HB

83

# HOUSE COMMITTEE REPOPT

(7)
**Date Referred to Committee: February 7, 2003** **FURTHER REFERRALS:**

**Date of Committee Action:** March 12, 2003

**The JUDICIARY Committee considered:** **HB 83**

**HOUSE BILL NO. 83** **REVISED UNIFORM ARBITRATION ACT**

**"An Act adopting a version of the Revised Uniform Arbitration Act; relating to the state's existing Uniform Arbitration Act; amending Rules 3, 18, 19, 20, and 21, Alaska Rules of Civil Procedure, Rule 601, Alaska Rules of Evidence, and Rule 402, Alaska Rules of Appellate Procedure; and providing for an effective date."**

**Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 83 (JUD)**
***For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____*** **[X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent _____Committee

*List of Abbrev for Depts.:*
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

| List by Dept(s): | *FN# | Fiscal | Indet. | Zero |
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| LAW | | | | ✓ |
| CRT | | | | ✓ |
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***PREVIOUS* FISCAL NOTES**

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| **Signing with recommendations** | Printed Last Name | DP | DNP | NR | AM |
|---|---|---|---|---|---|
| | Gara | ✓ | | | |
| | SAMUELS | | | ✓ | |
| Tom Anderson | ANDERSON | X | | | |
| Max Gruenberg | Gruenberg | – | | | |
| Gene Coghill | Coghill | | | ✓ | |
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| **Chair:** Ralph Samuels | McGuire | ✓ | | | |
| **Chair:** | | | | | |

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

**MEMORANDUM** March 17, 2003

**SUBJECT:** CSHB 83(JUD) relating to arbitration
(Work Order No. 23-LS0047\I)

**TO:** Representative Lesil McGuire
Attn: Vanessa

**FROM:** Theresa L. Bannister
Legislative Counsel

This memo accompanies the bill described above.

Possible effect of amendment. The amendment may interfere with the ability of certain persons to choose to use this new arbitration chapter to handle their arbitration. The persons affected would be those persons whose arbitration is covered by the Federal Arbitration Act,[1] primarily those persons whose arbitration agreements involve interstate commerce. It appears from reading the commentary for the Revised Uniform Arbitration Act that if this bill is changed to include a provision contrary to the holding in the Prima Paint case[2] the federal act may preempt the selection of this chapter by those persons because the new provision would be considered to interfere with the pro-arbitration stance of the federal act.

If you would like further information on this issue, please advise.

TLB:med
03-310.med

Enclosure

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[1] 9 U.S.C. sec. 1 et seq.

[2] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 35 (1967).

# LEGAL SERVICES

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Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

**MEMORANDUM** March 11, 2003

**SUBJECT:** Amendment to HB 83 relating to arbitration
(Work Order No. 23-LS0047\H.1)

**TO:** Representative Les Gara
Attn: Ryan

**FROM:** Theresa L. Bannister
Legislative Counsel

This memo accompanies the amendment you requested for the bill described above.

Description of amendment. The amendment basically takes the position of the dissent in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). In that case, 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 Federal Arbitration Act (FAA) to the case, determined that the arbitration clause was separable from the contract in which it was made. The broad arbitration clause of 9 U.S.C. sec. 3 of the Federal Arbitration Act encompassed arbitration of a claim alleging that the underlying contract was induced by fraud. The result was that even though the contract was argued to have been fraudulently induced, the arbitration provision was given effect. This amendment H.1, basically states that if the contract was procured by fraud, the arbitration provision in the contract is unenforceable. The amendment represents the basic position taken by the dissent in the case.

Federal preemption issue. The adoption in proposed sec. 09.43.330 of a different position than that held in the Prima Paint case raises a preemption issue under the Federal Arbitration Act. The commentary by the National Conference of Commissioners on Uniform State Laws states, with regard to the provisions in the Revised Uniform Arbitration Act that correspond to the provisions in sec. 09.43.330:

> 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 Mem'l 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 (1987); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Doctor's Assocs. 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.

Therefore, at least to the extent that an arbitration agreement involves interstate commerce, there appears to be a preemption issue with adopting the dissent's position in the Prima Paint case.

If I may be of further assistance, please advise.

TLB:med
03-287.med

Enclosure

23-LS0047\H.1
Bannister
3/11/03

# AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GARA

TO: HB 83

Page 2, line 17, following "09.43.330(a)":

Insert "or (b)"

Page 3, line 5, following "contract":

Insert ", and except as provided by (b) of this section"

Page 3, following line 5:

Insert a new subsection to read:

"(b) To the extent an agreement that contains an arbitration provision is invalidated on the grounds that a party was induced into entering into the agreement by fraud, the arbitration provision in the agreement is not enforceable, and the party is not required to prove that the party was induced into entering into the arbitration provision by fraud."

Reletter the following subsections accordingly.

Page 3, lines 9 - 10:

Delete "and whether a contract containing a valid agreement to arbitrate is enforceable"

HB 83 Revised Uniform Arbitration Act (23-LS0047\H)

Explanation of Legal Issue:

Drawing your attention to the bill, Page 3, Lines 2-14,
Sec. 09.43.330 Validity of agreement to arbitrate

A question was raised at our last meeting regarding (c), specifically, whether or not we wanted to depart from the RUAA and remove the clause on Line 9, "whether a contract containing a valid agreement to arbitrate is enforceable" (thereby giving this duty to the arbitrator versus the court).

The inclusion of this language into Alaska Statutes would have the effect of adopting the holding of the *Prima Paint* case, 388 U.S. 395 (1967). *Prima Paint* holds that the arbitration clause in a contract is separable from the rest of the contract and that allegations as to the validity of the contract in general, as opposed to the arbitration clause in particular, are to be decided by the arbitrator. The result is that even if a contract is argued to have been fraudulently induced, the arbitration provision can still be given effect.

The contrary view, that if a contract was procured by fraud, the arbitration provision in the contract is unenforceable, is explained in the memos written by Representative Gara and Therese Bannister, Leg. Legal. The drafted amendment, if adopted, would adopt this view.

in equity. . . ." 388 U.S. at 400; 87 S.Ct. at 1804. The Court then ventured to determine the scope of federal common law, and federal rules of equity, on this subject. It set forth the following framework, which is important to the understanding of both Prima Paint and later law.

The Court styled the "central question in this case" as follows: "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators." 388 U.S. at 402; 87 S.Ct. at 1805. The Court then crafted the following rule of construction. "If the claim is fraud in the inducement of the arbitration clause itself - an issue which goes to the making of the agreement to arbitrate - the federal court may proceed to adjudicate it." 388 U.S. at 403-404; 388 U.S. at 1806. When the Court states this is a "court" issue, it means to say the plaintiff is permitted to bring its fraud case in court, rather than to an arbitrator.

On the other hand, Prima Paint does not "permit the federal court to consider claims of fraud in the inducement of the contract generally." Id. The Court created a federal doctrine of "separability" to determine how much of a contract is to be invalidated when fraud in the inducement occurs. 388 U.S. at 402; 87 S.Ct. at 1805. As discussed above, this differs from Alaska's common law rule of severability, which provides that the whole contract is voidable unless it is "clear" the parties intended some provision to remain even if the main provision induced by fraud is invalidated. Johnson, 953 P.2d at 497, discussed supra.

The majority opinion was harshly criticized in a dissenting opinion by Justice Black, in which Justices Douglas and Stewart concurred. Justice Black was persuaded by the Restatement and Alaska common law rules of contract enforceability discussed above. He explained that the common law rendering fraudulently induced contracts void was clear, and should be adopted as federal common law on the issue of enforceability:

> "[Under the Act] an arbitration agreement is to be enforced by a federal court unless the court, not the arbitrator, finds grounds 'at law or in equity' for the revocation of any contract. Fraud, of course, is one of the most common grounds 'at law or in equity' for the revocation of any contract. If the contract was procured by fraud, then . . . there is absolutely no contract, nothing to arbitrate.

388 U.S. at 412; 87 S.Ct. at 1810 (emphasis added). He criticized the majority opinion as "fantastic", and as allowing important legal questions such as fraud and "whether any legal contract exists," as opposed to simple contract disputes, to be sent to "nonlawyer[]" arbitrators. 8388 U.S. at 407; 87 S.Ct. at 1808.

State courts are split on whether their arbitration acts, and their common law governing the effect of fraud on contract enforceability, should follow the Prima Paint rule or the Restatement rule. Those that do not follow Prima Paint adhere to Justice Black's dissenting view: that if an Arbitration Act incorporates the common law on contract enforceability, it incorporates the common law rule that fraud renders a contract voidable. E.g. City of Blaine v. John Coleman Hayes & Associates, 818 S.W.2d 33, 38 (Tenn. App. 1991)(discussing Justice Black dissent); accord Monette v. Tinsley, 975 P.2d 361, 366 (N.M. App. 1999)(fraud in the inducement of contract not subject to arbitration); Shaffer v. Jeffery, 915 P.2d a910, 918 (Okla. 1996)(contract voidable upon proof of "fraudulently induced" arbitration agreement, or "contract containing that agreement"); In re Oakwood Mobile Homes, 987 S.W.2d 571, 573 (Tex. 1999)(court question if "fraud in the formation" claimed); Public Service Credit Union v. Ernest, 988 F.2d 627, 629 (6th Cir. 1993)(under Michigan law, fraudulent inducement into contract renders arbitration clause voidable).

Commentators have also criticized "the fiction that an arbitration clause within a fraudulently induced contract is not infected by fraud." E.g., K. Davis, The Arbitration Claws: Unconscionability in the Securities Industry, 78 Boston U. L. Rev. 255, 267 (1998). In this case, the arbitration clause was not only "infected by fraud," but it was inserted by McKinley to help it either get away with or limit its liability for its fraud.

Today there is debate about whether Prima Paint has been overruled. M. Donovan, A. Searles, 10 Loyola Consumer L. Rev. at 270-71.[6]

The criticism of Prima Paint is justified. That criticism sounds even louder given Alaska law on contract enforceability, and its express incorporation into the Alaska Arbitration Act. The general common law rule is that fraud renders a contract voidable. While it may be that federal common law on this point was not clear at the time of Prima Paint, and new law had to be written, Alaska common law is clear. Alaska also has its own common law on separability. That rule requires that the arbitration clause in this case be invalidated with the rest of the contract.

## V. McKINLEY FRAUDULENTLY INDUCED SERRATO INTO BOTH THE 1997 CONTRACT, AND ITS ARBITRATION PROVISION

There is significant evidence that McKinley fraudulently induced Serrato into the 1997 employment agreement in this case. Those facts are discussed above. While Serrato is confident he need only prove fraudulent inducement into the contract in this case, a jury question is also presented under the stricter Prima Paint rule.

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[6]. In First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920 (1995), the Court cast its federal common law under Prima Paint into doubt. It held:

> When deciding whether the parties agreed to arbitrate a certain matter courts generally should apply ordinary state-law principles that govern the formation of contracts. . . . Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable evidence' that they did so.

514 U.S. at 943-44, 115 S.Ct. at 1924 (emphasis added). It has been noted by courts and commentators that "[t]he Court's holding 'suggests that the related and antecedent issue of whether an agreement to arbitrate is a contract of adhesion, fraudulently induced, or otherwise revocable, is an issue for the court as well. . . ." Berger v. Fitzgerald, 942 F. Supp. 963, 965 (S.D. N.Y.) (citation omitted); see also M. Donovan, A. Searles, 10 Loyola Consumer L. Rev. at 270-71. Two other federal courts in New York, which sees substantial litigation over arbitration clauses in stock exchange securities cases, have voiced the same conclusion. Aviall, Inc. v. Ryder System, Inc., 913 F. Supp. 826, 831 (S.D. N.Y. 1996), aff'd 110 F.3d 892 (2nd Cir. 1997); Maye v. Smith Barney, Inc., 897 F. Supp. 100, 106 (S.D. N.Y. 1995).

LEXSEE 388 us 395

**PRIMA PAINT CORP. v. FLOOD & CONKLIN MFG. CO.**

**No. 343**

**SUPREME COURT OF THE UNITED STATES**

***388 U.S. 395; 87 S. Ct. 1801; 18 L. Ed. 2d 1270; 1967 U.S. LEXIS 2750***

**March 16, 1967, Argued**

**June 12, 1967, Decided**

**PRIOR HISTORY:**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

**DISPOSITION:**
*360 F.2d 315*, affirmed.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** On a writ of certiorari to the United States Court of Appeals for the Second Circuit, petitioner corporation sought review of a judgment that an arbitrator was to resolve a claim of fraud in the inducement in regard to a consulting agreement between petitioner and respondent company, that contained a broad arbitration clause governed by the United States Arbitration Act of 1925, *9 U.S.C.S. § § 1*-14.

**OVERVIEW:** The parties had entered into the agreement after the corporation purchased the assets of the company's paint business. After the corporation failed to make the first payment due under the agreement the company served notice to arbitrate. The corporation filed suit seeking rescission of the entire agreement on the basis of fraud allegedly consisting of the company's misrepresentation that it was solvent and able to perform the agreement while it was completely insolvent. The company moved to stay the court action pending arbitration. The company contended that whether there was fraud in the inducement of the consulting agreement was a question for the arbitrators. The district court granted the company's motion with the court of appeals affirming. The Supreme Court affirmed, holding that (1) because the agreement was tied to the interstate transfer of the assets it affected interstate commerce and was within the coverage of the Act; (2) the arbitration clause in the agreement was separable from the rest of the agreement; and (3) allegations as to the validity of the agreement in general, as opposed to the arbitration clause in particular, were to be decided by the arbitrator.

**OUTCOME:** The Court affirmed the court of appeals' decision that an arbitrator was to resolve the corporation's claim of fraud in the inducement in regard to the agreement the corporation had entered into with the company.

**CORE TERMS:** arbitration, commerce, inducement, arbitration agreement, arbitrator, consulting agreement, arbitration clause, substantive law, Arbitration Act, interstate commerce, arbitrate, diversity, enforceable, admiralty, legislative history, state law, paint, subcommittee, compete, ground of fraud, federal law, separable, customer, maritime, entire contract, agreement to arbitrate, fraudulent, interstate, revocation, evidencing

**LexisNexis(TM) HEADNOTES - Core Concepts**

*Civil Procedure > Alternative Dispute Resolution*
[HN1] Section 2 of the United States Arbitration Act of 1925, *9 U.S.C.S. § § 1*-14, provides that a written provision for arbitration in any maritime transaction or a contract evidencing a transaction involving commerce shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

*Constitutional Law > Congressional Duties & Powers > Commerce Clause*
[HN2] The stay provisions of § 3 of the United States Arbitration Act of 1925 (Act), *9 U.S.C.S. § § 1*-14, apply only to the two kinds of contracts specified in § § 1 and 2 of the Act, namely those in admiralty or evidencing transactions in "commerce."

*Constitutional Law > Congressional Duties & Powers > Commerce Clause*
[HN3] A consulting agreement inextricably tied to the interstate transfer and to the continuing operations of an interstate manufacturing and wholesaling business evidences a transaction in interstate commerce.

*Civil Procedure > Alternative Dispute Resolution*
[HN4] Under § 4 of the United States Arbitration Act of 1925 (Act), *9 U.S.C.S. § § 1*-14, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that the making of the agreement for arbitration or the failure to comply with an arbitration agreement is not in issue. Accordingly, if the claim is fraud in the inducement of the arbitration clause itself -- an issue which goes to the "making" of the agreement to arbitrate -- the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. In passing upon an application of § 3 of the Act, for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

*Civil Procedure > Alternative Dispute Resolution*
[HN5] See § 4 of the United States Arbitration Act of 1925, *9 U.S.C.S. § § 1*-14.

*Constitutional Law > Congressional Duties & Powers > Commerce Clause*
[HN6] Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. And it is clear beyond dispute that the United States Arbitration Act of 1925, *9 U.S.C.S. § § 1*-14, is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty.

**SYLLABUS:**

Respondent (F & C), a New Jersey corporation which manufactured and sold paint and paint products to wholesale customers in a number of States, entered into a contract with petitioner (Prima), a Maryland corporation, whereby F & C agreed to perform consulting and other services relating to the transfer of operations from F & C to Prima and agreed not to compete with Prima, for which Prima agreed to pay, over the six-year life of the contract, certain percentages of receipts from sales. The contract, which stated that it "embodies the entire understanding of the parties," contained a broad arbitration clause that "any controversy . . . arising out of this agreement, or the breach thereof, shall be settled by arbitration in the City of New York in accordance with the rules . . . of the American Arbitration Association." Almost a year later, after the first payment had become due, Prima notified F & C that F & C had broken the consulting agreement and an earlier agreement involving Prima's purchase of F & C's paint business. Prima's chief contention was that F & C had fraudulently represented that it was solvent and able to perform its obligations whereas it was insolvent and planned to file a bankruptcy petition shortly after executing the consulting agreement. F & C responded by serving a notice of intention to arbitrate, whereupon Prima filed this diversity action in federal court for rescission of the consulting agreement on the basis of the alleged fraudulent inducement and contemporaneously sought to enjoin F & C from proceeding with arbitration. The United States Arbitration Act of 1925 provides, in § 2, that a written arbitration provision "in any . . . contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"; in § 3, that a federal court in which suit is brought upon an issue referable to arbitration by an arbitration agreement must stay the court action pending arbitration once it has decided that the issue is arbitrable under the agreement; and, in § 4, that a federal court whose assistance is invoked by a party seeking to compel another to arbitrate, if satisfied that an arbitration

agreement has not been honored and that "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue," shall order arbitration. The District Court granted a motion filed by F & C to stay the action pending arbitration, and the Court of Appeals dismissed Prima's appeal. *Held*:

1. The contract clearly evidenced a transaction involving interstate commerce and came within the coverage of the Arbitration Act. P. 401.

2. In passing upon an application for a stay of arbitration under § 3 of the Act, a federal court may not consider a claim of fraud in the inducement of the contract generally but "may consider only the issues relating to the making and performance of the agreement to arbitrate." Pp. 402-404.

3. The Act prescribes the manner in which federal courts are to treat questions relating to arbitration clauses in contracts which involve interstate commerce or admiralty, "subject matter over which Congress plainly has power to legislate." Hence, state rules allocating functions between court and arbitrator do not control. Pp. 404-405.

4. Since the claim of fraud here relates to inducement of the consulting agreement generally rather than in the arbitration clause and there is no evidence that the parties intended to withhold this issue from arbitration, there is no basis for granting a stay under § 3. Pp. 406-407.

**COUNSEL:**

Robert P. Herzog argued the cause and filed briefs for petitioner.

Martin A. Coleman argued the cause for respondent. With him on the brief was David N. Brainin.

Gerald Aksen argued the cause for the American Arbitration Association, as amicus curiae. With him on the brief were Whitney North Seymour, Sol N. Corbin, Osmond K. Fraenkel, William J. Isaacson and H. H. Nordlinger.

**JUDGES:**

Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

**OPINIONBY:**

FORTAS

**OPINION:**

**[*396]** **[***1273]** **[**1802]** MR. JUSTICE FORTAS delivered the opinion of the Court.

This case presents the question whether the federal court or an arbitrator is to resolve a claim of "fraud in **[*397]** the inducement," under a contract governed by the United States Arbitration Act of 1925, n1 where there is no evidence that the contracting parties intended to withhold that issue from arbitration.

----------Footnotes----------

n1 *9 U. S. C. §§ 1-14.*

----------End Footnotes----------

The question arises from the following set of facts. On October 7, 1964, respondent, Flood & Conklin Manufacturing Company, a New Jersey corporation, entered into what was styled a "Consulting Agreement," with petitioner, Prima Paint Corporation, a Maryland corporation. This agreement followed by less than three weeks the execution of a contract pursuant to which Prima Paint purchased F & C's paint business. The consulting agreement provided that for a six-year period F & C was to furnish advice and consultation "in connection with the formulae, manufacturing operations, sales and servicing of Prima Trade Sales accounts." These services were to be performed personally by F & C's chairman, Jerome K. Jelin, "except in the event of his **[***1274]** death or disability." F & C bound itself for the duration of the contractual period to make no "Trade Sales" of paint or paint products in its existing sales territory or to current customers. To the **[**1803]** consulting agreement were appended lists of F & C customers, whose patronage was to be taken over by Prima Paint. In return for these lists, the covenant not to compete, and the

services of Mr. Jelin, Prima Paint agreed to pay F & C certain percentages of its receipts from the listed customers and from all others, such payments not to exceed $ 225,000 over the life of the agreement. The agreement took into account the possibility that Prima Paint might encounter financial difficulties, including bankruptcy, but no corresponding reference was made to possible financial problems which might be encountered by F & C. The agreement stated that it "embodies the entire understanding of the parties **[*398]** on the subject matter." Finally, the parties agreed to a broad arbitration clause, which read in part:

"Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association . . . ."

The first payment by Prima Paint to F & C under the consulting agreement was due on September 1, 1965. None was made on that date. Seventeen days later, Prima Paint did pay the appropriate amount, but into escrow. It notified attorneys for F & C that in various enumerated respects their client had broken both the consulting agreement and the earlier purchase agreement. Prima Paint's principal contention, so far as presently relevant, was that F & C had fraudulently represented that it was solvent and able to perform its contractual obligations, whereas it was in fact insolvent and intended to file a petition under Chapter XI of the Bankruptcy Act, 52 Stat. 905, *11 U. S. C. § 701 et seq.*, shortly after execution of the consulting agreement. Prima Paint noted that such a petition was filed by F & C on October 14, 1964, one week after the contract had been signed. F & C's response, on October 25, was to serve a "notice of intention to arbitrate." On November 12, three days before expiration of its time to answer this "notice," Prima Paint filed suit in the United States District Court for the Southern District of New York, seeking rescission of the consulting agreement on the basis of the alleged fraudulent inducement. n2 The complaint asserted that the federal court had diversity jurisdiction.

----------Footnotes----------

n2 Although the letter to F & C's attorneys had alleged breaches of both consulting and purchasing agreements, and the fraudulent inducement of both, the complaint did not refer to the earlier purchase agreement, alleging only that Prima Paint had been "fraudulently induced to accelerate the execution and closing date of the [consulting] agreement herein, from October 21, 1964 to October 7, 1964. . . ."

----------End Footnotes----------

**[*399]** Contemporaneously with the filing of its complaint, Prima Paint petitioned the District Court for an order enjoining F & C from proceeding with the arbitration. F & C cross-moved to stay the court action pending arbitration. F & C contended that the issue presented -- whether there was fraud in the inducement of the consulting agreement -- was a question for the arbitrators and not for the District Court. Cross-affidavits were filed on the merits. On behalf of Prima Paint, the charges in the complaint were reiterated. Affiants for F & C attacked the sufficiency **[***1275]** of Prima Paint's allegations of fraud, denied that misrepresentations had been made during negotiations, and asserted that Prima Paint had relied exclusively upon delivery of the lists, the promise not to compete, and the availability of Mr. Jelin. They contended that Prima Paint had availed itself of these considerations for nearly a year without claiming "fraud," noting that Prima Paint was in no position to claim ignorance of the bankruptcy proceeding since it had participated therein in February of 1965. They added that F & C was revested with its assets in March of 1965.

**[***HR1A]** The District Court granted F & C's motion to stay the action **[**1804]** pending arbitration, holding that a charge of fraud in the inducement of a contract containing an arbitration clause as broad as this one was a question for the arbitrators and not for the court. For this proposition it relied on *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc., 271 F.2d 402 (C. A. 2d Cir. 1959)*, cert. granted, *362 U.S. 909*, dismissed under *Rule 60, 364 U.S. 801 (1960)*. The Court of Appeals for the Second Circuit dismissed Prima Paint's appeal. It held that the contract in question evidenced a transaction involving interstate commerce; that under the controlling *Robert* **[*400]** *Lawrence Co.* decision a claim of fraud in the inducement of the contract generally -- as opposed to the arbitration clause itself -- is for the arbitrators and not for the courts; and that this rule -- one of "national substantive law" -- governs even in the face of a contrary state rule. n3 We agree, albeit for somewhat different reasons, and we affirm the decision below.

----------Footnotes----------

n3 Whether a party seeking *rescission* of a contract on the ground of fraudulent inducement may in New York obtain judicial resolution of his claim is not entirely clear. Compare *Exercycle Corp.* v. *Maratta, 9 N. Y. 2d 329, 334, 174 N. E. 2d 463, 465 (1961),* and *Amerotron Corp.* v. *Maxwell Shapiro Woolen Co., 3 App. Div. 2d 899, 162 N. Y. S. 2d 214 (1957),* aff'd, *4 N. Y. 2d 722, 148 N. E. 2d 319 (1958),* with *Fabrex Corp.* v. *Winard Sales Co., 23 Misc. 2d 26, 200 N. Y. S. 2d 278 (1960).* In light of our disposition of this case, we need not decide the status of the issue under New York law.

----------End Footnotes----------

The key statutory provisions are § § 2, 3, and 4 of the United States Arbitration Act of 1925. [HN1] Section 2 provides that a written provision for arbitration "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." n4 Section 3 requires a federal court in which suit has been brought "upon any issue referable to arbitration under an agreement in writing for such arbitration" to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement. Section 4 provides a federal remedy for a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration," and directs the federal court to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored. n5

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n4 The meaning of "maritime transaction" and "commerce" is set forth in § 1 of the Act.

n5 See, *infra*, at 403-404.

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**[*401]**

**[***HR2]** **[***HR3A]** In *Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956),* this Court held that [HN2] the stay provisions of § 3, invoked here by respondent F & C, apply only to the two kinds of contracts specified in § § 1 and 2 of the Act, **[***1276]** namely those in admiralty or evidencing transactions in "commerce." Our first question, then, is whether the consulting agreement between F & C and Prima Paint is such a contract. We agree with the Court of Appeals that it is. Prima Paint acquired a New Jersey paint business serving at least 175 wholesale clients in a number of States, and secured F & C's assistance in arranging the transfer of manufacturing and selling operations from New Jersey to Maryland. n6 [HN3] The consulting agreement **[**1805]** was inextricably tied to this interstate transfer and to the continuing operations of an interstate manufacturing and wholesaling business. There could not be a clearer case of a contract evidencing a transaction in interstate commerce. n7

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n6 This conclusion is amply supported by an affidavit submitted to the District Court by Prima Paint's own president, which read in part:

"The agreement entered into between the parties on October 7, 1964, contemplated and intended an orderly transfer of the assets of the defendant to the plaintiff, and further contemplated and intended that the defendant would consult, advise, assist and help the plaintiff so as to insure a smooth transition of manufacturing operations to Maryland from New Jersey, together with the sales and servicing of customer accounts and the retention of the said customers."

The affidavit's references to a "transfer of the assets" cannot fairly be read to mean only "expertise and know-how . . . and a covenant not to compete," as argued by counsel for petitioner.

**[***HR3B]**

n7 It is suggested in dissent that, despite the absence of any language in the statute so indicating, we should construe it to apply only to "contracts between merchants for the interstate shipment of goods." Not only have we neither the desire nor the warrant so to amend the statute, but we find persuasive and authoritative evidence of a contrary legislative intent. See, *e. g.*, the House Report on this legislation which proclaims that "the control over interstate commerce [one of the bases for the legislation] reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). We note, too, that were the dissent's curious narrowing of the statute correct, there would have been no necessity for Congress to have amended the statute to exclude certain kinds of employment contracts. See § 1. In any event, the anomaly urged upon us in dissent is manifested by the present case. It would be remarkable to say that a contract for the purchase of a single can of paint may evidence a transaction in interstate commerce, but that an agreement relating to the facilitation of the purchase of an entire interstate paint business and its re-establishment and operation in another State is not.

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**[*402]** Having determined that the contract in question is within the coverage of the Arbitration Act, we turn to the central issue in this case: whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators. The courts of appeals have differed in their approach to this question. The view of the Court of Appeals for the Second Circuit, as expressed in this case and in others, n8 is that -- *except where the parties otherwise intend* -- arbitration clauses as a matter of federal law are "separable" from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass **[***1277]** arbitration of the claim that the contract itself was induced by fraud. n9 The Court of Appeals for the First **[*403]** Circuit, on the other hand, has taken the view that the question of "severability" is one of state law, and that where a State regards such a clause as inseparable a claim of fraud in the inducement must be decided by the court. *Lummus Co.* v. *Commonwealth Oil Ref. Co., 280 F.2d 915, 923-924* (C. A. 1st Cir.), cert. denied, *364 U.S. 911 (1960).* n10

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n8 In addition to *Robert Lawrence Co., supra,* see *In re Kinoshita & Co., 287 F.2d 951 (C. A. 2d Cir. 1961).* With respect to claims other than fraud in the inducement, the court has followed a similar process of analysis. See, *e. g., Metro Industrial Painting Corp.* v. *Terminal Constr. Co., 287 F.2d 382 (C. A. 2d Cir. 1961)* (dispute over performance); *El Hoss Engineer. & Transport Co.* v. *American Ind. Oil Co., 289 F.2d 346 (C. A. 2d Cir. 1961)* (where, however, the court found an intent not to submit the issue in question to arbitration).

n9 The Court of Appeals has been careful to honor evidence that the parties intended to withhold such issues from the arbitrators and to reserve them for judicial resolution. See *El Hoss Engineer. & Transport Co.* v. *American Ind. Oil Co., supra.* We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See § 1.

n10 These cases and others are discussed in a recent Note, Commercial Arbitration in Federal Courts, *20 Vand. L. Rev. 607, 622-625 (1967).*

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**[***HR4]** **[***HR5A]** With **[**1806]** respect to cases brought in federal court involving maritime contracts or those evidencing transactions in "commerce," we think that Congress has provided an explicit answer. That answer is to be found in § 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration agreement. [HN4] Under § 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue." n11 Accordingly, if the claim is fraud in the inducement of the arbitration clause itself -- an issue which **[*404]** goes to the "making" of the agreement to arbitrate -- the federal court may proceed to adjudicate it. n12 But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a § 3

application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

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n11 [HN5] Section 4 reads in part: "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."

**[***HR5B]**

n12 This position is consistent both with the decision in *Moseley v. Electronic Facilities, 374 U.S. 167, 171, 172 (1963),* and with the statutory scheme. As the "saving clause" in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract -- a situation inconsistent with the "saving clause."

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**[***HR6]** **[***HR7]** There **[***1278]** remains the question whether such a rule is constitutionally permissible. The point is made that, whatever the nature of the contract involved here, this case is in federal court solely by reason of diversity of citizenship, and that since the decision in *Erie R. Co.* v. *Tompkins, 304 U.S. 64 (1938),* federal courts are bound in diversity cases to follow state rules of decision in matters which are "substantive" rather than "procedural," **[*405]** or where the matter is "outcome determinative." *Guaranty Trust Co.* v. *York, 326 U.S. 99 (1945).* The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. See *Bernhardt v. Polygraphic Co., supra, at 202,* and concurring opinion, at 208. Rather, the question is whether [HN6] Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute **[**1807]** is based upon and confined to the incontestable federal foundations of "control over interstate commerce and over admiralty." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924); S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). n13

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n13 It is true that the Arbitration Act was passed 13 years before this Court's decision in *Erie R. Co.* v. *Tompkins, supra,* brought to an end the regime of *Swift v. Tyson, 16 Pet. 1 (1842),* and that at the time of enactment Congress had reason to believe that it still had power to create federal rules to govern questions of "general law" arising in simple diversity cases -- at least, absent any state statute to the contrary. If Congress relied at all on this "oft-challenged" power, see *Erie R. Co., 304 U.S., at 69,* it was only supplementary to the admiralty and commerce powers, which formed the principal bases of the legislation. Indeed, Congressman Graham, the bill's sponsor in the House, told his colleagues that it "only affects contracts relating to interstate subjects and contracts in admiralty." 65 Cong. Rec. 1931 (1924). The Senate Report on this legislation similarly indicated that the bill "[relates] to maritime transactions and to contracts in interstate and foreign commerce." S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924).

Non-congressional sponsors of the legislation agreed. As Mr. Charles L. Bernheimer, chairman of the Arbitration Committee of the New York Chamber of Commerce, told the Senate subcommittee, the proposed legislation "follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal jurisdiction. These fields are in admiralty and in foreign and interstate commerce." Hearing on S. 4213 and S. 4214, before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923). In the joint House and Senate hearings, Mr. Bernheimer answered "Yes; entirely," to the statement of the chairman, Senator Sterling, that "What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce." Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 7 (1924). Mr. Julius Henry

Cohen, draftsman for the American Bar Association of the proposed bill, said the sponsor's goals were: "First . . . to get a State statute, *and then to get a Federal law to cover interstate and foreign commerce and admiralty*, and, third, to get a treaty with foreign countries." Joint Hearings, *supra*, at 16 (emphasis added). See also Joint Hearings, *supra*, at 27-28 (statement of Mr. Alexander Rose). Mr. Cohen did submit a brief to the Subcommittee urging a jurisdictional base broader than the commerce and admiralty powers, Joint Hearings, *supra*, at 37-38, but there is no indication in the statute or in the legislative history that this invitation to go beyond those powers was accepted, and his own testimony took a much narrower tack.

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**[*406]**

**[***HR1B]** In the present case no claim has been advanced by Prima Paint that F & C fraudulently induced it **[***1279]** to enter into the agreement to arbitrate "any controversy or claim arising out of or relating to this Agreement, or the breach thereof." This contractual language is easily broad enough to encompass Prima Paint's claim that both execution and acceleration of the consulting agreement itself were procured by fraud. Indeed, no claim is made that Prima Paint ever intended that "legal" issues relating to the contract be excluded from arbitration, or that it was not entirely free so to contract. Federal courts are bound to apply rules enacted by Congress with respect to matters -- here, a contract involving commerce -- over which it has legislative power. The question which Prima Paint requested the District Court to adjudicate preliminarily to allowing arbitration to proceed is one **[*407]** not intended by Congress to delay the granting of a § 3 stay. Accordingly, the decision below dismissing Prima Paint's appeal is

*Affirmed.*

MR. JUSTICE HARLAN: In joining the Court's opinion I desire to note that I would also affirm the judgment below on the basis of *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc., 271 F.2d 402 (C. A. 2d Cir. 1959)*, cert. granted, *362 U.S. 909*, **[**1808]** dismissed under *Rule 60, 364 U.S. 801 (1960).*

**DISSENTBY:**
BLACK

**DISSENT:**

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART join, dissenting.

The Court here holds that the United States Arbitration Act, *9 U. S. C. § § 1*-14, as a matter of federal substantive law, compels a party to a contract containing a written arbitration provision to carry out his "arbitration agreement" even though a court might, after a fair trial, hold the entire contract -- including the arbitration agreement -- void because of fraud in the inducement. The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so. I am by no means sure that thus forcing a person to forgo his opportunity to try his legal issues in the courts where, unlike the situation in arbitration, he may have a jury trial and right to appeal, is not a denial of due process of law. I am satisfied, however, that Congress did not impose any such procedures in the Arbitration Act. And I am fully satisfied that a **[*408]** reasonable and fair reading of that Act's language and history shows that both Congress and the framers of the Act were at great pains to emphasize that nonlawyers designated to adjust and arbitrate factual controversies arising out of valid contracts would not trespass upon the courts' prerogative to decide the legal question of whether any legal contract exists upon which to base an arbitration.

I.

The agreement involved here is a consulting agreement in which **[***1280]** Flood & Conklin agreed to perform certain services for and not to compete with Prima Paint. The agreement contained an arbitration clause providing that "any controversy or claim arising out of or relating to this Agreement . . . shall be settled by arbitration in the City of New York." F & C, contending that Prima had failed to make a payment under the contract, sent Prima a "Notice of Intention to Arbitrate" pursuant to the New York Arbitration Act. n1 Invoking diversity jurisdiction, Prima brought this

action in federal district court to rescind the entire consulting agreement on the ground of fraud. The fraud allegedly consisted of F & C's misrepresentation at the time the contract was made, that it was solvent and able to perform the agreement, while in fact it was completely insolvent. Prima alleged that it would not have made any contract at all with F & C but for this misrepresentation. Prima simply contended that there was never a meeting of minds between the parties. F & C moved to stay Prima's lawsuit for rescission pending arbitration of the fraud issue raised by Prima. The lower courts, relying on the **[*409]** Second Circuit's decision in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc., 271 F.2d 402,* cert. granted, *362 U.S. 909,* dismissed, *364 U.S. 801,* held that, as a matter of "national substantive law," the arbitration clause in the contract is "separable" from the rest of the contract and that allegations that go to the validity of the contract in general, as opposed to the arbitration clause in particular, are to be decided by the arbitrator, not the court.

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n1 N. Y. Civ. Prac. § 7503 (1963) provides that once a party is served with a notice of intention to arbitrate, "unless the party served applies to stay the arbitration within ten days after such service he shall thereafter be precluded from objecting that a valid agreement was not made . . . ."

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The Court today affirms this holding for three reasons, none of which is supported **[**1809]** by the language or history of the Arbitration Act. First, the Court holds that because the consulting agreement was intended to supplement a separate contract for the interstate transfer of assets, it is itself a "contract evidencing a transaction involving commerce," the language used by Congress to describe contracts the Act was designed to cover. But in light of the legislative history which indicates that the Act was to have a limited application to contracts between merchants for the interstate shipment of goods, n2 and in light of the express failure of Congress to use language **[*410]** making the Act applicable to all contracts which "affect commerce," the statutory language Congress **[***1281]** normally uses when it wishes to exercise its full powers over commerce, n3 I am not at all certain that the Act was intended to apply to this consulting agreement. Second, the Court holds that the language of § 4 of the Act provides an "explicit answer" to the question of whether the arbitration clause is "separable" from the rest of the contract in which it is contained. Section 4 merely provides that the court must order arbitration if it is "satisfied that the making of the agreement for arbitration . . . is not in issue." That language, considered alone, far from providing an "explicit answer," merely poses the further question of what kind of allegations put the making of the arbitration agreement in issue. Since both the lower courts assumed that but for the federal Act, New York law might apply and that under New York law a general allegation of fraud in the inducement puts into issue the making of the agreement to arbitrate (considered inseparable **[*411]** under New York law from the rest of the contract), n4 the **[**1810]** Court necessarily holds that federal law determines whether certain allegations put the making of the arbitration agreement in issue. And the Court approves the Second Circuit's fashioning of a federal separability rule which overrides state law to the contrary. The Court thus holds that the Arbitration Act, designed to provide merely a procedural remedy which would not interfere with state substantive law, authorizes federal courts to fashion a federal rule to make arbitration clauses "separable" and valid. And the Court approves a rule which is not only contrary to state law, but contrary to the intention of the parties and to accepted principles of contract law -- a rule which indeed elevates arbitration provisions above all other contractual provisions. As the Court recognizes, that result was clearly not intended by Congress. Finally, the Court summarily disposes of the problem raised by *Erie R. Co.* v. *Tompkins, 304 U.S. 64,* recognized as a serious constitutional problem in *Bernhardt v. Polygraphic* **[***1282]** *Co., 350 U.S. 198,* by insufficiently supported assertions that it is "clear beyond dispute" that Congress based the Arbitration Act on its power to regulate commerce and that "if Congress relied at all on" its power to create federal law for diversity cases, such reliance "was only supplementary."

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n2 The principal support for the Act came from trade associations dealing in groceries and other perishables and from commercial and mercantile groups in the major trading centers. *50 A. B. A. Rep. 357 (1925).* Practically all who testified in support of the bill before the Senate subcommittee in 1923 explained that the bill was designed to cover contracts between people in different States who produced, shipped, bought, or sold commodities. Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 3, 7, 9, 10 (1923). The same views were expressed in the 1924 hearings. When Senator Sterling suggested, "What you have in

mind is that this proposed legislation relates to contracts arising in interstate commerce," Mr. Bernheimer, a chief exponent of the bill, replied: "Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance." Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 7. See also *id.*, at 27.

n3 In some Acts Congress uses broad language and defines commerce to include even that which "affects" commerce. Federal Employers' Liability Act, 35 Stat. 65, § 1, as amended, *45 U. S. C. § 51;* National Labor Relations Act, 49 Stat. 450, § 2, as amended, *29 U. S. C. § 152* (7). In other instances Congress has chosen more restrictive language. Fair Labor Standards Act of 1938, 52 Stat. 1062, § 6, as amended, *29 U. S. C. § 206.* Prior to this case, this Court has always made careful inquiry to assure itself that it is applying a statute with the coverage that Congress intended, so that the meaning *in that statute* of "commerce" will be neither expanded nor contracted. The Arbitration Act is an example of carefully limited language. It covers only those contracts "involving commerce," and nowhere is there a suggestion that it is meant to extend to contracts "affecting commerce." The Act not only uses narrow language, but also is completely without any declaration of some national interest to be served or some nationwide comprehensive scheme of regulation to be created, and this absence suggests that Congress did not intend to exert its full power over commerce.

n4 Although F & C requested arbitration pursuant to New York law, n. 1, *supra*, it is not entirely clear that New York law would apply in absence of the federal Act. And, as the Court points out, it is not entirely clear whether New York courts would consider Prima's promise to arbitrate inseparable from the rest of the contract. But, since *Robert Lawrence* held and the lower courts here assumed that application of New York law would produce a different result, and since the Court deems the status of state law immaterial to this case, I have assumed throughout this opinion that, in the absence of the Arbitration Act, Prima would have been able to obtain *judicial* resolution of its fraud allegations under New York law.

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**[*412]** II.

Let us look briefly at the language of the Arbitration Act itself as Congress passed it. Section 2, the key provision of the Act, provides that "[a] written provision in . . . a contract . . . involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" (Emphasis added.) Section 3 provides that "if any suit . . . be brought . . . *upon any issue referable to arbitration* under an agreement in writing for such arbitration, the court . . . *upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such an agreement*, shall . . . stay the trial of the action until such arbitration has been had . . . ." n5 (Emphasis added.) The language of these sections could not, I think, raise doubts about their meaning except to someone anxious to find doubts. They simply mean this: an arbitration agreement is to be enforced by a federal court unless the court, not the arbitrator, finds grounds "at law or in equity for the revocation of any contract." Fraud, of course, is one of the most common grounds for revoking a contract. If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated. Sections 2 and 3 of the Act assume the existence of a valid contract. They merely provide for enforcement where such a valid contract **[*413]** exists. These provisions were plainly designed to protect a person against whom arbitration is sought to be enforced from having to submit his legal issues as to validity of the contract to the arbitrator. The legislative history of the Act makes this clear. Senator Walsh of Montana, in hearings on the bill in 1923, observed, "The court has got to hear and determine **[**1811]** whether there is an agreement of arbitration, undoubtedly, and it is open to all defenses, equitable and legal, that would have existed at law . . . ." n6 Mr. Piatt, who represented the American Bar Association which drafted and supported the Act, was even more explicit: "I think this will operate something like an injunction process, except where he would attack it on the ground of fraud." n7 And then Senator Walsh replied: "If he should attack it on the ground of fraud, *to rescind the whole thing.* . . . I presume that it merely [is] a question of whether he did make the arbitration agreement or not, . . . and then he would possibly set up that he was misled about the contract and entered **[***1283]** into it by mistake . . . ." n8 It is evident that Senator Walsh was referring to situations in which the validity of the entire contract is called into question. And Mr. Bernheimer, who represented one of the chambers of commerce in favor of the bill, assured the Senate subcommittee that "the constitutional right to jury trial is adequately safeguarded" by the Act. n9 Mr. Cohen, the American Bar Association's draftsman of the bill, assured the members of Congress that the Act would not impair the right to a jury trial, because it deprives a person of that right only when he has voluntarily and validly waived it by agreeing to submit certain **[*414]** disputes to arbitration. n10 The court and a jury are to determine both the legal

existence and scope of such an agreement. The members of Congress revealed an acute awareness of this problem. On several occasions they expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. n11 He noted that such contracts "are really not voluntarily [*sic*] things at all" because "there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court . . . ." n12 He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases. The significant thing is that Senator Walsh was not thinking in terms of the arbitration provisions being "separable" parts of such contracts, parts which should be enforced without regard to why the entire contracts in which they were contained were agreed to. The issue for him was not whether an arbitration provision in a contract was made, but why, in the context of the entire contract and the circumstances **[*415]** of the parties, the entire contract was made. That is precisely the issue that a general allegation of fraud in the inducement raises: Prima contended that it would not have executed any contract, including the arbitration clause, if it were not for the fraudulent representations of F & C. Prima's agreement to an arbitration clause in a contract obtained by fraud was no more "voluntary" than an **[**1812]** insured's or employee's agreement to an arbitration clause in a contract obtained by superior bargaining power.

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n5 This section, unlike § 4, is expressly applicable to situations like the present one where a defendant in a case already pending in federal court moves for a stay of the lawsuit. In finding an "explicit answer" in a provision "not expressly" applicable, the Court almost completely ignores the language of § 3 and the proviso to § 2, a section which *Bernhardt* held to "define the field in which Congress was legislating." *350 U.S., at 201.*

n6 Senate Hearing, *supra*, at 5.

n7 *Ibid.*

n8 *Ibid.*

n9 Senate Hearing, *supra*, at 2.

n10 "The one constitutional provision we have got is that you have a right of trial by jury. But you can waive that. And you can do that in advance. Ah, but the question whether you waive it or not depends on whether that is your signature to the paper, or whether you authorized that signature, or whether the paper is a valid paper or not, whether it was delivered properly. So there is a question there which you have not waived the right of trial by jury on." Joint Hearings, *supra*, at 17.

It seems quite clear to me that Mr. Cohen was referring to a jury trial of allegations challenging the validity of the *entire* contract.

n11 Senate Hearing, *supra*, at 9-11. See also Joint Hearings, *supra*, at 15.

n12 Senate Hearing, *supra*, at 9.

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Finally, it is clear to me from the bill's sponsors' understanding of the function of arbitration that they never intended that the issue of fraud in the inducement be resolved by arbitration. They recognized two special values of arbitration: (1) the expertise of an **[***1284]** arbitrator to decide factual questions in regard to the day-to-day performance of contractual obligations, n13 and (2) the speed with which arbitration, as contrasted to litigation, could resolve disputes over performance of contracts and thus mitigate the damages and allow the parties to continue performance under the contracts. n14 Arbitration serves neither of these functions where a contract is sought to be rescinded on the ground of fraud. On the one hand, courts have far more expertise in resolving legal issues which go to the validity of a contract than **[*416]** do arbitrators. n15 On the other hand, where a party seeks to rescind a contract and his allegation of fraud in the inducement is true, an arbitrator's speedy remedy of this wrong should never result in resumption of performance under the contract. And if the contract were not procured by fraud, the court, under the summary trial procedures provided by the Act, may determine with little delay that arbitration must proceed. The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the

volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation. *Tumey v. Ohio, 273 U.S. 510.*

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n13 "Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact -- quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law -- the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned." Cohen & Dayton, The New Federal Arbitration Law, *12 Va. L. Rev. 265, 281 (1926).*

n14 See, *e. g.*, Senate Hearing, *supra*, at 3.

n15 "It [arbitration] is not a proper remedy for . . . questions with which the arbitrators have no particular experience and which are better left to the determination of skilled judges with a background of legal experience and established systems of law." Cohen & Dayton, *supra*, at 281.

----------End Footnotes----------

III.

With such statutory language and legislative history, one can well wonder what is the basis for the Court's surprising departure from the Act's clear statement which expressly excepts from arbitration "such grounds as exist at law or in equity for the revocation of any contract." Credit for the creation of a rationalization to justify this statutory mutilation apparently must go to the Second Circuit's opinion in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc., supra.* In that decision Judge Medina undertook to resolve the serious constitutional problem which this Court had avoided in *Bernhardt* by holding the Act inapplicable to a diversity case involving an intrastate contract. That problem was whether the Arbitration **[*417]** Act, passed 13 years prior to *Erie R. Co.* v. *Tompkins, 304 U.S. 64,* could be constitutionally applied in a diversity case even though its application would require the federal court to enforce an agreement to arbitrate which the state court across the street would not enforce. *Bernhardt*'s holding that arbitration **[***1285]** is "outcome determinative," *350 U.S., at 203,* **[**1813]** and its recognition that there would be unconstitutional discrimination if an arbitration agreement were enforceable in federal court but not in the state court, *id., at 204,* posed a choice of two alternatives for Judge Medina. If he held that the Arbitration Act rested solely on Congress' power, widely recognized in 1925 but negated in *Erie*, to prescribe general federal law applicable in diversity cases, he would be compelled to hold the Act unconstitutional as applied to diversity cases under *Erie* and *Bernhardt.* n16 If he held that the Act rested on Congress' power to enact substantive law governing interstate commerce, then the *Erie-Bernhardt* problem would be avoided and the application of the Act to diversity cases involving commerce could be saved.

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n16 Mr. Justice Frankfurter chose this alternative in his concurring opinion in *Bernhardt, 350 U.S., at 208,* and even the Court there suggested that its pre-*Erie* decision in *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp., 293 U.S. 449,* which applied the Act to an interstate contract in a diversity case, might be decided differently under the *Bernhardt* holding that arbitration is outcome-determinative, *350 U.S., at 202.*

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The difficulty in choosing between these two alternatives was that neither, quite contrary to the Court's position, was "clear beyond dispute" upon reference to the Act's legislative history. n17 As to the first, it is clear that Congress intended the Act to be applicable in diversity cases involving interstate commerce and maritime **[*418]** contracts, n18 and to hold the Act inapplicable in diversity cases would be severely to limit its impact. As to the second alternative, it is clear that Congress in passing the Act relied primarily on its power to create general federal rules to govern federal

courts. Over and over again the drafters of the Act assured Congress: "The statute establishes a procedure in the Federal courts . . . . It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power." n19 And again: "The primary purpose of the statute **[***1286]** is to make enforcible in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe **[*419]** the jurisdiction and **[**1814]** duties of the Federal courts." n20 One cannot read the legislative history without concluding that this power, and not Congress' power to legislate in the area of commerce, was the "principal basis" of the Act. n21 Also opposed to the view that Congress intended to create substantive law to govern commerce and maritime transactions are the frequent statements in the legislative history that the Act was not intended to be "the source of . . . substantive law." n22 As Congressman Graham explained the Act to the House:

"It does not involve any new principle of law except to provide a simple method . . . in order to give enforcement . . . . *It creates no new legislation, grants no new rights, except a remedy* to enforce an agreement in commercial contracts and in **[*420]** admiralty contracts." 65 Cong. Rec. 1931 (1924). (Emphasis added.)

Finally, there are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts n23 or to provide an independent federal-question basis for jurisdiction in federal courts apart from diversity jurisdiction. n24 The absence of both of these effects -- which normally follow from legislation of federal substantive law -- seems to militate against the view that Congress was creating a body of federal substantive law.

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n17 For an analysis of these alternatives, see generally, Symposium, Arbitration and the Courts, *58 Nw. U. L. Rev. 466 (1963);* Note, *69 Yale L. J. 847 (1960).*

n18 The House Report accompanying the Act expressly stated: "The purpose of this bill is to make valid and enforcible agreements for arbitration contained in contracts involving interstate commerce . . . *or which may be the subject of litigation in the Federal courts.*" H. R. Rep. No. 96, 68th Cong., 1st sess., 1 (1924) (emphasis added). Mr. Cohen and a colleague, commenting on the Act after its passage, explained: "The Federal courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would have had jurisdiction . . . . Where the basis of jurisdiction is diversity of citizenship, the dispute must involve $ 3000 as in suits at law." Cohen & Dayton, *supra*, at 267. See, *e. g.*, Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, *11 A. B. A. J. 153, 156;* Note, *20 Ill. L. Rev. 111 (1925).* The bill, as originally drafted by the American Bar Association, *49 A. B. A. Rep. 51-52 (1924),* and introduced in the House, H. R. No. 646, 68th Cong., 1st Sess. (1924), 65 Cong. Rec. 11081-11082 (1924), expressly provided in § 8 "that if the basis of jurisdiction be diversity of citizenship . . . the district court . . . shall have jurisdiction . . . hereunder notwithstanding the amount in controversy is unascertained . . . ." Though that provision was deleted by the Senate, the omission was not intended substantially to alter the law. 66 Cong. Rec. 3004 (1925).

n19 Committee on Commerce, Trade & Commercial Law, *supra*, *11 A. B. A. J., at 154.*

n20 Joint Hearings, *supra*, at 38.

n21 Although Mr. Cohen, in a brief filed with Congress, suggested that Congress might rely on its power over commerce, he added that there were "questions which apparently can be raised in this connection," *id.*, at 38, and expressly denied that "the proposed law depends for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress," *id.*, at 37. And when he testified, he made the point clearer:

"So what we have done . . . [in New York] is that we have . . . made it a part of our judicial machinery. That is what we have done. But it can not be done under our constitutional form of government and cover the great fields of commerce until you gentlemen do it, in the exercise of your power to confer jurisdiction on the Federal courts. The theory on which you do this is that you have the right to tell the Federal courts how to proceed." *Id.*, at 17.

The legislative history which the Court recites to support its assertion that Congress relied principally on its power over commerce consists mainly of statements that the Act was designed to cover only contracts in commerce, and that is certainly true. But merely because the Act was designed to enforce arbitration agreements only in contracts in

commerce, does not mean that Congress was primarily relying on its power over commerce in supplying that remedy of enforceability.

n22 Cohen & Dayton, *supra*, at 276.

n23 See, *e. g.*, Cohen & Dayton, *supra*, at 277; Committee on Commerce, Trade & Commercial Law, *supra*, at 155, 156. Mr. Rose, representing the Arbitration Society of America, suggested that the Act might have the beneficial effect of encouraging States to enact similar laws, Joint Hearings, *supra*, at 28, but Mr. Cohen assured Congress:

"Nor can it be said that the Congress of the United States, directing its own courts . . . , would infringe upon the provinces or prerogatives of the States. . . . The question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced . . . . There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement." *Id.*, at 39-40.

n24 This seems implicit in § 3's provision for a stay by a "court in which such suit is pending" and § 4's provision that enforcement may be ordered by "any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties."

----------End Footnotes----------

Suffice **[***1287]** it to say that Judge Medina chose the alternative of construing the Act to create federal substantive law in order to avoid its emasculation under *Erie* and *Bernhardt*. But Judge Medina was not content to stop there with a **[**1815]** holding that the Act makes arbitration agreements in a contract involving commerce enforceable in federal court even though the basis of jurisdiction is diversity and state law does not enforce such **[*421]** agreements. The problem in *Robert Lawrence*, as here, was not whether an arbitration agreement is enforceable, for the New York Arbitration Act, upon which the federal Act was based, enforces an arbitration clause in the same terms as the federal Act. The problem in *Robert Lawrence*, and here, was rather whether the arbitration clause in a contract induced by fraud is "separable." Under New York law, it was not: general allegations of fraud in the inducement would, as a matter of state law, put in issue the making of the arbitration clause. So to avoid this application of state law, Judge Medina went further than holding that the federal Act makes agreements to arbitrate enforceable: he held that the Act creates a "body of law" that "encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs." *271 F.2d, at 409.*

Thus, 35 years after the passage of the Arbitration Act, the Second Circuit completely rewrote it. Under its new formulation, § 2 now makes arbitration agreements enforceable "save upon such grounds as exist at *federal* law for the revocation of any contract." And under § 4, before enforcing an arbitration agreement, the district court must be satisfied that "the making of the agreement for arbitration, *as a matter of federal law*, is not in issue." And then when Judge Medina turned to the task of "the formulation of the principles of federal substantive law necessary for this purpose," *271 F.2d, at 409*, he formulated the separability rule which the Court today adopts -- not because § 4 provided this rule as an "explicit answer," not because he looked to the intention of the parties, but because of his notion that the separability rule would further a "liberal policy of promoting arbitration." *271 F.2d, at 410.* n25

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n25 It should be noted that the New York courts apparently do not find any inconsistency between application of a nonseparability rule and that State's policy of enforcing arbitration agreements, a policy embodied in a statute from which the federal Act was copied.

----------End Footnotes----------

**[*422]** Today, without expressly saying so, the Court does precisely what Judge Medina did in *Robert Lawrence*. It is not content to hold that the Act does all it was intended to do: make arbitration agreements enforceable in federal courts if they are valid and legally existent under state law. The Court holds that the Act gives federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement was made and what it

means. Even if Congress intended to create substantive rights by passage of the Act, I am wholly convinced that it did not intend to create such a sweeping body of federal substantive law completely to take away from the States their power to interpret contracts made by their own citizens in their own territory.

*First.* The legislative history is **[***1288]** clear that Congress intended no such thing. Congress assumed that arbitration agreements were recognized as valid by state and federal law. n26 Courts would give damages for their breach, but would simply refuse to specifically enforce them. Congress thus had one limited purpose in mind: to provide a party to such an agreement "a remedy formerly denied him." n27 "Arbitration under the Federal . . . [statute] is simply a new procedural remedy." n28 The Act "creates no new legislation, grants no new rights, except a remedy to enforce . . . ." n29 **[**1816]** The drafters of the Act were very explicit:

"A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure **[*423]** of the Federal courts. *It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws.* To be sure *whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made.*" Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, *11 A. B. A. J. 153, 154.* (Emphasis added.)

"Neither is it true that such a statute, declaring arbitration agreements to be valid, is the source of their existence as a matter of substantive law. . . .

"So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual States." Cohen & Dayton, The New Federal Arbitration Law, *12 Va. L. Rev. 265, 276-277.*

All this indicates that the § 4 inquiry of whether the making of the arbitration agreement is in issue is to be determined by reference to state law, not federal law formulated by judges for the purpose of promoting arbitration.

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n26 S. Rep. No. 536, 68th Cong., 1st Sess., 2 (1924); Joint Hearings, *supra*, at 38.

n27 Cohen & Dayton, *supra*, at 271.

n28 *Id., at 279.*

n29 65 Cong. Rec. 1931 (1924).

----------End Footnotes----------

**[***HR8]** Second. The avowed purpose of the Act was to place arbitration agreements "upon the same footing as other contracts." n30 The separability rule which the Court applies to an arbitration clause does not result in equality between it and other clauses in the contract. I had always thought that a person who attacks a contract on the ground of fraud and seeks to rescind it has to seek rescission of the whole, not tidbits, and is not given the option of denying the existence of some clauses and affirming the existence of others. Here F & C agreed both to perform consulting services for Prima and not to **[*424]** compete with Prima. Would any court hold that those two agreements were separable, even though Prima in agreeing to pay F & C not to compete did not directly rely on F & C's representations of being solvent? The simple fact is that Prima would not have agreed to the covenant not to compete or to the arbitration clause but for F & C's fraudulent promise that it would be financially able to perform consulting services. As this Court held in *United States v. Bethlehem Steel Corp., 315 U.S. 289, 298:*

"Whether a number of promises constitute one contract [and are non-separable] or more than one is to be determined by inquiring 'whether the parties assented to all the promises as a single whole, so **[***1289]** that there would have been no bargain whatever, if any promise or set of promises were struck out.'"

Under this test, all of Prima's promises were part of one, inseparable contract.

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n30 H. R. Rep. No. 96, 68th Cong., 1st Sess. (1924).

----------End Footnotes----------

*Third.* It is clear that had this identical contract dispute been litigated in New York courts under its arbitration act, Prima would not be required to present its claims of fraud to the arbitrator if the state rule of non-separability applies. The Court here does not hold today, as did Judge Medina, n31 that the body of federal substantive law created by federal judges under the Arbitration Act is required to be applied by state courts. A holding to that effect -- which the Court seems to leave up in the air -- would flout the intention of the framers of the Act. n32 Yet under this Court's opinion today -- that the Act supplies not only the remedy of enforcement but a body of federal doctrines to determine the validity **[**1817]** of an arbitration agreement -- failure to make the Act **[*425]** applicable in state courts would give rise to "forum shopping" and an unconstitutional discrimination that both *Erie* and *Bernhardt* were designed to eliminate. These problems are greatly reduced if the Act is limited, as it should be, to its proper scope: the mere enforcement in federal courts of valid arbitration agreements.

----------Footnotes----------

n31 "This is a declaration of national law equally applicable in state or federal courts." *271 F.2d, at 407.*

n32 See n. 23, *supra.*

----------End Footnotes----------

IV.

The Court's summary treatment of these issues has made it necessary for me to express my views at length. The plain purpose of the Act as written by Congress was this and no more: Congress wanted federal courts to enforce contracts to arbitrate and plainly said so in the Act. But Congress also plainly said that whether a contract containing an arbitration clause can be rescinded on the ground of fraud is to be decided by the courts and not by the arbitrators. Prima here challenged in the courts the validity of its alleged contract with F & C as a whole, not in fragments. If there has never been any valid contract, then there is not now and never has been anything to arbitrate. If Prima's allegations are true, the sum total of what the Court does here is to force Prima to arbitrate a contract which is void and unenforceable before arbitrators who are given the power to make final legal determinations of their own jurisdiction, not even subject to effective review by the highest court in the land. That is not what Congress said Prima must do. It seems to be what the Court thinks would promote the policy of arbitration. I am completely unable to agree to this new version of the Arbitration Act, a version which its own creator in *Robert Lawrence* practically admitted was judicial legislation. Congress might possibly have enacted such a version into law had it been able to foresee subsequent legal events, but I do not think this Court should do so.

I would reverse this case.

LEXSEE 517 us 681

**DOCTOR'S ASSOCIATES, INC. AND NICK LOMBARDI, PETITIONERS v. PAUL CASAROTTO ET UX.**

**No. 95-559.**

**SUPREME COURT OF THE UNITED STATES**

*517 U.S. 681; 116 S. Ct. 1652; 134 L. Ed. 2d 902; 1996 U.S. LEXIS 3244; 64 U.S.L.W. 4370; 96 Cal. Daily Op. Service 3502; 96 Daily Journal DAR 5705; 9 Fla. L. Weekly Fed. S 599*

**April 16, 1996, Argued**

**May 20, 1996, Decided**

**PRIOR HISTORY:**
ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA.

**DISPOSITION:**
*274 Mont. 3, 901 P.2d 596,* reversed and remanded.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Petitioner, a corporation that was a national franchiser of restaurants, sought review of the judgment of the Supreme court of Montana, which reversed a decision in favor of petitioner in a suit filed by petitioner to force arbitration of a contract dispute with respondent franchisee, based on its finding that Mont. Code Ann. § 27-5-114(4) had rendered the parties' contractual arbitration provision unenforceable.

**OVERVIEW:** Petitioner, a corporation, was a national franchiser of a chain of restaurants. It entered into a franchise agreement with respondent. The agreement permitted respondent to open a restaurant in Montana. The franchise agreement stated that all contract controversies would be settled by arbitration. Respondent subsequently filed suit against petitioner and its agent in Montana state court alleging state law contract and tort claims relating to the franchise agreement. Petitioner successfully demanded arbitration of those claims pursuant to the contract agreement and the Federal Arbitration Act (Act), *9 U.S.C.S. § 2.* That judgment was reversed by the court below upon its finding that Mont. Code Ann. § 27-5-114(4) rendered the agreement's arbitration clause unenforceable because the arbitration clause did not appear underlined on the first page of the agreement as required by the statute. That judgment was reversed and remanded upon the court's holding that Montana's first-page notice requirement, which governed not any contract, but specifically and solely contracts subject to arbitration, was in conflict with § 2 of the Act and therefore displaced by the federal measure.

**OUTCOME:** The judgment was reversed because the Montana statute at issue was held to be in direct conflict with the Federal Arbitration Act. Therefore, the Montana statute was preempted by the federal law.

**CORE TERMS:** arbitration, arbitration clause, franchise agreement, notice requirement, enforceability, revocation, subject to arbitration, invalidate, enforceable, state-law, notice, save, irrevocable, underlined, preempted, declares, typed, Federal Arbitration Act, arbitration agreement, pending arbitration, oral argument, standard form, state rule, unenforceable, revocability, franchisor, first-page, footing, last term, agreements to arbitrate

**LexisNexis(TM) HEADNOTES - Core Concepts**

***Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Enforcement***
[HN1] The Federal Arbitration Act, *9 U.S.C.S. § 2*, declares written provisions for arbitration valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Limits***
[HN2] State law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with the text of *9 U.S.C.S. § 2* of the Federal Arbitration Act.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Enforcement***
***Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Limits***
[HN3] States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of any contract. *9 U.S.C.S. § 2*. What States may not do is decide that a contract is fair enough to enforce all its basic terms, but not fair enough to enforce its arbitration clause. The Federal Arbitration Act (Act) makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress's intent.

***Contracts Law > Defenses > Duress & Undue Influence***
***Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Enforcement***
***Contracts Law > Defenses > Unconscionability***
[HN4] Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening *9 U.S.C.S. § 2*.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Limits***
[HN5] Courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Limits***
[HN6] By enacting *9 U.S.C.S. § 2*, Congress precluded states from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts.

**SYLLABUS:**

When a dispute arose between parties to a standard form franchise agreement for the operation of a Subway sandwich shop in Montana, respondent franchisee sued petitioners, franchisor Doctor's Associates, Inc. (DAI), and its agent, Lombardi, in a Montana state court. The court stayed the lawsuit pending arbitration pursuant to the arbitration clause set out in ordinary type on page nine of the franchise agreement. The Montana Supreme Court reversed, holding that the arbitration clause was unenforceable because it did not meet the state-law requirement that "notice that a contract is subject to arbitration" be "typed in underlined capital letters on the first page of the contract. " Mont. Code Ann. § 27-5-114(4). DAI and Lombardi unsuccessfully argued that § 27-5-114(4) was preempted by § 2 of the Federal Arbitration Act (FAA), which declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In arguing for preemption, DAI and Lombardi dominantly relied on *Southland Corp. v. Keating, 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852*, and *Perry v. Thomas, 482 U.S. 483, 96 L. Ed. 2d 426, 107 S. Ct. 2520*, in which this Court established that "state law . . . is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," but not if the state-law principle "takes its meaning precisely from the fact that a contract to arbitrate is at issue." *Id., at 493, n. 9* (emphasis added). The Montana Supreme Court, however, thought *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 103 L. Ed. 2d 488, 109 S. Ct. 1248*, limited § 2's preemptive force and correspondingly qualified *Southland* and *Perry;* the proper inquiry, the Montana Supreme Court said, should focus not on the bare words of § 2 but on the question: Would the application of § 27-5-114(4)'s notice requirement undermine the FAA's goals and policies. In the Montana court's judgment, the notice requirement did not undermine these goals and policies, for it did not preclude arbitration agreements altogether. On remand from

this Court for reconsideration in light of *Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 130 L. Ed. 2d 753, 115 S. Ct. 834,* the Montana court adhered to its original ruling.

*Held:* Montana's first-page notice requirement, which governs not "any contract," but specifically and solely contracts "subject to arbitration," conflicts with the FAA and is therefore displaced by the federal measure. Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2, see, *e. g., Allied-Bruce, 513 U.S. at 281,* but courts may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions, see, *e. g., ibid.* By enacting § 2, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts. *Scherk v. Alberto-Culver Co., 417 U.S. 506, 511, 41 L. Ed. 2d 270, 94 S. Ct. 2449.* Montana's § 27-5-114(4) directly conflicts with § 2 because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The Montana Supreme Court misread *Volt* in reaching a contrary conclusion. The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself. Applying § 27-5-114(4) here, in contrast, would invalidate the arbitration clause. Pp. 686-688.

**COUNSEL:**
Mark R. Kravitz argued the cause for petitioners. With him on the briefs were Jeffrey R. Babbin and H. Bartow Farr III.

Lucinda A. Sikes argued the cause for respondents. With her on the brief were David C. Vladeck, Paul Alan Levy, and William C. Watt. *

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* Briefs of amici curiae urging reversal were filed for the American Council of Life Insurance by Patricia A. Dunn, Stephen J. Goodman, and Phillip E. Stano; for the International Franchise Association et al. by William J. Fitzpatrick and John F. Verhey; and for Kaiser Foundation Health Plan, Inc., by Kennedy P. Richardson.

Deborah M. Zuckerman, Steven S. Zaleznick, and Patricia Sturdevant filed a brief for the American Association of Retired Persons et al. as amici curiae urging affirmance.

----------End Footnotes----------

**JUDGES:**
GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, post, p. 689.

**OPINIONBY:**
GINSBURG

**OPINION:**

**[***906]**

**[*682] [**1654]** JUSTICE GINSBURG delivered the opinion of the Court.

**[***HR1A]** This case concerns a standard form franchise agreement for the operation of a Subway sandwich shop in Montana. **[*683]** When a dispute arose between parties to the agreement, franchisee Paul Casarotto sued franchisor Doctor's Associates, Inc. (DAI), and DAI's Montana development agent, Nick Lombardi, in a Montana state court. DAI and Lombardi sought to stop the litigation pending arbitration pursuant to the arbitration clause set out on page nine of the franchise agreement.

[HN1] The Federal Arbitration Act (FAA or Act) declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. § 2.* Montana law, however, declares an arbitration clause unenforceable unless "notice that [the] contract is subject to arbitration" is "typed in underlined capital letters on the first page of the contract." Mont. Code Ann. § 27-5-114(4) (1995). The question here presented is whether Montana's law is compatible with the federal Act. We hold that

Montana's first-page notice requirement, which governs not "any contract," but specifically and solely contracts "subject to arbitration," conflicts with the FAA and is therefore displaced by the federal measure.

I

Petitioner DAI is the national franchisor of Subway sandwich shops. In April 1988, DAI entered a franchise agreement with respondent Paul Casarotto, which permitted Casarotto to open a Subway shop in Great Falls, Montana. The franchise agreement stated, on page nine and in ordinary type: "Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration . . . ." App. 75. **[***907]**

In October 1992, Casarotto sued DAI and its agent, Nick Lombardi, in Montana state court, alleging state-law contract and tort claims relating to the franchise agreement. DAI demanded arbitration of those claims, and successfully moved in the Montana trial court to stay the lawsuit pending arbitration. *Id.*, at 10-11.

**[*684]** The Montana Supreme Court reversed. *Casarotto v. Lombardi, 268 Mont. 369, 886 P.2d 931 (1994).* That court left undisturbed the trial court's findings that the franchise agreement fell within the scope of the FAA and covered the claims Casarotto stated against DAI and Lombardi. The Montana Supreme Court held, however, that Mont. Code Ann. § 27-5-114(4) rendered the agreement's arbitration clause unenforceable. The Montana statute provides:

"Notice that a contract is subject to arbitration . . . shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration."

Notice of the arbitration clause in the franchise agreement did not appear on the first page of the contract. Nor was anything relating to the clause typed in underlined capital letters. Because the State's statutory **[**1655]** notice requirement had not been met, the Montana Supreme Court declared the parties' dispute "not subject to arbitration." *268 Mont. at 382, 886 P.2d at 939.*

DAI and Lombardi unsuccessfully argued before the Montana Supreme Court that § 27-5-114(4) was preempted by § 2 of the FAA. n1 DAI and Lombardi dominantly relied on our decisions in *Southland Corp. v. Keating, 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984),* and *Perry v. Thomas, 482 U.S. 483, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987).* In *Southland,* we held that § 2 of the FAA applies in state as well as federal courts, see *465 U.S. at 12,* and "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," *id., at 10.* We noted in the pathmarking *Southland* **[*685]** decision that the FAA established a "broad principle of enforceability," *id., at 11,* and that § 2 of the federal Act provided for revocation of arbitration agreements only upon "grounds as exist at law or in equity for the revocation of any contract." In *Perry,* we reiterated: "[HN2] State law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2]." *482 U.S. at 493, n. 9.*

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n1 Section 2 provides, in relevant part:

"A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. § 2.*

----------End Footnotes----------

The Montana Supreme Court, however, read our decision in *Volt Information Sciences, Inc. v. Board of* **[***908]** *Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989),* as limiting the preemptive force of § 2 and correspondingly qualifying *Southland* and *Perry. 268 Mont. at 378-381, 886 P.2d at 937-939.* As the Montana Supreme Court comprehended *Volt,* the proper inquiry here should focus not on the bare words of § 2, but on this question: Would the application of Montana's notice requirement, contained in § 27-5-114(4), "undermine the goals and policies of the FAA." *268 Mont. at 381, 886 P.2d at 938* (internal quotation marks omitted). Section 27-5-114(4), in the Montana court's judgment, did not undermine the goals and policies of the FAA, for the

notice requirement did not preclude arbitration agreements altogether; it simply prescribed "that before arbitration agreements are enforceable, they be entered knowingly." *Id., at 381, 886 P 2d at 939.*

DAI and Lombardi petitioned for certiorari. Last Term, we granted their petition, vacated the judgment of the Montana Supreme Court, and remanded for further consideration in light of *Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995).* See *515 U.S. 1129 (1995).* In *Allied-Bruce*, we restated what our decisions in *Southland* and *Perry* had established:

**[*686]** "[HN3] States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' *9 U.S.C. § 2* (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent." *513 U.S. at 281.*

On remand, without inviting or permitting further briefing or oral argument, n2 the Montana **[**1656]** Supreme Court adhered to its original ruling. The court stated: "After careful review, we can find nothing in the *[Allied-Bruce]* decision which relates to the issues presented to this Court in this case." *Casarotto v. Lombardi, 274 Mont. 3, 7, 901 P.2d 596, 598 (1995).* Elaborating, the Montana court said it found "no suggestion in *[Allied-Bruce]* that the principles from *Volt* on which we relied [to uphold § 27-5-114(4)] have been modified in any way." *Id., at 8, 901 P.2d at 598-599.* We again granted certiorari, *516 U.S. 1036 (1996),* and now reverse.

----------Footnotes----------

n2 Dissenting Justice Gray thought it "cavalier" of her colleagues to ignore the defendants' request for an "opportunity to brief the issues raised by the . . . remand and to present oral argument." *Casarotto v. Lombardi, 274 Mont. 3, 9-10, 901 P.2d 596, 599-600 (1995).*

----------End Footnotes----------

II

**[***HR2A]** Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." *9 U.S.C. § 2* (emphasis added). Repeating our observation in *Perry*, the text of § 2 declares that state law may be **[***909]** applied "*if* that law arose to govern issues **[*687]** concerning the validity, revocability, and enforceability of contracts generally." *482 U.S. at 493, n. 9.* Thus, [HN4] generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. See *Allied-Bruce, 513 U.S. at 281; Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483-484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989); Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987).*

**[***HR1B]** **[***HR2B]** **[***HR3A]** [HN5] Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. See *Allied-Bruce, 513 U.S. at 281; Perry, 482 U.S. at 493, n. 9.* [HN6] By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co., 417 U.S. 506, 511, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974)* (internal quotation marks omitted). Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act. See 2 I. Macneil, R. Speidel, T. Stipanowich, & G. Shell, Federal Arbitration Law § 19.1.1, pp. 19:4-19:5 (1995) (under *Southland* and *Perry*, "state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted"). n3

**[***HR2C]** **[***HR3B]**

----------Footnotes---------- n3 At oral argument, counsel for Casarotto urged a broader view, under which § 27-5-114(4) might be regarded as harmless surplus. See Tr. of Oral Arg. 29-32. Montana could have invalidated the arbitration clause in the franchise agreement under general, informed consent principles, counsel suggested. She asked us to regard § 27-5-114(4) as but one illustration of a cross-the-board rule: Unexpected provisions in adhesion contracts must be conspicuous. See also Brief for Respondents 21-24. But the Montana Supreme Court announced no such sweeping rule. The court did not assert as a basis for its decision a generally applicable principle of "reasonable expectations" governing any standard form contract term. Cf. *Transamerica Ins. Co. v. Royle, 202 Mont. 173, 180, 656 P.2d 820, 824 (1983)* (invalidating provision in auto insurance policy that did not "honor the reasonable expectations" of the insured). Montana's decision trains on and upholds a particular statute, one setting out a precise, arbitration-specific limitation. We review that disposition, and no other. It bears reiteration, however, that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." *Perry v. Thomas, 482 U.S. 483, 493, n. 9, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987).*

----------End Footnotes----------

**[*688]** The Montana Supreme Court misread our *Volt* decision and therefore reached a conclusion in this case at odds with our rulings. *Volt* involved an arbitration agreement that incorporated state procedural rules, one of which, on the facts of that case, called for arbitration to be stayed pending the resolution of a related judicial proceeding. The state rule examined in *Volt* determined only the efficient order of proceedings; it did not **[**1657]** affect the enforceability of the arbitration agreement itself. We held that applying the state rule **[***910]** would not "undermine the goals and policies of the FAA," *489 U.S. at 478,* because the very purpose of the Act was to "ensur[e] that private agreements to arbitrate are enforced according to their terms," *id., at 479.*

**[***HR1C]** **[***HR2D]** Applying § 27-5-114(4) here, in contrast, would not enforce the arbitration clause in the contract between DAI and Casarotto; instead, Montana's first-page notice requirement would invalidate the clause. The "goals and policies" of the FAA, this Court's precedent indicates, are antithetical to threshold limitations placed specifically and solely on arbitration provisions. Section 2 "mandate[s] the enforcement of arbitration agreements," *Southland, 465 U.S. at 10,* "save upon such grounds as exist at law or in equity for the revocation of any contract," *9 U.S.C. § 2.* Section 27-5-114(4) of Montana's law places arbitration agreements in a class apart from "any contract," and singularly limits their validity. The State's prescription is thus inconsonant with, and is therefore preempted by, the federal law.

**[*689]** * * *

For the reasons stated, the judgment of the Supreme Court of Montana is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

**DISSENTBY:**
THOMAS

**DISSENT:**

JUSTICE THOMAS, dissenting.

For the reasons given in my dissent last term in *Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995),* I remain of the view that § 2 of the Federal Arbitration Act, *9 U.S.C. § 2,* does not apply to proceedings in state courts. Accordingly, I respectfully dissent.

# STATE OF ALASKA

**DEPARTMENT OF LAW**

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MAR 10 2003

March 10, 2003

Representative Ethan Berkowitz
House of Representatives
State Capitol
Mail Stop 3100
Juneau, AK 99801-1182

Re: HB 83, relating to the Revised Uniform Arbitration Act

Dear Representative Berkowitz:

I have reviewed HB 83, relating to adoption of the Revised Uniform Arbitration Act, and I see no legal issues that would impact implementation of the bill. The bill follows the recommendations of the authors of "Is the Revised Uniform Arbitration Act a Good Fit for Alaska," 19 Alaska Law Review 339.

Please don't hesitate to contact me if you have any questions about specific provisions of the bill.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: Keith B. Levy
Assistant Attorney General

KBL:sro

cc: David Marquez

TABLE 1: COMPARISON OF RUAA AND UAA SECTIONS

| Revised Uniform Arbitration Act | Uniform Arbitration Act |
|---|---|
| § 1 Definitions* | UAA § 17 for definition of "court" |
| § 2 Notice* | No corresponding UAA provision |
| § 3 When Act applies* | UAA § 3, § 20, and § 25 |
| § 4 Effect of Agreement to Arbitrate; Non-Waivable Provisions* | No corresponding UAA provision |
| § 5 [Application] for Judicial Relief | UAA § 16 |
| § 6 Validity of Agreement** | UAA § 1 |
| § 7 [Motion] to Compel or Stay Arbitration | UAA § 2 |
| § 8 Provisional Remedies* | No corresponding UAA provision |
| § 9 Initiation of Arbitration* | No corresponding UAA provision |
| §10 Consolidation of Separate Arbitration Proceedings* | No corresponding UAA provision |
| § 11 Appointment of Arbitrator; Service as a Neutral Arbitrator | UAA § 3 |
| § 12 Disclosure By Arbitrator* | No corresponding UAA provision |
| § 13 Action by Majority | UAA § 4 |
| § 14 Immunity of Arbitrator; Competency to Testify; Attorney's Fees and Costs* | No corresponding UAA provision |
| § 15 Arbitration Process** | UAA § 5 |
| § 16 Representation By Lawyer | UAA § 6 |
| § 17 Witnesses; Subpoenas; Depositions; Discovery** | UAA § 7 |
| § 18 Judicial Enforcement of Preaward Rulingby Arbitrator* | No corresponding UAA provision |
| § 19 Award | UAA § 8 |
| § 20 Change Award By Arbitrator | UAA § 9 |
| § 21 Remedies; Fees and Expenses ofArbitration Proceeding** | UAA 10 |
| § 22 Confirmation of Award | UAA § 11 |
| § 23 Vacating Award One additional basis for vacatur | UAA § 12 |
| § 24 Modification or Correction of Award | UAA § 13 |
| § 25 Judgement on Award; Attorney's Fees and Litigation Expenses* | No corresponding UAA provision for attorney fees, but see UAA §§ 14 and 15 regarding judgment on award |
| § 26 Jurisdiction | UAA § 17 |
| § 27 Venue | UAA § 18 |
| § 28 Appeals | UAA § 19 |
| § 29 Uniformity of Application and Construction | UAA § 21 |
| § 30 Relationship to Electronic Signatures in Global and National Commerce Act* | No corresponding UAA provision |
| § 31 Effective Date | UAA § 3, § 20, and § 25 |
| § 32 Repeal | UAA § 3, § 20, and § 25 |
| § 33 Savings Clause | UAA § 3, § 20, and § 25 |
| * – New Section<br>** – Partially New Section | |

# UNIFORM ARBITRATION ACT

(Last Revisions Completed Year 2000)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINTH YEAR
ST. AUGUSTINE, FLORIDA

JULY 28 - AUGUST 4, 2000

*WITH PREFATORY NOTE AND DRAFT COMMENTS*

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## PREFATORY NOTE

The Uniform Arbitration Act (UAA), promulgated in 1955, has been one of the most successful Acts of the National Conference of Commissioners on Uniform State Laws. Forty-nine jurisdictions have arbitration statutes; 35 of these have adopted the UAA and 14 have adopted substantially similar legislation. 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 the increasing use of arbitration, the greater complexity of many disputes resolved by arbitration, and the developments of the law in this area.

The UAA did not address many issues which arise in modern arbitration cases. The statute provided no guidance as to (1) who decides the arbitrability of a dispute and by what criteria; (2) whether a court or arbitrators may issue provisional remedies; (3) how a party can initiate an arbitration proceeding; (4) whether arbitration proceedings may be consolidated; (5) whether arbitrators are required to disclose facts reasonably likely to affect impartiality; (6) what extent arbitrators or an arbitration organization are immune from civil actions; (7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding; (8) whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences and otherwise manage the arbitration process; (9) when a court may enforce a preaward ruling by an arbitrator; (10) what remedies an arbitrator may award, especially in regard to attorney's fees, punitive damages or other exemplary relief; (11) when a court can award attorney's fees and costs to arbitrators and arbitration organizations; (12) when a court can award attorney's fees and costs to a prevailing party in an appeal of an arbitrator's award, and (13) which sections of the UAA would not be waivable, an important matter to insure fundamental fairness to the parties will be preserved, particularly in those instances where one party may have significantly less bargaining power than another; and (14) the use of electronic information and other modern means of technology in the arbitration process. The Revised Uniform Arbitration Act (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, 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. In most instances the RUAA provides a default mechanism if the parties do not have a specific agreement on a particular issue. Second, the underlying reason many parties choose arbitration is the relative speed, lower cost, and greater efficiency of the process. The law should take these factors, where applicable, into account. For example, section 10 allows consolidation of issues involving multiple parties. Such a provision can be of special importance in adhesion situations where there are numerous persons with essentially the same claims against a party to the arbitration agreement. Finally, in most cases parties intend the decisions of arbitrators to be final with minimal court involvement unless there is clear unfairness or a denial of justice. This contractual nature of arbitration means that the provision to vacate awards in section 23 is limited. This is so even where an arbitrator may award attorney's fees, punitive damages or other exemplary relief under section 21. Section 14 insulates arbitrators from unwarranted litigation to insure their independence by providing them with immunity.

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

In light of a number of decisions by the United States Supreme Court concerning the Federal Arbitration Act (FAA), any revision of the UAA must take into account the doctrine of preemption. The rule of preemption, whereby FAA standards and the emphatically pro-arbitration perspective of the FAA control, applies in both the federal courts and the state courts. To date, the preemption-related opinions of the Supreme Court have centered in large part on the two key issues that arise at the front end of the arbitration process—enforcement of the agreement to arbitrate and issues of substantive arbitrability. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 35 (1967); Moses H. Cone Mem'l 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 (1987); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996). That body of case law establishes that state law of any ilk, including adaptations of the RUAA, modifying 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 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 United States Circuit Courts of Appeals that the section 10(a) standards are not the exclusive grounds for vacatur.

Nevertheless, the Supreme Court's unequivocal stand to date as to the preemptive effect of the FAA provides strong reason to believe that a similar result will obtain with regard to section 10(a) grounds for vacatur. If it does, and if the Supreme Court eventually determines that the





section 10(a) standards are the sole grounds for vacatur of commercial arbitration awards, FAA preemption of conflicting state law with regard to the "back end" issues of vacatur (and confirmation and modification) would be certain. If the Court takes the opposite tack and holds that the section 10(a) grounds are not the exclusive criteria for vacatur, the preemptive effect of section 10(a) would most likely be limited 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). Any definitive federal "common law," pertaining to the nonstatutory grounds for vacatur other than those set out in section 10(a), articulated by the Supreme Court or established as a clear majority rule by the United States Courts of Appeals, likely 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 section C to the comment to section 23.

An important caveat to the general rule of FAA preemption is found in *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989) and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The focus in these cases is on the effect of FAA preemption on choice-of-law provisions routinely included in commercial contracts. *Volt* and *Mastrobuono* establish that a clearly expressed contractual agreement by the parties to an arbitration contract to conduct their arbitration under state law rules effectively trumps the preemptive effect of the FAA. If the parties elect to govern their contractual arbitration mechanism by the law of a particular state and thereby limit the issues that they will arbitrate or the procedures under which the arbitration will be conducted, their bargain will be honored—as long as the state law principles invoked by the choice-of-law provision do not conflict with the FAA's prime directive that agreements to arbitrate be enforced. *See, e.g.*, ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co., 188 F.3d 307 (5th Cir. 1999); Russ Berrie & Co. v. Gantt, 988 S.W.2d 713 (Tex. Ct. App. 1999). It is in those situations that the RUAA will have most impact. Section 4(a) of the RUAA also explicitly provides that the parties to an arbitration agreement may waive or vary the terms of the Act to the extent otherwise permitted by law. Thus, when parties choose to contractually specify the procedures to be followed under their arbitration agreement, the RUAA contemplates that the contractually-established procedures will control over contrary state law, except with regard to issues designated as "nonwaivable" in Section 4(b) and (c) of the RUAA.

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 because 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. In the absence of definitive federal law set out in the FAA or determined by the federal courts. 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 *Casarotto*, 517 U.S. 681, 686 (1996); and *Casarotto*, 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 an "equal footing" with other contracts.

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

As explained in detail in section B of the comment to section 23, there were a number of reasons that resulted in the decision not to include statutory sanction of the "opt-in" device for expanded judicial review in the RUAA: (1) the current uncertainty as to the legality of a state statutory sanction of the "opt-in" device, (2) 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 (3) the inclusion of a statutory provision that would permit the parties to contractually render arbitration decidedly non-final and non-binding. Simply stated, the potential gain to be realized by codifying a right to opt-into expanded judicial review that has not yet been definitively confirmed to exist does not outweigh the potential threat that adoption of an opt-in statutory provision would create for the integrity and viability of the RUAA as a template for state arbitration acts.

Unlike the "opt-in" judicial review mechanism, there are few, if any, legal concerns raised by statutory sanction of "opt-in" provisions for appellate arbitral review. Nevertheless, as explained in the section B of the Comments to section 23, because the current, contract-based view of arbitration establishes that the parties are free to design the inner workings of their arbitration procedures in any manner they see fit, the Drafting Committee determined that codification of that right in the RUAA would add nothing of substance to the existing law of arbitration.

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

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





long as it cannot be characterized as anti-arbitration or as intended to limit the enforceability or viability of agreements to arbitrate.

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

Any provisions of these state international arbitration statutes that are inconsistent with the New York Convention, to which the United States adhered in 1970 (terms of the New York Convention can be found at 9 U.S.C. § 201), or with the federal legislation in Chapter 2 of Title 9 of the United States Code are preempted. Chapter 2 creates federal-question jurisdiction in the federal district courts for any case "falling under the [New York] Convention" and permits removal of any such case from a state court to the federal court "at any time prior to trial." 9 U.S.C. §§ 203, 205. The statute covers any commercial agreement to arbitrate and the resultant arbitration award unless the matter involves only American citizens and has no reasonable relationship to any foreign country and the courts have broadly applied the statute. Therefore, it is unlikely that state arbitration law will have major application to an international case. There are two instances where state arbitration law might apply in the international context: (1) where the parties designate a specific state arbitration law to govern the international arbitration and (2) where all parties to an arbitration proceeding involving an international transaction decide to proceed on a matter in state court and do not exercise their rights of removal under Chapter 2 of Title 9 and the relevant provision of state arbitration law is not preempted by federal arbitration law or the New York Convention. In these relatively rare cases, the state courts will refer to the RUAA unless the state has enacted a special international arbitration law.

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

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

## REVISED UNIFORM ARBITRATION ACT (2000)

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

(1) "Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.





(2) "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) "Court" means [a court of competent jurisdiction in this State].

(4) "Knowledge" means actual knowledge.

(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.

**Comment:**

1. The term "arbitration organization" is similar to the one used in section 74 of the 1996 English Arbitration Act and describes well the functions of agencies such as the American Arbitration Association (AAA), the CPR, JAMS, the National Arbitration Forum, NASD Regulation, Inc., the American Stock Exchange, the New York Stock Exchange, and the International Chamber of Commerce. Arbitration organizations 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 unbiased. *See, e.g.*, Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 938 P.2d 903, 64 Cal. Rptr. 2d 843 (1997) (stating that 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 organization" is used in section 12 concerning arbitrator disclosure and section 14 concerning arbitrator immunity.

2. In defining "arbitrator" in section 1(2), the term "individual" rather than "person" is used because business entities or organizations do not function as "arbitrators."

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

4. The term "knowledge" is used in section 2 regarding notice under the RUAA and is referenced in section 12(a) concerning disclosure. It is based on the definition used in Article 1-201 of the Uniform Commercial Code. "Actual knowledge" as used in this Act is not intended to include imputed or constructive knowledge.

5. 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 nor is it meant to imply that the term "written" or like phrases in other statutes of an enacting state may not be given equally broad interpretation as the term "record."





**SECTION 2. NOTICE.**

(a) Except as otherwise provided in this [Act], a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

Comment.

1. The conditions of giving and receiving notice are based on terminology used in Article 1-201 (25, 27) of the Uniform Commercial Code. Section 2 spells out standards for when notice is given and received rather than requiring any particular means of notice. This allows parties to use systems of notice that become technologically feasible and acceptable, such as fax or electronic mail.

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

3. "Notice" is also used in section 9 regarding initiation of an arbitration proceeding; section 9 (a) requires that unless the parties otherwise agree as per section 4, notice must be given either by certified or registered, return receipt requested and obtained, or by service as authorized by law for the initiation of a civil action. Because of the language in section 2 "except as otherwise provided by this [Act]," the manner of notice provided in section 9(a) takes precedence as to notice of initiation of an arbitration proceeding.

**SECTION 3. WHEN [ACT] APPLIES.**

(a) This [Act] governs an agreement to arbitrate made on or after [the effective date of this [Act]].

(b) This [Act] governs an agreement to arbitrate made before [the effective date of this [Act]] if all the parties to the agreement or to the arbitration proceeding so agree in a record.

(c) On or after [a delayed date], this [Act] governs an agreement to arbitrate whenever made.

**Comment:**

1. Section 3 is based upon the effective-date provisions in the Revised Uniform Partnership

Act (section 1208) and 1996 Amendments constituting the Uniform Limited Liability Partnership Act of 1994 (section 1210). Section 3(b) allows parties who have entered into arbitration agreements under the UAA the option to elect coverage under the RUAA if they do so in a record. Section 3(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 applicable only to agreements entered into after the effective date of the Act. The Drafting Committee rejected this approach in the RUAA. 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 3(b) for these parties to opt into the provisions of the RUAA without rescinding their initial agreement. Section 3(c) also sets a time certain when all arbitration agreements will be governed by the RUAA. The time between when parties may opt into coverage under the RUAA and when parties' agreements must be governed by the RUAA will give parties a reasonable amount of time in which to learn of and adapt their arbitration agreements to the changes made by the RUAA.

3. Section 3 operates in conjunction with section 31, the effective date of the Act; section 32, that repeals the UAA or present arbitration statute in a state as of the delayed date which is the same delayed date as in section 3(c), and section 33, a savings clause that preserves actions or proceedings accruing before the RUAA takes effect and provides that, subject to section 3, an arbitration agreement made prior to the effective date of the RUAA is governed by the UAA.

The approach taken in sections 3, 31, 32 and 33 may cause a problem in some states that do not allow one statute, the RUAA, to amend another statute, the UAA. Some states may have to amend its current UAA so that it will not apply to arbitration agreements made after the effective date of the RUAA but before the delayed date of repeal of the UAA. Another possibility that a state with such a problem may consider is to incorporate the repealed UAA into the RUAA.

4. The following is an illustration of how sections 3, 31, 32 and 33 operate. Assume that a state legislature passes the RUAA and, in accordance with section 31, makes the RUAA effective on January 1, 2005, and, in accordance with section 3(c) and 32, chooses a date of January 1, 2007, (referred to as the "delayed date" in sections 3(c) and 32) by which all arbitration agreements in the state must conform to the RUAA and on which the UAA will be repealed. Under sections 3(a) and 31 any agreements entered into after January 1, 2005, would be covered by the RUAA. Under sections 3(b) and 33 for the period between January 1, 2005, and December 31, 2006, the UAA would apply to arbitration agreements entered into before January 1, 2005, unless all parties to the arbitration agreement or proceedings agree in a





record that the RUAA would govern. Under sections 3(c) and 32 on January 1, 2007, the RUAA would apply to all arbitration agreements, *i.e.*, those entered into both before and after January 1, 2005, the effective date of the RUAA.

5. By adopting section 3(c) a legislature will express a specific intent that the RUAA, on the date which the legislature selects, will have retroactive application as to arbitration agreements entered into prior to the effective date of the legislation and where the parties have not opted into coverage under the RUAA during the interim period under section 3(a)(2). Courts generally require legislatures to express such an intent as to retroactive application. Millenium Solutions, Inc. v. Davis, 258 Neb. 293, 603 N.W.2d 406 (1999) (holding that because legislature did not clearly express an intention that Uniform Arbitration Act was to be applied retroactively, it only applies prospectively); *see also* Koch v. S.E.C., 177 F.3d 784 (0th Cir. 1999); Phillips v. Curiale, 128 N.J. 608, 608 A.2d 895 (1992). Retroactive application of statutes to preexisting contracts is acceptable when the legislation has a legitimate purpose and the measures are reasonable and appropriate to that end. 2 Sutherland Stat. Const. § 41.07 (5th ed. 1993). The need for uniform application of arbitration laws and to avoid two sets of rules for arbitration agreements that are of a long-term duration are legitimate rationales for retroactive application, especially because parties will be given a time period in which to determine whether to opt for coverage under the UAA or the RUAA and during which to adjust any provisions in their arbitration agreements for eventual application of the RUAA. These same rationales were used for similar provisions in the Revised Uniform Partnership Act and the Uniform Limited Liability Partnership Act.

**SECTION 4. EFFECT OF AGREEMENT TO ARBITRATE; NONWAIVABLE PROVISIONS.**

(a) Except as otherwise provided in subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of this [Act] to the extent permitted by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) waive or agree to vary the effect of the requirements of Section 5(a), 6(a), 8, 17(a), 17(b), 28, or 28;

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

(3) agree to restrict unreasonably restrict the right under Section 12 to disclosure of any facts by a neutral arbitrator; or

(4) waive the right under Section 16 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this [Act], but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.





(c) A party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of this section or Section 3(a) or (c), 7, 14, 18, 20 (d) or (e), 22, 23, 24, 25(a) or (b), 29, 30, 31, or 32.

**Comment:**

1. Section 4 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 4 is to indicate that, although the RUAA is primarily a default statute and the parties' autonomy as expressed in their agreements concerning an arbitration normally should control the arbitration, there are provisions that parties cannot waive prior to a dispute arising under an arbitration agreement or cannot waive at all.

2. Section 4(a) embodies the notion of party autonomy in shaping their arbitration agreement or arbitration process. It should be noted that, subject to section 4(b) and (c) and in accordance with comment 1 to section 6, although the parties' arbitration agreement must be in a record, they subsequently may vary that agreement orally, for instance, during the arbitration proceeding.

3. The phrase "to the extent permitted by law" is included in section 4(a) to inform the parties that they cannot vary the terms of an arbitration agreement from the RUAA if the result would violate applicable law. This situation occurs most often when a party includes unconscionable provisions in an arbitration agreement. *See* comment 7 to section 8. The law in some circumstances may disallow parties from limiting certain remedies, such as attorney's fees and punitive or other exemplary damages. For example, although parties might limit remedies, such as recovery of attorney's fees or punitive damages in section 21, a court might deem such a limitation inapplicable where an arbitration involves statutory rights that would require these remedies. *See* comment 2 to section 21.

4. Section 4(b) is a listing of those provisions that cannot be waived in a predispute context. After a dispute subject to arbitration arises, the parties should have more autonomy to agree to provisions different from those required under the RUAA; in that circumstance the sections noted in 4(b) are waivable.

Special mention should be made of the following sections:





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

b. Section 4(b)(3) recognizes that many parties are governed by disclosure requirements through an arbitration organization or a professional association. Such requirements would be controlling instead of those in section 12 so long as they are reasonable in what they require a neutral arbitrator to disclose. Also, parties can waive the requirement that non-neutral arbitrators appointed by the parties make any disclosures under section 12. *See, e.g.*, AAA, Commercial Disp. Resolution Pro. R-12(b), 19 (disclosure requirements do not apply to party-appointed arbitrator, unless parties agree to the contrary).

c. Section 16, which provides that a party can be represented by an attorney and which cannot be waived prior to the initiation of an arbitration proceeding under Section 9, is an important right, especially in the context of an arbitration agreement between parties of unequal bargaining power. However, in labor-management 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, informal, and inexpensive arbitration mechanism. Because of this longstanding practice and because the parties are of relatively equal bargaining power, section 4(b)(4) makes an exception for labor-management arbitration.

d. Although prior to an arbitration dispute, parties should not be able to waive section 28 concerning jurisdiction and section 28 regarding appeals because these provisions deal with courts' authority to hear cases, after the dispute arises if parties wish to limit the jurisdictional provisions of section 28 or the provisions regarding appeals in section 28 to decide that there will be no appeal from lower court rulings, they should be free to do so.

5. Section 4(c) includes those provisions such as those that involve the judicial process, the waivability of the RUAA, the effective date of the RUAA, or the inherent rights of an arbitrator. The provisions in section 4(c) should not be within the control of the parties either before or after the arbitration dispute arises.

a. Section 7 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.

b. Section 14 provides arbitrators and arbitration organizations with immunity for acting in their

respective capacities. Similarly, arbitrators and representatives of arbitration organizations are protected from being required to testify in certain instances and if arbitrators or arbitration organizations are the subject of unwarranted litigation, they can recover attorney fees. This section is intended to protect the integrity of the arbitration process and is not waivable by the parties.

c. Likewise, section 18, dealing with judicial enforcement of preaward rulings, is an inherent right; otherwise parties would be unable to insure a fair hearing and there would be no mechanism to carry out preaward orders.

d. Subsections (a), (b) and (c) of section 20 give the parties the right to apply to the arbitrators to correct or clarify an award; this right is waivable. But the right of a court in section 20(d) to order an arbitrator to correct or clarify an award and the applicability of sections 22, 23, and 24 to section 20 as provided in section 20(e) are not waivable.

e. The judicial confirmation, vacatur, and modification provisions of sections 22, 23, and 24 are not waivable. Special note should be made in regard to section 23 concerning vacatur. Parties cannot waive or vary the statutory grounds for vacatur such as that a court can vacate an arbitration award procured by fraud or corruption. However, parties can add appropriate grounds that are not in the statute. For instance, as described in Comment C to section 23, courts have developed nonstatutory grounds of manifest disregard of the law and violation of public policy that will void an arbitration award. Parties could include such standards as grounds for vacatur in their arbitration agreement. Similarly, as discussed in Comment B to Section 23, at this time there is a split of authority whether courts will recognize the validity of arbitration agreements by parties to "opt in" to judicial review of an award for errors of fact or law. *See, e.g.*, Moncrief v. Heiley, & Blas, 3 Cal. 4th 1, 2, 832 P. 2d 899, 912 ("[I]n the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute.") (1992); *Trafina Printing, Inc. v. Fitzpatrick & Associates, Inc.* 135 N.J. 349, 357-58, 640 A. 2d. 788 (1994) ("[T]he parties are free to expand the scope of judicial review by providing for such expansion in their contract"). By including section 23 as one of the referenced sections in section 4(c), the Drafting Committee did not intend that an opt-in clause would "vary a requirement" of section 23. If authoritative case law recognizes an opt-in standard of review, section 4(c) is not intended to prohibit such a clause in an arbitration agreement.

f. Section 25(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 are not waivable. Section 25(c) concerns remedies of attorney's fees and litigation expenses that, similar to other remedies in section 21, parties can determine by agreement.





g. Parties cannot vary the nonwaivability provision of this section, the uniformity of interpretation in section 29, the applicability of the Electronic Signatures in Global and National Commerce Act of section 30, the effective date in section 31, the application of the Act in section 3(a) and (c), section 32 regarding repeal of the UAA or the savings clause in section 33.

**SECTION 5. [APPLICATION] FOR JUDICIAL RELIEF.**

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

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial [motion] to the court under this [Act] must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion must be given in the manner provided by law or rule of court for serving [motions] in pending cases.

**Comment:**

1. Section 5, subsections (a) and (b) are based on section 18 of the UAA. Its purpose is twofold: (1) that legal actions to a court involving an arbitration matter under the RUAA will be by motion and not by trial and (2) unless the parties otherwise agree, the initial motion filed with a court will be served in the same manner as the initiation of a civil action.

2. The UAA uses the term "application" throughout the statute. Legal actions under both the UAA and the FAA generally are conducted by motion practice and are not subject to the delays of a civil trial. This system has worked well and the intent of section 5 is to retain it. However, in some states there may be different means of initiating arbitration actions, such as filing a petition or a complaint. Instead of or along with a motion or an application. This section is not intended to alter established practice in any particular state and the terms "application" and "motion" have been bracketed throughout the RUAA for substitution by states where appropriate.

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

(a) An agreement contained in a record to submit to arbitration any existing or subsequent





controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

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

(d) 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.

**Comment:**

1. The language in section 6(a) as to the validity of arbitration agreements is the same as UAA section 1 and almost the same as the language of FAA section 2 which states that arbitration agreements "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, this section, for the most part, is intact.

Section 6(a) provides that any terms in the arbitration agreement must be in a "record." This too follows both the UAA and FAA requirements that arbitration agreements be in writing. However, a subsequent, oral agreement about terms of an arbitration contract is valid. This position is in accord 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 Equip. 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); Pacific Dev., L.C. v. Orton, 982 P.2d 94 (Utah App. 1999). Indeed it is typical in the arbitration context, for many parties to have only a short statement in their contracts concerning the resolution of disputes by arbitration, and perhaps a reference to the rules of an arbitration organization. It is oftentimes only after the initial arbitration agreement is written and when a dispute arises that the parties enter into more detailed agreements as to how their arbitration process will work. Such subsequent understandings, whether oral or written, are part of the arbitration agreement.

2. Subsections (b) and (c) of section 6 are intended to incorporate 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. City of Cottonwood v. James L. Fann Contracting, Inc. 179 Ariz. 185, 877 P.2d 284, 292 (1994); Thomas v. Farmers Ins. Exchange, 857 P.2d 532, 534 (Colo. Ct. App. 1993); Executive Life Ins. Co. v. John Hammer & Assoc., Inc., 569 So. 2d 855, 857 (Fla. Dist Ct. App. 1990); Amalgamated Transit Union Local 900 v. Suburban Bus Div., 262 Ill. App. 3d 334, 199 Ill. Dec. 630, 635, 634 N.E.2d 469, 474(1994); Des Moines Asphalt & Paving Co. v. Colcon Industries Corp., 500 N.W.2d 70, 72 (Iowa 1993); City of Lenexa v. C.L. Fairley Const. Co., 15 Kan App. 2d 207, 805 P.2d 507, 510 (1991); The Beyt, Rish, Robbins Group v. Appalachian Reg. Healthcare, Inc. 854 S.W.2d 784, 786 (Ky. Ct. App. 1993); City of Dearborn v. Freeman-Darling, Inc., 119 Mich.App. 439, 326 N.W.2d 831 (1982); City of Morris v. Duininck Bros. Inc., 531 N.W.2d 208, 210 (Minn. Ct. App. 1995); Gaines v. Fin. Planning Consultants, Inc. 857 S.W.2d 430, 433 (Mo.Ct.App. 1993); Exber v. Sletten, 92 Nev. 721, 558 P.2d 517 (1976); State v. Stremick Const. Co., 370 N.W.2d 730, 735 (N.D. 1985); Messa v. State Farm Ins. Co., 433 Pa.Super. 594, 641 A.2d 1187, 1170 (1994); Smith v. H.E. Bull Grocery Co., 18 S.W.3d 910 (Tex. Ct. App. 2000); Valero Energy Corp. v. Teco Pipeline Co., 2 S.W.3d 576 (Tex. Ct. App. 1999); City of Lubbock v. Hancock, 940 S.W.2d 123 (Tex. Ct. App. 1996); *but see* Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y.2d 193, 647 N.E.2d 1308, 623 N.Y.S.2d 800 (1995) (stating that a court rather than an arbitrator under New York arbitration law should decide whether a statute of limitations time bars an arbitration).

In particular it should be noted that section 6(b), which provides for courts to decide substantive arbitrability, is subject to waiver under section 4(a). This approach is not only the law in most states but also follows Supreme Court precedent under the FAA that if there is no agreement to the contrary, questions of substantive arbitrability are for the courts to decide First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995). Some arbitration organizations, such as the American Arbitration Association in its rules on commercial arbitration disputes, provide that arbitrators, rather than courts, make the initial determination as to substantive arbitrability. AAA, Commercial Disp. Resolution Pro. R-8(b); *see also* Apollo Computer, Inc. v Berg, 886 F.2d 469 (1st Cir. 1989) (finding that when parties agreed that all disputes arising out of or in connection with distributorship agreement would be settled by binding arbitration in accordance with the rules of arbitration of the International Chamber of Commerce, they agreed to submit issues of arbitrability to arbitrator); Daiei v. United States Shoe Corp., 755 F. Supp. 299 (D. Haw. 1991) (noting that parties agreed to submit issues of arbitrability to arbitrator, when they incorporated by reference in their arbitration agreement the rules of the International Chamber of Commerce providing that "any decision as to the arbitrator's jurisdiction shall lie with the arbitrator").

Sections 6(c) and (d) are also waivable under section 4(a).

3. In deciding the validity of arbitration agreements in the insurance industry under sections 6 (a) and (b), courts should note that such arbitration clauses trigger the need for analyses under the McCarran-Ferguson Act, 15 U.S.C. § 1012, the FAA, and applicable, relevant state law.

4. The language in section 6(c), "whether a contract containing a valid agreement to arbitrate is enforceable," is intended to follow the "separability" doctrine outlined in Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (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 was separable from the contract in which it was made. So long as no party claimed that only the arbitration clause was induced by fraud, a broad arbitration clause encompassed arbitration of a claim alleging 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 (1996) (hereinafter "Macneil Treatise"). A majority of states recognize some form of the separability doctrine under their state arbitration laws. Old Republic Ins. Co. v. Lanier, 644 So. 2d 1258 (Ala. 1994); U.S. Insulation, Inc. v. Hilro Constr. Co., 705 P.2d 490 (Ariz. Ct. App. 1985); Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 35 Cal. 3d 312, 197 Cal.Rptr. 581, 673 P.2d 251 (1983); Hercules & Co. v. Shama Rest. Corp., 613 A.2d 916 (D.C. Ct. App. 1992), Brown v. KFC Nat'l Mgmt. Co., 82 Hawaii 226, 921 P.2d 146 (1996); Quirk v. Data Terminal Systems, Inc., 739 Mass. 762, 400 N.E.2d 858 (Mass. 1980); Weinroth v. Carp, 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973); Weiss v. Voice/Fax Corp., 94 Ohio App. 3d 309, 640 N.E.2d 875 (Ohio 1994); Jackson Mills, Inc. v. BT Capital Corp., 440 S.E.2d 877 (S.C. 1994); South Carolina Pub. Serv. Auth. v. Great Western Coal, 437 S.E.2d 22 (S.C. 1993); Gerwell v. Moran, 10 S.W.3d 28 (Tex. Ct. App. 1999); Schneider, Inc. v. Research-Cottrell, Inc., 474 F. Supp 1179 (W.D. Pa. 1979) (applying Pennsylvania law); New Process Steel Corp. v. Titan Indus. Corp., 555 F. Supp. 1018 (S.D. Tex. 1983) (applying Texas law); Pinkis v. Network Cinema Corp., 512 P.2d 751 (Wash. 1973).

Other states have either limited or declined to follow the *Prima Paint* doctrine on separability. Rosenthal v. Great W. Fin. Sec. Corp., 14 Cal. 4th 394, 58 Cal.Rptr. 2d 875, 926 P.2d 1061 (1996); Goebel v. Blocks and Marbles Brand Toys, Inc., 568 N.E.2d 552 (Ind. 1991); City of Wamego v. L.R. Foy Constr. Co, 675 P.2d 912 (Kan. Ct. App. 1984); George Engine Co. v. Southern Shipbuilding Corp., 376 So. 2d 1040 (La. Ct. App. 1977); Holmes v. Coverall N. Am., Inc., 633 A.2d 932 (Md. 1993); Atlas v. Credit Clearing Corp. of Am., 197 N.W.2d 448 (Minn. 1972); Shaw v. Kuhnel & Assocs., 698 P.2d 880 (N.M. 1985); Shaffer v. Jeffery, 915 P.2d 910 (Okla. 1996) (recognizing that majority of states apply the doctrine of separability but declining to follow the doctrine); Frizzell Const. Co. v. Gatlinburg L.L.C., 9 S.W.3d 79 (Tenn. 1999).

5. Waiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause. However, because of the public policy favoring arbitration, a court normally will only find a waiver of a right to arbitrate where a party claiming waiver meets the burden of proving that the waiver has caused prejudice. Sedillo v. Campbell, 5 S.W.3d 824 (Tex. Ct. App. 1999). 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 Co. 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.

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

7. Contracts of adhesion and unconscionability: Unequal bargaining power often affects contracts containing 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 clarity and conspicuousness of the arbitration clause, 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 arbitration, 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 Fin. 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 281 (1997); Beldon Roofing & Remodeling Co. v. Tanner, 1997 WL 280482 (Tex. Ct. App. May 28, 1997)

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 Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (stating that 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 Maint. Mgt., Inc., 163 F.3d 1230 (10th Cir. 1999) (finding that an 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 Fin. Corp., 178 F.3d 1149 (11th Cir. 1999), cert. granted, 120 S.Ct. 1552, 146 L.Ed. 2d 458 (2000) (holding that 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) (*but cf.* Dobbins v. Hawk's Enter., 198 F.3d 715 (8th Cir. 1999) (finding that before court can determine if administrative costs make arbitration clause unconscionable, purchasers must explore whether arbitration organization will waive or diminish its fees or whether seller will offer to pay the fees)); 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* (stating that arbitration agreement unenforceable 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); Armendariz v. Foundation Health Psychcare Serv. Inc., 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000) (concluding that clause in arbitration agreement limiting employee's remedies in state anti-discrimination claims is cause to void arbitration agreement on grounds of unconscionability); Broughton v. Cigna Healthplans of California, 21 Cal. 4th 1066, 988 P.2d 67, 90 Cal. Rptr. 2d 334 (1999), (finding although consumer's claim for damages under consumer protection statute is arbitrable, claim for injunctive relief is not because of the public benefit for the injunctive remedy and the advantages of a judicial forum for such relief); Engalla v. Permanente Med. Grp., 15 Cal. 4th 951, 938 P.2d 903, 64 Cal. Rptr. 2d 843 (1997) (stating that 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); Gonzalez v. Hughes Aircraft Employees Fed. Credit Union, 70 Cal. App.4th 468, 82 Cal. Rptr. 2d 526 (1999) (holding that 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); Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997) (ruling that 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) (concluding that a 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) (finding that an arbitration clause that does not clearly and unmistakably include claims of employment discrimination fails to waive employee's statutory rights and remedies); Arnold v. United Co. Lending Corp., 511 S.E.2d 854 (W. Va. 1998) (holding that an arbitration clause in consumer loan transaction that contained waiver of the consumer's rights to access to the courts, while reserving practically all of the lender's right to a judicial forum found unconscionable).





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 organizations 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 1998, a similar group representing the views of consumers, industry, arbitrators, and arbitration organizations formed the National Consumer Disputes Advisory Committee under the auspices of the American Arbitration Association and adopted a DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES. Also in 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 Sec. 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 because (1) the doctrine of unconscionability reflects so much the substantive law of the states and not just arbitration, (2) the case law, statutes, and arbitration standards are rapidly changing, and (3) treating arbitration clauses differently from 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 4, 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 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 that provide claimants with important remedies. Courts should determining that an arbitration process is adequate to protect important rights. Without these safeguards, arbitration loses credibility as an appropriate alternative to litigation.

**SECTION 7. [MOTION] TO COMPEL OR STAY ARBITRATION.**

(a) On [motion] of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) if the refusing party does not appear or does not oppose the [motion], the court shall order the parties to arbitrate; and

(2) if the refusing party opposes the [motion], the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

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

(c) If the court finds that there is no enforceable agreement, it may not pursuant to subsection (a) or (b) order the parties to arbitrate.

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

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a [motion] under this section must be made in that court. Otherwise a [motion] under this section may be made in any court as provided in Section 27.

(f) If a party makes a [motion] to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

**Comment:**

1. The term "summarily" in section 7(a) and (b) is presently in UAA section 2(a) and (b). It has been defined to mean that a trial court should act expeditiously and without a jury trial to determine whether a valid arbitration agreement exists. Grad v. Wetherholt Galleries, 660 A.2d 903 (D.C. 1995); Wallace v. Wiedenbeck, 251 A.D.2d 1001, 674 N.Y.S.2d 230, 231 (N.Y. App. Div. 1998); Burke v. Wilkins, 507 S.E.2d 913 (N.C. Ct. App. 1998); In re MHI P'ship, Ltd., 7 S.W.3d 918 (Tex. Ct. App. 1999). The term is also used in section 4 of the FAA.

**SECTION 8. 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 and 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 the subject of a civil action.





(b) After an arbitrator is appointed and is authorized and able to act:

(1) the arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action and

(2) a party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a [motion] under subsection (a) or (b).

**Comment:**

1. The language of section 8 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 determined 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 consistent 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, 808 P.2d 807 (Ariz. Ct. App. 1991) (discussing 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) (discussing mechanic's lien); Rosa v. Blanchard, 251 Cal. App. 2d 739, 59 Cal. Rptr. 783 (1967) (discharge of attachment); Hughley v. Rocky Mountain Health Maint. Org., Inc., 927 P.2d 1325 (Colo. 1996) (stating that 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) (discussing preliminary injunctive relief to preserve status quo); Langston v.





National Media Corp., 420 Pa.Super. 611, 617 A.2d 354 (1992) (discussing 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 1280 (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 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-*see also* 9 U.S.C. § 8), Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049 (2d Cir. 1990) (injunction bond); *see* II Macneil Treatise §25.4.3. 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, 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 8 that limits a court ability to grant preliminary relief to any time "[b]efore an arbitrator is appointed or is authorized or able to act * * * upon motion of a party" and provides that after the appointment the arbitrator 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 the 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, 38.1. This language incorporates the notions of the *Salvano* case that 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 *Salvano* court's preliminary remedy 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 Pharm. Corp. v. Amgen, Inc., 882 F.2d 806, 814, appeal after remand, 887 F.2d 460 (3d Cir. 1989) (stating that court order to protect the status quo is necessary "to protect the integrity of the applicable dispute resolution process"); Hughley v. Rocky Mountain Health Maint. Org., Inc., 927 P.2d 1325 (Colo. 1996) (granting 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) (denying 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 act in a timely fashion or could not provide an effective provisional remedy. The notion of "urgency" is from the 1996 English Arbitration Act § 44(1), (3), (4), (8). Those circumstances of a party seeking provisional relief from a court rather than an arbitrator after the appointment process should be limited for the policy reasons previously discussed.

4. The case law, commentators, rules of arbitration organizations, 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 rulings 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's issuance of preliminary orders regarding sale and proceeds of property); Fishman v. Streeter, 1992 WL 146830 (Ohio Ct. App., June 25, 1992) (upholding under UAA arbitrator's interim order dissolving partnership); Park City Assoc. v. Total Energy Leasing Corp., 58 A. D.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 Disp. Resolution Pro. R-36, 45 (allowing arbitrator to take "whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods. Such interim measures may take the form of an interim award, and the arbitrator may require security for costs of such measures."); 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. Rules, 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.

If an arbitrator orders a provisional remedy under section 8(b), a party can seek court enforcement of that preaward ruling under section 18.

5. The intent of RUAA section 8(a) is to grant the court discretion to proceed 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. 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 in 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 to the arbitrator.

6. If a court makes a ruling under section 8(a), an arbitrator is allowed to review the ruling in appropriate circumstances under section 8(b). For example, a court, on the basis of affidavits or other summary material, may grant a temporary restraining order to prohibit a party from transferring property. After an arbitrator is appointed, the arbitrator may decide after a fuller review of the evidence that the party should be allowed to transfer the property. This would be a proper decision because the arbitrator, rather than the court, may have access to more evidence and it is the arbitrator who makes the final decision on the merits.

7. Section 8(c) is intended to insure that so long as a party is pursuing the arbitration process while requesting the court to provide provisional relief under RUAA section 8(a) or (b), the motion to the court should not act as a waiver of that party's right to arbitrate a matter. *See* Cal. Civ. Proc. Code § 1281.8(d).

**SECTION 9. INITIATION OF ARBITRATION.**





(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under Section 15(c) not later than the beginning of the arbitration hearing, the person by appearing at the hearing waives any objection to lack of or insufficiency of notice.

Comment:

1. Section 9 is a new provision in the RUAA regarding initiation of an arbitration proceeding and is more formal than the notice requirements in section 2. The language in section 9 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. Section 9(a) includes both the means of bringing the notice to the attention of the other parties and the contents of the notice of a claim. Both the means of giving the notice and the content of the notice are subject to the parties' agreement under sections 4(b)(2) and 9(a) so long as any restrictions on the means or content are reasonable. Not only does this approach comport with the concept of party autonomy in arbitration but it also recognizes that many parties utilize arbitration organizations that require greater or lesser specificity of notice and service.

3. The introductory language to section 9(a) concerns the means of informing other parties of the arbitration proceeding. Many arbitration organizations allow parties to initiate arbitration through the use of regular mail and do not require registered mail or service as in a civil action. *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 Arb. Forum Code of Pro. R. 6(B); 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 9 because section 4(b)(2) allows the parties to agree to the means of giving notice so long as there are no unreasonable restrictions.

Likewise, parties, particularly in light of the increase in electronic commerce, may decide to arbitrate disputes arising between them and to provide notice of the initiation or other proceedings of the arbitration process through electronic means. *See, e.g.*, National Arb.





Forum Code of Pro. R. 6(B).

However, if the parties do not provide for a reasonable means of notice, then section 9(a) requires that they utilize either certified or registered mail, with a return-receipt request and that such receipt is obtained, or the same type of service as authorized as in a civil action. The term "obtained" is intended to mean that the receipt was returned regardless of whether the recipient signed it.

4. Section 9(a) explicitly requires that notice of initiation 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 9(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 10 or to take other action.

5. Section 9(a) also includes a content requirement that the initiating party inform the other parties of "the nature of the controversy and the remedy sought." Similar requirements are found in the Florida and Indiana statutes and in the arbitration rules of organizations such as the American Arbitration Association, the Center for Public Resources, JAMS, NASD Regulation, Inc., and the New York Stock Exchange (although slightly different language may be used in the organizations' rules). This language in section 9(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 persons who are not attorneys often draft such notices.

6. Section 23(a)(6) allows a court to vacate an award if there is not proper notice under section 9 and the rights of the other party were substantially prejudiced. Section 9(b) requires that the complaining party make a timely objection to the lack or insufficiency of notice of initiation of the arbitration; this requirement is similar to that found in section 15(c) regarding notice of the arbitration hearing. Section 9(b) requires the party to object "no later than the beginning of the hearing" under Section 15(c), which is a time certain in the arbitration process.

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





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

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

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

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

(3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

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

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

Comment:

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

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* New England Energy v. Keystone Shipping Co., 855 F.2d 1 (1st Cir. 1988), cert denied, 489 U.S. 1077 (1989); Litton Bionetics, Inc. v. Glen Constr. Co., 292 Md. 34, 437 A.2d 208 (1981); Grover-Diamond Assoc. v. American Arbitration Ass'n, 297 Minn. 324, 211 N.W.2d 787 (1973); Polshek v. Bergen Cty. Iron Works, 142 N.J. Super. 518, 362 A.2d 63 (Ch. Div. 1976); Exber v. Sletten Constr. Co., 550 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 in the absence of an agreement by all parties to multiparty arbitration they do not have the power to order consolidation of arbitrations despite the presence of common legal or factual issues. *See, e.g.*, Stop & Shop Co. v. Gilbane Bldg. Co., 384 Mass. 325, 334 N.E.2d 429 (1973); J. Brodie & Son, Inc. v. George A. Fuller Co., 18 Mich. App. 137, 167 N.W.2d 466 (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; Glencore, Ltd. v. Schnitzer Steel Prod. Co., 189 F.3d 264 (2nd Cir. 1999). However, a recent California appellate decision held that state law regarding consolidated 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).

Some empirical studies also 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 93% 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 10 encourages drafters to address the issue expressly and enhances the possibility that all parties will be on notice regarding the issue.

Section 10 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 10(c) recognizes that consolidation of a party's claims should not be ordered in contravention of provisions of arbitration agreements prohibiting consolidation. *See also* section 4(a). However, section 10 is not intended to address the issue as to the validity of arbitration clauses in the context of class-wide disputes. For cases concerning this issue, *see, e.g.*, Lozada v. Dale Baker Oldsmobile, Inc., 91 F.Supp. 2d 1087 (W.D.Mich. 2000) (finding an arbitration provision is unconscionable in part because it waives class remedies allowable under Truth in Lending Act ("TILA"), as well as certain declaratory and injunctive relief under federal and state consumer protection laws), on appeal to Sixth Circuit; Ramirez v. Circuit City Stores, 90 Cal. Rptr. 2d 916 (Cal. Ct. App. 1999) (finding arbitration clause in contract of employment voided as unconscionable, in part, because it would deprive arbitrator of authority to hear classwide claim), review granted and opinion superseded, 995 P.2d 137 (Cal. 2000); Powertel v. Bexley, 743 So. 2d 570 (Fla. Ct. App. 1999) (refusing to enforce arbitration clause as unconscionable in part because of its retroactive application to preexisting lawsuit and because one factor as to it's substantive unconscionability was that it precluded the possibility of classwide relief); Jean R. Sternlight, *As Mandatory Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (October, 2000); *but cf.* Johnson v. West Suburban Bank, 225 F.3d 366, (3rd Cir. 2000) (holding that neither the text nor the legislative history of TILA or the Electronic Funds Transfer Act ("EFTA") indicate an inherent conflict between TILA or EFTA and the right to arbitrate even though plaintiffs cannot proceed under the class action provisions of these statutes); Thompson v. Illinois Title Loans, Inc., 2000 WL





45403 (N.D., Jan. 11, 2000) (same as to TILA claim); Sagal v. First USA Bank, N.A., 69 F.Supp. 2d 627 (D. Del. 1999) (same), on appeal to Third Circuit; Zawikowski v. Beneficial Nat'l Bank, 1999 WL 35304 (N.D. Ill., Jan. 11, 1999) (same); Randolph v. Green Tree Fin. Corp., 991 F.Supp. 1410 (M.D. Ala. 1997), rev'd on other grounds, 178 F.2d 1149 (11th Cir. 1999), cert. granted, 120 S.Ct. 1552 (2000) (same); Lopez v. Plaza Fin. Co., 1998 WL 210073 (N.D. Ill. April 25, 1998) (same); Brown v. Surety Finance Service, Inc., 2000 U.S. Dist. LEXIS 5734 (N.D. Ill. Mar. 23, 2000) (same); Meyers v. Univest Home Loan, Inc., 1993 WL 307747 (N.D. Cal., Aug. 4, 1993) (holding that claims of named-plaintiff asserted in class action under TILA and state consumer protection act must be arbitrated); Howard v. Klynveld Peat Marwick Goerderler, 977 F.Supp. 654, 665, n.7 (S.D.N.Y. 1997) ("A plaintiff "" who has agreed to arbitrate all claims arising out of her employment may not avoid arbitration by pursuing class claims. Such claims must be pursued in non-class arbitration."); Doctor's Assoc., Inc. v. Hollingsworth, 949 F.Supp. 77, 80-81 (D. Conn. 1996) (holding that class action contract claims brought by franchisees were subject to arbitration provision of franchising agreement requiring individual arbitrations); Erickson v. Painewebber, Inc., 1990 WL 104152 (N.D. Ill., July 13, 1990) (holding that fraud claims of named-plaintiff asserted in class action must be arbitrated).

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 418 (1993) (holding that 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, 228 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); *but see* Connecticut Gen'l Life Ins. Co. v. Sun Life Assurance Co. of Canada, 210 F.3d 771 (7th Cir. 2000) (noting that court deciding whether to consolidate arbitration proceedings should not insist that it be clear, rather than merely more likely than not, that the parties intended consolidation). Therefore, section 10(a)(4) requires courts to consider proof that the potential prejudice resulting from a failure to consolidate is not outweighed by prejudice to the rights of parties to the arbitration proceeding 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 10(a)(4) also requires courts to consider whether the potential prejudice resulting from a failure to consolidate is outweighed by "undue delay" or "hardship to the parties opposing consolidation." Such undue delay or hardship might result where, for example, one or more separate arbitration proceedings have already progressed to the hearing stage by the time the





motion for consolidation is made.

As the cases reveal, the mere 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 denied 27 N.Y.2d 535, 261 N.E.2d 112, 312 N.Y.S.2d 1003, cert. denied 400 U.S. 819 (1970); *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. The language in Section 10(a)(1) regarding "separate agreement to arbitrate" and "separate arbitration proceedings" are intended to cover arbitration among both principals and third-party beneficiaries of either the same agreement to arbitrate or separate agreements, such as guarantees, which incorporate by reference the arbitration provisions in the underlying contract. *See, e.g.*, Compania Espanola de Petroleos v. Nereus Shipping Co., 527 F.2d 966 (2d Cir. 1975), cert. denied, 426 U.S. 938 (1976); *but see* United Kingdom v. Boeing Co., 998 F.2d 68 (2d Cir. 1993).

5. A party cannot appeal a lower court decision of an order granting or denying consolidation under section 28, regarding appeals, because the policy behind section 28(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.

**SECTION 11. APPOINTMENT OF ARBITRATOR; SERVICE AS A NEUTRAL ARBITRATOR.**

(a) 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. If the parties have not agreed on a method, the agreed method fails, 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 the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

**Comment:**

1. Because section 11 is a waivable provision under section 4(a), parties may choose their own method of selecting an arbitrator under section 11(a). Parties oftentimes choose an arbitrator because of that person's knowledge or experience or relationship to the parties. This is particularly the case with non-neutral arbitrators who are sometimes chosen because of their relationship to a party and may have a direct interest in the outcome. Section 11(b) does not apply to non-neutral arbitrators but only to neutral arbitrators. Moreover, because section 11(b) is subject to the agreement of the parties, they may choose to have a person with the type of interest or relationship described in this subsection serve as a neutral arbitrator.

2. The award granted by an arbitrator who fails to disclose the type of interest or relationship described in section 11(b) is subject to a presumption of vacatur under sections 12(e) and 23 (a)(2). An arbitrator who discloses the type of interest or relationship described in section 11(b) and who, despite a timely objection by a party, decides to serve is subject to vacatur under sections 12(c) and 23(a)(2).

**SECTION 12. DISCLOSURE BY ARBITRATOR.**

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

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

(2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under Section 23(a)(2) for vacating an award made by the arbitrator





(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b), upon timely objection by a party, the court under Section 23(a)(2) may vacate an award.

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

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a [motion] to vacate an award on that ground under Section 23(a)(2).

**Comment:**

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, section 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." *See* RUAA section 23(a)(2); FAA section 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. *See, e.g.*, Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984); National Union Fire Ins. Co. v. Holt Cargo Sys., Inc., F.Supp. , 2000 WL 376802 (S.D.N.Y. March 28, 2000). 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., 960 S.W.2d 629, 637 (Tex. 1997). 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 Casualty 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 vacating 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., 405 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.*, Certain v. AMCO Ins. Co., 48 Cal. App.4th 500, 55 Cal. Rptr. 2d 605 (1996) (finding that 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) (stating that 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, section 12 sets forth affirmative requirements to assure that parties should access to all information that might reasonably affect the potential arbitrator's neutrality. A primary model for the disclosure standard in section 12 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. Starliha, 346 N.W.2d 683, 686 (Minn. Ct. App. 1984); *see also* Tex. Civ. Prac. & Rem. Code § 172.056; 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 (1998). 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.

The Drafting Committee decided to delete the requirement of disclosing "any" financial or personal interest in the outcome or "any" existing or past relationship and substituted the terms "a" financial or personal interest in the outcome or "an" existing or past relationship. The intent was not to include *de minimis* interests or relationships. For example, if an arbitrator owned a mutual fund which as part of a large portfolio of investments held some shares of stock in a corporation involved as a party in an arbitration, it might not be reasonable to expect the arbitrator to know of such investment and in any event the investment might be of such an insubstantial nature so as not to reasonably affect the impartiality of the arbitrator.

3. The fundamental standard of section 12(a) is an objective one: disclosure is required of facts that a reasonable person would consider likely to affect the arbitrator's impartiality in the arbitration proceeding. *See* ANR Coal Co. v. Cogentrix of North Carolina, Inc., 173 F.3d 493 (4th Cir. 1999) (stating that 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); Beebe Med. Center, Inc. v. Insight Health Servs. Corp., 751 A.2d 426 (Del. Ch. 1999) (finding that an arbitrator's nondisclosure of a relationship with an attorney representing a party in arbitration matter is substantial enough to create a "reasonable impression of bias" that requires vacatur of arbitration award). The "reasonable person" test is intended to make 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 under section 4(b)(3) so long as they do not "unreasonably restrict" the right to disclosure. For instance, in labor arbitration under a collective-bargaining agreement because the parties often interact with each other and arbitrators, 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. Thus a reasonable person in the field of labor arbitration may not expect personal, professional, or other past relationships to be disclosed. In other fields where parties do not have ongoing relationships, an arbitrator may be required to disclose such relationships.

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

Once an arbitrator has made a "reasonable inquiry" as required by section 12(a), the arbitrator will be required to disclose only "known facts" that might affect impartiality. The term "knowledge" (which is intended to include "known") is defined in section 1(4) to mean "actual knowledge."

Section 12(b) is intended to make the disclosure requirement a continuing one and applies to conflicts that arise or become evident during the course of arbitration proceedings. Sections 12 (a) and (b) also provide to whom the arbitrator must make disclosure. The arbitrator must disclose facts required under section 12(a) and (b) to the parties to the arbitration agreement and to the arbitration proceeding and to any other arbitrators. If the parties are represented by counsel or other authorized persons, the arbitrators can make such representations to those individuals.

4. Sections 12(c), (d), and (e) seek 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, in section 12(e) a neutral arbitrator's failure to disclose "a known, direct, and material interest in the outcome or a known, existing, and substantial relationship with a party," gives rise to a presumption of "evident partiality" under section 23(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). A person who has this type of interest or relationship, in the absence of agreement by the parties, is not to serve as a neutral arbitrator under section 11(b). Failure to disclose that type of interest or relationship creates the presumption of vacatur in section 23(a)(2). In such cases, 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). A party-appointed, non-neutral arbitrator's failure to disclose would be covered under the corruption and misconduct provisions of Section 23(a)(2) because in most cases it is presumed that a party arbitrator is intended to be partial to the side which appointed that person.

Section 12(d) involves instances other than "a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party" of an arbitrator's failure to disclose that do not create a rebuttable presumption of evident partiality by a neutral arbitrator but nevertheless may be a ground for vacatur under section 23(a)(2).

Section 12(c) covers instances where the arbitrator makes a required disclosure, a party objects to that arbitrator's service, but the arbitrator overrules the objection and continues to serve. In the situation of a disclosed interest or relationship, the presumption of evident partiality in section 12(d) does not apply even if the disclosure involved "a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and





substantial relationship with a party."

Challenges based upon a lack of impartiality, including disclosed or undisclosed facts, interests, or relationships are subject to the developing case law under section 23(a)(2). Courts also are given wider latitude in deciding whether to vacate an award under section 12(c) and (d) that is permissive in nature (an award "may" be vacated) rather than section 23(a) which is mandatory (a court "shall" vacate an award).

Section 12(c) and (d) also require a party to make a timely objection to the arbitrator's continued service in order to preserve grounds to vacate an award under section 23(a)(2). Bossley v. Mariner Fin. Grp., Inc., 11 S.W.3d 349, 351 (Tex. Ct. App. 2000) ("A party who does not object to the selection of the arbitrator or to any alleged bias on the part of the arbitrator at the time of the hearing waives the right to complain."). Where the arbitrator makes the disclosure under section 12(c) prior to the hearing, the party normally must object prior to the hearing; if the arbitrator fails to disclose a required fact under section 12(d), the party should object within a reasonable period after the person learns or should have learned of the undisclosed fact.

5. Special problems are presented by tripartite panels involving non-neutral arbitrators--that is, in situations such as where each of the arbitrating parties selects an arbitrator and a third, neutral arbitrator is jointly selected by the arbitrators chosen by the parties. *See generally* III Macneil Treatise § 28.4. In some such cases, it may be agreed that the arbitrators chosen by the parties are not regarded as "neutral" arbitrators, but are deemed to be predisposed toward the party which appointed them. *See, e.g.*, AAA, Commercial Disp. Resolution Pro. R-12(b), 19. However, in other situations even the arbitrators appointed by the parties may have a duty of neutrality on some or all issues. The integrity of the process demands that the non-neutral arbitrators chosen by the parties, like neutral arbitrators, disclose pertinent interests and relationships to all parties as well as other members of the arbitration panel. It is particularly important for the neutral arbitrator to know the interest of the arbitrator selected by each of the parties if, for example, such non-neutral arbitrator is being paid on a contingent-fee basis. Thus, section 12(a) and (b) apply to non-neutral arbitrators but under a "reasonable person" standard for someone in the position of a party and not a neutral arbitrator. Nasca v. State Farm Mut. Automobile Ins. Co., 2000 WL 374297 (Colo. Ct. App., April 13, 2000) (finding that party-appointed arbitrator had duty to disclose substantial business relationship with the party).

Section 12(c) and (d) also apply to non-neutral arbitrators but with a somewhat different effect than to a neutral arbitrator. For example, an undisclosed substantial relationship between a non-neutral arbitrator and the party appointing that arbitrator may be the subject of a motion to vacate under section 23(a)(2). *See* Donegal Ins. Co. v. Longo, 415 Pa. Super. 628, 632-34, 610 A.2d 466, 468-69 (1992) (stating that in view of attorney-client relationship between insured and the non-neutral arbitrator selected by that party, arbitration proceeding did not comport with procedural due process). However, an award would be vacated only where a





non-neutral arbitrator fails to disclose information that amounts to "corruption" or to "misconduct prejudicing the rights of a party" under section 23(a)(2)(B) and (C). The ground of "evident partiality" in section 23(a)(2)(A) by its terms only applies to an arbitrator appointed as a neutral" and it would not make sense to apply this ground to a non-neutral arbitrator whose function in many arbitration settings is to be an advocate for one of the parties.

It is also important to note that the disclosure requirements of section 12 are waivable under section 4(a) as to non-neutral arbitrators appointed by parties. In regard to neutral arbitrators, the parties under section 4(b)(3) can vary the requirements of section 12 so long as they do not "unreasonably restrict" the right to disclosure.

6. Often parties agree to a procedure for challenges to arbitrators, such as a determination by an arbitration organization. Section 12(f) conditions post-award resort to the courts under section 23(a)(2) upon compliance with such agreed-upon procedures. *See, e.g.*, Bernstein v. Gramercy Mills, Inc., 18 Mass. App. Ct. 403, 414, 452 N.E.2d 231, 238 (1983) (stating that AAA rule incorporated by arbitration agreement helps to describe level of non-disclosure that can lead to invalidation of award).

**SECTION 13. ACTION BY MAJORITY.** If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under Section 15(c).

**Comment:**

1. Because this section is not included in section 4(b) and (c), the requirements of majority action and that all arbitrators must conduct the hearing may be changed by the parties in their agreement to arbitrate. However, in the absence of an agreement to the contrary, a majority will determine claims and issues when there is a panel of arbitrators deciding a case and all the arbitrators on the panel must conduct the hearing.

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

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil





liability to the same extent as a judge of a court of this State acting in a judicial capacity.

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

(c) The failure of an arbitrator to make a disclosure required by Section 12 does not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection does not apply:

(1) to the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) to a hearing on a [motion] to vacate an award under Section 23(a)(1) or (2) if the [movant] establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d), and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees and other reasonable expenses of litigation.

**Comment:**

1. Section 14(a) regarding an arbitrator's immunity 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 has 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; most jurisdictions track the common law 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 Exch., 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 a civil action, 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. & Chem. Corp., 151 F. Supp. 853 (W.D. S.C. 1957). This full immunity from any civil proceedings is what is intended by the language in section 14(a).

2. Section 14(a) also provides the same immunity as is provided to an arbitrator to an arbitration organization. Extension of judicial immunity to those arbitration organizations is appropriate to the extent that they are acting "in certain roles and with certain responsibilities" that are comparable to those of a judge. Corey v. New York Stock Exch., 691 F.2d 1205, 1209 (6th Cir. 1982). This immunity to neutral arbitration organizations is appropriate because the duties that they perform in administering the arbitration process are the functional equivalent of the roles and responsibilities of judges administering the adjudication process in a court of law. There is substantial precedent for this conclusion. *See, e.g.*, New England Cleaning Serv., Inc. v. American Arbitration Ass'n, 199 F.3d 542 (1st Cir. 1999); Honn v. National Ass'n of Sec. Dealers, Inc., 182 F.3d 1014 (8th Cir. 1999); Hawkins v. National Ass'n of Sec. Dealers, Inc., 149 F.3d 330 (5th Cir. 1998); Olson v. National Ass'n of Sec. Dealers, Inc., 85 F.3d 381 (8th Cir. 1996); Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248 (9th Cir. 1973); Cort v. American Arbitration Ass'n, 795 F. Supp. 970 (N.D. Cal. 1992); Boraks v. American Arbitration Ass'n, 205 Mich.App. 149, 517 N.W.2d 771 (1994); Candor v. American Arbitration Ass'n, 97 Misc. 2d 287, 411 N.Y.S.2d 162 (Sup. Ct., Tioga Cty. 1978).

3. Section 14(b) makes clear that the statutory grant of immunity is intended to supplement, and not diminish, the immunity granted arbitrators and neutral arbitration organizations under any judicial, statutory or other law.

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

5. Section 14(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. New York and New Jersey have adopted similar provisions that prohibit anyone from calling an arbitrator as a





witness in a subsequent proceeding. N.J.R. Super. Ct. R. 4:21A-4; N.Y. Ct. R. §28.12. Consistent with the protections afforded judges, section 14(d) is intended to protect an arbitrator or a representative of an arbitration organization from being required to testify or produce records from an arbitration proceeding in any civil action, administrative proceeding, or related matter. However, if the law of a given state would require a judge to testify in a proceeding for strong public policy reasons, such as involvement in a criminal matter, an arbitrator or representative of an arbitration organization would likewise be required to testify.

An exception is made in section 14(d)(1) for situations such as when an arbitrator, arbitration organization, or representative of an arbitration organization asserts a claim against a party to the arbitration proceeding. 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, this section is intended to allow the arbitrator to testify as to the arbitrator's claim, but the arbitrator cannot be required to testify or produce records as to the party's counterclaim attacking the merits of the award. Otherwise the party can circumvent the general rule against requiring an arbitrator to provide testimony by forcing an action by the arbitrator by, for instance, not paying a contractually required fee for the arbitrator's services.

Section 14(d)(2) recognizes that arbitrators who have engaged in corruption, fraud, partiality or other misconduct that are grounds to vacate an award under sections 23(a)(1) and (2) may be required to give testimony so that a party will have evidence to prove such grounds. Such testimony or records from an arbitrator are only required 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 (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 allegation of these grounds without a showing of independent, objective evidence should be insufficient to require an arbitrator to testify or produce records from the arbitration proceeding.

6. Section 14(e) is intended to promote arbitral immunity. By definition, almost all suits against arbitrators, arbitration organizations, or representatives of an arbitration organization arising out of the good-faith discharge of arbitral powers are frivolous because of the breadth of their respective immunity. Spurious lawsuits against arbitrators, arbitration organizations, and representatives of an arbitration organization or involvement in collateral judicial or administrative proceedings deter individuals and entities from serving in such capacities and thereby harm the arbitration process because of the costs involved in defending even frivolous actions. Parties considering such litigation should be discouraged by the prospect of paying the litigation expenses of the arbitrator, arbitration organizations, or representatives of an arbitration organization. When they are not, the statute enables the arbitrators, arbitration organizations, or representatives of an arbitration organization to recover their litigation expenses and not to lose their fee and incur other expenses in the defense of a frivolous lawsuit. The terms "other reasonable expenses of litigation" are intended to include both





actions at the trial-court level and on appeal.

7. In Section 14(d)(2) only a "party" to the arbitration proceeding would file a motion to vacate under section 23(a)(1) or (2). However, the term "person" is used in section 14(e) because 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 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 testimony or records from Arbitrator A in the prior proceeding. Another possible scenario occurs when 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 14(e) against Z or T who would be "persons" but not necessarily "parties" to the arbitration proceeding between X and Y.

8. Section 14 does not grant arbitrators or arbitration organizations 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, 161 N.Y.S.2d 271 (N.Y. Sup. Ct. 1956).

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

**SECTION 15. ARBITRATION PROCESS.**

(a) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) if all interested parties agree; or

(2) upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.





(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party'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 that 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 although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with Section 11 to continue the proceeding and to resolve the controversy.

**Comment:**

1. Section 15 is a default provision and under section 4(a) is subject to the agreement of the parties. Section 15(a) is intended to give an arbitrator wide latitude in conducting an arbitration subject to the parties' agreement and to determine what evidence should be considered. It should be noted that the rules of evidence are inapplicable in an arbitration proceeding except that an arbitrator's refusal to consider evidence material to the controversy that substantially prejudices the rights of a party is a ground for vacatur under section 23(a)(3). *See* comment 4 to this section.

2. As the use of arbitration increases, there are more cases that involve complex issues. In such cases arbitrators are often involved in numerous prehearing matters involving conferences, motions, subpoenas, and other preliminary issues. Although the present UAA makes no specific provision for arbitrators to hold prehearing conferences or to rule on preliminary matters, arbitrators probably have the inherent authority to perform such tasks. 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 organizations whose rules may govern particular arbitration proceedings provide for prehearing conferences and the ruling on preliminary matters by arbitrators. *See, e.g.*, AAA Commercial Arb. R.-10; AAA Securities Arb. R. 10; AAA Construction Indus. Arb. R. 10; AAA Nat'l Rules for Resolution of Employment Disputes R. 6; National Arb. Forum Code of Pro. R. 24, 31; NASD Code of Arb. Proc. §32(d).

Section 15(a) is intended to allow arbitrators broad powers to manage the arbitration process both before and during the hearing. This section makes the authority of arbitrators to hold prehearing conferences explicit and is meant 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, it is not the intent of section 15(a) 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 provide "for a fair and expeditious disposition of the [arbitration] proceeding." The arbitrator should keep in mind the goals of an expeditious, less costly, and efficient procedure. *See also* RUAA section 17.

3. Presently the UAA has no provision dealing with 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) (confirming 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 1066, 47 Cal. Rptr. 2d 650 (1995) (upholding arbitrator's award based on a summary adjudication but cautioning 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, 82 Md. App. 19, 488 A.2d 192 (1985) (finding that dispositive motion is appropriate on issue of statute of limitations); Pegasus Constr. Corp. v. Turner Constr. Co., 84 Wash. App. 744, 929 P.2d 1200 (1997) (concluding that 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 Sec., Inc. v. Dalton, 929 F. Supp. 1411 (N.D. Okla. 1996) (vacating arbitration award and finding that the arbitration panel was 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.

Section 15(b) is intended to allow arbitrators to decide a request for summary disposition but only after a party requesting summary disposition gives appropriate notice and opposing parties have a reasonable opportunity to respond. The language in section 15(b) is based upon Rule 18 of JAMS Comprehensive Arbitration Rules and Procedures. In the arbitration context, the terms "request for summary disposition" are preferable to "motions for summary judgment" or "motions to strike or dismiss 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 fact 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 comment to section 23 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 rules is more applicable.

4. Section 15(c) allows an arbitrator to "hear and decide the controversy upon the evidence produced." The general rule in arbitration is that the rules of evidence need not be observed. III Macneil Treatise § 35.1.2.1; Cal. Civ. Proc. Code § 1282.2(d); AAA Commercial Arb. R-33; Center for Public Resources, Rules for Non-Administered Arb. of Business Disp. R. 11. It should be noted that an arbitrator's refusal "to consider evidence material to the controversy" is one of the grounds for which a court may vacate an arbitration award under section 23(a)(3). However, courts have determined that arbitrators have broad discretion as to what evidence they will consider. Cold Mountain Builders v. Lewis, 748 A.2d 921 (Me. 2000).

**SECTION 16. REPRESENTATION BY LAWYER.** A party to an arbitration proceeding may be represented by a lawyer.

**Comment:**

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 hold themselves out as advocates.

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

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





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

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

(b) In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

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

(d) If an arbitrator permits discovery under subsection (c), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator in another State must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

**Comment:**





1. Presently, UAA section 7 provides an arbitrator with subpoena authority only to require the attendance of witnesses and production of documents at the hearing (RUAA section 17(a)) or to depose a witness who is unable to attend a hearing (RUAA section 17(b)). Section 17(b) allows an arbitrator to permit a hearing deposition only when such deposition will insure that the proceeding is "fair, expeditious, and cost effective." This standard is also required in section 17(c) concerning prehearing discovery and in section 17(g) regarding the enforcement of subpoenas or discovery orders by out-of-state arbitrators.

Section 17(a) and (b) are not waivable under section 4(b) because they go to the inherent power of an arbitrator to provide a fair hearing by insuring that witnesses and records will be available at an arbitration proceeding. The other subsections of 17, including whether to allow prehearing discovery, can be waived or varied by agreement of the parties under section 4(a).

2. The authority in UAA section 7 which is limited only to subpoenas and depositions for an arbitration hearing has caused some courts to conclude that "pretrial discovery is not available under our present statutes for arbitration." Rippe v. West Am. Ins. Co., 1993 WL 512547 (Conn. Super. Ct., Dec. 2, 1993); *see also* Burton v. Bush, 614 F.2d 389 (4th Cir. 1980) (stating that party to arbitration contract had no right to prehearing discovery). Others require a showing of extraordinary circumstances before allowing discovery. *See, e.g.*, In re Delulemar di Navigazione, 153 F.R.D. 592 (E.D. La. 1994); Oriental Commercial & Shipping Co. v. Rossael, 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. Massachusetts–Mass. Gen. Laws. Ann. ch.251, § 7(e) (providing that 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) (stating that arbitrator may allow deposition of adverse witness for discovery purposes); Utah–Utah Code Ann. § 78-31a-8 (providing that arbitrators may order discovery in their discretion). Most commentators and courts conclude that extensive discovery, as allowed in civil litigation, eliminates the main advantages of arbitration in terms of cost, speed and efficiency.

3. The approach to discovery in section 17(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 under the case law of the UAA and FAA which provides that, unless the contract specifies to the contrary, discretion rests with the arbitrators whether to allow discovery. The discovery procedure in section 17(c) is intended to aid the arbitration process and ensure an expeditious, efficient and informed arbitration, while adequately protecting the rights of the parties. Because section 17(c) is waivable under section 4 (a), the provision is intended to encourage parties to negotiate their own discovery procedures. Section 17(d) establishes the authority of the arbitrator to oversee the prehearing

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

At the same time, it should be clear that in many arbitrations discovery is unnecessary and that the discovery contemplated by section 17(c) and (d) is not coextensive with that which occurs in the course of civil litigation under federal or state rules of civil procedure. Although section 17(c) allows an arbitrator to permit discovery so that parties can obtain necessary information, the intent of the language is that such discovery is to limit that discovery by considerations of fairness, efficiency, and cost. Because section 17(c) is subject to the parties' arbitration agreement, they can decide to eliminate or limit discovery as best suits their needs.

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

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

6. Section 17(d) explicitly states that if an arbitrator allows discovery, the arbitrator has the authority to issue subpoenas for a discovery proceeding such as a deposition. This issue has become particularly important as a result of the holding in *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999), in which the Fourth Circuit Court of Appeals found that, under language in the FAA similar to that in section 7 of the UAA, arbitrators did not have power to issue subpoenas to non-parties to produce materials prior to the arbitration hearing. This holding is contrary to that of three federal district court opinions under the FAA that have enforced arbitral subpoenas for prehearing discovery so that arbitrators could make a full and fair determination. Amgen, Inc. v. Kidney Ctr. 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. Fla. 1988). However, in *Integrity Insurance Co. v. American Centennial Insurance 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 to do so would require the person to appear twice-once for the hearing and once for the deposition. Because of the unclear case law, section 17





(d) specifically states that arbitrators have subpoena authority for discovery matters under the RUAA.

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

8. Third parties. It is clear from the case law that arbitrators have the power under the UAA (section 7) and the FAA (section 7) to issue orders, such as subpoenas, to non-parties whose information may be necessary for a full and fair hearing. Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd., 879 F. Supp. 878 (N.D. Ill. 1995) (holding that arbitrator had the power under FAA to subpoena a third party to produce documents and to testify at a deposition); Meadows Indem. Co. v. Nutmeg Ins. Co., 157 F.R.D. 42 (M.D. Tenn. 1994) (holding 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) (upholding 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 or the production of documents"); United Elec. Workers Local 893 v. Schmitz, 576 N.W.2d 357 (Iowa 1998) (holding that Iowa Arbitration Act confers on arbitrators the power to subpoena nonparty witnesses); *but see* COMSAT Corp. v. National Science Foundations, *supra*; Integrity Ins. Co. v. American Centennial Ins. Co., *supra*. Some state arbitration laws broadly allow arbitrators to enforce subpoenas for discovery purposes the same as in a civil proceeding which can be interpreted to include third parties. Kan. Stat. Ann. § 5-407; Cal. Civ. Proc. Code § 1283.05(d); Tex. Civ. Prac. & Rem. Code Ann. § 171.007(b); Utah Code Ann. § 78-31a-8.

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. Furthermore either 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 was inappropriate because it required the nonparty to divulge certain information which may put it at a competitive disadvantage and was not sufficiently relevant to the arbitration case.

The intent of section 17 is to follow the present approach of courts to safeguard the rights of third parties while insuring that there is sufficient disclosure of information to provide for a full and fair hearing. Further development in this area should be left to case law because (1) it would be very difficult to draft a provision to include all the competing interests when an arbitrator issues a subpoena or discovery order against a nonparty [e.g., courts seem to give lesser weight to nonparty's claims that an issue lacks relevancy as opposed to nonparty's claims a matter is protected by privilege]; (2) state and federal administrative laws allowing subpoenas or discovery orders do not make special provisions for nonparties; and (3) the courts have protected well the interests of nonparties in arbitration cases.

9. Section 17(g) is intended to allow a court in State A (the state adopting the RUAA) to give effect to a subpoena or any discovery-related order issued by an arbitrator in an arbitration proceeding in State B without the need for the party who has received the subpoena first to go to a court in State B to receive an enforceable order. This procedure would eliminate duplicative court proceedings in both State A and State B before a witness or record or other evidence can be produced for the arbitration proceeding in State B. The court in State A would have the authority to determine whether and under what appropriate conditions the subpoena or discovery-related orders should be enforced against a resident in State A. Similar to the language in 17(b) and (c), the statute directs the court to enforce subpoenas and discovery-related orders to "make the arbitration proceeding fair, expeditious, and cost effective." The last sentence of 17(g) requires that the subpoena be served and enforced under the laws of a civil action in State A where the request to enforce the subpoena is being made.

Because the procedure outlined in 17(g) is new, a party attempting to use this process in another state should reference section 17(g) in the subpoena or discovery-related order so that the parties, persons served, and the court know of this authority.

**SECTION 18. JUDICIAL ENFORCEMENT OF PREAWARD RULING BY ARBITRATOR.** If an arbitrator makes a prearward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under Section 19. A prevailing party may make a [motion] to the court for an expedited order to confirm the award under Section 22, in which case the court shall summarily decide the [motion]. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under Section 23 or 24.





**Comment:**

1. Section 18 is currently the law in almost all jurisdictions to enforce preaward arbitral determinations. Because the orders of arbitrators are not self-enforcing, a party who receives a favorable ruling with which another party refuses to comply, must apply to a court to have the ruling made an enforceable order. *See, e.g.*, 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); 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); Fraulo v. Gabelli, 37 Conn. App. 708, 657 A.2d 704 (1995) (enforcing under UAA preliminary orders issued by arbitrator 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 Corporation v. American Arbitration Association*, 478 F.2d 248, 251 (9th Cir. 1973) stated that "judicial review prior to the rendition of a final arbitration award should be indulged, if at all, only in the most extreme cases." The court concluded that a more lax rule would frustrate a basic purpose of arbitration of providing for a speedy disposition without the expense and delay of a court proceeding. In *Harleyville Mutual Casualty Co. v. Adair*, 421 Pa. 141, 145, 218 A.2d 791, 794 (Pa. 1966), the Pennsylvania Supreme Court held that to allow challenges to an arbitrator's interlocutory rulings would be "unthinkable." Massachusetts also rejected the appeal of an interlocutory order in *Cavanaugh v. McDonnell & Co.*, 367 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 18 requires a court to enforce the preaward ruling unless the ruling should be vacated under the standards for confirming, modifying, or vacating awards under sections 23 and 24.

Courts have considered more closely substantive challenges to preaward rulings of arbitrators on grounds of privilege or confidentiality. In *Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co.*, 414 Mass. 609, 609 N.E.2d 460 (1993), the defendant refused to turn over certain documents to the plaintiff, despite an arbitral subpoena requiring such, because the defendant claimed that portions of the documents contained attorney-client and work-product privileges. After the supervisor of public records had decided issues arising under the public records law, 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. *See also* World Commerce Corp. v. Minerals & Chem. Philipp Corp., 15 A.D. 432, 224 N.Y.S.2d 763 (1962) (holding that 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 309 (1980) (vacating award of arbitrator who incorrectly determined privilege of patient's confidential records); DiMania v. New York State Dept. of Mental Hygiene, 87 Misc. 2d 738, 388 N.Y.S.2d 590 (1976) (overruling decision of arbitrator regarding client's privilege of confidentiality); *compare* Great Scott Supermarkets, Inc. v. Teamsters Local 337, 383 F. Supp. 1351 (E.D. Mich. 1973)

(holding that 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). Because of the involvement of important legal rights, a court should review more carefully claims of confidentiality, trade secrets, privilege, or other matters protected from disclosure than other assertions that a preaward order of an arbitrator is invalid.

2. Section 18 states that a party may request an "expedited order" under section 22, "in which case the court shall summarily decide the [motion]." That language is similar to that found in section 7 that a court in a proceeding to compel or stay arbitration should act "summarily." The term "expedited" has been used in other statutes and court rules. 8 U.S.C. § 1252(a)(4) (an immigration statute providing 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 (providing that 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 (stating that 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, to the extent possible, advance on the docket a matter involving the enforcement of an arbitrator's preaward ruling in order to preserve the integrity of the arbitration proceeding which is underway.

The term "summarily" has the same meaning as in section 7 that a trial court should expeditiously and without a jury trial determine whether an arbitrator's preaward ruling should be enforced. Grad v. Wetherholt Galleries, 660 A.2d 903 (D.C. 1995); Wallace v. Wiedenbeck, 251 A.D.2d 1091, 674 N.Y.S 2d 230, 231 (N.Y. App. Div. 1998); Burke v. Wilkins, 131 N.C.App. 687, 507 S.E 2d 913 (1998); In re MHI P'ship, Ltd., 7 S.W.3d 918 (Tex. Ct. App. 1999).

3. There is no provision in RUAA section 28 for an appeal from a court decision on a preaward ruling by an arbitrator. The intent of the statute is not to allow such orders from a lower court to be appealed.

4. An arbitrator's order denying a request for a preaward ruling is not subject to an action for review under section 18 because (1) such a provision would lead to delay and more litigation without corresponding benefit to the process and (2) the primary reason to allow a court to consider a favorable preaward ruling is because such arbitral orders are not self-enforcing. The parties whose preaward 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. Section 18 requires an arbitrator's ruling to be incorporated into an "award under Section 19" because for procedural purposes there must be an award under Section 19 for a court to confirm under section 22 or to vacate, modify or correct under sections 23 or 24.

**SECTION 19. AWARD.**

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. 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 within or after the time specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.

**Comment:**

1. The terms "or otherwise authenticated" are intended to conform with the Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. § 7001, noted in section 30. An arbitrator can execute an award by an electronic signature which is intended to mean "an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." 15 U.S.C.A. § 7006(5).

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

(a) On [motion] to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

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

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

(3) to clarify the award.





(b) A [motion] under subsection (a) must be made and notice given to all parties within 20 days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the [motion] within 10 days after receipt of the notice.

(d) If a [motion] to the court is pending under Section 22, 23, or 24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

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

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

(3) to clarify the award.

(e) An award modified or corrected pursuant to this section is subject to Sections 19(a), 22, 23, and 24.

**Comment:**

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

2. Section 20 serves an important purpose in light of the arbitration doctrine of *functus officio* which is "a general rule in common law arbitration that when arbitrators have executed their awards and declared their decision they are *functus officio* and have no power to proceed further." Mercury Oil Ref. Co. v. Oil Workers, 187 F.2d 980, 983 (10th Cir. 1951); *see also* International 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 because of the *functus officio* doctrine there is some question whether, in the absence of an authorizing statute, a court can remand an arbitration decision to the arbitrators who initially heard the matter. 1 Domke §35.03.





3. The grounds in section 20(a) and (d) are essentially the same as those in UAA section 9, which provides the parties with a limited opportunity to request modification or correction of an arbitration award either (1) when there is an error as described in section 24(a)(1) for miscalculation or mistakes in descriptions or in section 24(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) (finding an amended arbitration award for purposes other than those enumerated in statute is void).

Section 20(a)(2) and (d)(2) include an additional ground for modification or correction that is based on FAA section 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. *See, e.g.*, Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp., 86 F.3d 96 (7th Cir. 1996); Americas Ins. Co. v. Seagull Companic Naviera, S.A., 774 F.2d 64 (2nd Cir. 1986).

4. The benefit of a provision such as section 20 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. Furthermore the FAA has only a limited exception in FAA section 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 to be issued 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 regarding whether and when a court can remand or arbitrators can clarify matters. *See* III Macneil Treatise §§37.6.4.4; 42.2.4.3; Legion Ins. Co. v. VCW, Inc., 198 F.3d 372 (8th Cir. 1999). The mechanism for correction of errors in RUAA section 20 enhances the efficiency of the arbitral process.

**SECTION 21. REMEDIES; FEES AND EXPENSES OF ARBITRATION PROCEEDING.**

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(c) As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under Section 22 or for vacating an

award under Section 23.

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

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

Comment:

1. Section 21(a) provides arbitrators the authority to make an award of punitive damages or other exemplary relief; however, the parties by agreement cannot confer such authority on an arbitrator where the arbitrator by law could not otherwise award such relief.

In regard 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 (1995). Federal authority is in accord with the preponderance of decisions applying the UAA and state arbitration statutes. *See*, e.g., Baker v. Sadick, 182 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984); Eychner v. Van Vleet, 870 P.2d 488 (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. 560, 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 (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 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).

If an arbitrator decides to award punitive damages under section 21(a), not only must such an award be authorized by law as if the claim were made in a civil action, but the arbitrator also must apply the same legal standards to the claim as required in a civil action and the evidence must be sufficient to justify an award of punitive damages.

2. Section 21(b) authorizes arbitrators to award reasonable attorney's fees and other reasonable expenses of arbitration where such would be allowed by law in a civil action; in addition, parties may provide for the remedy of attorney's fees and other expenses in their agreement even if not otherwise authorized by law.





As to arbitrators awarding attorney's fees, statutes in Texas and Vermont allow recovery for attorney's fees in arbitration when the 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) (providing that arbitrator shall award attorney's 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's 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's 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).

Although section 21(b) in regard to attorney's fees is like section 21(a) concerning punitive or other exemplary damages because both sections allow recovery when such an award has a basis in law, section 21(b) has no requirement that the arbitrator apply the appropriate legal standard or have sufficient evidence to support a claim of attorney's fees under the applicable statute.

2. Because section 21 is a waivable provision under section 4(a), the parties can agree to limit or eliminate certain remedies "to the extent permitted by law." It should be noted that 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 by contract can eliminate the right to attorney's fees or punitive damages or other exemplary relief. 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) (finding that employee with race discrimination claim under Title VII is bound by predispute 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) (stating that 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) (concluding that award under arbitration clause requiring each side to pay own attorney's fees in Title VII claim on which plaintiff prevailed but where arbitrators refused to award attorney's 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., 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000) (holding that limitation in arbitration agreement on remedies for employee to only





backpay and not allowing employee in anti-discrimination claim to attempt recovery of punitive damages or attorney's fees contributes to determination that arbitration clause is void as unconscionable); 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 21(c) preserves the traditional, broad right of arbitrators to fashion remedies. *See* III Macneil Treatise Ch. 38; 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 21(c) allows an arbitrator to order broad relief even that beyond the limits of courts which are circumscribed by principles of law and equity. The language in UAA section 12(a) [RUAA section 23(a)] stating that "the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm [an] award" has been moved to this section on remedies. The purpose of including this language in the UAA was to insure that arbitrators have a great deal of creativity in fashioning remedies; broad remedial discretion is a positive aspect of arbitration. Just as in UAA section 12(a), this language in section 21(c) means that arbitrators 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 21(d) 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 prohibits an arbitrator from awarding attorney's fees; section 21(b) specifically allows for an arbitrator to make such an award.

5. Section 21(e) addresses concerns respecting arbitral remedies of punitive or exemplary damages because of the absence, under present law, of guidelines for arbitral punitive awards and of the severe limitations on judicial review arbitration awards. 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 21(e) that require arbitrators who award a remedy of punitive damages to specify in the award the basis in fact for justifying, in





law for authorizing, and the amount of the award attributable to the punitive damage remedy. Again, it should be noted that parties can waive the requirements set forth in section 21(e) by agreement.

**SECTION 22. CONFIRMATION OF AWARD.** After a party to an arbitration proceeding receives notice of an award, the party may make a [motion] to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23.

Comment:

1. The language in section 22 has been changed to be similar to that in FAA section 9 to indicate that a court has jurisdiction at the time a party files a motion to confirm an award unless the award has been changed under section 20 or vacated, modified or corrected under sections 23 or 24. Although a losing party to an arbitration has 90 days after the arbitrator gives notice of the award to file a motion to vacate under section 23(b) or to file a motion to modify or correct under section 24(a), a court need not wait 90 days before taking jurisdiction if the winning party files a motion to confirm under section 22. Otherwise the losing party would have this period of 90 days in which possibly to dissipate or otherwise dispose of assets necessary to satisfy an arbitration award. If the winning party files a motion to confirm prior to 90 days after the arbitrator gives notice of the award, the losing party can either (1) file a motion to vacate or modify at that time or (2) file a motion to vacate or modify within the 90-day statutory period.

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 23. VACATING AWARD.**

(a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

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

(2) there was:

(A) evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) corruption by an arbitrator; or

(C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

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

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

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A [motion] under this section must be filed within 90 days after the [movant] receives notice of the award pursuant to Section 19 or within 90 days after the [movant] receives notice of a modified or corrected award pursuant to Section 20, unless the [movant] alleges that the award was procured by corruption, fraud, or other undue means, in which case the [motion] must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the [movant].

(c) If the court vacates an award on a ground other than that set forth in subsection (a)(5), it may order a rehearing. If the award is vacated on a ground stated in subsection (a)(1) or (2), the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in subsection (a)(3), (4), or (6), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in Section 19(b) for an award.

(d) If the court denies a [motion] to vacate an award, it shall confirm the award unless a [motion] to modify or correct the award is pending.

**A. Comment on Section 23(a)(2), (5), (6) and (c)**

1. Section 23(a)(2) is based on UAA section 12(a)(2). The reason "evident partiality" is a grounds for vacatur only for a neutral arbitrator is because non-neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them. As such, these non-neutral, party-appointed arbitrators are not expected to be impartial in the same sense as





neutral arbitrators. Macneil Treatise § 28.4. However, corruption and misconduct are grounds to vacate an award by both neutral arbitrators and non-neutral arbitrators appointed by the parties. As to misconduct, before courts will vacate an award on this ground, objecting parties must demonstrate that the misconduct actually prejudiced their rights. Creative Homes & Millwork, Inc. v. Hinkle, 428 S.E.2d 480 (N.C. Ct App. 1993). Courts have not required a showing of prejudice when parties challenge an arbitration award on grounds of evident partiality of the neutral arbitrator or corruption in any of the arbitrators. Gaines Constr. Co. v. Carol City Ut., Inc., 164 So. 2d 278 (Fl. Dist. Ct. 1964); Northwest Mech., Inc. v. Public Ut. Comm'n, 283 N.W.2d 522 (Minn. 1979), Egan & Sons Co. v. Mears Park Dev. Co., 414 N.W.2d 785 (Minn. Ct. App. 1987). Corruption is also a ground for vacatur in section 23(a)(1) that does not require any showing of prejudice.

2. The purpose of section 23(a)(5) is to establish that if there is no valid arbitration agreement, then the award can be vacated; however, the right to challenge an award on this ground is conditioned upon the party who contests the validity of an arbitration agreement raising this objection no later than the beginning of the arbitration hearing under section 15(c) 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) (stating that 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) (finding that 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) (holding that party who compels arbitration and participates in hearing without raising objection to the validity of arbitration agreement cannot afterwards attack arbitration agreement).

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 hearing rather than causing the other parties to go through the time and expense of the arbitration hearing only to raise the objection for the first time later in the arbitration process or in a motion to vacate an award. 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.

3. Section 23(a)(6) is a new ground of vacatur related to improper notice as to the initiation of the arbitration proceeding under section 9. The notice requirement in section 9 is a minimal one intended to meet due process concerns by informing a person as to the controversy and remedy sought. The notice of initiation of the arbitration proceeding is also subject to reasonable variation by the parties' agreement. *See* section 4(b)(2).





4. The notice of initiation of arbitration is not intended to be a formal pleading requirement. Thus, a party may waive the objection in section 9(b) by failing to make a timely objection. Section 23(a)(6) also requires that there is substantial prejudice to the other party before a court vacates an award for improper notice of initiation.

5. If a court orders a rehearing, section 23(c) provides that the arbitrator must "render the decision in the rehearing within the same time as provided in Section 19(b) for an award." This time period should be the same in the rehearing as in the original hearing. For example, if an agreement to arbitrate required an arbitrator render an award within 60 days after the close of the hearing, the arbitrator in the new hearing must make the award within 60 days after the close of the rehearing and not of the original hearing.

**B. Comment on the Concept of Contractual Provisions for "Opt-In" Review of Awards**

1. During the course of the Drafting Committee's deliberations between 1996 and 2000, no issue produced more discussion and debate than the question of whether Section 23 of the RUAA should include a provision that the parties could "opt in" to judicial review of arbitration awards for errors of law or fact or any other grounds not prohibited by applicable law.

There are certain policy reasons both for and against the adoption of a provision in the RUAA for expanded judicial review of an arbitrator's decision for errors of law or fact. The value-added dimensions considered by the Drafting Committee were 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 "wrongly decided" award previously prevented them from trying arbitration to do so.

The Drafting Committee weighed those value-added dimensions against the risks/downsides of adding "opt in"provision to the Act. There are several risks and downsides. 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 might lead to the routine inclusion of review provisions in arbitration agreements in order to assuage the concerns of parties uncomfortable with the risk of being stuck with disagreeable arbitration awards that are immune from judicial review. 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 conclusions 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. Finally, the time until resolution in many cases would be greatly lengthened, and the prospect of proceedings being reopened on remand following judicial review would increase.

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.

2. In addition to the policy differences noted above, the Drafting Committee was also concerned with the current diversity of opinion as to the legal propriety of the "opt-in" device reflected in the developing case law.

The first concern with the opt-in mechanisms providing for judicial review of challenged arbitration awards is the specter of FAA preemption. 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. Courts of Appeal 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 specter of FAA preemption is balanced by the assertion that the principle of *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468 (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 (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.

3. The second major impediment to inclusion of an opt-in provision for judicial review in the RUAA (and contractual provisions to the same effect) 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 (1995), the court held valid a contractual provision providing for judicial review of arbitral errors of law. The court concluded that the vacatur standards set out in section10(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 for judicial review is best demonstrated by the opinion of the Ninth Circuit Court of Appeals in *LaPine Technology Corp. v. Kyocera*, 130 F.3d 884 (9th Cir. 1997). The majority opinion in *Kyocera* framed the issue before the court to be: "Is 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 Manufacturing Co.*, 388 U.S. 395, 404 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. *See also* Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 American Rev. of Int'l Arb. 225 (1997); Stephen J. Ware, *"Opt-In" for Judicial Review of Errors of Law under the Revised Uniform Arbitration Act*, 8 American Rev. of Int'l Arb. 283 (1997) (both articles refuting the argument that an "opt-in" review clause is precluded on the grounds of creating jurisdiction). 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 issue of expanded judicial review.

A final significant opinion in the federal Circuit Court of Appeals 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 sections 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 United States Circuit Courts of Appeals





approving contractual opt-in provisions and two United States Circuit Courts 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.

4. 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. Ct. 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 that the parties were instead "required to proceed according to the [Michigan arbitration statute]." The appellate 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 Railroad v. Northern Indiana Commuter Transportation Dist.*, 682 N.E.2d 158, 159 (Ill. App. 3d 1997), rev'd on other grounds, 184 Ill. 151 (1998), refused to give effect to 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. Ct. App. 1982)).

In *NAB Constructin Corp. v. Metropolitan Transportation Authority*, 180 A.D. 436, 579 N.Y.S.2d 375 (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 (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.

5. The negative policy implications and the uncertain case law outlined above were substantial reasons why the Committee of the Whole adopted a sense-of-the-house resolution at the July, 1999, meeting of the National Conference of Commissioners on Uniform State Laws not to include expanded judicial review through an opt-in provision. This decision not to include in the RUAA a statutory sanction of expanded judicial review of the "opt-in" device effectively leaves





the issue of the legal propriety of this means for securing review of awards to the developing case law under the FAA and state arbitration statutes. Consequently, parties remain free to agree to contractual provisions for judicial review of challenged awards, on whatever grounds and based on whatever standards they deem appropriate until the courts finally determine the propriety of such clauses.

6. The Drafting Committee also considered a statutory sanction of "opt in" provisions for internal appellate arbitral review. Such a section in the statute would be significantly less troubling than the sanction of opt-in provisions for judicial review–because they do not entangle the courts in reviewing the merits of challenged arbitration awards. Instead, appellate arbitral review mechanisms merely add a second level to the contractual arbitration procedure that permits parties disappointed with the initial arbitral result to secure a degree of protection from the occasional "wrong" arbitration decision. *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 an opt-in provision. 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.

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

**C. Comment on the Possible Codification of the "Manifest Disregard of the Law" and the "Public Policy" Grounds For Vacatur:**

1. The Drafting Committee also considered the advisability of adding two new subsections to section 23(a) sanctioning vacatur of awards that result from a "manifest disregard of the law" or for an award that violates "public policy." Neither of those 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. Professional Planning Associates, Inc. 857 F.2d 742, 747 (11th Cir. 1988). "Manifest disregard of the law" "clearly means more than [an arbitral] error or misunderstanding with respect to the law." Carte Blanche (Singapore) PTE Ltd. v. Carte Blanche Int'l., 888 F.2d 260, 265 (2d Cir. 1989) (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986)).

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 the arbitrator 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 in *Seymour v. Blue Cross/Blue Shield*, 888 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 .. Misco, 484 U.S. 29, 43 (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*, 40 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 Refsnes, Inc.*, 994 F.2d 775 (11th Cir. 1994) and the Second Circuit in *Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108 (2d Cir. 1980) 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. *See, e.g.*, Schoenmacher v. Cummings and Lockwood of Connecticut, 252 Conn. 418, 747 A.2d 1017 (2000) (stating that court determines that public policy of facilitating clients' access to an attorney of their choice requires a court to conduct de novo review of arbitration decisions involving non-competition agreements among attorneys); State of Connecticut v. AFSCME, Council 4, 252 Conn. 467, 747 A.2d 480 (2000) (concluding that arbitration award reinstating employee for admittedly making harassing phone calls to a legislator which conduct violated state law should be overturned as a violation of clearly expressed public policy).

One area in which state courts have considered it appropriate to review the awards of arbitrators on public-policy grounds is family law and, in particular, statutes or case law requiring consideration of the "best interest" of children. Faherty v. Faherty, 97 N.J. 99, 477 A.2d 1257 (1984) (refusing to defer to arbitrator's award affecting child support because of the court's "non-delegable, special supervisory function in [the] area of child support" that warrants de novo review whenever an arbitrator's award of child support could adversely affect the substantial best interests of the child); Rakoszynski v. Rakoszynski, 663 N.Y.S.2d 957 (App. Div. 1997) (concluding that child support is subject to arbitration but child custody and visitation is not); Miller v. Miller, 423 Pa.Super. 162, 172, 620 A.2d 1161 (1993) (stating that court not bound by arbitrator's child custody determination but court must ascertain whether arbitral award is "adverse to the best interests of the children").





5. There are reasons for the RUAA not to embrace either the "manifest disregard" or the "public policy" standards of court review of arbitral awards. 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. As a result, the Drafting Committee concluded not to add these two grounds for vacatur in the statute. A motion to include the ground of "manifest disregard" in section 23(a) was defeated by the Committee of the Whole at the July, 2000, meeting of the National Conference of Commissioners on Uniform State Laws.

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

(a) Upon [motion] made within 90 days after the [movant] receives notice of the award pursuant to Section 19 or within 90 days after the [movant] receives notice of a modified or corrected award pursuant to Section 20, the court shall modify or correct the award if:

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

(2) the arbitrator has made an award on a claim 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 decision on the claims submitted.

(b) If a [motion] made under subsection (a) is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending the court shall confirm the award.

(c) A [motion] to modify or correct an award pursuant to this section may be joined with a [motion] to vacate the award.

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

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

(b) A court may allow reasonable costs of the [motion] and subsequent judicial proceedings.





(c) On [application] of a prevailing party to a contested judicial proceeding under Section 22, 23, or 24, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

**Comment:**

1. The same sections in the UAA (sections 14, 15) and a similar section in the FAA (section 13 regarding judgments and docketing) as well as in RUAA section 24(a) included court orders confirming, modifying or correcting awards but not vacating awards. There is no explanation in the legislative history or the case law under the UAA or the FAA for the omission of the inclusion of vacatur in reference to judgments and recording judgments. The indication from the cases is that courts that vacate arbitration awards refer to the vacatur orders as judgments. In its version of the UAA Arizona states that courts that vacate awards should enter a "judgment." Ariz. Rev. Stat. § 12-1512 (1994). There are other state appellate decisions which refer to vacatur orders as "judgments." Judith v. Graphic Communicats. Int'l Union, 727 A.2d 890, 891 (D.C. Ct. App. 1999); Guider v. McIntosh, 293 Ill.App. 3d 935, 689 N.E.2d 231, 233, 228 Ill.Dec. 359 (1997); FCR Greensboro, Inc. v. C & M Investments of High Point, Inc. 119 N.C.App. 576, 459 S.E.2d 292, 295, cert. denied, 341 N.C. 648, 462 S.E.2d 510 (1995); Rademaker v. Atlas Assur Co. 98 Ohio App. 15, 120 N.E.2d 592, 596 (1954). Section 25(a) and (c) includes a provision to enter judgment or award attorney's fees when there is an order "vacating without directing a rehearing." The terms "without directing a rehearing" were added because an order of vacatur is a final one and subject to appeal under section 28(a)(5) if the court does not order a rehearing under section 23(c).

2. Some of the language in UAA section 15 on judgment rolls and docketing has been rewritten and incorporated into section 25(a) that the judgment may be "recorded, docketed, and enforced as any other judgment in a civil action" both to delete what in some states would be considered archaic procedure under UAA section 15 and to allow states more flexibility in recording judgments according to the procedures in their states.

3. Section 25(c) promotes the statutory policy of finality of arbitration awards by adding a provision for recovery of reasonable attorney's fees and reasonable expenses of litigation to prevailing parties in contested judicial actions to confirm, vacate, modify or correct an award. Potential liability for the opposing parties' post-award litigation expenditures will tend to discourage all but the most meritorious challenges of arbitration awards. If a party prevails in a contested judicial proceeding over an arbitration award, section 25(c) allows the court discretion to award attorney's fees and litigation expenses. Blitz v. Bath Isaac Adas Israel Congregation, 352 Md. 31, 720 A.2d 912 (1998) (permitting 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)

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

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

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

**SECTION 26. JURISDICTION.**

(a) A court of this State having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this [Act].

**Comment:**

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

2. Section 26(a) deals with the enforceability of arbitration agreements. A person may seek to enforce an agreement to arbitrate in accordance with sections 6 and 7 in a state that has personal and subject matter jurisdiction. For example, consider a manufacturer that is a New York corporation and a consumer who resides in Missouri have an arbitration agreement that provides for arbitration in the state of New York. If the consumer challenges the enforceability





of the arbitration clause, the consumer could do so in a Missouri court that would otherwise have subject matter and personal jurisdiction over the New York corporation.

3. Section 26(b) follows the almost unanimous holdings of courts under the present, same language of section 17 of the UAA that if the parties in their agreement designate a place for the arbitration proceeding, then that state has exclusive jurisdiction to determine the validity of an arbitrator's award in accordance with section 25. The rationale of these courts has been to prevent forum-shopping in confirmation proceedings and to allow party autonomy in the choice of the location of the arbitration and its subsequent confirmation proceeding. State ex rel. Tri-County Constr. Co. v. Marsh, 668 S.W.2d 148, 152 (Mo. Ct. App. 1984) ("[E]very state that has considered the question of jurisdiction to confirm the award has focused on the place of arbitration and not the locus of the contract. * * * [T]he place of contracting is not always, or even frequently, the convenient location for arbitration. Modern business operates in a multi-state environment, and the parties should be permitted to choose the place of arbitration and confirmation upon consideration of convenience, and not upon artificial concepts of the place of contracting."); *see also* General Elec. Co. v. Star Technologies, Inc. 1998 WL 377028 (Del. Ch., June 13, 1998); Stephanie's v. Ultracashmere House LTD, 98 Ill.App. 3d 654, 424 N.E.2d 978, 54 Ill.Dec. 229 (1981); Tru Green Corp. v. Sampson, 602 S.W.2d 651 (Ky. App. 1981); Kearsarge Metallurgical Corp. v. Peerless Ins. Co., 383 Mass. 182, 418 N.E.2d 580 (1981).

4. It should be noted that in accordance with section 4(b)(1) parties can waive the requirements of section 26 after a dispute arises under an arbitration agreement.

**SECTION 27. VENUE.** A [motion] pursuant to Section 5 must be made 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 court of the [county] in which it was held. Otherwise, the [motion] may be made in the court of any [county] in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any [county] in this State. All subsequent [motions] must be made in the court hearing the initial [motion] unless the court otherwise directs.

**Comment:**

1. Oftentimes the parties in their arbitration agreement determine the location of the arbitration hearing. If the arbitration clause does not provide for a location, section 15 allows the arbitrator to set the location of the hearing. The venue provisions in this section give priority to the county in which the arbitration hearing was held.





2. Choice-of-forum clauses and, as a result, venue provisions have the potential to cause problems in adhesion situations. It should be noted that courts, in determining the enforceability of arbitration agreements under provisions such as section 6(a) have voided as unconscionable clauses in arbitration agreements that require persons to arbitrate in distant locations. *See, e.g.*, Brower v. Gateway 2000, Inc., 246 A.D. 246, 676 N.Y.S.2d 569 (1998) (holding unconscionable on ground of cost a clause which both required computer purchasers to arbitrate disputes in Chicago, Illinois, and also required arbitration according to rules of the International Chamber of Commerce which impose high administrative costs); Patterson v. ITT Consumer Fin. Corp., 14 Cal. App. 4th 1659, 18 Cal. Rptr. 2d 563 (1993) (refusing to enforce arbitration clause imposed by financing corporation on state's consumers that required arbitration to be heard in Minneapolis, Minnesota, and required payment of substantial filing fees).

**SECTION 28. 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 entered pursuant to this [Act].

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

**SECTION 29. 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 30. RELATIONSHIP TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** The provisions of this Act governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed





with the use of such records or signatures conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act.

**Comment:**

1. Section 30 is intended to conform the provisions allowing electronic signatures in sections 1 (3)(B) and 19 of the RUAA with the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001, 7002 (2000).

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

**Comment:**

1. Section 31 concerning effective date should be read in conjunction with section 3 which deals with when the Act applies. Section 3 provides for a transition period during which both the UAA and the RUAA apply and also a date after the effective date on which the RUAA will apply to all arbitration agreements no matter when parties entered into them.

**SECTION 32. REPEAL.** Effective on [delayed date should be the same as that in Section 3 (c)], the [Uniform Arbitration Act] is repealed.

**Comment:**

1. This section repeals the adopting State's present Uniform Arbitration Act. The effective date of the repealer should be the same date selected by the State in section 3(b) for the application of the RUAA to all arbitration agreements and proceedings.

2. This repeal section is based on section 1205 of the Revised Uniform Partnership Act and section 1208 of the 1996 Amendments constituting the Uniform Limited Liability Partnership Act. Both of these statutes have transition provisions similar to section 3 of the RUAA.

**SECTION 33. SAVINGS CLAUSE.** This [Act] does not affect an action or proceeding commenced or right accrued before this [Act] takes effect. Subject to Section 3 of this [Act], an arbitration agreement made before the effective date of this [Act] is governed by the [Uniform Arbitration Act].

**Comment:**

1. This section continues the prior law under the UAA with respect to a pending action or proceeding or right accrued until the UAA is repealed in accordance with sections 31 and 3(a) and (c) or the parties agree in a record under section 3(b) to apply the RUAA to an arbitration agreement made under the UAA. Because courts generally apply the law that exists at the time an action is commenced, in many circumstances the new law would displace the old law, but for this section.

2. While most states have general savings statutes, these are often quite broad. The intent of section 33 is to follow Rule 19 of the NCCUSL Procedural and Drafting Manual which states that a specific savings clause should be included in a statute "to preserve a law that the Act supersedes and which otherwise would apply with respect to described transactions and events that occur before the Act takes effect to minimize disruption inherent in change from the old to the new law." The comment to Rule 19 uses as an example statutes where there is a transition period like the Uniform Partnership Act upon which sections 3, 31, 32 and 33 of the RUAA are based.

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# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

**MEMORANDUM** March 10, 2003

**SUBJECT:** Sectional summary of HB 83 relating to the Revised Uniform Arbitration Act (Work Order No. 23-LS0047\H)

**TO:** Representative Ethan Berkowitz
Attn: Lisa

**FROM:** Theresa L. Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

**Section 1.** Amends the existing Uniform Arbitration Act to indicate to which agreements and contracts it applies.

**Section 2.** Adds an article containing the Revised Uniform Arbitration Act (RUAA).

Sec. 09 43.300 states that the RUAA governs arbitration agreements made on or after January 1, 2004. States that the RUAA governs arbitration agreements made before January 1, 2004 if all parties agree. States that, with one exception, the RUAA does not apply to certain labor-management contracts unless incorporated into the contract or its application is provided for by contract. States that the RUAA does not apply to certain collective bargaining agreements.

Sec. 09.43.310 provides for waiver or varying the effect of the RUAA. Lists certain agreements and waivers a party to an arbitration agreement may not make before the controversy arises. Prohibits the waiver or variation of the effect of certain RUAA provisions.

Sec. 09.43.320 directs that an application for judicial relief under the RUAA, except as provided in sec. 09.43.550, will be handled as provided by the state's court rules.

Sec. 09.43.330 provides that arbitration agreements contained in a record are valid, enforceable, and irrevocable, except on a ground that exists at law or in equity for the revocation of a contract. Directs the court to decide certain issues relating to arbitration agreements. Directs an arbitrator to decide certain issues relating to arbitration

agreements. Allows an arbitration proceeding to continue while a court resolves certain challenges.

Sec. 09.43.340 directs how a court is to proceed on application of a person alleging another person's refusal to arbitrate. Directs how a court is to proceed with an application of a person alleging that an arbitration has been initiated or threatened but there isn't an agreement to arbitrate. Prohibits a court from ordering arbitration if there isn't an enforceable agreement. Prohibits a court from refusing to order arbitration because of the merits of the claim or because grounds for the claim have not been established. Directs which court to use under certain circumstance. When a party applies to a court to order arbitration, directs the court to stay a judicial proceeding that involves a claim alleged to be subject to the arbitration. Directs that if a court orders arbitration, the court shall stay a judicial proceeding that involves a claim subject to the arbitration.

Sec. 09.43.350 allows a court to order a provisional remedy to protect an arbitration proceeding before an arbitrator is appointed and can act. Allows an arbitrator to order a provisional remedy to protect the arbitration proceeding and to promote a fair and expeditious resolution. Sets limits on when a party to an arbitration proceeding may apply for a court-ordered provisional remedy. Provides that a party's application for a provisional remedy does not waive a right of arbitration.

Sec. 09.43.360 establishes how a person initiates an arbitration proceeding. Provides that a person waives a lack or insufficiency of the notice required to initiate an arbitration unless the person objects not later than the beginning of the arbitration hearing.

Sec. 09.43.370 allows a court to consolidate separate arbitration proceedings under certain listed conditions. Allows the court to consolidate some claims and allow other claims to be resolved separately. Prohibits a court from consolidating claims if the arbitration agreement prohibits consolidation.

Sec. 09.43.380 describes what method is to be used to appoint an arbitrator and under what circumstance a court is to appoint the arbitrator. Gives a court-appointed arbitrator the same powers as an arbitrator designated in the arbitration agreement or appointed by the parties. Prohibits an individual with a certain interest in the outcome or a certain relationship with a party from serving as an arbitrator if the agreement requires neutrality.

Sec. 09.43.390 requires that before accepting appointment a person disclose facts that might affect the person's impartiality as an arbitrator. Makes disclosure a continuing obligation of an arbitrator. Provides that a timely objection to the arbitrator after disclosure of these facts may be grounds for vacating an award. Allows a court to vacate an award for failure to disclose as required by (a) - (b). Establishes a rebuttable presumption that a person appointed as a neutral arbitrator acts with partiality if the person does not disclose a known, direct, and material interest in the outcome or a known, existing, and substantial relationship with a party. Requires substantial

compliance with certain agreed procedures for challenges to arbitrators in order to vacate an award on that ground under sec. 09.43.500(a)(2).

Sec. 09.43.400 requires that the powers of an arbitrator be exercised by a majority of all of the arbitrators. Requires all of the arbitrators to conduct the hearing.

Sec. 09.43.410 provides an arbitrator and an arbitration organization the same immunity from civil liability as a judge. States that this immunity supplements any other immunity provided by law. State that an arbitrator does not lose this immunity by failing to make required disclosures. States that an arbitrator or representative of an arbitration organization is generally not competent to testify or required to produce arbitration records relating to an arbitration proceeding in a judicial, administrative, or similar proceeding to the same extent as a judge. Makes certain exceptions to this rule. Awards attorney fees and costs in a civil action to an arbitrator, arbitration organization, or representative of an arbitration organization when the court determines that the arbitrator, arbitration organization, or representative is protected by this immunity.

Sec. 09.43.420 allows an arbitrator to conduct the arbitration in the manner the arbitrator considers appropriate for a fair and expeditious disposition. Allows the arbitrator to hold conferences and deal with evidence, and to handle summary dispositions of the claims and issues under certain conditions. Establishes certain procedures for the arbitration. Gives the parties certain rights at the hearing. Provides for replacing an arbitrator when an arbitrator ceases acting or is unable to act.

Sec. 09.43.430 allows a party to an arbitration proceeding to be represented by an attorney.

Sec. 09.43.440 makes various provisions for subpoenas, witnesses, the production of records and other evidence, depositions, discovery, fees, and protective orders.

Sec. 09.43.450 makes certain provisions for incorporating preaward rulings into an award and for judicial enforcement of the award.

Sec. 09.43.460 requires an arbitrator to make a record of the arbitrator's award and requires the arbitrator or arbitration organization to give notice of the award to each party. Establishes when an award must be made and provides for extension of the time. Requires a party to give notice before receiving the award of an objection that an award was not timely in order to avoid waiving objection to the non-timeliness of the award.

Sec. 09.43.470 authorizes an arbitrator to modify or correct an award as provided in the section. Establishes certain procedural requirements regarding motions for modification or correction and objections to the motion. If certain applications are pending, allows a court to submit the claim to the arbitrator to consider modification or correction for certain reasons. States that a modified or corrected award is subject to action under certain other sections.

Sec. 09.43.480 authorizes an arbitrator to award punitive damages or other exemplary relief under certain conditions. Authorizes an arbitrator to award reasonable attorney fees and arbitration expenses under certain circumstances. Authorizes an arbitrator to order other remedies the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. States that an arbitrator's expenses and fees, together with other expenses, are to be paid as provided in the award. Requires the arbitrator who awards punitive damages or other exemplary relief to state in the award the facts and law on which these damages are based and state the amount of these damages separately.

Sec. 09.43.490 allows a party to apply for a court order confirming an award and directs the court to confirm the award unless the award is modified, corrected, or vacated under certain provisions.

Sec. 09.43.500 directs a court to vacate an award under certain described conditions. Establishes when an application to the court must be filed. Allows a court to order a rehearing if it vacates an award on certain grounds and establishes certain requirements for the rehearing. Directs a court that denies an application to vacate an award to confirm the award unless an application to modify or correct the award is pending.

Sec. 09.43.510 directs a court to modify or correct an award under certain conditions. Allows an application to modify or correct an award to be combined with an application to vacate the award.

Sec. 09.43.520 directs the court to enter judgment in conformity with its order on the arbitration award.

Sec. 09.43.530 allows a court to enforce an agreement to arbitrate if the court has jurisdiction over the controversy and the parties. States that an arbitration agreement providing for arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award under these provisions.

Sec. 09.43.540 establishes where in the state an application to the court is to be made.

Sec. 09.43.550 lists which orders and judgments can be appealed. Provides for the appeal to be taken as if from an order or judgment in a civil action.

Sec. 09.43.560 requires that the need to promote uniformity be considered when applying and construing these provisions.

Sec. 09.43.570 requires that those RUAA provisions that relate to the legal effect, validity, and enforceability of electronic records or signatures, and of contracts performed with the use of the records or signatures, conform to the federal Electronic Signatures in Global and national Commerce Act.

Sec. 09.43.580 explains what notice means in the RUAA.

Sec. 09.43.590 defines certain terms for the RUAA.

Sec. 09.43.595 provides for the new provisions to be called the Revised Uniform Arbitration Act.

**Section 3.** Conforming amendments.

**Section 4.** Conforming amendments.

**Section 5.** Conforming amendments.

**Section 6.** Conforming amendments.

**Section 7.** Conforming amendments.

**Section 8.** Describes the indirect court rule amendments made by the new provisions.

**Section 9.** Prohibits a person from waiving the effective date of a provision of this Act.

**Section 10.** Prevents this Act from affecting an action or proceeding begun or a right accrued before its effective date.

**Section 11.** States that the provisions that change court rules do not take effect unless sec. 8 receives the increased majority vote.

**Section 12.** Makes the Act effective January 1, 2004.

If I may be of further assistance, please advise.

TLB:lmb
03-070.lmb

# Alaska State Legislature

## House of Representatives

Minority Leader


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## Representative Ethan Berkowitz

District 13

**MEMORANDUM**

**Date:** February 25, 2003

**To:** Representative Lesil McGuire, Chair
House Judiciary Committee

**From:** Representative Ethan Berkowitz EAB

**Re:** House Bill 83

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I respectfully request that you schedule a hearing in the House Judiciary Committee for HB 83, adoption of the Revised Uniform Arbitration Act.

A copy of the bill, a sponsor statement, and additional background material are attached. A sectional analysis has been requested from Legislative Legal Services.

A teleconference site in Anchorage will likely be needed. If you have any questions or need additional information, please call Lisa Weissler at 465-3163.

Thank you.


*E-mail: Representative_Ethan_Berkowitz@legis.state.ak.us*

# Alaska State Legislature

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## Representative Ethan Berkowitz

District 13

## SPONSOR STATEMENT

## House Bill 83

**"An Act adopting a version of the Revised Uniform Arbitration Act; relating to the state's existing Uniform Arbitration Act; amending Rules 3, 18, 19, 20,21, Alaska Rules of Civil Procedure, Rule 601, Alaska Rules of Evidence, and Rule 402, Alaska Rules of Appellate Procedure; and providing for an effective date."**

This legislation updates Alaska's current arbitration statutes through adoption of the Revised Uniform Arbitration Act (RUAA). These revisions address many questions that the original uniform act did not and encourages the use of arbitration as a viable alternative to litigation.

The objective of the RUAA is to advance arbitration as a desirable alternative to litigation, but not to make arbitration another form of litigation. To this end, the RUAA endeavors to make the arbitration process more efficient, expeditious, and economical in a manner that is fair to the parties, and that promotes finality of the decision of the dispute submitted to arbitration.

Arbitration is the original "alternative dispute resolution" mechanism made legitimate under American law. The RUAA recognizes that more issues are being submitted to arbitration and that the issues are more complex, often involving higher monetary amounts. The RUAA covers a number of important issues that were not addressed in the original act and reflects aspects of arbitration practice as it has developed over the years.

A revision of the uniform arbitration act is necessary at this time in light of the ever-increasing use of arbitration and the developments of the law in this area. This important advance in the law of arbitration should be enacted as soon as feasible.


*E-mail: Representative_Ethan_Berkowitz@legis.state.ak.us*

Uniform Law Commissioners
The National Conference of Commissioners on Uniform State Laws

Home

> A Few Facts About The...

## UNIFORM ARBITRATION ACT (2000)

**PURPOSE:**
This act revises the Uniform Arbitration Act of 1956, adopted in 49 jurisdictions. The primary purpose of the act is to advance arbitration as a desirable alternative to litigation. A revision is necessary at this time in light of the ever-increasing use of arbitration and the developments of the law in this area.

**ORIGIN:**
Completed by the Uniform Law Commissioners in 2000.

**APPROVED BY:**
American Bar Association

**ENDORSED BY:**
American Arbitration Association
National Academy of Arbitrators
National Arbitration Forum

**STATE ADOPTIONS:**
Hawaii
Nevada
New Mexico
Utah

**2003 INTRODUCTIONS:**

Alaska
Arizona
Connecticut
Indiana
Massachusetts
Minnesota
New Jersey
North Dakota
Oklahoma
Oregon
West Virginia

For any further information regarding the Uniform Arbitration Act, please contact

John McCabe, Katie Robinson, or Mike Kerr at 312-915-0195.


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# ARTICLE

# IS THE REVISED UNIFORM ARBITRATION ACT A GOOD FIT FOR ALASKA?

CARL H. JOHNSON*
PETE D.A. PETERSEN**

*This Article considers the suitability of the Revised Uniform Arbitration Act (RUAA) for adoption by the State of Alaska. The Article provides background information on the history of alternative dispute resolution in Alaska, including the use and development of arbitration, and discusses the main issues that have been litigated both in Alaska courts and across the country with respect to the original Uniform Arbitration Act. The Authors provide a detailed review of the changes and clarifications included in the RUAA and conclude that the RUAA should be adopted by Alaska, as it is consistent with state case law and promotes Alaska's oft-stated goal of facilitating efficient and effective methods of alternative dispute resolution.*

## I. INTRODUCTION

Long before the advent of the court system and the now familiar practice of litigation, people were required to resolve their disputes among themselves.[1] There were no bureaucracies, judici-



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1. Mediation, for example, has existed for nearly 4,000 years. Dana Shaw, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. TOL. L. REV. 327, 329 (1998). Mediation was used in Biblical times and long ago by Na-

aries, or other government officials resolving their disputes for them. All issues were handled locally. Eventually, this private method of dispute resolution was replaced with one where third parties, sometimes judges, sometimes panels of "peers," decided how disputes would be handled. These anonymous third parties became the arbiters of the fate of the parties before them. In recent decades, the American trend has been to lean more favorably once again toward these private roots of dispute resolution,[2] toward various alternative dispute resolution (ADR) methods, and particularly toward arbitration.[3]

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tive American cultures such as the Lakota, Kiowa, Camanche, and Cheyenne. Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 890 (1997) (noting that the Gospel of Matthew encourages parties to first talk between themselves and attempt to resolve the dispute); Robert D. Garrett, *Mediation in Native America*, DISP. RESOL. J., Mar. 1994, at 38, 39 (discussing the role of mediation in tribal legal systems).

Arbitration enjoys a similarly long history. Commercial arbitration has been noted as a dispute resolution option as far back as the times when Greek and Phoenician traders were roaming the world. *See* F. KELLOR, AMERICAN ARBITRATION 3 (1948); *see generally* Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132 (1934). It has been in use in the United States for several hundred years. *See* 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 4.3 (1999); Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 346 (1995); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 854-56 (1961).

2. *See* Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031, 1033 (1996) ("There is a revolution taking place in this country—a revolution which is enhancing the quality of the legal system."); *see also* Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 3 (1993) (indicating that "[c]ompulsory ADR is part of a movement over the last three decades to develop alternatives to traditional litigation for the resolution of legal disputes").

3. Arbitration has been touted by the courts as a speedy, economical alternative to litigation. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (praising the inexpensive and speedy aspects of arbitration); Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 29 (1983) (noting that the FAA calls for a "summary and speedy disposition of motions or petitions to enforce arbitration clauses"); Metz v. Merrill Lynch, Piece, Fenner & Smith, Inc., 39 F.3d 1482, 1488 (10th Cir. 1994) (favoring arbitration because of its expeditious nature). Scholars have praised arbitration for its flexibility when compared to litigation. *See, e.g.*, Boyd A. Byers, *Mandatory Arbitration of Employment Disputes*, 67 J. KAN. BAR ASS'N, April 1998, at 18, 19; Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 204-05 (1996). Others have noted that arbitration is a superior alternative to an overloaded court

The earliest state-promulgated experiments with ADR mechanisms in Alaska came in the form of conciliation boards in rural areas. Between 1975 and 1977, the Alaska court system used federal funds to create and evaluate conciliation boards in six southwestern Alaska villages.[4] The Standing Advisory Committee on Mediation (Committee), created by the Alaska Supreme Court in 1991, currently works to establish and improve the use of ADR by the Alaska Court System.[5] The Committee, in conjunction with the Alaska Judicial Council, made the recommendations that eventually led to the adoption of the current version of Civil Rule 100 by the Alaska Supreme Court in 1993.[6] While the rule focuses on mediation as the primary ADR mechanism,[7] it also suggests that

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system incapable of handling its increasing caseload. Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 2-10 (1990); *see also* James H. Schropp, *Resolving SEC Enforcement Matters Through Alternative Means of Dispute Resolution*, 5 INSIGHTS 13, 14 (1991).

In contrast, several scholars have criticized the process of arbitration for various reasons. One author has noted that the "formal authority social custom power" enjoyed by arbitrators can exceed that of judges since arbitrators are not required to follow precedent, are rarely subject to appellate review of the substance of their decisions, and are not required to explain the basis for their decisions. Michael Hunter Schwartz, *Power Outage: Amplifying the Analysis of Power in Legal Relationships* (With Special Application to Unconscionability and Arbitration), 33 WILLAMETTE L. REV. 67, 136-37 (1997). Another commentator has argued that all forms of ADR, including arbitration, erode the guidance function of laws, and that ADR lacks the procedures necessary for "quality decision making." Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 15-27 (1987). Even the claims of the courts that arbitration is a truly speedy and economical alternative to litigation have been called into doubt because of a lack of supporting statistical evidence. Richard C. Downing & Patrick R. James, *Arbitaration of a Securities Dispute—An Overview for the Practitioner*, 13 U. ARK. LITTLE ROCK L.J. 621, 624-25 (1991). Downing and James add that there are substantial, substantive disadvantages to arbitration, such as limitations on discovery, inability to collect punitive damages or attorney's fees awards, lack of self-enforceability of arbitration awards, and limited grounds for appeal. *See id.* at 625-26.

4. ALASKA JUDICIAL COUNCIL. REPORT TO THE ALASKA LEGISLATURE: ALTERNATIVE DISPUTE RESOLUTION IN THE ALASKA COURT SYSTEM 31 (1997) [hereinafter ADR IN ALASKA].

5. *Id.* at 30.

6. Alaska Civil Rule 100 authorizes parties to apply for and judges to order mediation or other forms of ADR "for the purpose of achieving a mutually agreeable settlement." ALASKA R. CIV. P. 100(a).

7. It is relatively clear that Civil Rule 100 is used primarily for mediation. An Alaska Judicial Council survey sent to all state trial judges showed that 71% of the

other forms of ADR, such as early neutral evaluation and arbitration, may be used in the alternative.[8]

In addition to these general ADR efforts, Alaska has focused on developing arbitration as a viable ADR option. The Alaska legislature adopted the original 1955 Uniform Arbitration Act (UAA)[9] in 1968,[10] amending it in 1972.[11] In 1974, the Alaska Supreme Court adopted mandatory fee arbitration rules for attorney fee disputes.[12] The Alaska Bar Association originally proposed these rules, requesting that the court adopt them.[13]

After adopting the UAA, the Alaska legislature has largely left the task of shaping Alaska's arbitration law or, more accurately, filling in the voids of the original UAA, to the Alaska Supreme Court. The Alaska courts have not been alone in attempting to plug the holes in the original UAA. The court systems for the vast majority of jurisdictions that have adopted the UAA[14] have engaged in routine battles over such issues as the arbitrability of particular disputes, the procedures employed by arbitrators, the remedies arbitrators may award, and the reviewability of those decisions by state courts.[15] In an effort to clarify, codify, and improve

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responding trial court judges had ordered mediation at least once in the previous two years. ADR IN ALASKA, *supra* note 4, at 31.

8. *See* ALASKA R. CIV. P. 100(i).

9. UNIF. ARBITRATION ACT, 7 U.L.A. 1 (1997) [hereinafter UAA].

10. Act of August 6, 1968, 1968 Alaska Sess. Laws 232 (codified at ALASKA STAT. §§ 09.43.010–.180) (Michie 2001)).

11. *See* Act of September 5, 1972, 1972 Alaska Sess. Laws 113 (amending ALASKA STAT. § 09.43.010 by adding: "However, AS 09.43.010–09.43.180 do not apply to a labor-management contract unless they are incorporated into the contract by reference or their application is provided by statute.").

12. Alaska Supreme Court Order No. 176 (1974).

13. *See* A. Fred Miller, P.C. v. Purvis, 921 P.2d 610, 611 & n.1 (Alaska 1996) (quoting the 1973 resolution of the Alaska Bar Association recommending adoption of an arbitration fee dispute rule).

14. The National Conference of Commissioners on Uniform State Laws asserts that 49 jurisdictions have adopted the original Act. *See Uniform Arbitration Act Legislative Fact Sheet*, Uniform Law Commissioners, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-aa.asp (last visited Aug. 20, 2002). However, other sources contend that only 35 states have adopted the UAA. *See, e.g.*, Noah Rubins, *Time Limits for Confirmation of Arbitral Awards in the United States*, DISP. RESOL. J., Aug.-Oct. 2000, at 40, 43.

15. *See generally* Fairbanks Fire Fighters Assoc., Local 1324 v. City of Fairbanks, 48 P.3d 1165 (Alaska 2002) (arbitrability of issues); Miller v. Purvis, 921 P.2d 610 (Alaska 1996) (standard of review); Foster v. City of Fairbanks, 929 P.2d 658 (Alaska 1996) (remedies awarded by arbitrators); Public Safety Employees Ass'n v. Alaska, 902 P.2d 1334 (Alaska 1995) (reviewability).

the body of law on arbitration, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted a Revised Uniform Arbitration Act (RUAA) in August 2000.[16]

This Article provides background material on the primary issues that have been litigated regarding the gaps in the original UAA and the codification of that law in the RUAA. It also discusses whether the principles adopted in the RUAA are a good fit under Alaska Supreme Court case law. Part I provides background information on the Federal Arbitration Act (FAA), the UAA, and how courts have addressed many of the issues that have developed in arbitration. Part II highlights the key provisions of the RUAA that clarify the original act. Part III discusses how many of these issues have been addressed by the Alaska Supreme Court and compares the court's precedent to the solutions offered in the Revised Act. The Article concludes that the RUAA is consistent with Alaska case law and recommends that the Alaska legislature adopt the RUAA in substantial form to solidify arbitration law in Alaska and bring the state in line with arbitration developments currently underway across the nation.

## II. AN ARBITRATION PRIMER: THE ORIGINAL UNIFORM ARBITRATION ACT AND JURISPRUDENTIAL ATTEMPTS TO FILL ITS VOIDS

Arbitration and other ADR processes have become widely accepted and are being used in an increasing number of sectors, including commercial, insurance, employment, and family relationships. The centerpieces of arbitration are rooted in the FAA, enacted in 1925, and the model UAA, created in the 1950s and adopted by a majority of the states.[17]

### A. Brief History of Arbitration

Until the early twentieth century, the common law did not look favorably upon arbitration. Courts had historically refused to enforce arbitration agreements, likely due to a jealous guarding of their own power to resolve disputes.[18] Critics complained that arbitration was susceptible to unjust results, making it easy for a

16. REVISED UNIF. ARBITRATION ACT, 7 U.L.A. 6 (Supp. 2002) [hereinafter RUAA].

17. Some states have enacted arbitration statutes that are unique to that particular state. *See, e.g.*, ALA. CODE CIV. PRAC. § 6.6.1 (2001); CAL. CIV. P. CODE § 1280 (West 2002).

18. *See* Joseph T. Mclaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905, 906 & n.4 (1996) (citing various cases).

stronger party to take advantage of a weaker party.[19] Nevertheless, in 1920, New York became the first state to enact an arbitration statute.[20]

The general opposition to arbitration diminished greatly with the enactment of the FAA in 1925.[21] The FAA sought to place arbitration agreements on the same level of enforceability as contracts, noting that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[22] Early U.S. Supreme Court case law stressed that the FAA created a strong presumption in favor of arbitrability of disputes.[23] With the adoption of the FAA, courts could no longer refuse to enforce arbitration agreements.[24]

The UAA was completed by the NCCUSL in 1954 and approved in 1955.[25] Commentators have hailed the UAA as "one of the most successful Acts" ever promulgated by NCCUSL.[26] Decisions by the U.S. Supreme Court in the 1980s further contributed to a boom in the use of arbitration in commercial disputes.[27]

Court-ordered arbitration, unlike other forms of ADR, has been subjected to systematic empirical study for more than a decade. At first, researchers assessed the value and effectiveness of arbitration by comparing arbitrations to traditional jury or bench trials. They found that arbitration hearings, on average, were shorter than trials, involved less attorney preparation time, cost courts and private litigants less, and required less time in the

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19. Zhoadong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 478 nn.20-22 (1990).

20. *Id.* at 479; *see also* KELLOR, *supra* note 1, at 10.

21. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2000)). For a detailed examination of the legislative history of the FAA, see generally IAN R. MACNEIL, AMERICAN ARBITRATION LAW 83-121 (1992).

22. 9 U.S.C. § 2 (2000).

23. Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-21 (1974).

24. *See Scherk*, 417 U.S. at 510-11.

25. The UAA contains language similar to that found in the FAA. *See* Hecla Mining Co. v. Bunker Hill Co, 617 P.2d 861, 865 n.3 (Idaho 1980) (noting that the "proper scope of judicial review . . . does not vary significantly depending on which act applies").

26. Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 1 (2001).

27. *See* Hayford & Peeples, *supra* note 1, at 347-48 & n.8 (discussing evolution of decisions in the Court).

schedule queue.[28] Later research focused on the effects of arbitration on case processing and settlement behavior, concluding that, in general, arbitration programs do not divert cases from trial, but instead provide an alternative forum for cases that would have otherwise settled without a hearing.[29] Generally, litigants and their attorneys have reported high levels of satisfaction with the arbitration process and its results, regardless of whether they won or lost.[30] Arbitration has become the primary method to resolve disputes in many areas of the law.[31]

B. Primary Issues Addressed in Court Decisions Regarding the UAA

The UAA failed to provide for many issues that are commonly addressed in the realm of traditional courtroom dispute resolution. These unresolved issues include procedural issues such as consolidation and intervention and remedy-related issues such as attorney's fees and punitive damages. Thus, the courts have been left to decide whether such procedural or remedial options exist under the UAA. Since so much has been previously written on these major points, this subsection will provide only a brief overview of the major issues that have been subject to litigation under the original UAA.

1. *Arbitrability.* Challenges over what disputes are covered by an arbitration agreement frequently fill the dockets of state and federal courts. The matter typically at issue is whether a particular dispute is covered by the language of an arbitration agreement. Generally speaking, if the arbitration is conducted pursuant to the FAA, the courts will decide substantive arbitrability;[32] if the arbitration is under the UAA, the arbitrator makes those decisions,

28. ADR IN ALASKA, *supra* note 4, at 3; *see generally* Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217 (1989).

29. ADR IN ALASKA, *supra* note 4, at 3; *see generally* David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, DISP. RESOL. J., Feb. 1999, at 67; Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (1994) (analyzing early neutral evaluation in a California district); Robert J. MacCoun, *Unintended Consequences: A Cautionary Tale From New Jersey*, 14 JUST. SYS. J. 229 (1991).

30. Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in Alternative Dispute Resolution*, 15 OHIO ST. J. ON DISP. RES. 19, 55-56 (1999); Rosenberg & Folberg, *supra* note 29, at 1536; E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 980 (1990).

31. *See* Rosenberg & Folberg, *supra* note 29, at 1487-88.

particularly in situations where the arbitration agreement is ambiguous.[33] The key principle among these decisions is that the intentions of the parties, conveyed through the language in the arbitration agreement, should govern who determines arbitrability.[34] While originally considered to apply only to contract claims, several courts have held that various tort claims could be submitted for arbitration.[35]

2. *Arbitration Procedures.* One of the procedural holes in the original UAA related to consolidation of arbitration procedures. The UAA and the FAA, as well as a majority of state statutes, do not provide for consolidation. While state authorities are split on the issue of consolidation,[36] federal courts interpreting the FAA have refused to allow for consolidation where the arbitration agreement is silent on the matter.[37]

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32. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985); Dean Witter Reynolds, Inc. v. McCoy, 995 F.2d 649, 650 (6th Cir. 1993); Magallanes Inv., Inc. v. Circuit Sys., Inc., 994 F.2d 1214, 1217 (7th Cir. 1993).

33. *See, e.g.*, Orthopedic Physical Therapy Ctr. v. Sports Therapy Ctrs., Ltd., 621 A.2d 402, 403 (Me. 1993); Gold Coast Mall, Inc. v. Larmar Corp. 468 A.2d 91, 96 (Md. App. 1983).

34. *See, e.g.*, Elliot v. Inter-Ins. Exch. of Chi. Motor Club, 523 N.E.2d 1086, 1090 (Ill. App. 1988); Rogers Builders, Inc. v. McQueen, 331 S.E.2d 726, 731-32 (N.C. Ct. App. 1985) (concluding that the arbitrability of the claim depended "on the relationship of the claim to the subject matter of the arbitration clause").

35. *See generally* Thomas J. Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U. L. REV. 953 (1986) (citing cases relating to the arbitration of fraud, negligence, misrepresentation, breach of fiduciary duty, and misuse of partnership property).

36. Those state courts that permitted consolidation of arbitration proceedings did so on the grounds that allowing consolidation promoted efficiency in the adjudication of disputes and consistency in the final determination of disputes. *See, e.g.*, Litton Bionetics, Inc. v. Glen Constr. Co., 437 A.2d 208, 213 (Md. 1981); Grover-Diamond Assocs. v. Am. Arbitration Ass'n, 211 N.W.2d 787, 789-90 (Minn. 1973); County of Sullivan v. Edward L. Nezelek, Inc., 366 N.E.2d 72, 75 (N.Y. 1977); Exber v. Sletten Constr. Co., 558 P.2d 517, 524 (Nev. 1976). Those state courts opposed to permitting consolidation held that the absence of a provision in the arbitration agreement to permit consolidation was determinative. *See, e.g.*, Stop & Shop Cos. v. Gilbane Bldg. Co., 304 N.E.2d 429, 432 (Mass. 1973); J. Brodie & Son, Inc. v. George A. Fuller Co., 167 N.W.2d 886, 888 (Mich. Ct. App. 1969); Balfour, Guthrie & Co. v. Commercial Metals Co., 607 P.2d 856, 858 (Wash. 1980).

37. *See, e.g.*, Glencore, Ltd. v. Schnitzer Steel Prods. Co., 189 F.3d 264, 268 (2d Cir. 1999); Champ v. Siegel Trading Co., 55 F.3d 269, 274-77 (7th Cir. 1995); Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991); Baesler v.

Courts have also had to determine the role of the arbitrator in evaluating evidence. While the rules of evidence do not typically apply to arbitration proceedings, courts have vacated arbitration awards where an arbitrator's exclusion of evidence has led to the complete omission of critical evidence.[38] Generally, though, "[o]n questions of the admissibility of evidence, the arbitrator has great flexibility."[39] An arbitrator is empowered to exclude evidence,[40] and courts are usually reluctant to overturn an arbitration award as long as the arbitrator considered the substance of the excluded evidence in one form or another.[41]

3. *Awards and Remedies.* An arbitrator's power to award punitive damages under the original UAA has been an issue of considerable litigation and scholarly debate.[42] The original UAA and numerous state statutes are silent on punitive damages, leaving the courts to decide the issue. Generally, courts will permit an award of punitive damages as long as the arbitration agreement does not contain an express prohibition of such awards.[43] Courts are divided, however, on whether an arbitration agreement may validly limit or prohibit the award of certain types of damages.[44]

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Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990); Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989).

38. *See, e.g.*, Gevant v. New England Fire Ins. Co., 118 N.E.2d 574, 577 (N.Y. 1954); Smaligo v. Fireman's Fund Ins. Co., 247 A.2d 577, 580 (Pa. 1968).

39. Racine v. State, Dep't of Trans. & Pub. Facilities, 663 P.2d 555, 558 (Alaska 1983).

40. *See* Atlas Floor Covering v. Crescent House & Garden, Inc., 333 P.2d 194, 197-98 (Cal. Dist. Ct. App. 1958) (holding that arbitrators did not abuse their discretion in refusing to hear certain evidence).

41. *See* Allsate Ins. Co. v. Fioravanti, 299 A.2d 585, 588 (Pa. 1973) (holding that an arbitrator's refusal to allow the insurance company to submit a memorandum on the controlling legal issue did not deny the company a fair hearing because it had adequate opportunity to address the issue during the proceeding); L.R. Foy Const. Co. v. Spearfish Sch. Dist., 341 N.W.2d 383, 386 (S.D. 1983) (holding that an arbitrator's exclusion of the company's project manager as a witness did not deny the company a fair hearing because the arbitrator heard the project manager's proposed testimony from the company president).

42. *See generally* Stipanowich, *supra* note 35 (discussing punitive damages under the FAA and state law, including a discussion on the Commercial Arbitration Rules of the American Arbitration Association).

43. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58-63 (1995).

44. *Compare* Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1059-60 (11th Cir. 1998) (holding that arbitration agreements cannot proscribe an award for damages that is provided by statute) *with* Baravati v. Josephthal, Lyon

Given the UAA's silence on the issue, the primary factors in determining whether punitive damages are permissible in a given case are the language of the arbitration agreement, the guidelines of the association providing arbitration services, and the state law that governs the arbitration agreement. For example, many arbitration agreements may provide for arbitration according to the rules of a particular organization, such as the American Arbitration Association (AAA). The AAA's Commercial Arbitration Rules permit an arbitrator to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties."[45] Many courts have concluded that these rules permit an award of punitive damages.[46]

4. *Judicial Review.* The UAA provides for judicial review of arbitration awards on several grounds.[47] The key issues litigated under the original UAA have related to arbitrator misconduct or claims that an arbitrator's awards exceeded his authority, either under the UAA or the arbitration agreement. Claims of arbitrator misconduct under section 12 of the UAA typically involve allegations of corruption, fraud, undue means, evident partiality, or refusal to hear evidence as grounds for vacating an award.[48] Claims that an arbitrator has exceeded his authority usually arise in situa-

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& Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) ("[P]arties . . . can stipulate that punitive damages will not be awarded.").

45. AAA Commercial Arbitration Rules, R-45(a), *available at* http://www.law.berkeley.edu/faculty/ddcaron/Courses/rpid/rp04048.html (last visited Aug. 20, 2002).

46. *See* Kenneth R. Davis, *A Proposed Framework for Reviewing Punitive Damages Awards of Commercial Arbitrators*, 58 ALB. L. REV. 55, 66 & n.99 (1994).

47. *See* UAA §§ 12(a)(1) (awards "procured by corruption, fraud or other undue means"), 12(a)(2) (cases of evident partiality, corruption, or prejudicial misconduct by an arbitrator), 12(a)(3) (where an arbitrator exceeds the arbitrator's powers), 12(a)(4) (where an arbitrator refuses to postpone the hearing upon a showing of sufficient cause, refuses to consider evidence material to the controversy, or otherwise fails to conform with the UAA), and 12(a)(5) (where there was no agreement to arbitrate).

48. *See* Henley v. Econ. Fire & Cas. Co., 505 N.E.2d 1091, 1094-95 (Ill. App. Ct. 1987) (requiring vacatur of arbitrator award on several grounds, including the arbitrators' refusal to permit the plaintiff to respond to a motion, the failure of one of the arbitrators to participate in the plaintiff's motion for reconsideration, the improper characterization of the arbitrators' decision as unanimous, and repeated unsuccessful attempts to conform the award to UAA delivery requirements).

tions where an arbitrator decides a matter not submitted to him under the arbitration agreement.[49]

Despite these provisions, courts have found that judicial review of arbitration awards is extremely limited, reasoning that the parties contracted for the arbitrator's skills and abilities, not those of the courts.[50] Accordingly, courts have held that arbitration awards are presumptively valid, with all doubts being resolved in favor of upholding the award.[51]

## III. ADOPTION OF THE REVISED UNIFORM ARBITRATION ACT: CODIFYING THE COMMON LAW

After nearly forty years, the UAA was in need of some modification in light of the growing use of arbitration and the increasing complexity of controversies. The National Conference of Commissioners on Uniform State Laws (NCCUSL) undertook a five-year process to revise the UAA, taking comments and recommendations from many arbitration organizations, including the Tort and Insurance and Alternative Dispute Committees of the ABA.[52]

During its annual meeting on August 4, 2000, the NCCUSL completed drafting the RUAA. This revision identifies the gaps in the UAA regarding modern arbitration, the ever developing preemption doctrine, and the expansion of e-commerce. It also clarifies many ambiguous sections of the original UAA.[53]

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49. Alaska's arbitration statute provides that a party may seek vacatur of an award if "the arbitrators exceeded their powers." ALASKA STAT. § 09.43.120(a)(3) (Michie 2001). When an arbitrator decides an issue that was not submitted to it by the parties, either through explicit language in the arbitration agreement or in the choice of applicable arbitration guidelines, it has exceeded its authority. *See* Downing & James, *supra* note 3, at 645 n.186. This "exceeded authority" standard is invoked "particularly often." Hayford & Peeples, *supra* note 1, at 359 (discussing cases).

50. *See, e.g.*, United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960) ("It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.").

51. *See, e.g.*, Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233, 257 (W.D. Mo. 1976); Local 1466 Int'l Bhd. of Elec. Workers v. Columbus and S. Ohio Elec. Co., 455 F. Supp. 471, 473 (S.D. Ohio 1978).

52. *See* Andrew D. Ness, *Legislative Update: The Revised Uniform Arbitration Act of 2000*, CONSTR. LAWYER 35, Fall 2001.

53. RUAA, prefatory note at 2.

The RUAA also attempts to address many questions that the UAA did not, such as the initiation of proceedings, criteria for arbitration, the respective authority of courts and arbitrators, the duty of the arbitrator to ensure the integrity of the arbitration process, the powers of the arbitrator, the enforcement of arbitration awards, the scope of remedies available, and the proper use of technology.[54] The RUAA empowers arbitrators to control the arbitration process and promotes arbitration by increasing its efficiency, while holding sacred a party's right to freedom of contract.[55]

Although the RUAA does not significantly alter the UAA or the arbitration process,[56] it does make an effort to codify the common law that has developed in those areas that the UAA previously failed to address. The RUAA is an effort to prescribe judicial review while promoting increased arbitration, thus placing arbitration on equal footing with traditional litigation. Much of what is codified in the RUAA represents an amalgamation of trends supporting alternative dispute systems.

The RUAA gives primary consideration to the arbitration agreements into which parties have entered, deferring to the consensual nature of contract and affording parties free reign in com-

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54. The prefatory note states:

> [The UAA] provided no guidance as to (1) who decides the arbitrability of a dispute and by what criteria; (2) whether a court or arbitrators may issue provisional remedies; (3) how a party can initiate an arbitration proceeding; (4) whether arbitration proceedings may be consolidated; (5) whether arbitrators are required to disclose facts reasonably likely to affect impartiality; (6) what extent arbitrators or an arbitration organization are immune from civil actions; (7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding; (8) whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences and otherwise manage the arbitration process; (9) when a court may enforce a preaward ruling by an arbitrator; (10) what remedies an arbitrator may award, especially in regard to attorney's fees, punitive damages or other exemplary relief; (11) when a court can award attorney's fees and costs to arbitrators and arbitration organizations; (12) when a court can award attorney's fees and costs to a prevailing party in an appeal of an arbitrator's award; (13) which sections of the UAA would not be waivable, an important matter to insure fundamental fairness to the parties will be preserved, particularly in those instances where one party may have significantly less bargaining power than another; and (14) the use of electronic information and other modern means of technology in the arbitration process.

*Id.*

55. *Id.*

56. Ness, *supra* note 52, at 1.

posing arbitration agreements.[57] Further, the RUAA empowers arbitrators by providing them with the means to take control of the parties and the arbitration process and conferring increased finality on arbitration awards.[58]

Table 1 provides a detailed overview of the most pertinent changes and provisions embodied in the RUAA, focusing on "new" provisions and "clarifying" provisions. New provisions (indicated by a "*") are those that are new in comparison to the provisions of the original UAA, largely reflecting the body of common law that has developed in the nearly fifty years since the promulgation of the original UAA. The clarifying provisions (indicated by a "**") are those in which the RUAA merely eliminated the ambiguities under the original UAA and incorporated several updates to the UAA as developed through case law under the UAA and the FAA.

A. New Provisions

1. *Section 9—Notice and Initiation of Proceedings.* Section 9 of the RUAA is a new provision requiring that all parties to a contract be given notice of pending arbitration proceedings and the legal claims involved.[59] As basic as this notice requirement may appear, the UAA never provided any indication of the necessary steps to commence proceedings.

Under the RUAA, a party initiates arbitration proceedings by giving notice in writing to all signatories to an arbitration agreement.[60] The notice must contain the "nature of the controversy and remedies sought."[61] Parties are free to contract regarding how notice is to be satisfied and what content must be provided, so long as the contractual notice provisions are reasonable.[62] In the past, parties initiated arbitration via regular mail by making a demand for

57. RUAA, prefatory note at 2. This dedication to the party's contractual autonomy and ability to choose its arbitral fate results in a fairer outcome.

58. *Id.*

59. *Id.* § 9(a).

60. *Id.* An example would be a multi-party construction contract involving general contractors and subcontractors. When a dispute arises between some but not all of the subcontractors, notice of arbitration should be provided to all party signatories of the agreement and not just to the party against whom a claim is filed. *Id.* cmt. 4.

61. *Id.*

62. *Id.* § 4(b)(2) ("[B]efore a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not . . . agree to unreasonably restrict the right under Section 9 to notice of the initiation of an arbitration proceeding.").

TABLE 1: COMPARISON OF RUAA AND UAA SECTIONS

| Revised Uniform Arbitration Act | Uniform Arbitration Act |
|---|---|
| § 1 Definitions* | UAA § 17 for definition of "court" |
| § 2 Notice* | No corresponding UAA provision |
| § 3 When Act applies* | UAA § 3, § 20, and § 25 |
| § 4 Effect of Agreement to Arbitrate; Non-Waivable Provisions* | No corresponding UAA provision |
| § 5 [Application] for Judicial Relief | UAA § 16 |
| § 6 Validity of Agreement** | UAA § 1 |
| § 7 [Motion] to Compel or Stay Arbitration | UAA § 2 |
| § 8 Provisional Remedies* | No corresponding UAA provision |
| § 9 Initiation of Arbitration* | No corresponding UAA provision |
| §10 Consolidation of Separate Arbitration Proceedings* | No corresponding UAA provision |
| § 11 Appointment of Arbitrator; Service as a Neutral Arbitrator | UAA § 3 |
| § 12 Disclosure By Arbitrator* | No corresponding UAA provision |
| § 13 Action by Majority | UAA § 4 |
| § 14 Immunity of Arbitrator; Competency to Testify; Attorney's Fees and Costs* | No corresponding UAA provision |
| § 15 Arbitration Process** | UAA § 5 |
| § 16 Representation By Lawyer | UAA § 6 |
| § 17 Witnesses; Subpoenas; Depositions; Discovery** | UAA § 7 |
| § 18 Judicial Enforcement of Preaward Rulingby Arbitrator* | No corresponding UAA provision |
| § 19 Award | UAA § 8 |
| § 20 Change Award By Arbitrator | UAA § 9 |
| § 21 Remedies; Fees and Expenses ofArbitration Proceeding** | UAA 10 |
| § 22 Confirmation of Award | UAA § 11 |
| § 23 Vacating Award One additional basis for vacater | UAA § 12 |
| § 24 Modification or Correction of Award | UAA § 13 |
| § 25 Judgement on Award: Attorney's Fees and Litigation Expenses* | No corresponding UAA provision for attorney fees, but see UAA §§ 14 and 15 regarding judgment on award |
| § 26 Jurisdiction | UAA § 17 |
| § 27 Venue | UAA § 18 |
| § 28 Appeals | UAA § 19 |
| § 29 Uniformity of Application and Construction | UAA § 21 |
| § 30 Relationship to Electronic Signatures in Global and National Commerce Act* | No corresponding UAA provision |
| § 31 Effective Date | UAA § 3, § 20, and § 25 |
| § 32 Repeal | UAA § 3, § 20, and § 25 |
| § 33 Savings Clause | UAA § 3, § 20, and § 25 |
| * – New Section<br>** – Partially New Section | |

arbitration or notice of intent to arbitrate with the assistance of an arbitration organization.[63] Most arbitration organizations[64] have their own methods of serving notice. Some organizations require more formality than others.[65] This new initiation section provides flexibility in the notice requirement, leaving it to parties to design their own methods or rely on the ordinary practice of arbitration organizations.

In the event no method of notice is provided by the contract, parties are to rely on certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action.[66]

Any notice that is lacking or insufficient can be challenged.[67] Challenging an arbitration award under the RUAA requires a showing that a lack of notice substantially prejudiced a party.[68] Accordingly, a party's appearance at the hearing waives any objections to insufficient notice or lack of notice.[69]

2. *Section 12—Disclosure.* Section 12 of the RUAA creates an affirmative duty for arbitrators to disclose any conflicts of interest that may call into question the integrity of the arbitration process.[70] Because the RUAA is designed to fortify arbitrators with

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63. *Id.* § 9 cmt. 3.

64. "Arbitration organization" is defined as "an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator." *Id.* § 1(1). This definition section in the RUAA is a new feature for which no corresponding UAA section exists (except with reference to "court" at UAA section 17). *See supra* Table 1.

65. RUAA § 9 cmt. 3.

66. *Id.* § 9(a). The term "obtained" means that the receipt was returned to the sender regardless of whether it bears the signature of the recipient acknowledging receipt. *Id.* § 9 cmt. 3.

67. *Id.* § 9(b) (stating that "unless a person objects for lack or insufficiency of notice under Section 15(c) not later than the beginning of the arbitration hearing, the person by appearing at the hearing waives any objection to lack of or insufficiency of notice").

68. *Id.* § 23. Section 23 is discussed in more detail *infra* Part III.B.5.

69. *Id.*; *see also id.* § 9 cmt. 6 ("If the appearance at the arbitration hearing is for the purpose of raising the objection as to notice and such objection has not otherwise been waived, the party's appearance for the purpose of raising that objection should not be construed as untimely.").

70. *Id.* § 12(a). The UAA did not contain such a requirement. In general, most arbitrators have an ethical duty to disclose under the Code of Ethics for Arbitrators. AMERICAN BAR ASSOCIATION & AMERICAN ARBITRATION

new powers that may or may not have to be clarified, it is important that the RUAA also emphasize the corresponding need for fairness in all proceedings.[71]

The new section 12 attempts to codify the developing common law that arbitrators have a duty to disclose conflicts of interest. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[72] the U.S. Supreme Court required arbitrators to disclose to the parties any interests or relationships that "might create an impression of possible bias."[73] However, this standard has been much in dispute. A split of authority exists among the states as to what is the appropriate standard for disclosure. Some courts require more than an "appearance of bias" but less than that required for "actual bias,"[74] while others require a showing of "evident partiality."[75] The

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ASSOCIATION, CODE OF ETHICS FOR COMMERCIAL ARBITRATORS (1977). The RUAA requirement likely exceeds the ABA/AAA requirement.

71. *See* Drinane v. State Farm Mut. Auto. Ins. Co., 606 N.E.2d 1181, 1183 (Ill. 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.").

72. 393 U.S. 145 (1968).

73. In *Commonwealth Coatings*, an arbitrator did not disclose his close financial relationship with one of the parties to the proceeding. *Id.* at 146. The supposedly neutral arbitrator ran an engineering consulting business and served as a consultant on construction projects. *Id.* One of his regular customers was a party to the arbitration. *Id.* After an award was issued in favor of the party who had the business relationship with the arbitrator, the opposing party became aware of the relationship and sought to vacate the award. *Id.* The Court held that the arbitrator was required to disclose the prior relationship in these circumstances. *Id.* at 150. However, the Court did not agree as to what general standard of disclosure should apply. Writing for the majority, Justice Black articulated a standard requiring arbitrators to disclose any interest or relationship that "might create an impression of possible bias." *Id.* at 149. The concurring opinion by Justice White required something more than a trivial business relationship to trigger the disclosure requirement. *Id.* at 150-51 (White, J., concurring). The dissenting opinion by Justice Fortas contended that there was no actual partiality based upon the evidence presented. *Id.* at 152-55 (Fortas, J., dissenting).

74. *See, e.g.*, Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993); Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992); Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989); Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).

75. *See, e.g.*, Al-Harbi v. Citibank, N.A., 85 F.3d 680, 683 (D.C. Cir. 1996); Olson v. Merrill Lynch, Pierce, Fenner & Smith, 51 F.3d 157, 159-60 (8th Cir. 1995); Schmitz v. Zilveti, 20 F.3d 1043, 1049 (9th Cir. 1994); Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197, 1200-01 (11th Cir. 1982); Burlington N. R.R. Co. v. TUCO Inc., 960 S.W.2d 629, 630 (Tex. 1997).

RUAA resolves the ambiguities created by *Commonwealth Coatings* by adopting a reasonable person standard for the purpose of determining the existence of a duty to disclose.[76]

The question remains: "What type of interests or relationships need to be disclosed?"[77] This area has proven to be very fact-intensive and the RUAA attempts to draw some boundaries with its new language. Section 12 prevents parties from arguing that arbitrators do not have an affirmative duty to disclose[78] and sets forth "the affirmative requirements to assure that parties [have] access to all information that might reasonably affect the potential arbitrator's neutrality."[79] Section 12 requires that an arbitrator disclose any known[80] facts likely to affect impartiality to all parties, representatives, counsel, witnesses, and all other arbitrators to the proceedings.[81] This is a continuing duty[82] and arbitrators are required to make a reasonable inquiry in order to determine whether any conflicts exist.[83] It is worth noting that there are some states that

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76. *See* Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989) (holding that the standard is whether a reasonable person would conclude the arbitrator is partial); McNaughton & Rodgers v. Besser, 932 P.2d 819, 822 (Colo. Ct. App. 1996) (holding that the duty to disclose arises where a reasonable person is persuaded that arbitration is likely to be partial).

77. *See* RUAA § 12 cmt. 2. The Drafting Committee removed the requirement of "any" interest or relationship and substituted with "a[n]" interest or relationship, supposedly eliminating *de minimis* interests or relationships from becoming an issue. *Id.*

78. Nasca v. State Farm Mut. Auto. Ins. Co., 12 P.3d 346, 349-50 (Colo. Ct. App. 2000).

79. RUAA § 12 cmt. 2.

80. Section 1 of the RUAA defines "knowledge" as actual knowledge.

81. Section 12(a) of the RUAA provides:

> Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including: (1) a financial or personal interest in the outcome of the arbitration proceeding; and (2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrators [sic].

82. *Id.* § 12(b) ("An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.").

83. *Id.* § 12(a).

still have stricter disclosure requirements than those provided by the RUAA.[84]

When in doubt, disclosure should be made using reasonable, good judgment. "The arbitration process functions best when an amicable and trusting atmosphere is preserved .... This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties."[85] It is better to determine an arbirator's impartiality early in the process rather than create a source of contentious dispute in the post-award stage.[86] Since the RUAA makes disclosure explicit, it is likely to reduce, at least hopefully, the amount of vacatur litigation.[87]

The RUAA establishes two new standards for arbitrators with respect to waiver of disclosure requirements. A "non-neutral" or "party-appointed" arbitrator[88] may not have a duty to disclose if the parties so provide in their agreement.[89] However, if a non-neutral arbitrator is required to disclose and fails to do so, there is no automatic vacatur of an award issued by that arbitrator.[90] The failure to disclose must be shown to be prejudicial to the complaining party.[91] Even where a failure to disclose is deemed to be prejudicial based on the arbitrator's "evident partiality," the general outcome is to order a new arbitration hearing.[92] Conversely,

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84. *See* CAL. CIV. PROC. CODE §§ 1281.6, 1281.9, 1281.95, 1297.121, 1297.122 (West Supp. 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 172.056 (Vernon Supp. 2002).

85. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 151 (1968) (White, J. and Marshall, J., concurring).

86. Burlington N. R.R. Co. v. TUCO, Inc., 960 S.W.2d 629, 633 (Tex. 1997).

87. *See* Washburn v. McManus, 895 F. Supp. 392, 400 (D. Conn. 1994) (holding that courts should not encourage unsuccessful parties in their efforts to seek insubstantial, tenuous relationships that might form the basis for some theoretically plausible yet completely unsubstantiated cry of bias).

88. *See* RUAA §§ 11 cmt. 1, 12 cmt. 5.

89. There is no prohibition on varying or altering the disclosure requirement. *But see id.* § 4(b)(3) (noting that a party to an arbitration agreement may not "agree to unreasonably restrict the right under Section 12 to disclosure of any facts by a neutral arbitrator").

90. *See* RUAA § 12(d) ("If the arbitrator did not disclose a fact as required by [section 12], upon timely objection by a party, the court ... *may* vacate an award.") (emphasis added).

91. *See id.* § 23(a)(2); Creative Homes & Millwork, Inc. v. Hinkle, 426 S.E.2d 480, 483 (N.C. Ct. App. 1993).

92. *See, e.g.*, Umana v. Swidler & Berlin, Chartered, 745 A.2d 334, 339 (D.C. 2000).

neutral arbitrators may have disclosure requirements modified, but only to a reasonable extent.[93] Thus, the NCCUSL RUAA Drafting Committee (Drafting Committee) was mindful of party autonomy and the freedom of choice in the negotiation process.[94] Parties may agree to higher or lower standards for disclosure and may contract for the appointment of an arbitrator or arbitrators on a tripartite panel.[95]

Another significant difference created by section 12 of the RUAA is that a neutral arbitrator is "presumed"[96] to act with "evident partiality."[97] "The reason 'evident partiality' is a grounds for vacatur only for a neutral arbitrator is because non-neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them. As such, these non-neutral, party-appointed arbitrators are not expected to be impartial in the same sense as neutral arbitrators."[98] However, this presumption is rebuttable.[99]

If a neutral arbitrator fails to disclose a known, direct, and material interest or a known, existing,[100] and substantial relationship, it

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93. RUAA § 4(b)(3) (stating that a party to an agreement may not "agree to unreasonably restrict the right under Section 12 to disclosure of any facts by a neutral arbitrator").

94. *See id.* § 11 cmt. 1. UAA section 3 provides for the appointment of arbitrators by the court. It also provides that parties may select arbitrators in their agreement. UAA § 3 n.3. RUAA section 11 maintains this feature of the UAA.

95. The Drafting Committee was aware that parties who select arbitration by contract are foregoing a jury trial and accepting limited judicial review in exchange for a method of speedy resolution that costs less and provides for one's own choosing of a decision-maker, one likely having expertise in a given field. Parties usually choose arbitrators based on their professional, business, or commercial expertise, or their relationship to the parties. *See* RUAA § 11 cmt. 1, § 12 cmt. 1.

96. *Id.* § 12(c) ("An arbitrator appointed as a neutral arbitrator who does not disclose a *known, direct, and material interest* in the outcome of the arbitration proceeding or a *known, existing, and substantial relationship* with a party is presumed to act with evident partiality under Section 23(a)(2)") (emphasis added); *see also* Burlington N. R.R. Co. v. TUCO, Inc., 960 S.W.2d 629, 636 (Tex. 1997) ("We emphasize that this evident partiality is established from the *nondisclosure itself*, regardless of whether the nondisclosed information necessarily establishes partiality or bias.").

97. RUAA § 23(a)(2)(A) (stating that courts should vacate an award where there was "evident partiality by an arbitrator appointed as a neutral arbitrator").

98. *Id.* § 23 cmt. 1.

99. *Id.* § 12 cmt. 4 ("[I]t is then the burden of the party defending the award to rebut the presumption by showing that the award was not tainted by the nondisclosure or there in fact was no prejudice.").

100. It appears that a past relationship would not support such a presumption because there is a slight difference in the wording chosen by the Drafting Commit-

is then presumed that the arbitrator acts with "evident partiality" and any award is subject to vacatur.[101] How big a role this rebuttable presumption plays will depend on the types of interests or relationships involved and whether the standard for the presumption to attach appears to be a high one.[102] Some states impose even stricter disclosure requirements on arbitrators.[103]

Finally, all challenges based on an arbitrator's alleged impartiality are subject to any contract provision detailing methods of challenge and are considered conditions precedent.[104] Timely objections are required before any challenge or review for vacatur is initiated.[105]

3. *Section 10—Consolidation.* The RUAA takes a major step by adding an entirely new section related to the consolidation of multi-party disputes and separate arbitration proceedings. Section 10 provides that, upon motion of one of the parties, a court may order consolidation of some or all claims in situations where there are separate arbitration agreements or proceedings between the same parties or where one party is involved in a separate arbitration agreement or proceeding with a third party.[106] However, in order to consolidate, it must be shown that: (1) the claims arise "in

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tee regarding what is to be disclosed. RUAA sections 12(a)(1) and (2) require the arbitrator to have "a financial or personal interest in the outcome" or "an existing or *past* relationship with any of the parties" before the award can be subject to vacatur. Section 12(e), however, requires the arbitrator to have a "known, direct, and material interest" or a "known, existing, and substantial relationship."

101. *Id.* § 23(a)(2)(A).

102. RUAA sections 12(a)(1) and (2) are worded differently than section 12(e).

103. *See* CAL. CIV. PROC. CODE §§ 1281.6, 1281.9, 1281.95, 1297.121, 1297.122 (West. Supp. 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 172.056 (Vernon Supp. 2002). On a related note, on July 22, 2002, the National Association of Securities Dealers, Inc. (NASD) and the New York Stock Exchange filed suit against the California Judicial Council and its members. Both arbitration organizations are seeking a declaration that they are exempt from the California arbitrator disclosure standards that were implemented in that state on July 1, 2002. *See* NASD, NASD Seeks Exemption from California Arbitration Rules, The Neutral Corner, *at* http://www.nasdadr.com/neutral_corner/0802_default.asp (last visited October 20, 2002).

104. RUAA section 12(f) reads:

> If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a [motion] to vacate an award on that ground under Section 23(a)(2).

105. *Id.* § 12(c).

106. *Id.* § 10(a)(1).

substantial part" from the same transaction or series of transactions; (2) the presence of a common issue of law or fact creates the possibility of conflicting decisions in separate arbitration proceedings; and (3) any prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay, prejudice, or hardship to the party opposing consolidation.[107]

Consolidation has been a source of controversy and conflict.[108] There are few state statutes that address consolidation[109] and most arbitration agreements do not provide for it. It is hardly a reality that all parties are signatories to one agreement document, although it does happen.[110] However, consolidation has been required in some cases for various reasons implicating the interests of efficiency in arbitration and the prevention of conflicting awards.[111] The current trend under the FAA holds that where parties do not expressly agree on consolidation there is no requirement to con-

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107. *Id.* § 10(a)(2)-(4).

108. *Id.* § 10 cmt. 1.

109. *See, e.g.*, CAL. CIV. PROC. CODE § 1281.3 (West 2002); GA. CODE ANN. § 9-9-6 (2002); MASS. GEN. LAWS ch. 251, § 2A (2002); N.J. STAT. ANN. § 2A-23A-3 (West 2002); S.C. CODE ANN. § 15-48-60 (Law. Co-op. 2002); UTAH CODE ANN. § 78-31(a)-(9)(2002).

110. *See* Hartford Accident Indem. Co. v. Swiss Reinsurance American Corp., 246 F.3d 219 (2d Cir. 2001).

111. *See* Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co. of Can., 210 F.3d 771, 775 (7th Cir. 2000) (holding that consolidation was appropriate when both textual and practical arguments favored it); New England Energy v. Keystone Shipping Co., 855 F.2d 1, 5-6 (1st Cir. 1988) (holding that the FAA did not preclude consolidation when the agreement was silent on the issue and the state law provided for consolidation); Litton Bionetics, Inc. v. Glen Constr. Co., 437 A.2d 208, 217-18 (Md. 1981) (holding that a circuit court is empowered by the state UAA to order consolidation); Grover-Diamond Assoc. v. Am. Arbitration Ass'n, 211 N.W.2d 787, 790 (Minn. 1973) (holding that consolidation was appropriate where parties chose the same arbitrator, the arbitration agreement did not prohibit joint arbitrations, and there was no prejudice); Exber, Inc. v. Sletten Constr. Co., 558 P.2d 517, 524 (Nev. 1976) (holding that consolidation is appropriate when evidence, witnesses, and legal issues were the same in both disputes and there was no showing of prejudice); Polshek v. Bergen County Iron Works, 362 A.2d 63, 68-70 (N.J. Super. Ct. Ch. Div. 1976) (holding that consolidation was appropriate even without an authorizing statute because of common issues and lack of prejudice); County of Sullivan v. Edward L. Nezelek, Inc., 366 N.E.2d 72, 75 (N.Y. 1977) (holding that a trial court was within its discretion to order consolidation when there was a common contact to the two claims and consolidations would provide a more consistent result); Plaza Dev. Serv. v. Joe Harden Builder, Inc., 365 S.E.2d 231, 233 (S.C. Ct. App. 1988) (holding that consolidation was appropriate where there was no finding of prejudice).

solidate.[112] Despite the fact that a majority of federal appellate courts have ruled against consolidation,[113] the RUAA makes an effort to encourage the use of arbitration in multi-party scenarios similar to judicial consolidation of litigation proceedings.[114] Where common issues of fact and law are present, section 10 allows courts to order consolidation.[115]

4. *Section 4—Waivable Provisions.* Section 4 of the RUAA in effect provides that parties entering into arbitration agreements are free to arrange such contracts as they wish, subject to minimal prohibitions.[116] As such, section 4 operates as a default statute and should be referred to when analyzing the various ways of designing an arbitration clause or agreement.[117] No doubt there is the temptation to craft an agreement heavily in favor of one's own interest. Those who do so should take caution because there is always the increased likelihood of a vacatur challenge.

In general, the RUAA permits parties to vary their agreements in any manner and at any time subsequent to the initial agreement as long as the integrity of arbitration remains intact.[118]

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112. *See* Glencore, Ltd. v. Schnitzer Steel Prod. Co., 189 F.3d 264, 267 (2d Cir. 1999) ("[T]here is no source of authority in either the FAA or the Federal Rules of Civil Procedure for the district court to order consolidation absent authority granted by the contracts."); *see also* 3 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 33.3 (1999). *But see* Blue Cross of Cal. v. Superior Court, 78 Cal. Rptr. 2d 779, 793 (Cal. Ct. App. 1998) (holding that the FAA does not preempt state law on issues of procedure, including consolidation).

113. *See* Champ v. Siegel Trading Co. Inc., 55 F.3d 269, 277 (7th Cir. 1995); U.K. v. Boeing Co., 998 F.2d 68, 69 (2d Cir. 1993); Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991); Baesler v. Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990); Prospective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989); Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984); Rolls-Royce Indus. Power, Inc. v. Zurn EPC Services, Inc., 2001 WL 1397881, at *6 (D. Ill. 2001).

114. *See* Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co. of Can., 210 F.3d 771, 774 (7th Cir. 2000) (stating that "a court can in appropriate circumstances consolidate cases before it").

115. RUAA § 10(a)(3).

116. *Id.* § 4 ("A party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of [the RUAA] to the extent permitted by law.").

117. *See id.* § 4 cmt. 1.

118. *See id.* § 6 (stating that although the initial agreement shall be in a "record," subsequent oral or written modifications are permitted); *see generally id.* § 6 cmt. 1; Premier Technical Sales, Inc. v. Digital Equip. Corp., 11 F. Supp. 2d 1156 (N.D. Cal. 1998); Cambridgeport Sav. Bank v. Boersner, 597 N.E.2d 1017 (Mass.

The RUAA demands that parties to a contract be responsible for their consensual arrangements. There is no doubt that parties on the wrong end of an arbitration agreement will challenge such agreements or arbitration provisions. Most will fail,[119] but there is a possibility for success where an agreement runs contrary to fundamental fairness, takes away statutory rights, or undermines an arbitrator's ability to govern the arbitration proceedings.[120] Section 4 explicitly prohibits parties from waiving or varying the effect of the RUAA in a number of substantive areas. Under the RUAA, parties to an arbitration agreement may not contract so as to waive their respective rights to seek judicial relief,[121] to appeal,[122] to be

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1992); Pellegrene v. Luther, 169 A.2d 298 (Pa. 1961); Pac. Dev., L.C. v. Orton, 982 P.2d 94 (Utah Ct. App. 1999).

119. *See* RUAA § 6 cmt. 7 ("Despite some recent developments to the contrary, courts do not often find contracts unenforceable for unconscionability.").

120. *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) (holding that an arbitration agreement can be invalid when one party promulgates rules that are egregiously unfair); Shankle v. B-G Maint. Mgmt., Inc., 163 F.3d 1230, 1233 (10th Cir. 1999) (holding an employee's discrimination claim not subject to arbitration where the arbitral forum is substantially limited by having to pay a portion of the arbitrator's fee); Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (holding an employee was not required to arbitrate Title VII claim when the agreement limited his damages below the statutory minimum); Armendariz v. Found. Health Psychcare Serv. Inc., 6 P.3d 669, 683 (Cal. 2000) (noting that an arbitration agreement limiting an employee's remedies under state anti-discrimination claims may be void); Engalla v. Permanente Med. Group, 938 P.2d 903, 916-17 (Cal. 1997) (holding that a health maintenance organization could not compel arbitration when it fraudulently induced participant to agree to arbitrate, misrepresented arbitration selection process, and forced delays making participant waive arbitration right); Gonzalez v. Hughes Aircraft Employees Fed. Credit Union, 83 Cal. Rptr. 2d 763, 765 (Cal. Ct. App. 1999) (holding an arbitration contract unenforceable because of persuasive procedural and substantive unconscionability); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 152 (Cal. Ct. App. 1997) (finding unconscionable an arbitration clause that was one-sided, reserved litigation rights to employer but not employee, had shorter statute of limitation for employee, and limited damages); Alamo Rent A Car, Inc. v. Galarza, 703 A.2d 961, 966 (N.J. Super. Ct. App. Div. 1997) (holding employment discrimination claim not subject to arbitration because it was not clearly delineated in agreement as subject to arbitration); Arnold v. United Co. Lending Corp., 511 S.E.2d 854, 862 (W. Va. 1998) (holding unconscionable an arbitration provision when consumer waived right to judicial review in consumer loan agreement while reserving lender's right to judicial review).

121. RUAA §§ 4(b)(1), 5(a) ("Except as otherwise provided in Section 28, an [application] for judicial relief under this [Act] must be made by [motion] to the court and heard in the manner provided by law or rule of court for making and hearing [motions]."). The bracketed sections are provided by the RUAA to ac-

represented by an attorney,[123] to file a motion to compel or stay the arbitration,[124] to seek confirmation of an award,[125] to move to vacate an award,[126] or to request modification or correction of an award.[127] Additionally, arbitration agreements may not limit the immunity of an arbitrator or an arbitration organization from suit[128] or restrict an arbitrator's power to issue pre-hearing orders,[129] to issue subpoenas and permit depositions of parties,[130] or to modify or correct an award.[131] Finally, contracting parties may not structure their ar-

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commodate differences in initiating arbitration in different states. Some states allow the filing of petitions or complaints with or without motions or applications. The terms "application" and "motion" have been bracketed throughout the RUAA for states to substitute where appropriate and does not attempt to alter the already established practice of each state.

122. *Id.* §§ 4(b)(1), 28. The RUAA keeps intact the right to appeal as it appears in the UAA. Appeals may be taken from orders denying a motion to compel arbitration, granting a stay of arbitration, confirming or denying confirmation of an award, modifying or correcting an award, vacating an award without directing a rehearing, or entering a final judgment pursuant to the RUAA. *See id.* § 28 (a)(1)–(6).

123. *Id.* §§ 4(b)(4), 16. Under UAA section 6, an attempt to waive right to be represented by an attorney prior to the proceedings or hearing is ineffective. The RUAA is somewhat different in that it allows an employer or a labor organization to waive the right to representation in a labor arbitration. *Id.* § 4(b)(4).

124. *Id.* §§ 4(c), 7. Section 7 is not a new section. Authority to compel or stay proceedings can be found at UAA section 2.

125. *Id.* §§ 4(c), 22. After a party receives notice of an award, "the party may make a [motion] to the court for an order confirming the award." RUAA § 22. The RUAA alters the language of UAA section 11 regarding confirmation so as to bring it into conformity with the terms used by the FAA.

126. *Id.* §§ 4(c), 23. The RUAA keeps intact UAA section 12 on vacating an award with one addition regarding insufficient or lack of notice as a basis for vacatur, provided that the complaining party establish timely objection, substantial prejudice, and no waiver of objection by appearance at hearing. *Id.* §§ 9, 23(a)(6).

127. *Id.* §§ 4(c), 24.

128. *Id.* §§ 4(c), 14. Section 14 is a new provision granting immunity to an arbitrator. This follows the RUAA's direction to empower arbitrators and enhance the efficiency of arbitration proceedings.

129. *Id.* §§ 4(b)(1), 8. Section 8 is a completely new section granting arbitrators more authority. The RUAA prohibits any waiver of or variance of an arbitrator's authority to preserve the status quo of property that may become the means of satisfying a judgment (e.g., preliminary injunctive relief, replevin, attachment, or sequestration of assets). Note that section 4 does not prohibit parties from waiving or varying an arbitrator's remedies at the award stage or post-hearing stage. *Id.* § 21.

130. *Id.* §§ 4(b)(1), 17.

bitration agreement so as to modify or alter the validity, enforceability, or irrevocability of arbitration agreements,[132] the jurisdiction of a court,[133] the judicial enforceability of an arbitrator's preaward rulings,[134] a court's authority to award attorney's fees and litigation expenses for services related to confirming, vacating, modifying or correcting an award,[135] the uniformity of application and construction of RUAA,[136] the application of the Electronic Signatures in Global and National Commerce Act,[137] the effective date provisions of the RUAA,[138] or the repeal date of a state's present statute adopting the UAA.[139]

Under section 4, parties are permitted to vary or modify the RUAA provisions regarding notice of the initiation of an arbitration proceeding and the duty of disclosure on the part of a neutral arbitrator as long as such modifications are reasonable.[140]

5. *Section 8—Provisional Remedies.* Section 8 of the RUAA empowers the arbitrator or arbitration panel to deal effectively with the modern arbitration issues of multiparty claims and com-

131. *Id.* §§ 4(c), 20(d)-(e). If a motion to the court is pending regarding confirmation, vacatur, or modification, "the court may submit [a] claim to the arbitrator to consider whether to modify or correct the award." *Id.* § 20(d); *see also id.* §§ 22-24. Further, section 20(e) provides that an award must be provided by record and may be subject to confirmation, vacatur, or modification. *Id.* § 20(e); *see also id.* §§ 19(a), 22-24.

132. *Id.* §§ 4(b)(1), 6(a) ("[Arbitration agreements] are valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.").

133. *Id.* §§ 4(b)(1), 26 ("A court . . . having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.").

134. *Id.* §§ 4(c), 18. Section 18 is a new provision granting greater power to arbitrators and requiring courts to enforce their rulings.

135. *Id.* §§ 4(c), 25(a), 25(b). Sections 25(a) and 25(b) correspond to UAA sections 14 and 15 with a similar provision in FAA section 13 regarding judgments and docketing.

136. *Id.* §§ 4(c), 29. Section 29 is not a new section. Uniformity of interpretation can be found at UAA section 21.

137. *Id.* §§ 4(c), 30. This is a new provision of the RUAA intended to expand coverage of arbitration agreements using electronic mediums.

138. *Id.* §§ 4(c), 3(a), 3(c). Sections 3(a) and 3(c) govern the effective date of the RUAA. The exception is provided in section 3(b) where parties have entered into a contract under the UAA and have the option to elect coverage under the RUAA.

139. *Id.* §§ 4(c), 32.

140. *Id.* §§ 4(b)(2)-(3), 9, 12. For a detailed discussion of the requirements of RUAA sections 9 and 12, see *supra* Part III.A.1 (section 9) and Part III.A.2 (section 12).

plex discovery. This provisional remedy[141] section was first envisioned by the original drafters of the UAA, but was eliminated in the final 1955 version.[142] Section 8 assists the arbitration process by placing more authority in the hands of arbitrators to handle prehearing matters and reduces the opportunity for parties to resort to the courts. The Drafting Committee identified the need to prevent the pre-arbitration dispersal of assets by a party fearing liability and accordingly provided for provisional remedies prior to a hearing that can operate to protect and preserve property.

Where an arbitrator has not been appointed, a party may request the court to enter a provisional remedy to secure property.[143] After an arbitrator has been appointed and is authorized to act, the arbitrator may order provisional remedies, including interim awards, as the arbitrator finds necessary.[144] When an arbitrator is not able to act or cannot provide an adequate remedy on an urgent matter, the parties may request a court to issue a provisional remedy.[145] In such a case, an arbitrator can order a party to perform a

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141. "Provisional remedy" is defined as "[a]n equitable proceeding before judgment to provide for the postjudgment safety and preservation of property." BLACK'S LAW DICTIONARY 1297 (7th ed. 1999).

142. RUAA § 8 cmt. 1.

143. *Id.* § 8(a). Section 8(a) reads as follows:

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

*Id.*; *see also* Ortho Pharm. Corp. v. Amgen, Inc., 882 F.2d 806, 814 (3d Cir. 1989) (holding that a court order protects the status quo to protect the integrity of the arbitration process); Hughley v. Rocky Mountain Health Maint. Org., Inc., 927 P.2d 1325, 1333 (Colo. 1996) (upholding the issuance of a preliminary injunction until arbitrator addressed the matter of chemotherapy); King County v. Boeing Co., 570 P.2d 713, 718-19 (Wash. App. 1977) (denying declaratory judgment because rental dispute was a matter for the arbitrator to decide).

144. RUAA § 8(b)(1). Section 8(b)(1) reads as follows:

> The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action . . . ."

*Id.*

145. *Id.* § 8(b)(2). The 1996 English Arbitration Act sections 44(1), (3), (4), and (6) is the source of the term "urgent." *Id.* § 8 cmt. 3.

contract, or compel a party to refrain from particular conduct or produce material.[146]

Most jurisdictions allow courts to issue provisional remedies pending the outcome of an ongoing arbitration.[147] Among federal courts of appeal, the Eighth Circuit is the only dissenter to this view. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*,[148] the court recognized the inherent overlap of authority when a court considers irreparable harm and the likelihood of success on the merits, issues that it concluded should be left to the authority of the arbitrator.[149] There is some indication that security should be provided in such circumstances.[150]

The RUAA's adoption of section 8 is designed to increase the efficiency of the arbitration process by placing more authority in the hands of arbitrators to handle such pre-hearing matters, thereby reducing the need or opportunity for parties to resort to the courts. In seeking to expand the ability of arbitrators in this area, the Drafting Committee cited a line of precedent holding that arbitrators have broad authority to order provisional remedies and interim relief.[151] Section 8 is intended to codify these developments

146. *See* Fraulo v. Gabelli, 657 A.2d 704, 711 (Conn. App. 1995) (concerning the arbitrator's preliminary order regarding proceeds of sale); Park City Assoc. v. Total Energy Leasing Corp., 396 N.Y.S.2d 377, 378 (N.Y. App. Div. 1977) (affirming denial of preliminary injunction as "the direction for arbitration encompasses the night of the arbitrator . . . to grant provisional remedies").

147. *See* CAL. CIV. P. CODE § 1281.8 (West Supp. 2002); N.J. STAT. ANN. § 2A:23A-6(b) (West 2000); N.Y. C.P.L.R. § 7502(c) (McKinney 2002); BancAmerica Commercial Corp. v. Brown, 806 P.2d 897, 900 (Ariz. Ct. App. 1990) (issuing a writ of attachment to secure settlement agreement between creditor and debtor); Lamber v. Superior Court, 279 Cal. Rptr. 32, 35 (Cal. Ct. App. 1991) (issuing mechanic's lien); *Hughley*, 927 P.2d at 1333 (issuing preliminary injunction to maintain chemotherapy treatment provided by health maintenance organization); Salvucci v. Sheehan, 212 N.E.2d 243, 245 (Mass. 1965) (issuing a temporary restraining order to prevent conveyance or encumbrance of property subject to a pending arbitration).

148. 726 F.2d 1286, 1292 (8th Cir. 1984) (stating that there is no judicial relief 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").

149. *See* 2 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 25.1 (1999).

150. *See* Anaconda v. Am. Sugar Ref. Co., 322 U.S. 42, 46 (1944) (holding that private parties may not agree to eliminate the use of traditional admiralty procedures, or its concomitant security, from the requirements of the United States Arbitration Act).

151. RUAA § 8 cmt. 4; *see, e.g.*, N.J. STAT. ANN. § 2A:23A-6 (providing for provisional remedies such as "attachment, replevin, sequestration and other corre-

and give arbitrators a larger scope of authority so as to further limit the occasions and need for judicial action.

6. *Section 21—Remedies in Final Awards.* A key provision in the RUAA relates to one of the most often litigated issues under the original UAA—remedies.[152] Section 21 expressly provides that an arbitrator may award punitive damages,[153] attorney's fees and

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sponding or equivalent remedies"); Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046, 1049 (6th Cir. 1984) (upholding arbitrator's interim award requiring city to continue performance of coal purchase contract until further order of arbitration panel).

152. RUAA § 21(a)-(e) provides:

> An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.
>
> An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.
>
> As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under Section 22 or for vacating an award under Section 23.
>
> An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.
>
> If an arbitrator awards punitive damages or other exemplary relief under subsection (a), the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

153. Although section 21 is a new feature, the concept of an arbitrator awarding punitive damages is not. This follows the trend of the RUAA in accommodating the growth in arbitration and arbitration common law developments. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 64 (1995) (holding that the arbitral award, including punitive damages, should have been enforced according to the scope of the contract between the parties); Baker v. Sadick, 208 Cal. Rptr. 676, 681 (Cal. Ct. App. 1984) (holding that a doctor who submitted a tort claim to an arbitrator cannot claim arbitrator's lack of authority over punitive damages); Eychner v. Van Vleet, 870 P.2d 486, 489 (Colo. Ct. App. 1993) ("A valid and enforceable arbitration provision divests the court of jurisdiction over all arbitrable issues."); Richardson Greenshields Sec., Inc. v. McFadden, 509 So. 2d 1212, 1213 (Fla. Dist. Ct. App. 1987) (holding that tort actions including punitive damages are proper subjects for arbitration); Bishop v. Holy Cross Hosp., 410 A.2d 630, 632 (Md. Ct. Spec. App. 1980) (holding that under Maryland's Health Care Malpractice Claims Statute, arbitration panels have authority to award punitive damages); Rodgers Builders, Inc. v. McQueen, 331 S.E.2d 726, 731 (N.C. Ct.

expenses,[154] and any other remedy that an arbitrator deems just and appropriate unless the parties provide otherwise in the arbitration agreement.[155] This follows the overall theme of the RUAA by empowering arbitrators while at the same time allowing parties to sculpt their agreement as they see fit. An arbitrator may have broad authority to control the process of arbitration and issue remedies that are just and appropriate, but parties are free to eliminate certain types of remedies through limitation of remedies clauses.

Section 21 does give rise to concerns regarding adhesion contracts in the context of arbitration agreements between consumers and lenders, employers and employees, and medical providers and subscribers. The Drafting Committee chose to leave the issue of adhesion contracts and unconscionability to developing case law across the country.[156] The Drafting Committee noted that a large number of organizations have developed "Due Process Protocols" to ensure procedural and substantive fairness in employment, consumer, and health care arbitrations.[157]

7. *Section 18—Arbitrator Self-Enforcement.* Because arbitration awards are not self-enforcing, parties receiving an unfavorable ruling in an arbitration proceeding may evade an order simply by refusing to comply. Parties receiving favorable rulings are, therefore, forced to seek a court order enforcing the arbitrator's ruling. Enforcement of final awards is usually not a problem because a prevailing party only has to file a motion with the court for an or-

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App. 1985) (holding that arbitrators may settle any controversy arising between parties to an arbitration contract, including tort claims or claims for punitive damages); Kline v. O'Quinn, 874 S.W.2d 776, 782 (Tex. Ct. App. 1994) (holding that arbitrators may determine the sufficiency of pleadings to support awards for punitive damages); Grissom v. Greener & Sumner Constr., Inc., 676 S.W.2d 709, 711 (Tex. Ct. App. 1984) (holding that arbitrator's award of exemplary damages cannot be modified where such claims have expressly been submitted in the arbitration agreement). *But see* Leroy v. Waller, 731 S.W.2d 789, 792 (Ark. Ct. App. 1987) (holding that Arkansas law does not allow arbitration of tort claims, and thus arbitration panels are without power to award punitive damages); Sch. City of E. Chi., Ind. v. East Chi. Fed. of Teachers, 422 N.E.2d 656, 663 (Ind. Ct. App. 1981) (holding that arbitrator's award of punitive damages was void as against public policy); Shaw v. Kuhnel & Assocs., 698 P.2d 880, 882 (N.M. 1985) (holding that "an arbitrator should not be given authority to award punitive damages"); Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 794 (N.Y. 1976) ("An arbitrator has no power to award punitive damages, even if agreed upon by the parties.").

154. RUAA § 21(b).

155. *Id.* § 21(a)-(c).

156. *See id.* § 6 cmt. 7.

157. *Id.*

der of confirmation.[158] However, the enforcement of pre-award rulings, such as provisional remedies, is much more problematic. Courts are generally very hesitant to grant review of interlocutory orders of an arbitrator except on issues involving privilege or confidentiality.[159]

Section 18 of the RUAA rectifies this situation and greases the wheels of arbitration by allowing a prevailing party to seek expedited review of an arbitrator's pre-award ruling pursuant to RUAA section 22 (Confirmation of Award). Section 18 also commands that courts "shall summarily decide" such motions and issue an order confirming the ruling unless the court vacates, modifies, or corrects it.[160] Section 18 allows for speedy determinations of prehearing rulings.[161] Note, however, that there is no provision in the RUAA providing for an appeal from a court decision on a prehearing ruling by an arbitrator.[162]

8. *Section 30—Technology.* Section 30 of the RUAA incorporates the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act[163] regarding the legal effect, validity, and enforceability of electronic records or electronic signatures. The opportunity for online dispute resolution is becoming a new avenue to resolve controversies quickly,[164] and the RUAA attempts to address what the UAA did not, in light of technological advances.

B. Clarifying Provisions

1. *Section 6—Arbitrability.* Section 6, the updated version of the UAA section 1, addresses the validity of arbitration contracts. It is not an entirely new section, but, among other things, it attempts to provide additional guidance on the issue of who decides

158. *Id.* § 22; UAA § 11.

159. RUAA § 18 cmt. 1; *see also* Aerojet-General Corp. v. Am. Arbitration Ass'n, 478 F.2d 248, 251 (9th Cir. 1973) (stating that "judicial review prior to the rendition of a final arbitration award should be indulged, if at all, only in the most extreme cases").

160. RUAA § 18.

161. *Id.* § 18 cmt. 2.

162. *Id.* § 18 cmt. 3. The intent of section 18 is not to allow such orders from a lower court to be appealed. *Id.*

163. 15 U.S.C. §§ 7001, 7002 (2000).

164. *See generally* William K. Slate, *Online Dispute Resolution: Click Here to Settle Your Dispute*, DISP. RESOL. J., Nov. 2001-Jan. 2002, at 8.

arbitrability and by what criteria.[165] In response to common law developments in many states, section 6 provides that courts are to decide substantive arbitrability questions, but leaves procedural questions for the arbitrator to decide.[166] Under this clarifying position, arbitrators will have statutory authority to determine whether all conditions precedent are fulfilled prior to the start of arbitration.[167] For example, procedural areas include laches, notice, estoppel, and other conditions precedent. However, statutes of limitations may be an exception to the rule.[168]

While section 6 does not substantially change the UAA, it does explicitly accommodate computer technology.[169] A written agreement or computer agreement is valid, enforceable, and irrevocable under the RUAA unless some basis in law or equity makes it revocable.[170] The RUAA's broad definition of "record" and its adoption of standards regarding the validity of electronic records and signatures[171] allow arbitration agreements and proceedings to take better advantage of new technology.

The issue of federal preemption of state arbitration laws is particularly relevant to questions of arbitrability. The U.S. Su-

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165. *See* RUAA prefatory note. This was a particular issue of concern identified by the Drafting Committee.

166. *Compare* RUAA § 6(b) ("The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.") *with* RUAA § 6(c) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.").

167. *Id.* § 6(b).

168. *Compare* Smith Barney, Harris Upham & Co. v. Luckie, 647 N.E.2d 1308, 1313 (N.Y. 1995) (holding that the court rather than the arbitrator should decide whether a statute of limitations bars an arbitration) *with* 7-Eleven, Inc. v. Dar, 757 N.E.2d 515, 521 (Ill. App. Ct. 2001) (upholding arbitrator's determination that agreement's ten-day limitation was not enforceable).

169. Section 6(a) of the RUAA provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." RUAA § 6(a). The reference to "in a record" is provided in the new definitions section. *Id.* § 1. The original UAA does not have a definitions section. The RUAA defines "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." *Id.* § 1(6). In the comments of section 1, the Drafting Committee states that the definition is intended to accommodate the use of electronic evidence in commercial transactions. *Id.* § 1(6) cmt. 5.

170. *Id.* § 6(a).

171. *See supra* Part III.A.8.

preme Court has provided guideposts in the preemption area, suggesting that any arbitration agreement should provide clear and express language about what is being waived or altered.[172] For example, waiver of arbitrability issues to be decided by a court must be clearly stated in the contract along with clear guidance for determining the arbitrability of a contract dispute.[173]

2. *Section 15—Arbitration Procedures.* Section 15 of the RUAA is intended to give broad authority to arbitrators to control and manage all arbitration proceedings.[174] If arbitration is to be placed on equal footing with traditional litigation, an arbitrator must be able to hold pre-hearing conferences and rule on preliminary matters in the same way a judge would conduct judicial pretrial conferences and preliminary motions. Section 15 seeks to empower arbitrators in ways that the original UAA did not.

Section 15 provides that an arbitrator may conduct an arbitration in any manner that the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.[175] An arbitrator may rule on summary dispositions[176] on the request of any party af-

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172. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (observing that the relevant state law required an objective showing that the parties intended to submit a controversy to arbitration); Mastrobuono v. Shearson Lehmon Hutton, Inc., 514 U.S. 52, 63 (1995) (applying common law principle that a party who drafts an ambiguous agreement may not later claim the benefit of the doubt); *see also* Volt Info. Scis., Inc. v. Stanford Univ., 489 U.S. 468, 475 (1989) (implying that general state law contract principles govern the interpretation of arbitration agreements).

173. *See generally* Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287 (1999) (providing detailed discussion regarding the U.S. Supreme Court's directions regarding arbitration, state arbitration, and contracting parties' authority to choose).

174. The corresponding UAA section is section 5.

175. *See* RUAA § 15(a). Section 15(a) states that

> [a]n arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality and weight of any evidence.

*Id.*

176. Summary disposition is not equated with summary judgment. Questions of law and summary judgment motions are some, but not all, of the matters for an arbitrator to rule on. An arbitrator is not confined to the rules of evidence and is free to consider whatever he or she believes to be relevant to an award. *See id.* § 15 cmt. 3.

ter notice and opportunity to respond have been provided.[177] The UAA did not provide such authority to arbitrators, but the Drafting Committee noted that "arbitrators probably have the inherent authority to perform such tasks."[178] Section 15, however, explicitly places more procedural matters within the discretion of arbitrators under the RUAA.

3. *Section 17—Discovery.* The RUAA also expands an arbitrator's authority to issue protective orders[179] and establishes the arbitrator's authority to issue discovery-related orders.[180] Under the UAA, an arbitrator's authority included subpoena and deposition powers.[181] The RUAA expands on this authority and provides for arbitrator discretion concerning discovery.[182] However, this grant may conflict with the goals of arbitration, as expansive discovery only weighs down the process and undermines the primary benefits associated with arbitration—efficiency and cost effectiveness.

4. *Section 14—Arbitrator Immunity.* Another addition to the RUAA is section 14, providing that arbitrators and arbitration or-

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177. *Id.* § 15(b)(1)-(2). Section 15(b) reads as follows:

> [a]n arbitrator may decide a request for summary disposition of a claim or particular issue: (1) if all interested parties agree; or (2) upon request of one party to the arbitration proceeding if that party gives notice to all other parties . . . and the other parties have a reasonable opportunity to respond.

*Id.*

178. *Id.* § 15 cmt. 2.

179. *Id.* § 17(e) ("An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action . . . .").

180. *Id.* § 17(c) ("An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.").

181. UAA § 17. Under the RUAA the subpoena and deposition authority is not subject to party waiver. *See* RUAA § 4(b)(1). However, there is no restriction on whether parties can alter or vary the protective order or other discovery-related authority. A party's ability to waive pre-hearing discovery should encourage parties to negotiate their own methods of discovery. *Id.* § 17 cmt. 3.

182. *See* RUAA § 17 cmt. 3 ("[D]iscretion rests with the arbitrators whether to allow discovery. The discovery procedure in Section 17(c) is intended to aid the arbitration process and ensure an expeditious, efficient and informed arbitration, while adequately protecting the rights of the parties.").

ganizations acting in that capacity are immune from civil liability.[183] Arbitral immunity is the rule in virtually every jurisdiction,[184] shielding arbitrators from having to testify[185] in any type of proceeding.[186] Unless criminal activity waives the immunity[187] or a complaining party desires to have an arbitrator testify in order to show alleged fraud,[188] arbitrators possess immunity similar to that of judicial officers. Immunity questions commonly arise when a party attempts to summon an arbitrator to testify about his reasoning supporting an award or any suspected conflicts of interest.

Section 14(d)(2) recognizes that arbitrators who have engaged in corruption, fraud, partiality, or other misconduct may be required to give testimony so that a party will have evidence to prove such grounds to vacate an award under sections 23(a)(1) and (2).[189] However, "[s]uch testimony or records from an arbitrator are only required after the objecting party makes a sufficient initial showing that such grounds exist."[190] Without such objective evidence, arbitrators should not have to testify or produce records from the arbitration proceeding.[191]

Extending quasi-judicial immunity when arbitrators function similarly to judges is a codification of common law.[192] This section

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183. *Id.* § 14(a).

184. Feichtinger v. Conant, 893 P.2d 1266, 1267 (Alaska 1995).

185. RUAA § 14(d). Section 14(d) reads as follows:

> In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity.

*Id.*; *see also* Woods v. Saturn Distrib. Corp., 78 F.3d 424, 430 (9th Cir. 1996) (denying request to depose arbitrator); Lyeth v. Chrysler Corp., 929 F.2d 891, 899 (2d Cir. 1991) (denying request to depose arbitrator where there was no clear evidence of bias or impropriety).

186. RUAA § 14(a) ("An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.").

187. *Id.* § 14 cmt. 8 ("Section 14 does not grant arbitrators or arbitration organizations immunity from criminal liability arising from their conduct in their arbitral or administrative roles.").

188. *Id.* § 14 cmt. 5.

189. *Id.* § 14(d)(2).

190. *Id.* § 14 cmt. 5.

191. *Id.*

192. *See* Butz v. Economou, 438 U.S. 478, 511-12 (1978) (extending judicial-like immunity when "functional comparability" of non-judicial officials' acts and judgments resembles that of judicial official); Feichtinger v. Conant, 893 P.2d

is new, but not surprising in light of the fact that the RUAA seeks to empower arbitrators and raise the process of arbitration to near equal status with traditional litigation.[193] The immunity also applies to arbitration organizations and organization representatives so long as each is acting with judge-like responsibilities.[194] There is no waiver of immunity when an arbitrator fails to disclose known, direct, and material interests or known, existing, and substantial relationships.[195] The sole remedy for this situation is vacatur.[196] As a deterrent to challenging arbitrators' immunity, the RUAA makes it permissible to collect attorney's fees and expenses associated with the successful defense of lawsuits.[197]

*5. Sections 22, 23, 24, and 25—Judicial Review.* Since arbitration has always been a resolution process that narrows judicial attention, the RUAA includes few substantive changes from the original UAA provisions regarding confirmation,[198] vacatur,[199]

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1266, 1267 (Alaska 1995) ("Arbitral immunity gives arbitrators absolute immunity from liability for damages arising out of quasi-judicial actions taken by them.").

193. *See, e.g.*, Southwire Co. v. Am. Arbitration Ass'n, 545 S.E.2d 681, 684-85 (Ga. Ct. App. 2001); Higdon v. Constr. Arbitration Assocs., Ltd., 71 S.W.3d 131, 132 (Ky. Ct. App. 2002); Kabia v. Koch, 713 N.Y.2d 250, 256-57 (Civ. Ct. 2000); Buyer's First Realty, Inc. v. Cleveland Area Bd. of Realtors, 745 N.E.2d 1069, 1081 (Ohio Ct. App. 2000).

194. RUAA § 14(a); *see* Olson v. Nat'l Ass'n of Sec. Dealers, Inc., 85 F.3d 381, 383 (8th Cir. 1996); Austern v. Chi. Bd. Options Exch., Inc., 898 F.2d 882, 886 (2d Cir. 1990); *see also* New England Cleaning Serv., Inc. v. Am. Arbitration Ass'n, 199 F.3d 542, 545 (1st Cir. 1999); Honn v. Nat'l Ass'n of Sec. Dealers, Inc., 182 F.3d 1014, 1018 (8th Cir. 1999); Hawkins v. Nat'l Ass'n of Sec. Dealers, Inc., 149 F.3d 330, 332 (5th Cir. 1998); Corey v. N.Y. Stock Exch., 691 F.2d 1205, 1209 (6th Cir. 1982).

195. RUAA § 14(c); *see also id.* § 12.

196. *Id.* § 23.

197. *Id.* § 14(e). Section 14(e) reads as follows:

> If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records . . . and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees and other reasonable expenses of litigation.

*Id.*

198. *See* RUAA § 22. This section is not waivable per section 4 of the RUAA. *Compare* UAA § 11.

modification, or correction[200] of awards. The Drafting Committee was aware that in order to enhance the efficiency and effectiveness of arbitration it was important to refrain from adding new grounds for courts to review the merits of arbitration awards.

During the revision process, the most controversial area of discussion was the proposed addition of more grounds on which courts could vacate arbitration awards. Ultimately, "manifest disregard of the law" and "violation of public policy" were not included in section 23 (Vacating Award) as permissible bases on which a court could vacate an arbitration award.[201] Nor does the RUAA provide for expanded judicial review of an arbitrator's decision for errors of law or fact. The Drafting Committee believed that several policy risks weighed against such a substantive change. Notably, the Drafting Committee believed that allowing parties a "second bite at the apple" would effectively undermine the finality of arbitration and increase costs, both in terms of time and resources.[202]

The only new ground for vacatur in section 23 relates to situations in which arbitration is conducted notwithstanding improper notice under section 9.[203] A party seeking to challenge an award on this basis must make a timely objection and show that the lack of proper notice substantially prejudiced its rights.[204] It is also worth noting that the RUAA allows for a shorter time period than the FAA in which a prevailing party can file a motion requesting judicial confirmation of an award.[205] Although it declines to provide new grounds for judicial review, the RUAA imposes few restrictions on the ability of parties to add appropriate grounds for judicial review when drafting their arbitration agreements. Section 4 of

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199. *See* RUAA § 23. This section is not waivable per section 4 of the RUAA. *Compare* UAA § 12.

200. *See* RUAA § 24. This section is not waivable per section 4 of the RUAA. *Compare* UAA § 13.

201. RUAA § 23 cmt. C(1).

202. *Id.* § 23 cmt. B(1).

203. *Id.* § 23(a)(6).

204. *Id.* §§ 23(a)(6), 23(b).

205. *Id.* § 22 cmt. 2. This comment states that

> [t]he Drafting Commmittee 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.

*Id.*

the RUAA merely prohibits attempts to eliminate all judicial review.[206]

Section 25 allows the court discretion to award attorney's fees and expenses for contested judicial proceedings to confirm, vacate, modify, or correct an award.[207] This provision is waivable under section 4. If the parties wish for a different rule, they remain free to contract as they please.[208] Section 25 also updates the word choice of UAA section 15 regarding judgment rolls and docketing so that arbitration awards can be "recorded, docketed, and enforced as any other judgment in a civil action."[209]

## IV. ALASKA'S ARBITRATION LAW AND THE RUAA

In fifteen states, legislation adopting the RUAA was introduced during the 2001-02 legislative session; one state, Utah, has officially enacted the RUAA.[210] This part of the Article will examine whether the RUAA would create harmony or discord with Alaska arbitration law and whether the Alaska legislature should consider adopting the RUAA.

### A. Review of Alaska Law

Unlike many jurisdictions, Alaska case law on arbitration in general, and on the UAA in particular, is fairly limited. Cases under the UAA have generally focused on issues such as who deter-

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206. *Id.* § 4.

207. *Id.* § 25.

208. *Id.* § 25 cmt. 6.

209. *Id.* § 25 cmt. 2.

210. The jurisdictions introducing such legislation, as of August 2002, are Arizona, Connecticut, the District of Columbia, Idaho, Illinois, Indiana, Minnesota, Missouri, New Jersey, Ohio, Oklahoma, Utah (enacted), Vermont, Virginia, and West Virginia. *See* National Conference of Commissioners on Uniform State Laws, http://www.nccusl.org (last modified Aug. 16, 2002). The RUAA is also gaining support from numerous groups, including an endorsement from the ABA's House of Delegates in San Diego, California (Feb. 14-20, 2001). The RUAA has also been endorsed by seven separate sections of the ABA: Dispute Resolution; Litigation; Business Law; Labor and Employment Law; Torts and Insurance Practice; Real Property, Probate and Trust Law; and Senior Lawyers. Press Release, Revised Uniform Act Receiving Widespread Support, National Conference of Commissioners on Uniform State Laws (Feb. 22, 2001), *available at* http://www.nccusl.org/nccusl/pressreleases/pr2-22-01-1.asp. The RUAA has also been endorsed by the American Arbitration Association, the National Arbitration Forum, the National Academy of Arbitrators, Jams, the Dispute Resolution Committee of the Association of the Bar of the City of New York, and the American College of Real Estate Lawyers. *Id.*

mines arbitrability, the level of review that courts should apply to an arbitrator's decision and award, the availability of particular remedies, and the role of the arbitrator in weighing evidence.

Consistent with other jurisdictions, the Alaska Supreme Court has routinely asserted that Alaska's arbitration statute (a version of the UAA) "evinces a strong public policy in favor of arbitration."[211] Given that arbitration should be an alternative to litigation, not a prelude to it, the court "ha[s] followed a policy of minimal court interference with arbitration."[212] The court has also routinely stressed that such a policy permits parties, "in the absence of restricting statutory terms," to contract freely "for the terms of arbitration that they desire."[213]

1. *Arbitrability.* While courts have been mixed on the issue of whether arbitrators or courts determine the arbitrability of a dispute,[214] the Alaska Supreme Court has fallen on the side of the debate that honors the parties' intent. In *State v. Public Safety Employees Ass'n*,[215] the court stressed that arbitration was "a creature of contract law," allowing the parties to contract freely for those terms deemed important for an arbitration agreement.[216] The court adopted the federal rule, which provides that "arbitrability is a question for the courts '[u]nless the parties clearly and unmistakably provide otherwise.'"[217] The court concluded that the arbitrator should decide which issues are arbitrable since the parties had "unmistakably agreed to submit the question" to the arbitrator.[218]

2. *Procedural Issues.* Several procedural issues have arisen in judicial review of arbitrator decisions. Chief among them are consolidation and intervention, although some other minor issues have also been discussed.[219] In *Consolidated Pacific Engineering v. Greater Anchorage Borough*,[220] the Alaska Supreme Court examined whether the superior court could order the consolidation of two arbitration proceedings over the objection of a party.[221] The court noted that nothing in Alaska's court rules or statutes, even Alaska's arbitration statute, either permitted or prohibited con-

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211. Modern Const., Inc. v. Barce, Inc., 556 P.2d 528, 529 (Alaska 1976); Univ. of Alaska v. Modern Const., Inc., 522 P.2d 1132, 1138 (Alaska 1974).

212. City of Fairbanks Mun. Utils. Sys. v. Lees, 705 P.2d 457, 459-60 (Alaska 1985) (citing Nizinski v. Golden Valley Elec. Ass'n, 509 P.2d 280, 283 (Alaska 1973)).

213. Bd. of Educ., Fairbanks North Star Borough Sch. Dist. v. Ewig, 609 P.2d 10, 12 (Alaska 1980) (citing Anchorage Med. & Surgical Clinic v. James, 555 P.2d 1320, 1321 (Alaska 1976)).

solidation of arbitration proceedings.[222] The court then observed a split in authority among other jurisdictions and the American Arbitration Association's longstanding policy not to approve consolidation without the consent of all parties.[223] Emphasizing the rights of the parties to determine the terms of arbitration through contract, the court concluded that consolidation could not be ordered absent language in the arbitration agreement supporting it.[224] The court

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214. Hayford & Peeples, *supra* note 1, at 355-57. For a broadened and more philosophical examination of the arbitrability question, see Rau, *supra* note 173.

215. 798 P.2d 1281 (Alaska 1990).

216. *Id.* at 1285.

217. *Id.* (quoting AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)).

218. *Id.*

219. For example, in Marathon Oil Co. v. ARCO Alaska, Inc., 972 P.2d 595 (Alaska 1999), the Alaska Supreme Court observed that in bifurcated proceedings, a partial decision as to one portion of the case (liability, for example) cannot be revised by the arbitrators once it has been issued. *Id.* at 602 (citing Trade & Transp. v. Natural Petro. Charterers, 931 F.2d 191, 195 (2d Cir. 1991)). The court added that other courts have held that even when "the parties have not explicitly agreed to the finality of a liability decision, the decision should be considered final if the record suggests that the parties" believed it was final. *Id.* (citing McGregor Van De Moere, Inc. v. Paychex, Inc., 927 F. Supp. 616, 618 (W.D.N.Y. 1996)).

Then in Int'l Bhd. of Electric Workers, Local Union 1547 v. City of Ketchikan, 805 P.2d 340 (Alaska 1991), the court held that the superior court erred in interpreting an award found to be ambiguous. *Id.* at 341. The court noted that when asked to clarify an ambiguous award, the superior court should follow two steps. *Id.* First, it should determine "whether the award is, in fact, ambiguous." *Id.* Then, in cases where ambiguity does exist, the only option for the superior court is to remand to the arbitrator for clarification. *Id.* The court stressed that a superior court may not interpret an arbitrator's award. *Id.* at 343. In that same case, the Alaska Supreme Court noted that "[t]here is nothing in Alaska's declaratory judgment act which prohibits its use to determine questions arising out of arbitration." *Id.* at 342.

Finally, the Alaska Supreme Court has noted that a party will waive any challenge to an arbitrator's actions by failing to object during the arbitration proceedings. *See, e.g.*, Integrated Res. Equity Corp. v. Fairbanks North Star Borough, 799 P.2d 295, 298-99 (Alaska 1990); Alaska State Hous. Auth. v. Riley Pleas, Inc., 586 P.2d 1244, 1248 (Alaska 1978).

220. 563 P.2d 252 (Alaska 1977).

221. *Id.* at 252.

222. *Id.* at 254.

223. *Id.* at 254-55.

224. *Id.* at 255.

also stressed that this approach reflected how the "law now favors arbitration with a minimum of court interference."[225]

The Alaska Supreme Court has provided even less guidance on the issue of intervention. The fundamental rule is that the language of the arbitration agreement governs.[226] In *Powers v. United Services Automobile Ass'n*,[227] the court examined whether an injured motorist who pursued a successful arbitration against a primary carrier could preclude a secondary carrier from additional arbitration where the secondary carrier had neither notice nor opportunity to participate in the first arbitration.[228] The court affirmed the superior court's holding that collateral estoppel did not preclude the secondary carrier from pursuing additional arbitration, primarily because there was no privity between the secondary carrier and the parties to the arbitration agreement.[229] The court also rejected as meritless the contention that the secondary carrier waived its right to arbitrate by "fail[ing] to participate in the subject arbitration."[230] The court found there was not "direct, unequivocal conduct" that indicated the secondary carrier had abandoned its right to arbitrate.[231] Finally, the court noted it was unclear whether intervention was even an option in arbitration,[232] since the Alaska version of the UAA provided no guidance on intervention.[233]

3. *Judicial Review.* Generally speaking, actions to vacate an award are governed by Alaska's arbitration statute.[234] Such appli-

225. *Id.* (quoting Nikiski v. Golden Valley Elec. Ass'n, Inc., 509 P.2d 280, 283 (Alaska 1973)).

226. *See, e.g.*, Bd. of Education, Fairbanks North Star Borough Sch. Dist. v. Ewig, 609 P.2d 10, 13 (Alaska 1980) ("The arbitrator will be without power or authority to make any decisions . . . which [are] violative of the terms of this Agreement.").

227. 6 P.3d 294 (Alaska 2000).

228. *Id.* at 295.

229. *Id.* at 297.

230. *Id.* at 298.

231. *Id.* at 299 (quoting Airoulofski v. State, 922 P.2d 889, 894 (Alaska 1988)).

232. *Id.*

233. *See* ALASKA STAT. §§ 09.43.010-09.43.180 (Michie 2001).

234. *See id.* § 09.43.120(a). Section 09.43.120(a) reads as follows:

> On application of a party, the court shall vacate an award if
>
> (1) the award was procured by fraud or other undue means;
>
> (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of a party;
>
> (3) the arbitrators exceeded their powers;

cations before the superior court should be conducted in the same manner as provided for in the hearing of motions.[235] The arbitration award is to be presumed valid.[236] At a hearing, the party challenging the award bears the burden of proof.[237]

The proper standard of review for an arbitration award depends on the basis for the arbitration.[238] The Alaska Supreme Court has identified at least five different standards of review applicable to arbitrators' decisions and awards of remedies: (1) purely unreviewable;[239] (2) the "reasonably possible" standard;[240] (3) the "gross error" standard;[241] (4) the "arbitrary and capricious" standard;[242] and (5) a due process standard.[243] The level of review or the scrutiny applied to the arbitrator's decision increases as the parties lose their autonomy over the terms of the arbitration process. A brief summary of these standards will be useful in determining if certain provisions of the RUAA comport with Alaska law.

For arbitrations conducted under the UAA, "the standard of review is highly deferential."[244] In *Ahtna, Inc. v. Ebasco Constructors, Inc.*,[245] the court noted that in arbitrations conducted under Alaska's Uniform Arbitration Act, an arbitrator's findings of fact are unreviewable even in the face of gross error.[246] Similarly, the

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(4) the arbitrators refused to postpone the hearing upon sufficient cause being shown for postponement or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of AS 09.43.050, as to prejudice substantially the rights of a party; or

(5) there was no arbitration agreement and the issue was not adversely determined in proceedings under AS 09.43.020 and the party did not participate in the arbitration hearing without raising the objection.

*Id.*

235. City of Fairbanks Mun. Util. Sys. v. Lees, 705 P.2d 457, 460-61 (Alaska 1985) (citing ALASKA STAT. § 09.43.150; ALASKA R. CIV. P. 77).

236. *Lees*, 705 P.2d at 461; Univ. of Alaska v. Modern Constr., Inc., 522 P.2d 1132, 1139 (Alaska 1974).

237. *Lees*, 705 P.2d at 461.

238. Butler v. Dunlap, 931 P.2d 1036, 1038 (Alaska 1997) (per curiam).

239. *See, e.g.*, Ahtna, Inc. v. Ebasco Constructors, Inc., 894 P.2d 657, 660-61 (Alaska 1995).

240. *See, e.g.*, *Modern Constr.*, 522 P.2d at 1137.

241. *See, e.g.*, City of Fairbanks v. Rice, 628 P.2d 565, 567 (Alaska 1981).

242. *See Butler*, 931 P.2d at 1039.

243. *See* A. Fred Miller, PC v. Purvis, 921 P.2d 610, 618 (Alaska 1996).

244. *Butler*, 931 P.2d at 1038.

245. 894 P.2d 657 (Alaska 1995).

246. *Id.* at 660-61; *see also* Alaska State Hous. Auth. v. Riley Pleas, Inc., 586 P.2d 1244, 1247-48 (Alaska 1978). The court has also applied this "statutory stan-

court has asserted several times that there is no judicial review of the merits of an arbitrator's decision.[247] The *Ahtna* court noted that an arbitrator's conclusions of law, including conclusions concerning the meaning of the parties' contract, are not reviewable except with respect to questions concerning arbitrability.[248] The court favorably quoted the U.S. Supreme Court's rationale: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[249] The court took great pains to emphasize that the *Riley Pleas* standard, prohibiting judicial review of an arbitrator's construction of the contract as to issues other than arbitrability, was the proper standard for courts to apply.[250]

When arbitrability is the issue, the standard of review concerning questions of law is whether the arbitrator's conclusion is reasonably possible.[251] Under this standard, an arbitrator's construction of the contract, not the underlying factual findings, will be reviewed to determine whether it "is a reasonably possible [construction] that can seriously be made in the context in which the contract was made."[252] Applying this standard, the court in *Breeze v. Sims*[253] concluded that it was within the arbitrator's powers as a trier of fact to determine that an oral contract existed between the parties and obligated former clients to pay their attorney's fees and entitled clients to demand fee arbitration pursuant to Alaska Bar Rule 34.[254] Additionally, in *Marathon Oil Co. v. ARCO Alaska, Inc.*,[255] the court held that the arbitrators' interpretation of an agreement was reasonable when they found that the current field operator (Marathon Oil) was responsible for gas re-delivery, even

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dard of review" to findings of fact issued by an arbitrator pursuant to Alaska Bar Rule 34 (fee arbitration). Breeze v. Sims, 778 P.2d 215, 217 (Alaska 1989).

247. *See, e.g.*, Masden v. Univ. of Alaska, 633 P.2d 1374, 1376-77 (Alaska 1981); *Riley Pleas*, 586 P.2d at 1247.

248. *Ahtna*, 894 P.2d at 661.

249. *Id.* (quoting United Steel Workers of Amer. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)).

250. *Id.* at 661-62.

251. Univ. of Alaska v. Modern Constr., Inc., 522 P.2d 1132, 1137 (Alaska 1974).

252. *Id.* (quoting Maynard E. Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act*, 10 VAND. L. REV. 685, 706 (1957)).

253. 778 P.2d 215 (Alaska 1989).

254. *Id.* at 217-18 (citing Curran v. Hastreiter, 579 P.2d 524, 526 (Alaska 1978); *see also* Alaska State Hous. Auth. v. Riley Pleas, Inc., 586 P.2d 1244, 1247 (Alaska 1978)).

255. 972 P.2d 595 (Alaska 1999).

though this conclusion required the arbitrators to revise the final liability decision.[256]

In disputes where the arbitration agreement expressly excludes the arbitration from Alaska's arbitration statute,[257] the Alaska Supreme Court has used a standard of "gross error" in reviewing an arbitrator's decisions of law and fact.[258] "Gross error" is defined as "only those mistakes which are both obvious and significant."[259]

The "most searching" standard of review applied by the Alaska Supreme Court applies to cases of compulsory arbitration.[260] Under this standard, the court must overturn the arbitrator's finding if it concludes that the determination was "arbitrary and capricious."[261] This standard of review has been impliedly equated with the "abuse of discretion" standard.[262] The Alaska Supreme Court, in explaining why a heightened standard of review was necessary for mandatory arbitration, has provided the following:

> When parties agree to submit their differences to an arbitrator, they should be bound by his decision. Courts should be reluctant to upset arbitrators' awards, lest the advantages of arbitration as a fast and certain means of resolving disputes be lost. Occasional uncorrected errors in arbitrators' decisions are tolerable because the parties have agreed to accept reduced possibilities of appellate review in order to have their dispute resolved

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256. *See id.* at 601-02. The court specifically rejected an argument by Marathon Oil that the arbitrators were not empowered to interpret the agreement, noting, "[a]bsent the ability to construe arbitration agreements, arbitrators would be precluded from acting during hearings because the agreements are the source of their powers." *Id.* at 601.

257. ALASKA STAT. § 09.43.010 (Michie 2000) provides:

> A written agreement to submit an existing controversy to arbitration or a provision in a written contract to submit to arbitration a subsequent controversy between the parties is valid, enforceable, and irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract. However, AS 09.43.010–9.43.180 do not apply to a labor-management contract unless they are incorporated into the contract by reference or their application is provided for by statute.

258. *See* City of Fairbanks v. Rice, 628 P.2d 565, 567 (Alaska 1981); Nizinski v. Golden Valley Elec. Ass'n, Inc., 509 P.2d 280, 283 (Alaska 1973); *see also* City of Valdez v. 18.99 Acres, 686 P.2d 682, 687-88 n.9 (Alaska 1984).

259. *Rice*, 628 P.2d at 567.

260. Butler v. Dunlap, 931 P.2d 1036, 1039 (Alaska 1997).

261. *Id.*; *see also* Public Safety Employees Ass'n, Local 92 v. State, 895 P.2d 980, 984 (Alaska 1995); Municipality of Anchorage v. Anchorage Police Dept. Employees Ass'n, 839 P.2d 1080, 1088 (Alaska 1992).

262. *Butler*, 931 P.2d at 1039.

> quickly and with certainty. Compulsory arbitration is different. The parties have not agreed voluntarily to accept reduced possibilities of appellate review in order to resolve their dispute swiftly. It is by operation of law that the parties are denied their usual right to have their disputes resolved by the courts. Therefore, a standard of review higher than gross error is appropriate.[263]

The court has also applied this standard in situations where a party seeks to support a claim that an arbitrator's decision should be vacated for refusing to grant a request for postponement.[264]

A final standard of review applicable only to attorney fee arbitration is one that examines whether due process was accorded in the arbitration proceeding. In *A. Fred Miller, P.C. v. Purvis*,[265] an attorney filed a petition to vacate an arbitrator's award, arguing that he was denied due process because judicial review on the merits of the arbitrator's decision was not available.[266] Under the fee arbitration rules, a client that has a fee dispute with an attorney has a right to have the dispute resolved by arbitration.[267] The court noted that the rules include several fairly specific procedural provisions for the arbitration of fee disputes, including notice and hearing requirements, the opportunity to challenge the panel peremptorily, the ability to compel witnesses, procedures for taking telephonic evidence, and a requirement for the arbitrator to provide a written decision.[268] Applying the *Mathews v. Eldridge*[269] standards to these rules, the court concluded that the rules satisfied the minimal requirements of having an opportunity to be heard and the right to represent one's interests.[270] The court balanced the interest in appellate review with the undesirability of the extra delay and expense associated with extended review, concluding that "the benefits to be gained from appellate review on the merits necessarily outweigh the detriments which such review would entail."[271]

263. State v. Public Safety Employees Ass'n, 798 P.2d 1281, 1287 (Alaska 1990).

264. *See* Ebasco Constructors, Inc. v. Ahtna, Inc., 932 P.2d 1312, 1316 (Alaska 1997) ("[A] litigant should be required to show that the arbitrator committed gross error in his determination that a litigant did not show 'sufficient cause' for postponement.").

265. 921 P.2d 610 (Alaska 1996).

266. *Id.* at 611-12.

267. *See* ALASKA BAR R. 34(b).

268. *See A. Fred Miller*, 921 P.2d at 612.

269. 424 U.S. 319 (1976).

270. *A. Fred Miller*, 921 P.2d at 617-18.

271. *Id.* at 618.

4. *Remedies.* The Alaska Supreme Court has examined two general areas of remedies—pre- and post-judgment interest and attorney's fees. Primarily, the court has approached the issue as one of contractual intent. For example, in *Board of Education, Fairbanks North Star Borough v. Ewig*,[272] the court upheld an award of a teacher's back pay because a disagreement over salary might include such an award, and it did not violate the arbitration agreement.[273] Additionally, in *Alaska Public Employees Ass'n v. State, Department of Environmental Conservation*,[274] the court emphasized an arbitrator's broad discretion in fashioning a remedy, holding that under the applicable agreement this power permitted the arbitrator to define a worker's former job by function rather than merely by its title.[275]

Regarding pre-judgment and post-judgment interest, the Alaska Supreme Court has held that it is the duty of the arbitrator to award pre-judgment interest, while the superior court may order post-judgment interest. In *Ebasco Constructors, Inc. v. Ahtna, Inc.*,[276] the court noted that Alaska was different from many other jurisdictions in that it awarded pre-judgment interest largely "as a matter of course."[277] In *Ebasco Constructors*, the superior court had awarded both pre- and post-judgment interest.[278] Reversing the superior court as to the pre-judgment interest, the supreme court noted that "permitting a reviewing court to add pre-award interest to an arbitration award would be inconsistent with the policy of allowing the arbitrator to determine all arbitrable aspects of a dispute."[279] The Alaska Supreme Court affirmed the superior court, however, as to the post-judgment interest, noting that computation of such awards will always be fairly straightforward, and that an arbitrator, at the time of an arbitration award, is less capa-

272. 609 P.2d 10 (Alaska 1980).

273. *Id.* at 14.

274. 929 P.2d 662 (Alaska 1996).

275. *Id.* at 666 ("We have stated: 'there is ample authority for the proposition that arbirators generally have authority to fashion any remedy necessary to resolution of the dispute.'" (citation omitted)).

276. 932 P.2d 1312 (Alaska 1997).

277. *Id.* at 1317 (quoting Hofmann v. von Wirth, 907 P.2d 454, 455 (Alaska 1995) (quoting Tookalook Sales & Serv. v. McGahan, 846 P.2d 127, 129 (Alaska 1993))).

278. *Ebasco Constructors*, 932 P.2d at 1314.

279. *Id.* at 1317-18.

ble of determining the total amount of post-judgment interest to be awarded.[280]

Under Alaska's version of the UAA, the superior court is authorized to award attorney's fees and costs to the prevailing party in an action to affirm or modify an arbitration award.[281] The Alaska Supreme Court has not permitted attorney's fees absent direct reference to arbitrating under the UAA or other specific language in the arbitration agreement permitting such an award. It has limited this application to attorney's fees associated with the superior court action to vacate or confirm the arbitration award. For example, in *Marathon Oil Co. v. ARCO Alaska, Inc.*,[282] the Alaska Supreme Court affirmed the superior court's decision to uphold an arbitration award and its ruling that the arbitration agreement permitted recovery of attorney's fees in an action to vacate or correct the award.[283] However, in *Harold's Trucking v. Kelsey*,[284] the court noted that attorney's fees are not typically available in the arbitration proceeding itself.[285] Similarly, the court has held that the superior court's calculation of Rule 82 fees (attorney's fees) based on the damages awarded *at arbitration* was clearly erroneous.[286]

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280. *Id.* at 1318. The court also affirmed the award of post-judgment interest as applied to the arbitrator's award of attorney's fees. The court observed:

> For purposes of determining whether post-award interest is permissible, there is no persuasive reason to treat attorney's fees differently than other parts of an arbitrator's award. An award of interest simply "places an injured plaintiff in the same position as if he had been compensated immediately for his loss."

*Id.* (quoting City & Borough of Juneau v. Commercial Union Ins. Co., 598 P.2d 957 (Alaska 1979)).

281. *See* ALASKA STAT. § 09.43.140 (Michie 1968); Anchorage Med. & Surgical Clinic v. James, 555 P.2d 1320, 1324 (Alaska 1976) (interpreting ALASKA STAT. § 09.43.140).

282. 972 P.2d 595 (Alaska 1999).

283. *Id.* at 604.

284. 584 P.2d 1128 (Alaska 1978).

285. *Id.* at 1130; *see also* ALASKA STAT. § 09.43.100 (Michie 2001) ("Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, *not including counsel fees*, incurred in the conduct of the arbitration, shall be paid as provided in the award." (emphasis added)).

286. *See* Integrated Res. Equity Corp. v. Fairbanks North Star Borough, 799 P.2d 295, 300 (Alaska 1990). The court noted that the language in Civil Rule 82 referring to the "costs of the action" applied only to the action in the superior court to confirm, vacate, modify or correct an arbitrator's award. The court vacated the award of attorney's fees, stressing that the prevailing party was entitled

5. *Evidentiary Issues.* The Alaska Supreme Court, consistent with other jurisdictions, has held that strict evidentiary rules do not apply to arbitration proceedings.[287] However, despite this relaxed approach, the court has also held that the principles of due process require that parties have a right to a fair hearing and the opportunity to cross-examine witnesses.[288] The court has been reluctant to reverse an arbitrator's decision when an arbitrator has excluded one specific form of evidence, but has admitted other forms; this is particularly so where the arbitrator's exclusion of evidence was directly related to determining the credibility of witnesses.[289] The court has also noted that the arbitrator is permitted to exclude evidence as cumulative.[290]

B. Comparing Key RUAA Provisions to Alaska's Common Law

While the Alaska Supreme Court has not had the occasion to address many of the issues raised in the new or clarifying provisions of the RUAA, the issues the court has addressed have been resolved consistent with the majority view. The RUAA codification of the approach adopted in the majority of jurisdictions on many points is consistent with Alaska common law. Many other provisions, while not decided by Alaska courts, are most likely consistent with the position the Alaska Supreme Court would take.

1. *Arbitrability.* Section 6 of the RUAA provides that, unless the parties otherwise agree, courts determine the substantive issues of arbitrability, while arbitrators decide the procedural aspects, such as time limits, laches, notice and other similar matters. Under prior Alaska case law, the court had followed the federal rule, which provides that arbitrability is a question for the courts unless the parties clearly provide otherwise.[291] The RUAA preserves this approach by providing that the parties may provide in their arbitra-

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to reasonable attorney's fees only for the confirmation hearing, and remanded the case to the superior court. *Id.*

287. *See, e.g.*, Racine v. State, Dep't of Transp. & Pub. Facilities, 663 P.2d 555, 557 (Alaska 1983) (holding that the plaintiff's due process rights were not infringed).

288. *See id.*

289. *See* City of Fairbanks Mun. Utils. Sys. v. Pees, 705 P.2d 457, 461-62 (Alaska 1985).

290. *See id.* at 462 (citing Atlas Floor Covering v. Crescent House & Garden, Inc., 333 P.2d 194, 198-99 (Cal. Ct. App. 1958)).

291. State v. Pub. Safety Empls. Ass'n, 798 P.2d 1281, 1285 (Alaska 1990) (citing AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)).

tion agreement whether the courts or arbitrators will determine matters of substantive or procedural arbitrability.[292]

2. *Procedural Issues.* Under RUAA section 10, courts have the ability to order the consolidation of arbitration proceedings under appropriate circumstances.[293] The original UAA, and most state statutes, do not contain a provision regarding consolidation. RUAA section 10 contradicts federal case law under the FAA[294] and the case law of several state jurisdictions[295] by holding that allowing courts to order consolidation conflicts with the concept of party autonomy (assuming that consolidation is not provided for in the arbitration agreement). However, empirical evidence has shown that parties to a multi-party arbitration dispute prefer that courts have the power to provide for consolidation.[296]

On the surface, permitting consolidation might seem to conflict with Alaska law as well. In *Consolidated Pacific Engineering, Inc. v. Greater Anchorage Area Borough*,[297] the Alaska Supreme Court held that parties could not be ordered to consolidate absent supporting language in the arbitration agreement.[298] However, it is overly simplistic to conclude that section 10 of the RUAA conflicts with the court's holding in *Consolidated Pacific*. First, the court noted that the UAA was silent as to consolidation.[299] Second, the court stressed the importance of minimal court interference.[300] Under the RUAA, however, consolidation is provided for explicitly, thus avoiding a situation where a court would have to analogize to the civil rules for guidance. Third, section 10 is a default provision; hence, the RUAA permits the parties to determine in their arbitration agreements whether to provide for consolidation and preserve

292. RUAA § 4(a).

293. *Id.* § 10.

294. *See, e.g.*, Glencore, Ltd. v. Schnitzer Steel Prod. Co., 189 F.3d 264, 267-68 (2d Cir. 1999) (finding consolidation under FAA inappropriate absent specific language permitting consolidation in the arbitration agreement).

295. *See, e.g.*, Stop & Shop Cos. v. Gilbane Bldg. Co., 304 N.E.2d 429, 431-32 (Mass. 1973); J. Brodie & Son, Inc. v. George A. Fuller Co., 167 N.W.2d 886, 888 (Mich. Ct. App. 1969); Balfour, Guthrie & Co. v. Commercial Metals Co., 607 P.2d 856, 857 (Wash. 1980).

296. *See* Heinsz, *supra* note 26, at 13 (discussing results of two surveys showing that 83% of practitioners and arbitrators polled preferred judicial determinations on consolidation).

297. 563 P.2d 252 (Alaska 1977).

298. *Id.* at 255.

299. *Id.* at 254.

300. *Id.* at 255.

party autonomy.[301] Lastly, section 10(a)(4) requires courts determining whether to grant consolidation to consider any prejudice resulting from "undue delay" or "hardship." This would provide additional protection against the concerns expressed by the court in *Consolidated Pacific*.[302]

3. *Judicial Review*. The scope of a court's authority is one of the few areas left relatively unchanged in the new RUAA. Most relevant to Alaska jurisprudence was a decision by the Drafting Committee *not* to provide a section allowing parties to "opt-in" to judicial review of arbitration awards for errors of law.[303] Particularly, the Drafting Committee decided against allowing parties to seek judicial review of an arbitrator's decision when the law was incorrectly applied.[304]

The decision by the Drafting Committee not to adopt this provision keeps the RUAA in line with the Alaska Supreme Court's decisions regarding judicial review. As previously noted, the Alaska Supreme Court's overall approach to review of decisions by arbitrators is "highly deferential."[305] The court has consistently held that an arbitrator's conclusions of law, including those related to the meaning of a contract, are not reviewable except as to issues of arbitrability.[306] Thus, the RUAA does not conflict with Alaska law regarding the standard of review.[307]

4. *Remedies*. Unlike the original UAA, the RUAA explicitly grants the arbitrator authority to award attorney's fees and punitive damages. The safe-harbor provision of section 21 provides that the arbitrator may award punitive damages and attorney's fees

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301. RUAA § 10(a)-(c).

302. 563 P.2d at 254-55.

303. RUAA § 23 cmt. B(1).

304. *See* Heinsz, *supra* note 26, at 27-28 (discussing debate over whether to include opt-in provision).

305. *See, e.g.*, Butler v. Dunlap, 931 P.2d 1036, 1038 (Alaska 1997) (per curiam).

306. *See, e.g.*, Ahtna, Inc. v. Ebasco Constructors, Inc., 894 P.2d 657, 661 (Alaska 1995).

307. The Drafting Committee also considered and rejected two other possible grounds for vacatur: for reasons of public policy, an approach adopted in several other jurisdictions, and for "manifest disregard of the law." *See supra* Part III.B.5; Heinsz, *supra* note 26, at 32-35. The Alaska Supreme Court has never considered either of these grounds for reviewing and vacating an arbitrator's decision. Once again, however, a decision to reject these additional grounds for vacating an award brings the RUAA in line with the Alaska Supreme Court's laissez faire approach to judicial review of an arbitrator's decision.

only if "authorized by law in a civil action."[308] When the arbitration agreement requires the arbitrator to follow the applicable law, then the arbitrator is required to apply the law correctly, despite the previously mentioned standards of review.[309] Thus, the arbitrator would not be allowed to award either attorney's fees or punitive damages that exceeded limitations provided for in Alaska law. The RUAA also requires the arbitrator to apply the same standard the courts would apply in determining the appropriateness of punitive damages.[310] Thus, the arbitrator would have to follow the Alaska Supreme Court's standards for punitive damages.[311] In addition, the inherent limitations of the RUAA's punitive damages provision would not permit the arbitrator to award punitive damages exceeding statutory limitations.[312]

The RUAA provides a final level of protection in not granting parties the ability by agreement to confer authority on an arbitrator to grant punitive damages, although it does permit parties to agree to the provision of attorney's fees.[313] One commentator has

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308. RUAA § 21(a)-(b).

309. *See* Pub. Safety Employees Ass'n v. State, 895 P.2d 980, 985 (Alaska 1995) (finding that the arbitrator violated the arbitrary and capricious standard of review by failing to correctly apply applicable law).

310. *See* RUAA § 21(a).

311. Alaska Statebank v. Fairco, 674 P.2d 288, 296 (Alaska 1983). The Alaska Supreme Court observed that in order to recover punitive damages, a party must prove that the wrongdoer's conduct was "outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another." *Id.* at 296. A party need not prove actual malice. *Id.* Rather, "[r]eckless indifference to the rights of others, and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages." Barber v. Nat'l Bank of Alaska, 815 P.2d 857, 864 (Alaska 1991) (quoting Restatement (Second) of Torts § 908 (Tent. Draft No. 19, 1973)). Punitive damages must be proven by clear and convincing evidence. ALASKA STAT. § 09.17.020(b) (Michie 2001). To reach this standard, the proponent must "produce[] in the trier of fact a firm belief or conviction about the existence of a fact to be proved." Buster v. Gale, 866 P.2d 837, 844 (Alaska 1994) (quoting Castellano v. Bitkower, 346 N.W.2d 249, 253 (Neb. 1984).

The Alaska Supreme Court has specifically held that punitive damages are not available in a breach of contract claim unless the conduct constituting the breach is itself an independent tort. Lee Houston & Assocs. v. Racine, 806 P.2d 848, 856 (Alaska 1991). This standard alone places great limitations on the application of punitive damages to arbitration under the RUAA in Alaska, since most arbitration disputes are contractual in nature.

312. *See* ALASKA STAT. § 09.17.020(f)-(h) (Michie 2001).

313. RUAA § 21(b) (permitting arbitrators to grant reasonable attorney's fees and other expenses of arbitration "by agreement of the parties to the arbitration proceeding," yet failing to provide the same authority as to punitive damages).

noted that this omission reflects the intent of the Drafting Committee, as a matter of public policy, to avoid granting a power to punish that would not ordinarily be bestowed upon private parties.[314] Since section 21 is also one of the waivable provisions of the new Act,[315] the parties are still free to dictate the scope of the arbitrator's authority through their agreements, consistent with Alaska law.

Section 25(c) also grants the court discretion to award "reasonable attorney's fees and other reasonable expenses of litigation" to a prevailing party in any contested judicial proceeding to confirm, vacate, or modify an arbitration award.[316] This provision is wholly consistent with the Alaska Supreme Court's prior decisions and the current Alaska arbitration statute.[317]

5. *Evidence.* Under section 15 of the RUAA, arbitrators maintain their discretion concerning the admissibility and weight of evidence while the parties' rights to present evidence and cross-examine witnesses are preserved.[318] This allows the RUAA to remain consistent with the Alaska Supreme Court's emphasis on the importance of an opportunity for a fair hearing and the cross-examination of witnesses.[319] While section 15 also provides for summary disposition, an issue not yet addressed by Alaska courts, it requires that the opposing party be given the opportunity to respond[320] and is waivable under section 4.[321]

Aside from these specific issues, the overall tone and approach of the RUAA harmonizes well with the Alaska Supreme Court's hands-off approach to arbitrability. One of the common themes running throughout Alaska jurisprudence is the desire to permit minimal court interference to further the goal of contractual

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314. *See* Heinsz, *supra* note 26, at 25 n.144.

315. *See* RUAA § 4(a).

316. *Id.* § 25(c).

317. *See* ALASKA STAT. § 09.43.140 (Michie 2001) (allowing the court to award "[c]osts of the application and of the proceedings subsequent to the application, and disbursements" after judgment "confirming, modifying, or correcting an award" from arbitration); Marathon Oil Co. v. ARCO Alaska, Inc., 972 P.2d 595, 604 (Alaska 1999) (interpreting ALASKA STAT. § 09.43.140 to include attorney's fees).

318. RUAA § 15(a)-(d).

319. *See* Racine v. Dep't of Trans. & Pub. Facilities, 661 P.2d 555, 557 (Alaska 1983) (preventing use of hearsay evidence in arbitration proceeding where it "deprive[s] a party of the right to a fair hearing" and "the right and opportunity to conduct cross-examination in a particular case").

320. RUAA § 15(b)(2).

321. *Id.* § 4(a).

autonomy between parties.[322] While many of the new provisions would introduce issues not yet addressed in Alaska, they are also waivable provisions under section 4, thus preserving each party's ability to draft an arbitration agreement suitable to its needs.

More importantly, the certainty and flexibility provided for under the RUAA are a much-needed commodity in Alaska. Several of the previously discussed Alaska cases noted the absence of any guidance under the UAA, arbitration agreements, or operating rules of procedure for the applicable arbitration organization.[323] While substantively correct decisions, a review of these cases highlights some of the inadequacies of an arbitration system that provides for expediency at the expense of a more familiar and comforting approach that parties are accustomed to under traditional litigation. The RUAA brings more of these familiar procedures, such as compelling discovery,[324] and providing for consolidation,[325] as well as substantive options, such as attorney's fees[326] and punitive damages,[327] into the realm of arbitration with clear guidance so as to avoid any confusions during the confirmation process. It also takes important measures to ensure that parties will continue to control their own arbitration destiny.

## V. CONCLUSION AND RECOMMENDATIONS

Alaska became a state in 1959, some four years after the promulgation of the UAA by the NCCUSL. It was another nine years before the Alaska Legislature adopted the UAA for Alaska. Certainly, it is understandable that the legislature was not in a hurry.

Since that time, arbitration has become a viable alternative to litigation, despite its relative shortcomings. Alaska has taken steps to formally embrace arbitration in ways outside of adopting the UAA, and ADR in general has flourished.[328] As we approach another legislative session in Alaska, perhaps it is time for some legislators to seriously consider whether they want to contribute to Alaska's growth in arbitration and to the improvement in dispute resolution services and mechanisms in Alaska. The original UAA,

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322. *See, e.g.*, Int'l Bhd. of Elec. Workers, Local Union 1547 v. City of Ketchikan, 805 P.2d 340, 341 (Alaska 1991).

323. *See, e.g.*, Powers v. United Servs. Auto Ass'n, 6 P.3d 294, 299-300 (Alaska 2000).

324. *Id.* § 17.

325. *Id.* § 10.

326. *Id.* § 21(b).

327. *Id.* § 21(a).

328. *See generally* ADR IN ALASKA, *supra* note 4, at Part 2.

while an important leap forward in improving arbitration services in the 1950s, is now a mere relic that contributes more doubt and confusion than it does certainty in the modern age of arbitration.

As noted previously, the RUAA strengthens and recognizes some of the most sacred tenets of arbitration law as pronounced by the Alaska Supreme Court. It emphasizes party autonomy over all things, allowing most of its new provisions to be waived if parties disagree on issues such as consolidation or the availability of punitive damages. Even when arbitrators are permitted to consider and apply these issues, it commands them to act in a manner consistent with applicable law. Given the 1997 tort reform movement, potential opponents can rest assured that the standards required for establishing punitive damages, and the limits placed on such monetary awards, will remain intact. Most importantly, parties have been given the opportunity to fashion more suitable and certain remedies, where skeleton language under the UAA and judicial inability to act prevailed before.

The authors recommend that the Alaska Legislature adopt the RUAA in substantial form as soon as possible. It has already been over two years since the NCCUSL adopted its final form; let us not allow the cloud of uncertainty and unpredictability to permeate in Alaska for longer than necessary. Certainly, the legislature will have other fish to fry, but given the RUAA's codification of the majority approach to many arbitration issues, and its harmony with Alaska jurisprudence, this should be an easy bill to pass. We look forward to seeing it assigned to a House or Senate Bill number in the near future.

# FISCAL NOTE

**STATE OF ALASKA**
**2003 LEGISLATIVE SESSION**

Fiscal Note Number:
Bill Version: HB 83
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act adopting a version of the Revised Uniform Arbitration Act; . . ."
BRU Civil Division
Component Governmental Affairs Transportation
Sponsor Representative Berkowitz
Requester House Judiciary Committee
Component No. 2207; 2214

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|---|---|---|---|---|---|---|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| **TOTAL OPERATING** | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| **CAPITAL EXPENDITURES** | | | | | | |
| **CHANGE IN REVENUES ( )** | | | | | | |

**FUND SOURCE** (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type–Do not abbreviate) | | | | | | |
| **TOTAL** | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

**Estimate of any current year (FY2003) cost:** 0.0
**Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:**

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

**ANALYSIS:** *(Attach a separate page if necessary)*

This bill adopts a version of the Revised Uniform Arbitration Act (RUAA), as recommended by the National Conference of Commissioners on Uniform State Laws. The provisions of this bill govern agreements to arbitrate that are made on or after January 1, 2004. The original Uniform Arbitration Act (UAA), which was adopted in Alaska in 1968, will remain in effect with respect to arbitration agreements entered into before January 1, 2004, unless the parties agree to apply the RUAA. The RUAA addresses a number of issues that are not addressed in the UAA, including: the process for initiating arbitration; authority to consolidate arbitrations; requiring arbitrators to make certain disclosures; providing immunity for arbitrators; allowing depositions and discovery in arbitration proceedings; judicial enforcement of preaward rulings by arbitrators; and defining remedies available in arbitration, including punitive damages, attorney's fees, and other relief.

Passage of this legislation would have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 2/28/03 4:57 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 2/28/2003
Agency Department of Law

(Revised 9/2002 OMB)

# FISCAL NOTE

**STATE OF ALASKA**
**2003 LEGISLATIVE SESSION**

Fiscal Note Number:
Bill Version: HB83 DOC 2 28
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Department of Corrections
Title: Revised Uniform Arbitration Act
BRU: Administration & Operations
Compoonent:
Sponsor: Representative Berkowitz
Requester:
Component No.:

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|---|---|---|---|---|---|---|
| Personal Services | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Travel | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Contractual | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Supplies | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Equipment | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Land & Structures | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Grants & Claims | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Miscellaneous | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| **TOTAL OPERATING** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |
| **CAPITAL EXPENDITURES** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |
| **CHANGE IN REVENUES ( )** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |

**FUND SOURCE** (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1003 GF Match | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1004 GF | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1005 GF/Program Receipts | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 1037 GF/Mental Health | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Other (Specify Type--Do not abbreviate) | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| **TOTAL** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |

**Estimate of any current year (FY2003) cost:** 0.0
**Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:**

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | 0 | 0 | 0 | 0 | 0 | 0 |
| Part-time | 0 | 0 | 0 | 0 | 0 | 0 |
| Temporary | 0 | 0 | 0 | 0 | 0 | 0 |

**ANALYSIS:** *(Attach a separate page if necessary)*

This bill has no fiscal impact to the Department of Corrections.

Prepared by: Jerry D. Burnett, Director
Phone 465-3339
Division: Administrative Services
Date/Time 2/28/03 3:31 PM
Approved by: Portia C.K. Parker, Assistant Commissioner
Date 2/28/2003
Agency: Department of Corrections

(Revised 0/2002 OMB)

# FISCAL NOTE

**STATE OF ALASKA**
**2003 LEGISLATIVE SESSION**

Fiscal Note Number:
Bill Version: HB 83
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected:

Title: Revised Uniform Arbitration Act
BRU: Alaska Court System
Component: Trial Courts

Sponsor: Representative Bekowitz
Requester: House Judiciary
Component No.: 768

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|---|---|---|---|---|---|---|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| **TOTAL OPERATING** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |
| **CAPITAL EXPENDITURES** | | | | | | |
| **CHANGE IN REVENUES ( )** | | | | | | |

**FUND SOURCE** (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type--Do not abbreviate) | | | | | | |
| **TOTAL** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |

**Estimate of any current year (FY2003) cost:** 0.0
**Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:**

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

**ANALYSIS:** *(Attach a separate page if necessary)*

The court system does not anticipate any fiscal impact from the passage of HB 83

Prepared by: Douglas Wooliver, Administrative Attorney
Phone 463-4750
Division: Alaska Court System
Date/Time 3/7/03 11:49 AM

Approved by: Stephanie Cole, Administrative Director
Date 3/7/2003
Agency: Alaska Court System

(Revised 9/2002 OMB)

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February 28, 2003

Hon. Lesil McGuire
Chair – Judiciary Committee
Alaska House of Representatives
State Capitol, Room 118
Juneau, Alaska 99801-1182

RE: HB 83 – Revised Uniform Arbitration Act

Dear Representative McGuire:

I write to respectfully offer the House Judiciary Committee my support for HB 83, which embodies in essence the Revised Uniform Arbitration Act of the National Conference of Commissioners on Uniform State Laws (NCCUSL). I am one of the Alaska commissioners of the NCCUSL. The other Alaska commissioners are Alaska Supreme Court Justice Alexander O. Bryner; Asst. Alaska Attorney General Deborah Behr; attorney L.S. Kurtz, Jr. of Anchorage; attorney Arthur H. Peterson of Juneau; and attorney Tamara B. Cook, Director of the Alaska Legislative Affairs Agency.

I would like to provide the House Judiciary Committee with the following information concerning the background of the Revised Uniform Arbitration Act and the principal purposes it is intended to serve.

**Background – The Uniform Arbitration Act (adopted in Alaska – 1968)**

The NCCUSL promulgated the original Uniform Arbitration Act in 1955. It subsequently was adopted as law in 49 jurisdictions, including Alaska, and together with the Federal Arbitration Act has provided the fundamental substance of the law governing agreements to arbitrate in the United States.

The 1955 Uniform Arbitration Act accomplished two fundamental things. First, it reversed the common law rule that denied enforcement of a contract provision requiring arbitration of disputes before there an actual dispute arose. Historically at common law the parties were able to agree to arbitrate only after an actual dispute arose. The common law prohibited agreements to arbitrate made in anticipation of possible disputes. Second, the 1955 Uniform Arbitration Act provided some basic procedures for the conduct of an arbitration. The Uniform Act has not mandated the arbitration of any dispute. Its function has been to let persons determine whether or not they want to use arbitration by agreement.

Arbitration is the original alternative dispute resolution (ADR) mechanism made legitimate under American law. It is an alternative to a judicial proceeding to resolve a dispute. Arbitration has traditionally been a means of resolving disputes when issues are specialized and technical. These kinds of disputes require specialist resolution and there is no desire for damage awards like those awarded by a court of law. A typical example is an arbitration that allocates costs of defects in a building project between architects, contractors and property owners. Arbitrators are chosen by the parties with construction expertise to determine responsibility for defects. The arbitration is conducted quickly. It is free of the constraints of court-room procedure, and may be tailored to adducing evidence for the specific kind of dispute. The parties all have a strong desire to avoid litigation and are normally satisfied with the results of arbitration. Construction disputes have been regularly resolved by arbitration for a long period of time.

However, provisions calling for arbitration occur in all kinds of contracts as the burgeoning caseload has slowed the civil justice process in the courts and as the costs of lawsuits have risen dramatically. As the arbitration process has been more utilized for resolving disputes that have traditionally been resolved by litigation, it has become clear that the limited procedural provisions of the Uniform Arbitration Act are no longer adequate. For that reason, the NCCUSL has now promulgated a next generation state arbitration act, the Revised Uniform Arbitration Act of 2000 (RUAA).

**The Revised Uniform Arbitration Act of 2000 (RUAA)**

The RUAA continues to authorize agreements to arbitrate disputes before they arise. However, the procedural side of arbitration is greatly augmented to meet modern needs. It deals with procedural issues not addressed in the 1955 Act. The effect should be more efficient and fair arbitrations as an alternative to litigation than is the case under the 1955 Act. The 1955 Act was a great advance in American law. The objective of the 2000 Act is to make the contribution of the 1955 Act even greater.

The 2000 Uniform Act has been drafted, also, against the significant and preemptive presence of the Federal Arbitration Act. The federal act applies to arbitration provisions in private contracts. The Federal Arbitration Act encourages arbitration as an alternative to litigation. Therefore, any state law that limits the availability of arbitration risks failure as a matter of federal preemption. Although there is not complete agreement about the relationship between federal and state law on certain specific issues, the 2000 Uniform Act is drafted to avoid preemption by federal law.
It is not possible to cover all the provisions in this important revision in this letter. However, the primary purposes underlying the revisions that the RUAA seeks to implement

may be fairly summarized as 1) providing more certainty in arbitration proceedings, 2) dealing with potential problems of federal preemption, and 3) addressing important issues that have arose under the original UAA as reflected in the case law throughout the country. The RUAA not only revises certain provisions of the original act, but also includes a number of new provisions.

The RUAA expressly provides that it is a default act. Most of its provisions may be varied or waived by contract. There are certain provisions that may not be waived or varied. These include the basic rule that an agreement to submit a dispute to arbitration is valid; the rules that govern disclosure of facts by a neutral arbitrator; the rules guaranteeing enforcement or appeal of the act, an arbitration agreement or an arbitration decision in a court; or, the standards for vacating an award. Declaring the RUAA a default act is important because it gives the parties an option to choose between federal or state law to govern their arbitration. Without this, the federal arbitration act is applicable by default. IN addition, restrictions on waiving or varying certain statutory requirements are important to protect parties to these agreements.

The RUAA specifically allows a court to order provisional remedies during the course of an arbitration before an arbitrator is selected. The 1955 Uniform Act has no such provision. Thus the RUAA improves upon the original act by preventing a party from delaying the selection of an arbitrator in order to delay proceedings and dissipate the effect of an arbitration award. The RUAA also gives an arbitrator, when selected, the express power to order provisional remedies, a power not expressly given in the 1955 Uniform Act. An arbitrator has the same powers as a court has in a judicial proceeding.

The RUAA allows consolidation of separate arbitration proceedings, a matter that was never contemplated in the 1955 Uniform Act. The existence of multiple parties, multiple agreements and complex litigation has made the issue of consolidation of arbitration actions very important. Courts have varied over consolidation. The RUAA expressly allows and governs consolidation.

The 1955 Uniform Act allows an award to be vacated because of an arbitrator's partiality - lack of neutrality. It does not specifically require disclosure of any interest that may give rise to a question of neutrality. The RUAA specifically addresses disclosure of known facts that give rise to questions of neutrality. Such facts include a financial or personal interest in the outcome of the arbitration proceeding or an existing or past relationship with a party. The lack of disclosure itself may be a ground for vacating an award, and there is a presumption of partiality when non-disclosure occurs. Upon disclosure, a party has the opportunity to object to the appointment of an arbitrator intended to be neutral. If there is no objection, that may affect the ability to raise partiality as a ground for vacating an award.

These provisions provide substantial express protection to parties to an arbitration proceeding that simply are not a part of the 1955 Uniform Act.

A crucial issue in arbitrations is the express immunity of arbitrators from civil liability. It is not an issue addressed in the 1955 Uniform Act, but is important to impartial and fair proceedings. An arbitrator who expects or fears a lawsuit simply because of a decision, cannot be counted upon to act fairly or competently. The RUAA provides arbitrators with immunity from civil liability "to the same extent as a judge of a court of this State acting in a judicial capacity."

An arbitrator under the RUAA may conduct the arbitration in such manner as the arbitrator considers appropriate to the fair and expeditious disposition of the proceeding. This express authority does not appear in the 1955 Uniform Act. The 1955 Uniform Act provides for subpoena of witnesses, and for depositions. Under the RUAA, an arbitrator also has the express power to make summary dispositions of claims or issues under appropriate procedures, to hold pre-arbitration proceeding meetings or to use any other discovery process (any process that adduces relevant evidence for the proceeding) applicable to resolution of the dispute. These provisions put arbitrators on the same level as judges in a judicial proceeding with respect to discovery of evidence.

The RUAA expressly permits an arbitrator to give punitive damages or other exemplary relief, "if such an award is authorized by law in a civil action involving the same claim." Attorney's fees may be awarded under the same standard. The 1955 Uniform Act does not expressly address either issue, but the case law has established the power to award punitive damages in most jurisdictions. The Federal Arbitration Act decisions also provide for punitive damages and some states have amended the 1955 Uniform Act to include attorney's fees. These new provisions put arbitrators on the same footing as judges in a court of law, and reflect the expansion of arbitration into disputes traditionally resolved in courts of law.

These are some highlights of the revision to the RUAA. The number of disputes in arbitration grows yearly. The RUAA responds to this growth with better and more complete arbitration procedures. It aligns state law with federal law, which decreases the potential for litigation on preemption grounds. This important advance in the law of arbitration should be enacted in all states as soon as feasible.

My sincere thanks to you, the sponsors of this bill, and the members of the House Judiciary Committee for taking the time to consider this important bill that if enacted with help provide Alaskans with even better alternatives for resolving disputes promptly, efficiently, and economically.

Sincerely,

W. Grant Callow

cc: Hon. Ethan Berkowitz
Hon. Bruce Weyhrauch
Hon. Carl Moses
Asst. Alaska Attorney General Deborah Behr
Tamara B. Cook, Director,
Alaska Legislative Affairs Agency
L.S. Kurtz, Jr., Attorney at Law
Arthur H Peterson, Attorney at Law