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H.P. 892 House of Representatives, March 6, 2003

An Act To Enact the Revised Uniform Arbitration Act

Reference to the Committee on Judiciary suggested and ordered printed.

Millicent M. MacFarland

MILLICENT M. MacFARLAND
Clerk

Presented by Representative DAVIS of Falmouth.

Be it enacted by the People of the State of Maine as follows:

PART A

Sec. A-1. 14 MRSA c. 706, as amended, is repealed.

Sec. A-2. 14 MRSA §755 is enacted to read:

Uniform Comment

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. Cassarotto, 517 U.S. 681 (1996). That body of case law establishes that state law of any ilk, including adaptations of the RUAA, mooting or limiting contractual agreements to arbitrate must yield to the pro-arbitration public policy voiced in Sections 2, 3, and 4 of the FAA.

The other 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 these 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 Cassarotto, 517 U.S. 681, 685 (1996); and Cassarotto, 517 U.S. at 688 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)). Arbitration agreements may not be invalidated under state laws applicable only to arbitration provisions. Id. The FAA will preempt state law that does not place arbitration agreements on 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.

CHAPTER 755

REVISED UNIFORM ARBITRATION ACT

§8701. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Arbitration organization. "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. "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. "Court" means a court of competent jurisdiction in this State.

4. Knowledge. "Knowledge" means actual knowledge.

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

6. Record. "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.

Uniform 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."

§8702. Notice

1. Notice by taking action. Except as otherwise provided in this chapter, 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.

2. Knowledge or receipt of notice. A person has notice if the person has knowledge of the notice or has received notice.

3. Attention or delivery. 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.

Uniform Comment

1. The conditions of giving and receiving notice are based on terminology used in Article 1-201(25) 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.

§8703. When chapter applies

1. Agreement to arbitrate on or after effective date. This chapter governs an agreement to arbitrate made on or after January 1, 2004.

2. Agreement to arbitrate before effective date. This chapter governs an agreement to arbitrate made before January 1, 2004 if all the parties to the agreement or to the arbitration proceeding so agree in a record.

3. All agreements to arbitrate. On or after July 1, 2004, this chapter governs an agreement to arbitrate whenever made.

Uniform Comment

1. Section 3 is based upon the effective-date provisions in the Revised Uniform Partnership Act (Section 1206) 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 Sections 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 (9th 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.

§8704. Effect of agreement to arbitrate; nonwaivable provisions

1. Parties may waive or vary effect of chapter. Except as otherwise provided in subsections 2 and 3, 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 chapter to the extent permitted by law.

2. Actions prohibited before controversy. Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

A. Waive or agree to vary the effect of the requirements of section 8705, subsection 1; 8706, subsection 1; 8708; 8717, subsection 1 or 2; 8726; or 8728;

B. Agree to unreasonably restrict the right under section 8709 to notice of the initiation of an arbitration proceeding;

C. Agree to unreasonably restrict the right under section 8712 to disclosure of any facts by a neutral arbitrator; or

D. Waive the right under section 8716 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this chapter, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

3. Requirements that may not be waived or varied. 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 8703, subsection 1 or 3; 8707; 8714; 8718; 8720, subsection 4 or 5; 8722; 8723; 8724; 8725, subsection 1 or 2; 8729; 8730; or 8731.

Uniform 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 6. 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 26 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 26 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., Moncarsh 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); Tretina 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.

§8705. Application for judicial relief

1. Motion for judicial relief. Except as otherwise provided in section 8728, an application for judicial relief under this chapter 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.

2. Notice of motion. Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this chapter 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.

Uniform Comment

1. Section 5, subsections (a) and (b) are based on Section 16 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.

§8706. Validity of agreement to arbitrate

1. Agreement valid, enforceable and irrevocable; exceptions. 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.

2. Court determination; agreement or controversy. The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

3. Arbitrator determination; condition precedent; contract. 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.

4. Arbitration controversies pending. 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.

Uniform 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.

Subsection (a), being the same as Section 1 of the Uniform Arbitration Act ("UAA"), is intended to include arbitration provisions contained in the bylaws of corporate or other associations as valid and enforceable arbitration agreements. Courts that have addressed whether arbitration provisions contained in the bylaws of corporate or other associations are enforceable under the UAA have unanimously held that they are. See Elbadramany v. Stanley, 490 So.2d 964, 964-65 (Fla. Dist. Ct. App. 1986); Wigod v. Chicago Mercantile Exchange, 490 N.E.2d 39 (Ill. App. Ct. 1986); Van C. Argiris & Co. v. May, 398 N.E.2d 1239, 1240 (Ill. App. Ct. 1979); Maine Cent. R. Co. v. Bangor & Aroostook R. Co., 395 A.2d 1107, 1119-1121 (Me. 1978). See also Keith Adams & Associates, Inc. v. Edwards, 477 P.2d 36, 38 (Wash. Ct. App. 1970); Willard Alexander, Inc. v. Glasser, 290 N.E.2d 813, 814 (N.Y. 1972).

This result, that corporate bylaws are contracts between the corporation and its shareholders and among its shareholders, is consistent with the rule in the majority of jurisdictions, including Delaware, New York, Illinois, Massachusetts, and California. See ER Holdings, Inc. v. Norton Co., 735 F. Supp.

1094, 1097 (D. Mass. 1990); Kidsco Inc. v. Dinsmore, 674 A.2d 483, 492 (Del. Ch. 1995) (citing Centaur Partners, IV v. National Intergroup, Inc., 582 A.2d 923, 926 (Del. 1990)); Black v. Glass, 438 So.2d 1359, 1367 (Ala. 1983); Norris v. S. Shore Chamber of Commerce, 424 N.E.2d 76, 77 (Ill. App. Ct. 1981); Procopio v. Fisher, 443 N.Y.S.2d 492, 495 (N.Y. App. Div. 1981); Jessie v. Boynton, 361 N.E.2d 1267, 1273 (Mass. 1977); O'leary v. Board of Directors, Howard Young Medical Center, Inc., 278 N.W.2d 217, 222 (Wis. Ct. App. 1979); Casady v. Modern Metal Spinning & Mfg. Co., 10 Cal. Rptr. 790, 793 (Cal. Ct. App. 1961). See also Brenner v. Powers, 584 N.E.2d 569, 574 (Ind. Ct. App. 1992) (holding that the bylaws of Indiana not-for-profit corporation are generally "a form of contract between the corporation and its members and among the members themselves"). Moreover, a number of additional jurisdictions that have not specifically held corporate bylaws to be contracts have determined that such bylaws should be construed and interpreted as though they were contracts. See Unigroup, Inc. v. O'Rourke Storage & Transfer Co., 980 F.2d 1217, 1220 (8th Cir. 1992) (applying Missouri law); Phillips v. National Trappers Ass'n, 407 N.W.2d 609, 611 (Iowa Ct. App. 1987); Storrs v. Lutheran Hosps. and Homes Soc. of Am., Inc., 609 P.2d 24, 30 (Alaska 1980); Blue Ridge Property Owners Assoc. v. Miller, 221 S.E.2d 163, 166 (Va. 1976); Toler v. Clark Rural Elec. Co-op. Corp., 512 S.W.2d 25, 26 (Ky. 1974); Schroeder v. Meridian Imp. Club., 221 P.2d 544, 548 (Wash. 1950).

This result is further supported by the general rule that the bylaws of voluntary associations are a contract between the association and its members, and among its members. See Robinson v. Kansas State High School Activities Ass'n, Inc., 917 P.2d 836, 844 (Kan. 1996); Loigman v. Trombadore, 550 A.2d 154, 161 (N.J. Super. App. Div. 1988); Hebert v. Ventetuolo, 480 A.2d 403, 407 (R.I. 1984); Maine Cent. R. Co. v. Bangor & Aroostook R. Co., 395 A.2d 1107, 1119 (Me. 1978); Attoe v. Madison Professional Policemen's Ass'n, 255 N.W.2d 489, 492 (Wis. 1977); Stoica v. International Alliance of Theatrical Stage Emp. and Moving Picture Mach. Operators of U.S. and Canada, 178 P.2d 21, 22-23 (Cal. Ct. App. 1947).

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 1167, 1170 (1994); Smith v. H.E. Butt 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, 58 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 (1995) [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); Weinrott v. Carp, 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973); Weiss v. Voice/Fax Corp., 94 Ohio App. 3d 309, 640 N.E.2d 875 (Ohio 1994); Jackson Mills, Inc. v. BT Capital Corp., 440 S.E.2d 877 (S.C. 1994); South Carolina 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); Atcas 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 a party challenges the arbitrability of a dispute in a court proceeding, the arbitration organization or arbitrators in their discretion may continue with the arbitration 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 261 (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 determine that an arbitration process is adequate to protect important rights. Without these safeguards, arbitration loses credibility as an appropriate alternative to litigation.

§8707. Motion to compel or stay arbitration

1. Motion to compel arbitration. On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

A. If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and

B. 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.

2. Motion that no agreement. 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.

3. No enforceable agreement. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate pursuant to subsection 1 or 2.

4. Claim lacks merit, grounds not established. 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.

5. Claim pending in court. 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 8727.

6. Stay judicial proceeding upon motion to order arbitration. 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.

7. Stay judicial proceeding upon order to arbitrate. 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.

Uniform Comment

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 1091, 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.

§8708. Provisional remedies

1. Order for provisional remedies before arbitrator can act. 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.

2. Provisional remedies ordered by arbitrator. After an arbitrator is appointed and is authorized and able to act:

A. 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

B. 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 can not provide an adequate remedy.

3. Arbitration not waived. A party does not waive a right of arbitration by making a motion under subsection 1 or 2.

Uniform 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, 806 P.2d 897 (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); Ross 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 1286 (8th Cir. 1984), which concluded that preliminary injunctive relief under the FAA is simply unavailable, because the "judicial inquiry requisite to determine the propriety of injunctive relief necessarily would inject the court into the merits of issues more appropriately left to the arbitrator." Id. at 1292; see also Peabody Coalsales Co. v. Tampa Elec. Co., 36 F.3d 46 (8th Cir. 1994).

2. The Hovey case underscores the difficult conflict raised by interim judicial remedies: they can preempt the arbitrator's authority to decide a case and cause delay, cost, complexity, and formality through intervening litigation process, but without such protection an arbitrator's award may be worthless. See II Macneil Treatise §25.1. Such relief generally takes the form of 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, 36.1. 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), (6). These 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).

§8709. Initiation of arbitration

1. Giving notice. 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.

2. Lack or insufficiency of notice. Unless a person objects for lack or insufficiency of notice under section 8715, subsection 3 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.

Uniform 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.

§8710. Consolidation of separate arbitration proceedings

1. Consolidation by court. Except as otherwise provided in subsection 3, 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:

A. 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 3rd person;

B. The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

C. The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

D. 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.

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

3. No consolidation if agreement prohibits. The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

Uniform 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. 516, 362 A.2d 63 (Ch. Div. 1976); Exber v. Sletten Constr. Co., 558 P.2d 517 (Nev. 1976); Plaza Dev. Serv. v. Joe Harden Builder, Inc., 294 S.C. 430, 365 S.E.2d 231 (S.C. Ct. App. 1988).

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

The split of authority regarding the power of courts to consolidate arbitration proceedings in the absence of contractual consolidation provisions extends to the federal sphere. In the absence of clear direction in the FAA, courts have reached conflicting holdings. The current trend under the FAA disfavors court-ordered consolidation absent express agreement. See generally III Macneil Treatise §33.3; 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 83% of nearly 1,000 responding practitioners also favored consolidation of arbitrations involving multiparty disputes. See Dean B. Thomson, The Forum's Survey on the Current and Proposed AIA A201 Dispute Resolution Provisions, 16 Constr. Law. 3, 5 (No. 3, 1996).

3. A provision in the RUAA specifically empowering courts to order consolidation in appropriate cases makes sense for several reasons. As in the judicial forum, consolidation effectuates efficiency in conflict resolution and avoidance of conflicting results. By agreeing to include an arbitration clause, parties have indicated that they wish their disputes to be resolved in such a manner. In many cases, moreover, a court may be the only practical forum within which to effect consolidation. See Schenectady v. Schenectady Patrolmen's Benev. Ass'n, 138 A. D.2d 882, 883, 526 N.Y.S.2d 259, 260 (1988). Furthermore, it is likely that in many cases one or more parties, often non-drafting parties, will not have considered the impact of the arbitration clause on multiparty disputes. By establishing a default provision which permits consolidation (subject to various limitations) in the absence of a specific contractual provision, Section 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 its 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 45493 (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., 1996 WL 210073 (N.D. Ill. April 25, 1996) (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 416 (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, 229 N.Y.S.2d 204 (1962) (refusing to consolidate arbitrations where one agreement required AAA tribunal, other called for arbitrator to be appointee of president of real estate board); 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. 936 (1976); but see United Kingdom v. Boeing Co., 988 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.

§8711. Appointment of arbitrator; service as neutral arbitrator

1. Appointment. 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.

2. Ineligible to serve as arbitrator. 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.

Uniform 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).

§8712. Disclosure by arbitrator

1. Disclosure of interest, relationship. 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:

A. A financial or personal interest in the outcome of the arbitration proceeding; and

B. 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 arbitrator.

2. Continuing obligation to disclose. 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 that a reasonable person would consider likely to affect the impartiality of the arbitrator.

3. Ground to vacate award. If an arbitrator discloses a fact required by subsection 1 or 2 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 8723, subsection 1, paragraph B for vacating an award made by the arbitrator.

4. Court may vacate award. If the arbitrator did not disclose a fact as required by subsection 1 or 2, upon timely objection by a party, the court under section 8723, subsection 1, paragraph B may vacate an award.

5. Presumption of evident partiality. 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 8723, subsection 1, paragraph B.

6. Substantial compliance. 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 8723, subsection 1, paragraph B.

Uniform 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 328802 (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., 495 F.2d 1260, 1263 (2d Cir. 1973) (applying FAA; failure to disclose relationships that "might create an impression of possible bias"). Some courts have introduced an objective element into the standard - that is, viewing the facts from the standpoint of a reasonable person apprised of all the circumstances. See, e.g., Ceriale v. AMCO Ins. Co., 48 Cal. App.4th 500, 55 Cal. Rptr. 2d 685 (1996) (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. Stariha, 346 N.W.2d 663, 666 (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 (1996). Many arbitrators are already familiar with these standards, which provide for disclosure of pertinent interests in the outcome of an arbitration and of relationships with parties, representatives, witnesses, and other arbitrators.

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., 16 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).

§8713. 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 8715, subsection 3.

Uniform Comment

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.

§8714. Immunity of arbitrator; competency to testify; attorney's fees and costs

1. Immune from civil liability. 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.

2. Supplements. The immunity afforded by this section supplements any immunity under other law.

3. Failure to disclose. The failure of an arbitrator to make a disclosure required by section 8712 does not cause any loss of immunity under this section.

4. Incompetent to testify, produce records. 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:

A. 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

B. To a hearing on a motion to vacate an award under section 8723, subsection 1, paragraph A or B if the movant establishes prima facie that a ground for vacating the award exists.

5. Attorney's fees and expenses. 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 4 and the court decides that the arbitrator, arbitration organization or representative of the 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.

Uniform 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 267, 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, 151 N.Y.S.2d 221 (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.

§8715. Arbitration process

1. Manner. An arbitrator may conduct an arbitration in a manner 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.

2. Summary disposition. An arbitrator may decide a request for summary disposition of a claim or particular issue:

A. If all interested parties agree; or

B. 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.

3. Hearing. If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than 5 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.

4. Rights at hearing. At a hearing under subsection 3, 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.

5. Replacement arbitrator. If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with section 8711 to continue the proceeding and to resolve the controversy.

Uniform 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 Ntn'l Rules for Resolution of Employment Disputes R. 8; 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 1096, 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, 62 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 16 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, 746 A.2d 921 (Me. 2000).

§8716. Representation by lawyer

A party to an arbitration proceeding may be represented by a lawyer.

Uniform 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.

§8717. Witnesses; subpoenas; depositions; discovery

1. Subpoenas. 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.

2. Depositions. 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 can not be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

3. Discovery. An arbitrator may permit discovery 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.

4. Compliance. If an arbitrator permits discovery under subsection 3, 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.

5. Protective order. 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.

6. Witness laws and fees apply. 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.

7. Enforcement. 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.

Uniform 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 Section 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 Deiulemar di Navigazione, 153 F.R.D. 592 (E.D. La. 1994); Oriental Commercial & Shipping Co. v. Rosseel, 125 F.R.D. 398 (S.D.N.Y. 1989). Most courts have allowed discovery only at the discretion of the arbitrator. See, e.g., Stanton v. PaineWebber Jackson & Curtis, Inc., 685 F. Supp 1241 (S.D. Fla. 1988); Transwestern Pipeline Co. v. J.E. Blackburn, 831 S.W.2d 72 (Tex. Ct. App. 1992). The few state arbitration statutes that have addressed the matter of discovery also leave these issues to the discretion of the arbitrator. 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 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. However, the default standard of Section 17(c) is meant to discourage most forms of discovery in arbitration.

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 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.

§8718. Judicial enforcement of preaward ruling by arbitrator

If an arbitrator makes a preaward 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 8719. A prevailing party may make a motion to the court for an expedited order to confirm the award under section 8722, 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 8723 or 8724.

Uniform 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., 357 Mass. 452, 457, 258 N.E.2d 561, 564 (Mass. 1970), noting that to allow a court to review an arbitrator's interlocutory order "would tend to render the proceedings neither one thing nor the other, but transform them into a hybrid, part judicial and part arbitrational." Thus Section 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 909 (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 736, 386 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,

363 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(e)(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 Section 23 or 24.

§8719. Award

1. Record. 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.

2. Time of award. 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.

Uniform Comment

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).

§8720. Change of award by arbitrator

1. Modify or correct award. On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

A. Upon a ground stated in section 8724, subsection 1, paragraph A or C;

B. Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

C. To clarify the award.

2. Timing of motion. A motion under subsection 1 must be made and notice given to all parties within 20 days after the movant receives notice of the award.

3. Objection to motion. A party to the arbitration proceeding must give notice of any objection to the motion within 10 days after receipt of the notice.

4. Motion to court pending. If a motion to the court is pending under section 8722, 8723 or 8724, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

A. Upon a ground stated in section 8724, subsection 1, paragraph A or C;

B. Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

C. To clarify the award.

5. Modified or corrected award. An award modified or corrected pursuant to this section is subject to sections 8719, subsection 1, 8722, 8723 and 8724.

Uniform 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 Compania 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., 193 F.3d 972 (8th Cir. 1999). The mechanism for correction of errors in RUAA Section 20 enhances the efficiency of the arbitral process.

§8721. Remedies; fees and expenses of arbitration proceeding

1. Relief as authorized in law. 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.

2. Attorney's fees and expenses. 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.

3. Other remedies. As to all remedies other than those authorized by subsections 1 and 2, an arbitrator may order remedies 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 8722 or for vacating an award under section 8723.

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

5. Bases in fact and law. If an arbitrator awards punitive damages or other exemplary relief under subsection 1, 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.

Uniform 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, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984); Eychner v. Van Vleet, 870 P.2d 486 (Colo. Ct. App. 1993); Richardson Greenshields Sec., Inc. v. McFadden, 509 So. 2d 1212 (Fla. Dist. Ct. App. 1987); Bishop v. Holy Cross Hosp., 44 Md. App. 688, 410 A.2d 630 (1980); Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), review denied, 315 N.C. 590, 341 N.E.2d 29 (1986); Kline v. O'Quinn, 874 S.W.2d 776 (Tex. Ct. App. 1994), cert. denied, 515 U.S. 1142 (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. 36; Michael Hoellering, Remedies in Arbitration, Arbitration and the Law (1984) (annotating federal and state decisions). Generally their authority to structure relief is defined and circumscribed not by legal principle or precedent but by broad concepts of equity and justice. See, e.g., David Co. v. Jim Miller Constr., Inc., 444 N.W.2d 836, 842 (Minn. 1989); SCM Corp. v. Fisher Park Lane Co., 40 N.Y.2d 788, 793, 358 N.E.2d 1024, 1028, 390 N.Y.S.2d 398, 402 (1976). This is why Section 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.

§8722. 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 8720 or 8724 or is vacated pursuant to section 8723.

Uniform 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 Section 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.

§8723. Vacating award

1. Grounds for vacating. Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

A. The award was procured by corruption, fraud or other undue means;

B. There was:

(1) Evident partiality by an arbitrator appointed as a neutral arbitrator;

(2) Corruption by an arbitrator; or

(3) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

C. 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 8715 so as to prejudice substantially the rights of a party to the arbitration proceeding;

D. An arbitrator exceeded the arbitrator's powers;

E. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section 8715, subsection 3 not later than the beginning of the arbitration hearing; or

F. The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 8709 so as to prejudice substantially the rights of a party to the arbitration proceeding.

2. Timing of motion to vacate. A motion under this section must be filed within 90 days after the movant receives notice of the award pursuant to section 8719 or within 90 days after the movant receives notice of a modified or corrected award pursuant to section 8720, 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.

3. Rehearing. If the court vacates an award on a ground other than that set forth in subsection 1, paragraph E, it may order a rehearing. If the award is vacated on a ground stated in subsection 1, paragraph A or B, the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in subsection 1, paragraph C, D or F, 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 8719, subsection 2 for an award.

4. Confirmation of award. 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.

Uniform Comment

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, 426 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 270 (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 90 days after the close of the hearing, the arbitrator in the new hearing must make the award within 90 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 these 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 Intern'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 Intern'l Arb. 263 (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 156, 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 these two standards is presently codified in the FAA or in any of the state arbitration acts. However, all of the federal circuit courts of appeals have embraced one or both of these standards in commercial arbitration cases. See Stephen L. Hayford, Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards, 30 Ga. L. Rev. 734 (1996).

2. "Manifest disregard of the law" is the seminal nonstatutory ground for vacatur of commercial arbitration awards. The relevant case law from the federal circuit courts of appeals

establishes that "a party seeking to vacate an arbitration award on the ground of 'manifest disregard of the law' may not proceed by merely objecting to the results of the arbitration." O.R. Securities, Inc. v. 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, 988 F.2d 1020,1023 (10th Cir. 1993). Seymour observed: "[I]n determining whether an arbitration award violates public policy, a court must assess whether 'the specific terms contained in [the contract] violate public policy, by creating an 'explicit conflict with other 'laws and legal precedents.'" Id. at 1024 (citing United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 43 (1987)).

Like the "manifest disregard of the law" nonstatutory ground, vacatur under the "public policy" ground requires something more than a mere error or misunderstanding of the relevant law by the arbitrator. Under all of the articulations of this nonstatutory ground, the public policy at issue must be a clearly defined,

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

Second, the Eleventh Circuit in Brown v. Rauscher Pierce Refnses, Inc., 994 F.2d 775 (11th Cir. 1994) and the Second Circuit in Diapulse Corp. of 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., Schoonmacher v. Cummings and Lockwood of Connecticut, 252 Conn. 416, 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.

§8724. Modification or correction of award

1. Grounds to modify or correct award. Upon motion made within 90 days after the movant receives notice of the award pursuant to section 8719 or within 90 days after the movant receives notice of a modified or corrected award pursuant to section 8720, the court shall modify or correct the award if:

A. There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award;

B. 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

C. The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

2. Confirmation of award. If a motion made under subsection 1 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.

3. Joinder of motions. A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

§8725. Judgment on award; attorney's fees and litigation expenses

1. Entry of judgment. 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.

2. Reasonable costs. A court may allow reasonable costs of the motion and subsequent judicial proceedings.

3. Reasonable attorney's fees and expenses. On application of a prevailing party to a contested judicial proceeding under section 8722, 8723 or 8724, 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.

Uniform 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. Intn'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. 575, 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.

§8726. Jurisdiction

1. Jurisdiction to enforce agreement. A court of this State having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

2. Exclusive jurisdiction. An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this chapter.

Uniform 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., 1996 WL 377028 (Del. Ch., June 13, 1996); Stephanie's v. Ultracashmere House LTD, 98 Ill.App. 3d 654, 424 N.E.2d 979, 54 Ill.Dec. 229 (1981); Tru Green Corp. v. Sampson, 802 S.W.2d 951 (Ky. App. 1991); Kearsarge Metallurgical Corp. v. Peerless Ins. Co., 383 Mass. 162, 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.

§8727. Venue

A motion pursuant to section 8705 must be made in the Superior 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 Superior Court of the county in which it was held. Otherwise, the motion may be made in the Superior 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 Superior 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.

Uniform 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).

§8728. Appeals

1. Subject of appeal. An appeal may be taken from:

A. An order denying a motion to compel arbitration;

B. An order granting a motion to stay arbitration;

C. An order confirming or denying confirmation of an award;

D. An order modifying or correcting an award;

E. An order vacating an award without directing a rehearing; or

F. A final judgment entered pursuant to this chapter.

2. Manner of appeal. An appeal under this section must be taken as from an order or a judgment in a civil action.

§8729. 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.

§8730. Relationship to Electronic Signatures in Global and National Commerce Act

The provisions of this chapter 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 federal Electronic Signatures in Global and National Commerce Act, 15 United States Code, Section 7001, et seq.

Uniform Comment

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).

§8731. Savings clause

This chapter does not affect an action or proceeding commenced or right accrued before January 1, 2004. Subject to section 8703, an arbitration agreement made before January 1, 2004 is governed by the Uniform Arbitration Act, former chapter 706.

Uniform Comment

(This is section 33 of the Uniform Act.)

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.

§8732. Short title

This chapter may be known and cited as "the Revised Uniform Arbitration Act."

Sec. A-3. Effective date. This Part takes effect January 1, 2004.

PART B

Sec. B-1. 10 MRSA §1294, sub-§3, as enacted by PL 1995, c. 462, Pt. A, §22 and affected by §23, is amended to read:

3. Arbitration. Nothing contained in this section may bar the right of an agreement to provide for binding arbitration of disputes. Any arbitration must be consistent with the provisions of this chapter and Title 14, chapter ~~706~~ 755, and the place of any arbitration must be in the city or county in which the dealer maintains the dealer's principal place of business in the State.

Sec. B-2. 10 MRSA §1440, sub-§4, as enacted by PL 1997, c. 427, §2, is amended to read:

4. Arbitration. If a dispute arises under this chapter, the dealer may voluntarily agree to submit that dispute to binding or nonbinding arbitration. An arbitration proceeding must be voluntary, initiated by serving a written request for arbitration on the other party and conducted under the provisions of the ~~Maine~~ Revised Uniform Arbitration Act.

Sec. B-3. 14 MRSA §6017, sub-§4, as enacted by PL 1999, c. 192, §2, is amended to read:

4. Arbitration. A commercial landlord and tenant may agree in their lease or in a separate agreement to arbitration of disputes as to termination, the right of possession arising under the lease between landlord and tenant and amounts owed for rent before an arbitrator or arbitrators chosen in advance pursuant to the lease or other written agreement. The decision of the arbitrator is final. If the arbitrator rules in favor of the landlord, the landlord may, by presentation of an attested copy of the arbitrator's decision, and after docketing of the arbitrator's decision by the Superior Court, immediately obtain a writ of possession from the clerk of the Superior Court. The arbitrator's decision may be stayed or appealed from only upon such grounds as generally lie for stay or appeal of an arbitration decision pursuant to ~~the Uniform Arbitration Act, Title 14, section 5949~~ sections 8707 and 8728.

Sec. B-4. 26 MRSA §937, last ¶, as enacted by PL 1985, c. 294, §§2 and 3, is amended to read:

The board may, at any time in the arbitration process, seek a stipulated settlement of the matter submitted to it for resolution provided that settlement is approved by the parties to the dispute. Except as provided in section 972, arbitration proceedings ~~shall be~~ are subject to the review provisions of the Revised Uniform Arbitration Act~~, Title 14, chapter 706~~.

Sec. B-5. 26 MRSA §1333, as enacted by PL 1997, c. 472, §1, is amended to read:

§1333. Review

Either party may seek a review of a binding determination by an arbitration panel or arbitrator pursuant to the Revised Uniform Arbitration Act~~, Title 14, Chapter 706~~.

Sec. B-6. 28-A MRSA §1457, sub-§2, as enacted by PL 1987, c. 45, Pt. A, §4, is amended to read:

2. Neutral arbitrator. If the certificate of approval holder and the wholesale licensee are unable to agree on the reasonable compensation to be paid for the value of the wholesale licensee's business, as defined in subsection 1, they shall submit the matter to a neutral arbitrator selected by the parties, or, if they ~~cannot~~ can not agree, by the Chief Justice of the Supreme Judicial Court. The costs of the arbitration ~~shall~~ must be paid 1/2 by the wholesale licensee and 1/2 by the certificate of approval holder ~~or;~~ otherwise the arbitration proceeding ~~shall be~~ is governed by the ~~Maine~~ Revised Uniform Arbitration Act.

Sec. B-7. Effective date. This Part takes effect January 1, 2004.

SUMMARY

Part A replaces the Uniform Arbitration Act with the Revised Uniform Arbitration Act, approved by the National Conference of Commissioners on Uniform State Laws in 2000.

Details of the new law are contained in the Prefatory Note and the Uniform Comments following each section.

This Act takes effect January 1, 2004.

Part B corrects cross-references.