union v. Chicago Sun-Times, 935 F.2d 1501, 1505 (7th Cir. 1991) ("If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for judicial review of that award; federal [court] jurisdiction cannot be created by contract.") (labor arbitration case); *but see* Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993, 996 (5th Cir. 1995) (The court, relying on the Supreme Court's contractual view of the commercial arbitration process reflected in *Volt* , *Mastrobuono* and First Options of Chicago v. Kaplan, 514 U.S. 938, 947, 115 S. Ct. 1920, 1925 (1995), held valid a contractual provision providing for judicial review of arbitral errors of law. The court concluded that the vacatur standards set out in §10(a) of the FAA provide only the default option in circumstances where the parties fail to

contractually stipulate some alternate criteria for vacatur).

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

The Ninth Circuit relied squarely on the opinion of the Fifth Circuit in *Gateway*. The court rejected the "jurisdictional" view of the FAA set out by the Seventh Circuit in *Chicago Typographical Union*.

Caution should be exercised not to over-read the significance of Kyocera. Judge Fernandez, who wrote the opinion of the court, merely brushed aside any concerns pertaining to contractual "creation" of jurisdiction for the federal courts. Judge Kozinski, while concurring with Judge Fernandez, expressed concern that Congress has not authorized review of arbitral awards for errors of law or fact, but felt it necessary to enforce this agreement. Judge Mayer, in a dissent, cautioned that the Circuit Court had no authority to review the award in just any manner in which the parties contracted. The three opinions in Kyocera crystallize the true nature of the debate as to the "jurisdictional" dimension of the section 20(b) Alternatives I and II issue.

A final significant recent federal Circuit Court of Appeals opinion is UHC Management Co. v. Computer Sciences Corp., 148 F.3d 992 (8th Cir. 1998). In *UHC*, the Eighth Circuit determined whether the contract language clearly established the parties' intent to contract for expanded judicial review.

The portion of the analysis relevant here is that which concerns the propriety of contractual agreements providing for expanded judicial review beyond that contemplated by sections 10 and 11 of the FAA. The court observed that although parties may elect to be governed by any rules they wish regarding the arbitration itself, it is not clear whether the court can review an arbitration award beyond the limitations of FAA §§ 10 and 11. Congress never authorized a *de novo* review of an award on its merits, and therefore, the Court concluded that it had no choice but to confirm the award when there are no grounds

to vacate based on the FAA.

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

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

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

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

In a similar manner, the Illinois Court of Appeals, in Chicago, Southshore and South Bend R.R. v. N. Indiana Commuter Transp. Dist., 682 N.E.2d 156, 159 (Ill. App. 3d 1997), *rev'd on other grounds*, 184 Ill. 151 (1998), refused to effect the provision of an arbitration agreement permitting a party claiming that the arbitrator's award is based upon an error of law "to initiate an action at law [ ] to determine such legal issue." In so holding the Illinois Court stated: "The subject matter jurisdiction of the trial court to review an arbitration award is limited and circumscribed by statute. The parties may not, by agreement or otherwise, expand that limited jurisdiction. Judicial review is limited because the parties have chosen the forum and must therefore be content with the

informalities and possible eccentricities of their choice." (citing Konicki v. Oak Brook Racquet Club, Inc. 441 N.E.2d 1333 (Ill. App. 1982).

In NAB 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.

4. 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?"

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

Any value-added dimensions must then be weighed against the risks/downsides of adding this provision to the Act. The risks/downsides inherent are several. Paramount is the assertion that permitting parties a "second bite at the apple" on the merits effectively eviscerates arbitration as a true alternative to traditional litigation. An opt-in section in the RUAA would propel large numbers of attorneys to put review provisions in arbitration agreements, as a safe harbor in order to avoid manifold malpractice claims by clients who lose in arbitration. The inevitable post-award petition for vacatur would in many cases result in the negotiated settlement of many disputes due to the specter of vacatur litigation the parties had agreed would be resolved in arbitration.

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

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

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

These negative policy implications were a substantial reason why the Committee of the Whole adopted a sense-of-the-house resolution at the July, 1999, meeting not to include expanded judicial review but rather to consider an internal arbitral appeals mechanism.

6. At bottom, any alternative version of section 20(b) that creates a vacatur standard beyond the bounds contemplated by §10(a) of the FAA would raise the specter of federal preemption. The opt-in provisions which were the subject of the sense-of-the-house motion by the Committee of the Whole would strain the concept of freedom of contract in ways not contemplated by the rule of Volt and Mastrobuono by permitting the parties to alter the present, existing relationship between their contractual right to fashion their arbitration mechanisms and the role of the courts in overseeing the arbitration process. Such an approach would permit the parties to authorize courts to vacate challenged awards on grounds that are not sanctioned by the FAA or the attendant case law. Whether the Supreme Court would approve an extension of the freedom of contract into this new realm is uncertain at this point.

There is a clear analogy between whether section 20 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 Committee has decided that in light of the palpable threat of federal preemption that a statutory sanction of either of these nonstatutory grounds would create, it is best to omit any reference to them in the RUAA. Instead, it was decided to leave the issue of their ultimate standing to the developing case law.

The case law summarized above on opt-in provisions demonstrates the current uncertainty as to the propriety of an explicit statutory sanction of contractual provisions expanding the scope of judicial review beyond the current parameters recognized in the FAA and the vacatur-related case law. Consequently, adoption in the RUAA of an opt-in provision could create a substantial disincentive to adoption of the RUAA by the states, founded on the fear of eventual federal preemption of the vacatur template of any state arbitration act based on the uniform statute. That concern, 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 by interjecting the courts at the back end of the process, argue against including the opt-in approach in the statute itself. Simply stated, the potential gain to be realized by codifying a right 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 approach of an internal, arbitral appeal mechanism as drafted in Section 20(b) eliminates any need to venture into the currently uncertain waters of the interface between the parties' freedom of contract and the proper role of the courts in reviewing challenged arbitration awards. The decision not to statutorily sanction a statutory opt-in provision should not be read as implying that the Drafting Committee rejects that

approach. Instead, the decision not to place it in the RUAA results from the fact that the current uncertainty in the case law renders the issue not "ripe" for codification. If an opt-in model is eventually approved as a matter of federal law under the FAA, its omission from the RUAA will not preclude parties from adopting that approach. Until the broader issue of the propriety of the type of opt-in mechanism is definitively decided, its adoption in the RUAA is ill advised. For all of these reasons, the Drafting Committee has concluded that Section 20(b) as incorporated in the current drat of the RUAA is the more defensible option.

C. Reporter's Notes on Section 20: The Possible Codification of the "Manifest Disregard of the Law" and the "Public Policy" Grounds For Vacatur:

1. A question has arisen as to the advisability of adding two new subsections to section 20(a) sanctioning vacatur of awards that result from a "manifest disregard of the law" or for an award that violates "public policy." Neither of these two standards is presently codified in the FAA or in any of the state arbitration acts. However, all of the federal circuit courts of appeals have embraced one or both of these standards in commercial arbitration cases. *See* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards,* 30 GA. L. REV. 734 (1996).

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

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

The other element of the "manifest disregard of the law" standard requires a reviewing court to evaluate the arbitrator's knowledge of the relevant law. Even if a reviewing court finds a clear error of law, vacatur is warranted under the "manifest

disregard of the law" ground only if the court is able to conclude that the arbitrator knew the correct law but nevertheless "made a conscious decision" to ignore it in fashioning the award. *See* M&C Corp. v. Erwin Behr & Co., 87 F.3d 844, 851 (6th Cir. 1996). For a full discussion of the "manifest disregard of the law" standard, *see* Stephen L. Hayford, *Reining in the Manifest Disregard of the Law Standard: The Key to Stabilizing the Law of Commercial Arbitration*, 1999 J. DISP. RESOL. 117.

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

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

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

RESOL. 249.

4. States have rarely addressed "manifest disregard of the law" or "public policy" as grounds for vacatur.

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

SECTION 21. MODIFICATION OR CORRECTION OF AWARD.

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

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

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

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

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

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

SECTION 22. JUDGMENT OR DECREE ON AWARD; ATTORNEY'S FEES AND LITIGATION EXPENSES.

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

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

(c) On application of a prevailing party *to a contested judicial proceeding under Section 19, 20, or 21*, a court may add to a judgment ~~or decree~~ confirming, modifying, or correcting an award, reasonable attorney's fees, and litigation expenses incurred in the post-award judicial proceeding. ~~, if the other party:~~

~~(1) unsuccessfully resisted a motion to confirm under Section 19; or~~

~~(2) sought unsuccessfully to vacate, modify, or correct the award under Sections 20 or 21.~~

Reporter's Notes:

1. Section 22(c) promotes the statutory policy of finality of arbitration awards. Potential liability for the opposing parties post-award litigation expenditures will tend to discourage all but the most meritorious challenges or stubborn parties. A party who refuses to comply with an arbitration award, requiring the other prevailing party to seek an order of confirmation, or who chooses to seek to have the award vacated or modified, risks bearing the prevailing party's reasonable attorney's fees and expenses of the post arbitration litigation. 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. This 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 22(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 22(c) is a default rule only. If the parties wish to contract for a different rule, they remain free to do so.

5. Commissioner Behr of Alaska suggested that "reasonable" be added before "costs" in Section 22(b). The term is used in regard to attorney fees in Section 22(c). On the other hand, "reasonable" is implicit as to a court awarding "costs" in any setting.

6. Commissioner Ossen of Connecticut suggested that a party who either unsuccessfully or successfully resolves a motion to confirm, vacate, or modify or correct an award should be eligible for attorney's fees. In redrafting, the Reporter incorporated this idea into Section 22(c) by eliminating subsections (1) and (2) because then the notion is that the "prevailing party" in motions under Sections 19, 20, or 21 is eligible for attorney's fees and litigation expenses whether that person brought the action or the action was brought against that person but the person prevailed. The term "contested" was included to incorporate the notion in Note 2 that a right to recovery does not apply if a party's resistance was entirely passive–usually by a person who cannot pay an arbitration award.

7. A Commissioner at the annual meeting raised the issue of what the term "disbursements" meant in Section 22(c) and whether it was necessary. This term was carried over from Section 14 of the UAA. In researching this issue, the term is often used in connection with "costs" as occurs in Section 22(c). The legal meaning of "disbursements" is money paid or spent in connection with an action. BLACK'S LAW DICTIONARY 463 (1990); WEST'S LEGAL THESAURUS/DICTIONARY 239 (1985). The term is

similar to the "costs" of an action and usually include such expenses as witness fees, costs of taking a deposition, publication, service of process, etc. Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995); Cecil v. Bank of America, 142 Ca.App.2d 249, 298 P.2d 24 (1956); Jones v. Ippoliti, 1995 WL 493782 (Conn. Super.). The terms are often used synonymously in the case law but a difference between "costs" and "disbursements" is that generally the latter term means monies that have already been spent; whereas, "costs" may have been charged to a party but not been paid out.

SECTION 23. JUDGMENT ROLL; DOCKETING.

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

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

(2) the award;

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

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

(b) A judgment ~~or decree~~ under this section may be docketed as if rendered in a civil action.

SECTION 24. JURISDICTION. An agreement to arbitrate pursuant to Section 3 providing for arbitration in this State confers jurisdiction on the court to enforce the agreement and to enter judgment on an award under this [Act].

Reporter's Notes:

1. The term "court" is now in the definitional section at section 1(2).

SECTION 25. VENUE. An initial motion must be filed in the court of the [county] in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the [county] in which it was held. Otherwise, the motion must be filed in the [county] in which the adverse party *to the arbitration proceeding* resides or has a place of business or, if the adverse party *to the arbitration proceeding* has no residence or place of business in this State, to the court of any [county] in this State. All subsequent motions must be filed in the court hearing the initial motion unless the court otherwise directs.

SECTION 26. APPEALS.

(a) An appeal may be taken from:

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

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

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

(4) an order modifying or correcting an award;

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

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

(b) The appeal must be taken in the manner and to the same extent as from an order or a judgment in a civil action.

SECTION 27. EFFECT OF AGREEMENT TO ARBITRATE;

NONWAIVABLE PROVISIONS.

(a) *Except as otherwise provided in subsection (b), the parties may waive or vary the terms in this [Act] in their agreement to arbitrate or in any other valid agreement between them to the extent permitted by law.* ~~Except as otherwise provided in subsection (b) or unless otherwise provided by law, an arbitration proceeding between the parties is governed by the arbitration agreement. To the extent the arbitration agreement does not otherwise provide, this [Act] governs the arbitration proceeding between the parties.~~

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

(1) waive or vary this section or Section 3(a); Section 4; Section 5; Section 15; Section 17(c); Section 19; Sections 20(a), (c), (d), and (e); Section 21; Section 22(a) and (b); Section 23; Section 24; Section 26; Section 28; or Section 29(a), (b)(1), and (c);

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

(3) waive the right of a party *to an agreement to arbitrate* under Section 13 to be represented by an attorney at any proceeding or hearing under this [Act] before the proceeding or hearing.

Reporter's Notes:

1. Section 27 is similar to provisions in the Uniform Partnership Act (section 103)

and in the proposed Revised Uniform Limited Partnership Act (section 101B). The intent of section 27 is to indicate that, although the RUAA is primarily a default mechanism and the parties' autonomy, as expressed in the arbitration agreement, should normally control the arbitration, there are provisions that parties cannot waive. The Drafting Committee determined that it was important to restate this position in one place in the statute, in addition to language throughout the statute using the terms "unless the parties otherwise agree" which is defined in Section 1(5), in light of the adhesion situation where one party has substantially more bargaining power than the other but either does not have so much power or does not exercise it in such a way that a court would conclude that the arbitration agreement is an unconscionable one.

2. The language "unless otherwise provided by law" in section 27(a) insures that one party cannot subject another to unconscionable provisions or other requirements that a court would determine illegal. For instance, although parties might limit remedies, such as recovery of attorney's fees or punitive damages in section 18, a court might deem such a limitation inapplicable where an arbitration involves statutory rights which would require these remedies.

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

a. Section 5 is a close call as to whether the parties' arbitration agreement could limit access to a court or an arbitrator for an extraordinary remedy, such as an order to preserve assets, either before or after the arbitration proceeding begins.

b. Section 6 allows the parties to shape what goes into a notice to commence an arbitration proceeding or the means of giving the notice but section 27(b) (2) preserves the idea that some reasonable notice must be given.

c. Some groups have argued that section 13 which gives the parties a right to be represented by an attorney should be waivable. In labor arbitration many parties agree to expedited provisions where, prior to any hearing on a particular matter, they knowingly waive the right to have attorneys present their cases (and also prohibit transcripts and briefs) in order to have a quick and informal arbitration mechanism. Section 27(b)(3) restates the notion in section 13 that before the arbitration proceeding a party cannot waive the right to be represented by an attorney.

d. Sections 4, 15, 17(c), 19, 20(a) and (c)-(e), 21, 22 (a) and (b), 23, 24, and 26 all involve access to courts or the judicial process and likely should not be within the control of the parties.

1) Section 4 concerns the court's authority either to compel or stay arbitration

proceedings. Parties should not be able to interfere with this power of the court to initiate or deny the right to arbitrate.

2) Section 15, dealing with court enforcement of pre-award rulings, should be an inherent right; otherwise there is no mechanism to carry out a pre-award order.

3) Section 17(a) gives the parties the right to apply to the arbitrators to correct or clarify an award; presumably this should be waivable. But the right of a court in section 17(b) to order an arbitrator to correct or clarify an award and the applicability of sections 19, 20, and 21 to section 17 as provided in section 17(c) should not.

4) The vacatur provisions of section 20 are not waivable except for section 20(b) because it gives the parties the right to establish an internal arbitral appeal mechanism if they so agree.

5) Section 22(a) and (b) provides the mechanisms for a court to enter judgment and to award costs. Because these powers are within the province of a court they should not be waivable. Section 22(c) concerns remedies of attorney's fees and litigation expenses which, similar to other remedies in section 18, parties can determine by agreement. Section 23, judgment roll; and docketing; section 24, jurisdiction; and section 26, appeals, are matters under the control of the court's processes.

e. Parties probably should not be able to vary the nonwaivability provision of this section, the uniformity of interpretation in section 28, or the effective date in section 29(a), (b)(1), and (c).

4. The language in section 27(b), "[t]he parties to an arbitration agreement or to the arbitration proceeding may not" is intended to include the parties' arbitration agreement and any subsequent agreements between them that are valid to the extent permitted by law as defined in Section 1(7) and the Reporter's Notes following.

5. The change in Section 27(a) is consistent with Reporter Note 5 in Section 1. If the Drafting Committee agrees with this change, Reporter Note 5 explaining the meaning of various terms of art in the language used in revised Section 27(a) should be moved to this Section.

SECTION 28. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

In applying and construing this Uniform Act, consideration must be given to the need to

promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 29. EFFECTIVE DATE.

(a) This [Act] takes effect on [effective date].

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

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

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

(c) After [date], this [Act] governs all agreements to arbitrate.

Reporter's Notes:

1. Section 29 is based upon the effective-date provisions in the Revised Uniform Partnership Act and 1996 Amendments constituting the Uniform Limited Liability Partnership Act of 1994. Section 29(b)(2) allows parties who have entered into arbitration agreements under the UAA the option to elect coverage under the RUAA. Section 29(c) establishes a certain date when all arbitration agreements, whether entered into before or after the effective date of the RUAA, will be governed by the RUAA rather than the UAA.

2. Section 20 of the UAA provided that the law was only applicable to agreements entered into after the effective date of the Act. The Drafting Committee rejected this approach. If it were followed, such a section would cause two sets of rules to develop for arbitration agreements under state arbitration law: one for agreements under the UAA and one for agreements under the RUAA. This is especially troublesome in situations where parties have a continuing relationship that is governed by a contract with an arbitration clause. There would be no mechanism, such as section 29(b)(2) for these parties to opt into the provisions of the RUAA without rescinding their initial agreement. Section 29(c) also sets a time certain when all arbitration agreements will be governed by the RUAA.